

DENNIS & CO., INC.
Law Book Publishers
269 MAIN STREET
BUFFALO, N. Y.



UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

WIL ONS.

Scots Rev Volumes.
Royal 8 IX., now
ready.

Green's E By the
most Co n 13 Vols.
15s. *nett*

The New he Laws
of Eng rities. In
12 Vols.

Scots Sta npleted in
8 Volum *Prospectus*
and parti

The Parli enty-Fifth
Annual

The Scots Law Times: A Law Newspaper and Reporter. Published every Saturday Morning. Price 6d.

Each number contains—The Decisions of the Week in the Court of Session, Outer and Inner Houses, House of Lords, and Sheriff Courts; A Digest of the Preceding Numbers; Summaries of New Acts of Parliament; News, Articles, and Notes on Legal Subjects of Interest; A Portrait and Biographical Notice of a leading Member of the Profession.

The Juridical Review: Published Quarterly. Subscription, 12s. Vols. I. to XI., in half morocco, price 12s. each.

Burns' Conveyancing Practice, according to the Law of Scotland. By JOHN BURNS, W.S. Royal 8vo. 25s. *nett.* 1899.

Stewart on Diligence. A Treatise on the Law of Diligence. By J. GRAHAM STEWART, M.A., LL.B., Advocate. Royal 8vo. 40s. *nett.* 1898.

Glegg on the Workmen's Compensation Act, 1897. A Commentary. Second Edition. By A. T. GLEGG, Advocate. Royal 8vo. 7s. 6d. *nett.* 1899.

Gloag and Irvine on Rights in Security, Heritable and Moveable, including Cautionary Obligations. By W. M. GLOAG, B.A., Advocate, and J. M. IRVINE, LL.B., Advocate. Royal 8vo. 40s. *nett.* 1897.

Sandeman's Digest of Scots Decisions, 1895–99. Decided in the Supreme Courts of Scotland, and reported in the various Series of Reports. Together with a Table of all Cases which have been judicially considered during the period. By J. C. S. SANDEMAN, Advocate. Royal 8vo. With Supplement. 14s. *nett.*

To be continued annually.

Grierson's Stamp Duties. A Treatise on the Law of Stamp Duties on Written Instruments. By P. J. H. GRIERSON, Solicitor to the Inland Revenue. Demy 8vo. 10s. *nett.* 1899.

Scotch Appeal Cases in the House of Lords, 1851 to 1873. With Tables of all the Cases cited, Notes, and Copious Index. Reported by JAMES PATERSON, M.A. 2 vols. Royal 8vo. £5, 5s.

Law Books published by William Green & Sons.

Miller's Law of Nature and Nations in Scotland. A Series of Lectures delivered in Session 1895–96 in the University of Glasgow. By W. Galbraith Miller, M.A., LL.B., Advocate. Demy 8vo. 4s. *nett.* 1896.

Irons' Dean of Guild Court. A Manual of the Law and Practice of, with Synopsis of the Law relating to Building Restrictions, Servitudes, &c. By James Campbell Irons, S.S.C. Demy 8vo. 25s. *nett.* 1895.

Brown's Sale of Goods Act, 1893. Notes and Commentaries on the Sale of Goods Act, 1893. By Professor Richard Brown, Glasgow. Demy 8vo. 16s. *nett.* 1895.

Conveyancing Statutes from the 13th Century to the Present Time, with the Repealed Acts and Portions of Acts distinguished, and the 1863 and 1874 Acts annotated with Cases relating to each Section. Arranged and Edited by John Craigie, M.A., LL.B., Advocate. Royal 8vo. 25s. *nett.* 1895.

Shennan's Parish Councillor's Hand-Book. A Digest of the Local Government (Scotland) Act, 1894 (57 & 58 Vict. cap. 58), with the Text of the Act, and an Account of the Powers and Duties of Parish Councils. By Hay Shennan, Sheriff-Substitute, Lerwick. Fourth Edition. Demy 8vo. 1s. 6d. *nett.* 1895.

Cooper on Defamation. A Handbook of the Law of Defamation and Verbal Injury. By F. T. Cooper, M.A., LL.B., Advocate. Demy 8vo. 14s. *nett.* 1894.

Dewar's Penal Servitude and Prevention of Crimes Acts, 1853-1891. By David Dewar, Chief Constable. Demy 8vo. 5s. *nett.* 1895.

Angus' Dictionary of Crimes and Offences. A Dictionary of Crimes and Offences according to the Law of Scotland, with Appendix relating to Criminal Jurisdiction, Arrest of Offenders, &c. By John W. Angus, Chief Constable, Greenock. Demy 8vo. 12s. *nett.* 1895.

Stewart on Mines and Minerals. A Treatise on the Law of Mines, Quarries, and Minerals in Scotland. By D. Ross Stewart, LL.B., Advocate. Royal 8vo. 30s. *nett.* 1894.

Lorimer's Finance Act, 1894. The New Death Duties imposed by the Finance Act, 1894, with Text, Introduction, and Notes, by J. Campbell Lorimer, Advocate. Demy 8vo. 5s. *nett.* 1894. Supplement to Do. Being the Act of 1896, with Annotations. 2s. 6d. *nett.* 1896.

Doak's Court Procedure. A Manual of Court Procedure, Civil and Criminal. By R. A. Doak, M.A., B.L. Demy 8vo. 5s. *nett.* 1899.

Law Examination Questions. A Handbook for the use of Students preparing for the Examination in Law under the Law-Agents (Scotland) Act, 1873. Compiled by a Law-Agent. Demy 8vo. 5s. *nett.*

Law Books published by William Green & Sons.

Wallace and M'Neil's Banking Law. Banking Law, with Forms. By WILLIAM WALLACE, M.A., Advocate, and ALLAN M'NEIL, Solicitor and N.P., Bank of Scotland, Edinburgh, and Examiner in Law for the Institute of Bankers in Scotland (1894). Second Edition. Royal 8vo. 15s. *nett.* 1899.

Grierson's Index of Cases Judicially Noted. An Index of Cases Commented upon in Judgments in the Court of Session, and in Scottish Appeals to the House of Lords, from November 1862 to August 1893. By P. J. HAMILTON GRIERSON, B.A., Advocate. Bound in half leather. Royal 8vo. 25s. *nett.* 1894.

Handy-Book of Reference to Decisions in the Court of Session, Court of Justiciary, and House of Lords, from July 1885 to August 1893. Crown 8vo. 6s. *nett.* 1894.

Millar on Prescription. A Handbook of Prescription according to the Law of Scotland. By J. H. MILLAR, Advocate. Demy 8vo. 12s.

Accounting in Theory and Practice. A Text-Book. By GEO. LISLE, C.A., F.F.A. Demy 8vo. 15s. *nett.* 1899.

Walton on Husband and Wife. A Handbook of Husband and Wife according to the Law of Scotland. By F. P. WALTON, B.A., LL.B., Advocate. Demy 8vo. 20s. *nett.*

Stevenson's Presumption of Life. The Law of Scotland in Relation to the Presumption of Life of Absent Persons. By J. H. STEVENSON, M.A., Advocate. Crown 8vo. 6s.

Blair's Election Manual. A Manual for Parliamentary, County Council, and Municipal Elections, and Election Petitions, with an Appendix of Practical Forms and Index. By P. J. BLAIR, M.A., LL.B., Advocate. 8vo. 15s. *nett.*

Pithie's Inland Revenue Cases. Summary Proceedings, together with a Statement of Procedure in Appeals in Inland Revenue Cases in Scotland. By M. PITHIE. Demy 8vo. 7s. 6d. *nett.* 1899.

Mackay's Manual of Practice. A Manual of Practice in the Court of Session. By A. J. G. MACKAY, Advocate. Royal 8vo. 30s. *nett.*

Hardie's Law Agents' Book-keeping. A Manual of Book-keeping for Law Agents, with Forms for Trusts Accounts. By W. HARDIE, C.A., Greenock. 4to. 5s. *nett.*

Irons on The Burgh Police Act, 1892. An Annotated Edition of The Burgh Police (Scotland) Act, 1892, with Notes of Decisions, &c. By J. CAMPBELL IRONS, M.A., S.S.C. Demy 8vo. 22s. *nett.*

Menzies on Trustees. The Law of Scotland affecting Trustees. By A. J. P. MENZIES, Advocate. 2 vols. Demy 8vo. 30s. *nett.* 1897.

ENCYCLOPÆDIA

OF

SCOTS LAW

VOLUME VI



PRINTED FOR

WILLIAM GREEN & SONS,

BY MORRISON AND GIBB LIMITED,

September 1897.

AGENTS IN LONDON	. . .	SWEET & MAXWELL LD.
,, ,,	. . .	STEVENS & HAYNES.
,, GLASGOW	. . .	JOHN SMITH & SON.
,, AMERICA	. .	BOSTON BOOK CO.

GREEN'S ENCYCLOPÆDIA

OF THE

LAW OF SCOTLAND

EDITED BY

JOHN CHISHOLM, M.A., LL.B.

ADVOCATE, AND OF THE MIDDLE TEMPLE BARRISTER-AT-LAW

VOLUME VI

FIRM NAME TO *INNUENDO*

EDINBURGH

WILLIAM GREEN & SONS

LAW PUBLISHERS

1897

T
G 8528
1896
v.6

The Articles in this Volume have been Revised by their respective Authors as at 15*th July* 1897.

THE AUTHORS OF THE PRINCIPAL ARTICLES IN THIS VOLUME ARE AS FOLLOWS:—

Fishings.—E. W. Neish, Advocate.

Fixtures.—W. M. Gloag, Advocate.

Flag, Law of the.—W. Galbraith Miller, Advocate; Lecturer on Public and Private International Law, Glasgow University.

Flumen.—J. M. Irvine, Advocate; Lecturer on Roman Law, Glasgow University.

Foreign.—G. Wardlaw Burnet, Advocate; Lecturer on Private International Law, Edinburgh University.

Forfeiture.—F. A. Umpherston, Advocate.

Forgery.—A. M. Anderson, Advocate.

Forisfamiliation.—C. D. Murray, Advocate.

Forum non conveniens.—C. Dick Peddie, Advocate.

Franchise.—J. C. Guy, Advocate.

Fraud (Civil Law).—W. Hunter, Advocate.

Fraud (Criminal Law).—A. M. Anderson, Advocate.

Fraudulent Bankruptcy. — W. J. Cullen, Advocate.

Freight.—J. A. Spens, Writer, Glasgow.

Friendly Societies.—J. Wright Forbes, Advocate.

Fruits.—A. O. M. Mackenzie, Advocate.

Fugitation; and

Fugitive Offenders.—H. H. Brown, Procurator-Fiscal of Elginshire.

Furniture.—W. A. Ramsay, Advocate.

Furthcoming.—A. A. Grainger Stewart, Advocate.

Game Laws.—C. N. Johnston, Advocate.

Gaming and Betting.—F. A. Umpherston, Advocate.

Gas.—Alastair Davidson, Advocate.

General Ship.—Alexander Moffatt, Advocate.

Glebe.—J. B. M'Intosh, S.S.C.

Goodwill.—J. R. Christie, Advocate.

Grass of Ministers.—J. B. M'Intosh, S.S.C.

Grassum.—C. D. Murray, Advocate.

Ground-annual.—A. A. Grainger Stewart, Advocate.

Ground Game Act, 1880.—C. N. Johnston, Advocate.

Guaranty (Mercantile).—Professor Herkless, St. Mungo's College, Glasgow.

Guardianship of Infants Act, 1886.—C. Dick Peddie, Advocate.

Habit and Repute.—R. W. Renton, Procurator-Fiscal, Cupar.

Habit and Repute as Proof of Marriage.—F. P. Walton, Advocate; Professor of Roman Law, McGill University, Montreal, Canada.

Hackney Coachmen.—R. Scott Brown, Advocate.

Half-Blood.—W. A. Ramsay, Advocate.

Hamesucken.—R. W. Renton, Procurator-Fiscal, Cupar.

Hares.—C. N. Johnston, Advocate.

Heir;

Heirs and Bairns;

Heir-Apparent; and

Heirs-Portioners.—Wm. Chree, Advocate.

Heirship Moveables.—C. R. A. Howden, Advocate.

Heritable and Moveable.—Professor Rankine, Q.C., Edinburgh University.

Heritable Jurisdiction.—R. Burns Begg, Advocate.

Heritable Securities.—W. M. Gloag, Advocate.

Heritage, Proof of Obligations regarding.—P. J. Hamilton-Grierson, Advocate.

755200

Heritors.—W. J. N. Liddall, Advocate.

Highways.—Hay Shennan, Advocate, Sheriff-Substitute of Zetland.

Hiring; and

Hiring of Custody.—J. G. Millar, Advocate.

Holograph Writings; and

Homologation.—P. J. Hamilton-Grierson, Advocate.

Horning, Letters of.—Patrick Smith, Advocate.

Horses.—D. Ross Stewart, Advocate.

Housebreaking.—R. W. Renton, Procurator-Fiscal, Cupar.

Housing of the Working Classes.—Hay Shennan, Advocate, Sheriff-Substitute of Zetland.

Husband.—F. P. Walton, Advocate; Professor of Roman Law, McGill University, Montreal.

Hypother.—W. M. Gloag, Advocate.

Identification; Identity.—P. J. Hamilton-Grierson, Advocate.

Illegal and Immoral Contracts.—R. Scott Brown, Advocate.

Imprisonment for Debt.—W. J. Cullen, Advocate.

Improbation of Deeds ex facie *Probative.*—P. J. Hamilton-Grierson, Advocate.

Incest.—A. M. Anderson, Advocate.

Income Tax.—A. A. Grainger Stewart, Advocate.

Incompetency.—W. A. Ramsay, Advocate.

Incorporation.—Andrew Mitchell, Advocate.

Indictment.—J. N. Hart, Procurator-Fiscal Glasgow.

Inducie.—F. M. Anderson, Advocate.

Industrial and Provident Societies.—J. Wright Forbes, Advocate.

Infeftment.—J. Burns, W.S.

Inhabited House Duty.—The Solicitor of Inland Revenue (P. J. Hamilton-Grierson, Advocate).

Inhibition; and

Inhibition of Teinds.—F. M. Anderson, Advocate.

Injury.—A. T. Glegg, Advocate.

Innkeeper.—J. A. Fleming, Advocate.

Innominate Rights.—C. D. Murray, Advocate.

GREEN'S ENCYCLOPÆDIA

OF

THE LAW OF SCOTLAND

Firm Name.—The firm name is the name under which the business of persons who have entered into partnership with one another is carried on (see Partnership Act, 1890, s. 4 (1)). A partnership, both at common law and under the Partnership Act, 1890, must contain at least two partners, for there cannot be a partnership of one (Bell, *Com.* ii. 514) If, therefore, a single person trading under a firm name is sequestrated, his private creditors and trade creditors rank equally on his estate.

A single person, however, though he cannot form a partnership, may have the exclusive right to the use of the name under which he trades: just in the same way as the firm may have the exclusive right to use the firm name under which it trades: for this protection is given to the right of using that has been acquired, and it is immaterial whether it has been acquired by a firm or an individual (*Singer Manufacturing Co.*, 1873, 11 M. 267).

Partners may carry on business under any name they may select, subject only to this, that they may not adopt as a firm name a name to which any other person or firm has an exclusive right (*Smith*, 1888, 16 R. 36). The firm name may be either a name or names of an individual partner or partners, or it may be a descriptive name.

In the former case, the firm can sue, or be sued, in its social name without the addition of the names of any of the partners (*Forsyth*, 13 S. 42). It naturally follows that it is competent to use diligence against an individual partner of a firm against whom a decree has been obtained (*Thomson*, 2 July 1812, F. C.). A firm also may use diligence in its own name (*Wilson*, 14 S. 262).

In the latter case, when a firm has a descriptive name such as the Culcreugh Cotton Co., it can only sue and be sued provided the names of three partners, if there be so many, be added to the descriptive name (*London Shipping Co.*, 3 D. 1045; *Antermony Coal Co.*, 4 M. 1017). But if a decree has been properly obtained against a firm, whether it has a descriptive name or not, any partner may be charged under it, as a decree against a firm is a decree against every person who is a partner of it. This was always the rule at common law, and is now also statute law (see Partnership Act, 1890, s. 4 (2)). This is the rule, however, only while the firm is in existence; for when it is sought to enforce a claim against a

dissolved firm, all the partners who are within the jurisdiction must be called as defenders (*Muir*, 1862, 24 D. 1189).

In Scotland, a firm is a person distinct from the partners of whom it is composed (Partnership Act, 1890, s. 4 (2); Bell, *Com.* ii. 507), and can for most purposes act in its social name. It of course acts through a partner or some one authorised agent. Each partner, in particular, has an implied mandate to act for the firm, and bind it, so long as he acts within the scope of the firm's business. A partner can even, in certain cases, compel the concurrence of a fellow-partner. Thus, when firms with descriptive names sue, a partner of such a firm can compel the concurrence of a fellow-partner, if his name is necessary to make the instance good (*Antermony Coal Co., supra*).

Many consequences peculiar to the law of Scotland flow from the rule of law that a firm is a legal *persona*. Thus—

(1) Partners can stand in the relation of debtor or creditor to the firm of which they are partners. A firm can, for instance, be sequestrated without the individual partners being sequestrated; and, similarly, an individual partner can be sequestrated without the firm being also sequestrated.

(2) In relation to persons dealing with the firm, it, in the first instance, is the debtor or creditor, the partners being considered as cautioners for the firm. It follows that an action for a debt due by a firm cannot, in the first instance, be directed against a partner. The firm must first have failed to pay, before a partner can be sued.

(3) On the sequestration of a firm and the individual partners, the creditors of the firm rank, in the first place, for the full amount of their debts on the partnership estate; and in the event of their not being paid in full, they also rank for the balance on the estates of the partners, along with the creditors of such partners.

(4) The share of a partner can be attached by his creditors by using arrestments in the hands of the firm as a separate person.

(5) A firm can own property, and the title to it can in all cases, except in the case of feudal property, be taken in the firm name. Thus, a lease can be taken in the firm name, but property held in fee cannot. In such a case it must be held by certain individuals, such as the partners, as trustees for the firm (*Dennistoun, M'Nair, & Co.*, M. App. Tack, No. 15; *Morrison*, 1818, Hume, 720).

(6) A firm can sue and be sued and use diligence, or diligence can be used against it, in the manner above described.

(7) One firm can sue another firm even although there may be one or more parties who are partners of both firms (Bell, *Com.* ii. 507). See PARTNERSHIP.

First Offenders.—By the Probation of First Offenders Act, 1887 (50 & 51 Vict. c. 25), it is enacted that where any person is convicted of larceny or false pretences or of an offence punishable with not more than two years' imprisonment, and where no previous conviction is proved against him, and if, regard being given to the offender's youth, character, and antecedents, to the trivial nature of the offence, and to any extenuating circumstances, it seem expedient to the Court that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognisance, with or without securities, during such period as the Court

may direct, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour (s. 1). Power is given by (2) sec. 1 of the Act to the Court to direct the offender to pay the costs of the prosecution or some portion thereof, within such period or in such instalments as to the Court may seem proper. If a Court having power to deal with the offender in respect of his original offence, or any Court of summary jurisdiction, is satisfied on information on oath that the offender has failed to observe any of the conditions of his recognisance, it may issue a warrant for his apprehension (s. 2). Where an offender is apprehended on such a warrant he shall, if not brought forthwith before the Court having power to sentence him, be brought before a Court of summary jurisdiction, by which he may either be remanded till the time named in his recognisance at which he was to come up for judgment, or until the sitting of a Court having power to deal with his original offence, or he may be admitted to bail with a surety ((2) s. 2).

If the offender be so remanded he may be committed to a prison either for the county or place in or for which the Court remanding him acts, or for the county or place where he is bound to appear for judgment, and the warrant of remand shall order that he be brought before the Court before which he was bound to appear for judgment, or to answer to his conduct since his release (s. 2 (3)).

The Court, before directing the release of an offender under this Act, shall be satisfied that the offender or his surety have a fixed abode or occupation either in the county or place where the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

The term Court is defined by the Act as including a Court of summary jurisdiction.

Fishings.

I. Sea Fisheries.

The right of white-fishing in the *mare proximum*, or territorial waters, of Scotland, *i.e.* within the three-mile limit, is perfectly free to any subject of the realm, and may be exercised in any way not prohibited by Statute. The right carries with it the right to the use of the shore for the purpose of white-fishing (Ld. Chan. Cairns in *M'Donald*, 1875, 2 R. H. L. 49; Act 1705, c. 2; Act 1756, 29 Geo. II. c. 23, ss. 1, 17). Outside the three-mile limit, in the open sea, the right of fishing for every kind of fish is common to all nations, and is controlled either by custom or international convention (see Sea Fisheries Convention with France, embodied in Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), and International Convention Act, 1883 (46 & 47 Vict. c. 22); Selden, *Mare Clausum*, B. i.; Hale, *De Jure Maris*, c. 4).

Fishermen are entitled to make use of waste and uncultivated lands for the space of 100 yards inland from high-water mark for certain purposes of their occupation (1770, 11 Geo. III. c. 31, s. 11; *Cameron*, 1848, 10 D. 446; *Hoyle*, 1858, 21 D. 96; *Scott*, 1887, 15 R. 27). The right of white-fishing includes the right to take limpets and other small shell-fish, but excludes the right to take oysters, mussels, and salmon, which are all vested patrimonially in the Crown (*Hall*, 1852, 14 D. 324; *Ds. Sutherland*, 1868, 6 M. 199; *D. Argyll*, 1859, 22 D. 261; *Lindsay*, 1868, 7 M. 239; *Mags. of St. Andrews*, 1869, 7 M. 1105; *Gammell*, 1859, 3 Macq. 419; *Anderson*, 1867, 6 M. 117). Sea fisheries, and more especially herring fisheries, are

regulated by special Statutes. The Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45), embodied a fishery convention with France, which recognised an exclusive right of fishing within the three-mile limit to each country, and provided for the admission of the fishing-boats of each country for the purpose of selling fish at certain specified ports, under regulations mutually agreed upon. In addition, the Act provided for the numbering, registering, and lighting of fishing-boats. The Fishery Board (Scotland) Act, 1882 (45 & 46 Vict. c. 78), established the first Fishery Board for Scotland (see *infra*, *Fishery Board*). The Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), embodied an international convention between Great Britain, Germany, Belgium, Denmark, France, and the Netherlands. It amended, and in part repealed (s. 30), the Act of 1868, and provided *inter alia* for the maintenance of order among fishing-boats and their crews, and for the prohibition of engines for the destruction of fishing-gear (*Combe*, 1886, 13 R. J. C. 67: *Leslie*, 1886, 14 R. 288). The Sea Fisheries (Scotland) Amendment Act, 1885 (48 & 49 Vict. c. 70), amended the Act of 1883, and gave wide powers to the Fishery Board to make bye-laws restricting or prohibiting "in any part of the sea adjoining Scotland, and within the exclusive fishery limits of the British Islands," any method of fishing which the Board is satisfied is injurious. The bye-law must be approved by the Secretary for Scotland, and the penalty prescribed is a fine not exceeding £100, or sixty days' imprisonment (s. 4). The Sea Fishing-Boat (Scotland) Act, 1886 (49 & 50 Vict. c. 53), deals with joint ownership, purchase, sale, and mortgaging of fishing-boats.

Trawling—The Herring Fishery (Scotland) Act, 1889 (52 & 53 Vict. c. 23), prohibits, s. 6, "beam-trawling or otter trawling within three miles of low-water mark of any part of the coast of Scotland," and "within the waters specified in the Schedule hereto annexed, save only between such points on the coast or within such other defined areas as may from time to time be permitted by bye-laws of the Fishery Board for Scotland, and subject to any conditions or regulations made by those bye-laws. Provided that this section shall not apply to the Solway Firth and the Pentland Firth: and provided also that nothing herein contained shall affect the powers of the Fishery Board under sec. 4 of the Sea Fisheries (Scotland) Amendment Act, 1885" (48 & 49 Vict. c. 70). The penalty for an offence under this section is provided by sec. 3 of the amending Act of 1890 (53 Vict. c. 10): "Any person who uses any method of fishing in contravention of the sixth section of the Herring Fishery (Scotland) Act, 1889, or of any bye-law of the Fishery Board duly confirmed, shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding £100, and, failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment if no imprisonment has followed on the conviction; and every net set, or attempted to be set, in contravention of this section shall be forfeited, and may be seized and destroyed or otherwise disposed of by any superintendent of the herring fishery or other officer employed in the execution of the Herring Fishery (Scotland) Acts." Sec. 7 of the Act 1889 provides that the Fishery Board may, by bye-law, direct that beam-trawling and otter trawling shall not be used within a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire in any area or areas to be defined in such bye-law, and may from time to time make, alter, or revoke bye-laws for the purpose of this section; but no such bye-law shall be of any validity until confirmed by the Secretary for Scotland. A bye-law closing the Moray Firth has been enacted (*Wilson*, 1896, 23 R. J. C. 56,

overruling *Green*, 1896, 23 R. J. C. 50). The penalty for an offence under this section is now provided by sec. 10 (4) of the Sea Fisheries Regulation (Scotland) Act, 1895 (58 & 59 Vict. c. 42), which is quoted below. That Act also gives the Fishery Board powers for the prohibition of seine-trawling in any area or areas within the limits specified in sec. 6 of the Act of 1889 (quoted *supra*), or in the Schedule annexed to that Act. The penalty for a breach of any bye-law made under this section is a fine not exceeding £5 for the first offence, and not exceeding £20 for the second or any subsequent offence, together with seizure and destruction of the net; but if there is no conviction, any net seized is to be returned, and compensation made for any loss or damage occasioned to the net by such seizure. Sec. 10 gives power to prohibit trawling within the thirteen-mile limit, subject to certain important reservations: "(1) The Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam-trawling and otter trawling shall not be used in any area or areas under the jurisdiction of Her Majesty within thirteen miles of the Scottish coast, to be defined in such bye-law, and may from time to time make, alter, and revoke bye-laws for the purposes of this section. Provided that the powers conferred in this section shall not be exercised in respect to any areas under Her Majesty's jurisdiction lying opposite to any part of the coasts of England, Ireland, or the Isle of Man, within thirteen miles thereof. (2) No bye-law under this section shall be confirmed by the Secretary for Scotland until he shall have directed a local inquiry to be held in the district adjoining the part of the sea to be included in the bye-law; at which inquiry all persons interested shall be heard, whether resident in the district or not: and notice of such inquiry shall be sent to all committees of sea fishery districts in the United Kingdom. (3) Provided that no area of sea within the said limit of thirteen miles shall be deemed to be under the jurisdiction of Her Majesty for the purposes of this section unless the powers conferred thereby shall have been accepted as binding upon their own subjects with respect to such area by all the States' signatories of the North Sea Fishing Convention, 1882. (4) Any person who uses any such method of fishing in contravention of any such bye-law shall be liable on conviction, under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding £100, and, failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment if no imprisonment has followed upon the conviction: and every net set, or attempted to be set, in contravention of any such bye-law may be seized and destroyed or otherwise disposed of by any superintendent of the herring fishery or other officers employed in the execution of the Herring Fishery (Scotland) Acts. Provided always that, if no conviction shall follow, any net so seized shall be forthwith returned, and due compensation made for any loss or damage occasioned thereto by such seizure. (5) Subsec. 2 of sec. 7 of the Herring Fishery (Scotland) Act, 1889, is hereby repealed, and the provisions of the foregoing subsection shall be and are hereby substituted therefor (*Wilson*, *supra*). (6) Failing payment by a certain date named in the conviction of the fine imposed upon the person or persons convicted, decree therefor may be pronounced against the owner or owners of the offending vessel or boat; and upon such decree being pronounced, the person or persons convicted shall be relieved therefrom, and from all penalties attaching thereto."

Prosecutions under these Acts are conducted under the Summary Jurisdiction Acts, 1864 and 1881, and the Criminal Procedure Act, 1887 (*Nicholson*, 1885, 12 R. J. C. 46). Offenders are within the jurisdiction of

the Sheriffs of the county or counties adjacent to where the offence is committed, and the Sheriff's jurisdiction extends to a distance of ten miles from the coast (48 Geo. III. c. 110, s. 60). The instance of a procurator-fiscal of a Sheriff Court is a good instance (*Nicholson, supra*).

An action has lately been brought by the master of a German trawler to interdict the Lord Advocate and others from preventing him from landing in Scotland fish caught by beam-trawling in any part of the Moray Firth beyond territorial waters (*Poll* v. *Lord Advocate.* Not yet decided, 1897).

Herring-Fishing.—All barrels or half-barrels in which herrings are packed must contain thirty-two and sixteen gallons English wine measure (55 Geo. III. c. 94, ss. 12, 40; *Lowdon*, 1884, 11 R. J. C. 57; *Bremner*, 1890, 17 R. J. C. 31). Regulations have been made by the Fishery Board, under powers conferred by various Acts, and especially by 48 & 49 Vict. c. 70, s. 9, regarding the materials to be used in the construction of barrels, their hooping, and the markings on the barrels. Fir wood may now be used in making barrels (37 & 38 Vict. c. 25). Sec. 4 of 52 & 53 Vict. c. 23 provides that "any person buying, selling, delivering, or receiving fresh herrings in the Scotch Herring Fishery shall be entitled to use for the purpose thereof the measure known as the cran, or a quarter-cran measure, being a measure of such capacity that four times its contents when filled with herrings shall be equal to one cran: and such measure shall be made of wood, or of such other material as the Fishery Board for Scotland shall direct, and shall be made and branded or otherwise marked in accordance with any regulations for the time being in force of the Fishery Board for Scotland, which regulations the Board are hereby authorised to make, and from time to time alter and revoke as they see fit. These measures, made, branded, or otherwise marked in all respects in conformity with the regulations for the time being in force of the said Board, shall be the only legal measures for use in buying, selling, delivering, or receiving fresh herrings in the Scotch Herring Fishery; and any person using any box, basket, or other measure not so made, branded, or otherwise marked shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding £5 for the first offence, and not exceeding £20 for the second or any subsequent offence: and also to the forfeiture of the measure or measures, which may be seized and destroyed or otherwise disposed of by any superintendent of the herring-fishing, or other officers employed in the execution of the Herring Fishery (Scotland) Acts. Provided always that nothing in this Act contained shall prevent the sale of herrings by weight, or number, or in bulk."

Branding is carried out by the officers of the Fishery Board, who, under the Board's regulations, affix to each barrel the brand denoting the class of herrings it contains. The penalty for fraudulent branding is a fine not exceeding £50, or not more than six months' imprisonment (48 Geo. III. c. 110, s. 50; 14 & 15 Vict. c. 26, s. 3). The officers of the Board are not liable for acts done in the course of their duties, unless done maliciously (48 Geo. III. c. 110, s. 59).

Sec. 5 of the Act 1889 (52 & 53 Vict. c. 23) provides that "it shall not be lawful to set or shoot any herring-net on any day between sunrise and one hour before sunset on any day between the first day of June and the first day of October, nor between sunrise on Saturday morning and one hour before sunset on Monday evening, on the West Coasts of Scotland between the points of Ardnamurchan on the north and the Mull of Galloway on the south," under a penalty not exceeding £5 for the first offence,

and £20 for the second or any subsequent offence, together with forfeiture of the nets employed.

The meshes of any net employed for the capture of herrings shall measure not less than one inch from knot to knot; the use of a double bottom or pouch, and the placing of one net behind the other so as to diminish the size of mesh, are prohibited (48 Geo. III. c. 110, s. 12); but these restrictions are only enforced within the three-mile limit.

Whale-Fishing.—Whales of large size captured within territorial waters are royal fish, and belong to the sovereign (Hale, *De Jure Maris*, p. 43; Stair, ii. 1. 5 and 33; Ersk. ii. 1. 10). Whales of smaller size, captured within territorial waters, belong to the captor; and the view that, in the Shetland Isles, the proprietor of the shore on which they had been run aground had a share in them, has been negatived (*Bruce*, 1890, 17 R. 1000). Outside territorial waters, all whales belong to the captor. There are certain special rules determining the rights of property in captured whales. The capture must be complete or the fish mortally wounded (Stair, ii. 1. 33). The rule of "fast and loose" provides that the person who first harpoons a fish, provided that he retains his hold, is proprietor of the fish (Bell, *Prin.* s. 1289; *Aberdeen Arctic Co.*, 1869, 4 Macq. 355; *Jennings*, 1808, 1 Taun. 241; *Littledale*, 1788, *id.* 243; *Addison*, 1794, 3 Pat. App. 334; *Hutchison*, 1830, 5 Murray, 162; *Hogarth*, 1827, 1 Moo. & M. 58; *Skinner*, 1827, *id.* 59).

Oyster and Mussel Fishing.—The right to take oysters and mussels is, like salmon-fishing, *inter regalia*, and belongs as a patrimonial right to the Crown (*Duchess of Sutherland*, 1868, 6 M. 199). The right extends over the coasts, bays, and public rivers of Scotland, but is bounded by the three-mile limit. The right does not extend to oysters or mussels detached from the scalps or beds and scattered over the coast. It does not seem to extend to scalps or beds in private rivers, probably because the *alveus* of such rivers belongs to the adjacent proprietor (*Grant*, 1764, Mor. 12801). The right may be made the subject of an express grant by the Crown (Bell, *Prin.* s. 646; *Ramsay*, 1776, 5 Bro. Supp. 445; *Grant, supra*; *D. Portland*, 1832, 11 S. 14; *Maitland*, 1860, 23 D. 216; *Erskine*, 1819, Hume, 558; *Agnew*, 1822, 2 S. 42; *Mags. of St. Andrews*, 1869, 7 M. 1105; *Lindsay*, 1868, 7 M. 239; *D. Buccleuch*, 1843, 5 D. 846; *D. Argyll*, 1859, 22 D. 261). The right may also be established by prescription on a barony title *cum piscationibus* (*Duchess of Sutherland, supra*; *Lindsay, supra*), or on a non-barony title *cum piscationibus* (*Erskine, supra*); but probably not on a barony title without a clause of fishings (Rankine, *Landownership*, p. 238; *Ramsay, supra*; *Agnew, supra*; but see Ld. Barcaple, p. 240, in *Lindsay, supra*). A grant to magistrates, burgesses, citizens, inhabitants, and community of a royal burgh forms part of the common good, but the fishermen of the burgh have the right to an adequate supply of bait at reasonable rates (*Mags. of St. Andrews, supra*; *Chisholm*, 1872, 2 Coup. 49). The grantee must not, in the exercise of his right, interfere with the primary uses of the shore, such as navigation and passage, nor does the grant exclude the public right to fish for white floating fish in the same place (3 & 4 Vict. c. 74, s. 3); provided that in private fisheries established under 29 & 30 Vict. c. 85, or under the Sea Fisheries Act, 1868, the public right is carried on by methods which do not injure the beds. Any person who wilfully and knowingly takes oysters or mussels from scalps which do not belong to him, is guilty of theft (3 & 4 Vict. c. 74; 10 & 11 Vict. c. 92; *Chisholm, supra*; *Garrett*, 1866, 5 Irv. 259). Oyster and mussel beds are also protected by 31 & 32 Vict. c. 45, s. 53, which prohibits the use of any

implement except a line or net for catching floating fish, and it must be so used as not to disturb or injure the beds. Dredging, except under a lawful authority for improving the navigation, depositing of any ballast, rubbish, or any other substance on the beds, placing any apparatus or thing prejudicial on the beds, except for a lawful purpose of navigation or anchorage, and disturbing or injuring the beds in any way, except as aforesaid, are all prohibited. The beds must be marked out and known as such, to obtain the protection of the Act.

Under the Sea Fisheries Regulation (Scotland) Act, 1895 (58 & 59 Vict. c. 42), extended powers are given to the Fishery Board to regulate oyster and mussel fishing. Sec. 8 (1) provides that the fishery district committees to be established under that Act (see *infra, Fishery Board*) may, subject to the regulations of the Fishery Board, impose penalties and make bye-laws to be observed within their district for (*b*) "constituting within their district any district of oyster cultivation for the purposes of sec. 4 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42); (*d*) for repealing or amending any order made under sec. 10 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877; (*e*) for the regulation, protection, and development of fisheries for all or any specified kinds of shell-fish: and any such bye-laws shall provide, amongst other things, for (1) the fixing of the sizes and conditions at which shell-fish may not be removed from a fishery, and the mode of determining such sizes; (2) the obligation to re-deposit in specified localities any shell-fish the removal or possession of which is prohibited by, or in pursuance of, any Act of Parliament: (3) the protection of shell-fish laid down for breeding purposes; (4) the protection of culch and other material laid down for the reception of spat, that is to say, of the spawn or young of any kinds of shell-fish; and (5) the obligation to re-deposit such culch or other material in specified localities. (2) A fishery district committee shall further have power to stock or re-stock any public fishery for shell-fish." Secs. 11 to 17 deal with mussel fisheries. The Fishery Board is to draw up a list of mussel or clam fisheries or beds or scalps, specifying their situation and limits, and the names of the owners or reputed owners (s. 11). The Board may lease or purchase any mussel or clam fisheries or beds or scalps; and in the event of purchase otherwise than by agreement, the provisions of the Lands Clauses Act are to apply (s. 12). A fishery district committee may, subject to the regulations of the Board, impose penalties and make bye-laws for the establishment and maintenance or improvement of scalps in certain specified ways, including the letting on lease of any scalp, etc., by the Fishery Board (s. 13). The Fishery Board or their tenants, where they have acquired a title under the Act to scalps, etc., shall, subject to the rights of the Crown and its grantees, have the exclusive right of depositing, propagating, dredging, and taking mussels and clams within the limits of each fishery district, "and in the exercise of that right may, within the limits of the district, make and maintain mussel or clam fisheries and beds or scalps, and collect and remove the same from place to place, and deposit the same as and when they think fit, and do all other things which they think proper for obtaining, storing, and disposing of the produce of their fishery: Provided always that, when the Fishery Board or their sub-lessees or tenants hold any mussel or clam fishery or bed or scalp on lease, they shall in no case exceed the powers conferred upon them in their respective leases" (s. 14). The Board or their sub-lessees or tenants may impose tolls and royalties, subject to the rights of the Crown and its grantees, upon persons dredging

and taking mussels or clams, to be applied for the benefit of the fishery only (s. 15). The Board may also borrow from the Public Works Loan Commissioners, upon the security of the tolls and royalties, with the consent of the Secretary for Scotland, for the purchase, lease, maintenance, or regulation of any mussel or clam fisheries or beds or scalps, or for the cultivation of mussels or clams generally (s. 16). Sec. 17 prohibits, under a penalty not exceeding £20 and liability to make good all damage, any person within the limits of a fishery district, other than the Crown and its grantees, and the Fishery Board or their sub-lessees or tenants, from fishing on or near a scalp, etc., with anything but hook and line, or a net solely for catching floating fish; for dredging, except under a lawful authority, for improving navigation; depositing ballast or rubbish: or any instrument likely to cause injury, except for the purpose of navigation or anchorage. The close time for "deep-sea oysters" is from 15 June to 4 August, and for all other oysters from 14 May to 4 August (40 & 41 Vict. c. 42); and the Fishery Board may restrict or prohibit, for a limited period not exceeding one year, the dredging or taking of oysters on any bank or bed (48 & 49 Vict. c. 70, s. 11).

Lobsters and Crabs.—It has not been decided whether lobster-fishing can be made the subject of an exclusive grant, but the better opinion seems to be that the right is a public one (*D. Portland*, 1832, 11 S. 14). The close time for lobster-fishing is from 1 June to 1 Sept. (9 Geo. II. c. 33, s. 4). No one may have in his possession, or sell, a lobster less than 8 inches long, or a crab less than $4\frac{1}{4}$ inches across the back, or crabs in certain states, except for bait; and the Secretary for Scotland may restrict or prohibit fishing for crabs or lobsters either for a period of years or for a certain period in each year (40 & 41 Vict. c. 42, s. 8). Sec. 8 (*c*) of the Act 1895 (58 & 59 Vict. c. 42) also provides that fishery district committees may make regulations for "directing that the proviso to sec. 8 of the Fisheries (Oyster, Crab, and Lobster) Act, 1877 (40 & 41 Vict. c. 42), which permits edible crabs in certain conditions or under a certain size to be taken or be in the possession of any person, if those crabs are intended for bait for fishing, shall not apply."

Fishery Board.—A Fishery Board for Scotland was first established in 1882 by 45 & 46 Vict. c. 78. That Act conferred upon the Fishery Board all the powers and duties contained in the Sea Fisheries and Herring Fishery Acts, as well as the superintendence of Salmon Fisheries, and the powers and duties of the Salmon Fishery Acts. The Act does not apply to the Tweed (s. 7). This Act is still in force, but the Board has been reconstituted, and further powers given to it by the Sea Fisheries Regulation (Scotland) Act, 1895 (58 & 59 Vict. c. 42). The Board consists of "seven members (viz. three members, of whom one shall be the chairman of the Board, a second shall be the Sheriff of a county in Scotland, and the third shall be a person of skill in the branches of science concerned with the habits and food of fishes, and four members, who shall be representative of the various fishing interests of Scotland), to be appointed by Her Majesty from time to time after the passing of this Act, on the recommendation of the Secretary for Scotland, and to hold office for five years, unless they sooner die or resign office. Four members shall be a quorum. The chairman or deputy-chairman, as the case may be, shall have a casting as well as a deliberative vote" (s. 4 (1)). The Secretary for Scotland may appoint a scientific superintendent (s. 4 (2)). Sec. 5 provides for the appointment of fishery district committees. "On the application of a county council, or of a town council, or of the police commissioners

of a police burgh, the Secretary for Scotland may from time to time, by order, (*a*) create a sea fisheries district, including any part of the sea adjoining Scotland, or within the jurisdiction of the Fishery Board for Scotland. (*b*) Define the limits of the district and sea chargeable with any expenses under this Act; and (*c*) provide for the constitution of a fishery district committee for the regulation of the sea fisheries carried on within the district." A draft of the order must be published locally, and a local inquiry held if any objection is taken to the order. The order must also be laid for thirty days before both Houses of Parliament while in session; and if either House within that period resolves that the whole or any part of the Order so made ought not to be in force, the same shall not have any force, without prejudice to the making of any other order in its place. Sec. 6 provides for the establishment of fishery district committees where fishery districts have been created. "In each fishery district there shall be a fishery district committee, who shall be a committee composed of such number of members (in this Act referred to as ordinary members) of the county councils of the counties, and of the town councils of the royal or parliamentary burghs, and the burgh commissioners of the police burghs, comprised within the district, and appearing to have an interest, as may be fixed by the order creating the district, or by any other order of the Secretary for Scotland, with the addition of such number of fishery members representing the fishing interests of the district as may be directed by the order, but not exceeding one-half in number of the whole committee. The fishery members may be distributed or apportioned among such portions of counties, and among such burghs and police burghs, as the Secretary for Scotland shall determine by the order. A fishery district committee shall, subject to the provisions of the order creating the sea fishery district, be a committee of a county council, or town council, or commissioners of a police burgh, or, if two or more of such bodies are represented upon it, shall be deemed to be a joint-committee of such bodies, and the provisions of the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), relative to joint-committees, shall apply accordingly" (s. 6 (1)). The ordinary members are to be appointed annually by the various councils. The fishery members are to be elected every three years by all persons included in the expression "fishing interests" (s. 6 (3) (*a*)). The county and burgh assessors are to prefix a distinctive mark to the number or name of any county or burgh elector whom they shall respectively consider to be entitled, or who shall satisfy them that he is entitled, to be included in the expression "fishing interests," and objection may be taken to the insertion or omission of the mark in the same way as in the case of any other entry in, or omission from, the register (s. 6 (3) (*b*)). The expression "fishing interests" includes "all persons engaged or employed in the industry or business of sea-fishing, excepting fisheries for salmon and fish of the salmon kind as defined by any Act relating to salmon, either as owners of fisheries or interests therein, fishermen, fishing-boat owners, smack owners, fish curers, fish merchants, or otherwise" (s. 28). Each voter has as many votes as there are members to be elected, but he may not give more than one vote to any candidate (s. 6 (3) (*c*)). "The expenses of a fishery district committee, so far as sanctioned and payable by a county council, shall be levied and collected within the county (excluding police burghs), as an addition to the general purposes rate, and, so far as sanctioned and payable by a town council or burgh commissioners, by the town council, acting as such or as police commissioners, and by the burgh commissioners, as an addition to the burgh general assessment, or, where

there is no burgh general assessment, to any other available assessment." (s. 6 (6)). The Fishery Board is to convene, at least once a year, a meeting of not less than one representative nominated for that year by each fishery district committee, to confer with the Fishery Board and for consultative purposes, on matters relating to the Act. Sec. 8 provides that "a fishery district committee may, from time to time, subject to such regulations as may be made in that behalf by the Fishery Board, impose penalties, and also make bye-laws to be observed within their district, for all or any of the following purposes, namely: (*a*) For restricting or prohibiting, either absolutely or subject to such regulations as may be provided by the bye-laws, any method of fishing for sea fish, or the use of any instrument for fishing for sea fish, and for determining the size of mesh, form, and dimensions of any instrument of fishing for sea fish (*b*, *c*, *d*, and *e* deal with oysters, mussels, lobsters, and crabs; see *supra*). (*f*) For prohibiting or regulating the deposit or discharge of any solid or liquid substance detrimental to sea fish or sea-fishing; and (*g*) for repealing or amending any bye-law made by the fishery district committee in pursuance of this Act (ss. 11–17 deal with mussels; see *supra*). Sec. 18 saves all orders made under the Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45). A district committee may appoint fishery officers, who are to have certain powers of search and seizure, and are to be deemed police constables, for the enforcement of bye-laws (s. 19). The Board may also employ officers and vessels for the protection of sea fisheries (s. 20); and any Sheriff or two justices, upon information on oath, may grant warrant to enter suspected places, provided that the warrant shall not continue in force for more than one week (s. 21). All bye-laws must be confirmed by the Secretary for Scotland (s. 22), and all prosecutions may be under the Summary Jurisdiction Acts (s. 23). In places where no fishery district committee has been constituted, the Fishery Board has all the powers given in the Act to district committees (s. 26). The Board may employ the grant given under 5 Geo. IV. c. 64, as "security for obtaining a loan from the Public Works Loan Commissioners."

Under the Crofters Act, 1886 (49 & 50 Vict. c. 29, s. 32), the Fishery Board may make advances to fishermen in crofting parishes.

II. Salmon-Fishing.

The right of salmon-fishing belongs to the Crown as a separate heritable estate, and forms part of the *patrimonium principis* (Stair, ii. 3. 69; Ersk. ii. 6. 15; *Gammell*, 1851, 13 D. 854, 5 Macq. 419). The right may be given out either with the land or separately; in the latter case the grant implies, as a pertinent, the right of access to and use of the banks of a river, foreshore or beach for the purpose of salmon-fishing (*Miller*, 1825, 4 S. 214: *Berry*, 1841, 4 D. 139; *Lord Advocate*, 1878, 6 R. 108).

A right to salmon-fishing may be established (1) by direct grant *cum piscatione salmonum* (*Mackenzie*, 1841, 3 D. 646; *Gray*, 1877, 4 R. H. L. 76). The conveyance must be in the dispositive clause. A grant of pertinents does not include the right; nor is a clause of "fishings" in the *tenendas* clause of any avail, at least in the ordinary case, though such a clause, combined with a grant of pertinents in the dispositive clause of a charter from a subject-superior, has been held to be a valid title upon which to found prescription (*Sinclair*, 1867, 5 M. H. L. 97; *M'Culloch*, 1874, 2 R. 27). (2) By a grant *cum piscationibus*, followed by prescriptive possession of salmon-fishings (*Maxwell*, 1628, Mor. 14250; *Forbes*, 1701, Mor. 7812: *D. Queensberry*, 1773, M. 14257; *Forbes*, 1824, 2 S. 515; *D. Sutherland*,

1836, 14 S. 960). A good title may be prescribed on such a clause even in a charter by a subject-superior, where it can be proved from the earlier titles that fishings have been given out by the Crown (*Sinclair, supra*; *Stuart*, 1867, 6 M. H. L. 123; *Earl of Zetland*, 1870, 8 M. H. L. 144). (3) By prescriptive possession of salmon-fishings by the holder of a barony title, either with or without fishings (*Milne's Trs.*, 1868, 6 M. 972; *D. Richmond*, 1870, 8 M. 530; *Cathcart*, 1871, 9 M. 744; *M'Donall*, 1875, 2 R. H. L. 49). Where a barony is divided, it would appear that salmon-fishings go with the part of the barony to which they pertain (*M'Culloch*, 1874, 2 R. 27). Where the right is gained by prescription, it is limited to the extent of possession (*Cathcart*, 1871, 9 M. 744); but in *Lovat*, 1880, 7 R. H. L. 122, it was held that possession of salmon-fishings on a barony title in certain parts of a river was sufficient to prescribe the right on the whole river, so far as within the barony. The possession must be attributable to the grant (*Carnegie*, 1777, Mor. 10611); must be exclusive, and must be by net and coble or some other legal method of a clear and unequivocal kind (*Anderson*, 1867, 5 Irv. 499, 6 M. 117; *Milne*, 1850, 13 D. 112; *Ramsay*, 1848, 10 D. 661; *Sinclair*, 1890, 17 R. 507). It was at one time thought that rod-fishing was of no avail to prove possession, but the tendency now is to regard fishing with rod and line as sufficient in cases where net and coble is not practicable, or not so profitable, and where, therefore, the former may be regarded as the higher and more valuable method (*D. Richmond*, 1836, 14 S. 960; *Stuart*, 1868, 6 M. H. L. 123; *Warrand's Trs.*, 1890, 17 R. H. L. 13; *D. Roxburghe*, 1879, 6 R. 663; *Lord Lovat*, 1880, 7 R. H. L. 122). Possession for twenty years is probably sufficient to establish prescription (Conveyancing Act, 1874 (37 & 38 Vict. c. 94, s. 34) (*Buchanan*, 1882, 9 R. 1268; *Ogston*, 1893, 21 R. 282, 23 R. H. L. 16).

Where the right is held by different proprietors on the opposite banks of a river, the rule of bounding charters applies, at least in large streams, and neither party is entitled to fish either with net or rod beyond the *medium filum* (*Stuart, supra*; *Mags. of Perth*, 1750, Mor. 12792, 1 Pat. 645; *Milne*, 1850, 13 D. 112; *L. Monimusk*, 1623, Mor. 10840, 14264). In smaller streams, with regard to net-fishing, it is usual to arrange fishing on alternate days, or alternate shots of the net (*Mather*, 1873, 11 M. 522; *Milne, supra*; *D. Richmond*, 1870, 8 M. 530; *Earl of Zetland*, 1873, 11 M. 469). With regard to rod-fishing, it has not been decided whether fishing beyond the *medium filum* is permissible (*Somerville*, 1859, 22 D. 279, per Ld. Deas, p. 288), but probably the rule of bounding charters would not be enforced, at least where its enforcement would mean a denial of the right of fishing altogether. A proprietor is not entitled to interfere with the *alveus* even on his own side of the *medium filum*, *e.g.* he is not entitled to make erections in the stream for any purpose, nor to blast boulders (*Mather, supra*; *D. Roxburghe*, 1879, 6 R. 663; *Robertson*, 1879, 6 R. 1290); but he is entitled to restore the *alveus* on his own side to its original condition after being disturbed by a flood (*Mather, supra*).

The boundaries of salmon-fishings between adjoining proprietors are usually fixed by dropping a perpendicular from the boundary on the bank to the *medium filum* (*Keith*, 1884, 12 R. 66; *Gray*, 1885, 12 R. 530; *Mags. of Tain*, 1887, 15 R. 83). Minor rights of salmon-fishing may be feudalised, such as the "right and privilege of one tide's fishing of salmon yearly" (*Murray*, 1880, 7 R. 804); and a proprietor, while conveying a right of salmon-fishing, may reserve to himself the right of fishing in a particular manner, *e.g.* by rod (*D. Richmond*, 1867, 5 M. 310). Fishings are frequently the subject of lease. The net and rod fishings in the same water may be let to

different persons, and the lessor may reserve to himself a particular method of fishing, *e.g.* rod-fishing, which may be afterwards let (*Gemmill*, 1847, 9 D. 727). A lease of fishings carries with it all rights that the lessor can claim. The landlord's right of hypothec still applies to a lease of fishings (Stair, i. 13. 15; Bankt. i. 17. 10), and has been held to apply to the produce of the fishing (*Cumming*, 1667, Mor. 6237; *Molison*, 1687, Mor. 6239). It is doubtful whether it applies to boats, nets, etc. (Rankine on *Leases*, pp. 341, 350; Stewart, *Fishings*, p. 163). A lease of salmon-fishings, being a separate heritable estate, is protected against singular successors by the Act 1449, c. 17, 6 James II. A lease of fishings probably excludes sub-tenants and assignees, without special mention (*Earl of Fife*, 1864, 3 M. 323; *Mackintosh*, 1895, 22 R. 345).

Statutory Regulations.—The use of fixed engines for taking salmon, though permitted on the open coast (*Kintore*, 1828, 3 W. & S. 261; *Duchess of Sutherland*, 1836, 14 S. 959), has long been prohibited by a series of Statutes (Rankine, *Landownership*, p. 282) in rivers and estuaries; and all controversy as to where any particular estuary may end and the sea begin has been set at rest under the Act 1862 (25 & 26 Vict. c. 97, s. 6), whereby the commissioners under the Act were empowered to fix the boundary line between the estuary and the sea in every river in Scotland, except the Tweed, the mouth of which was already defined in the Act 1859 (22 & 23 Vict. c. 70). (For these boundaries, see Stewart, *Fishings*, App.) These Statutes have been liberally interpreted for the protection of salmon-fishing, and the decisions "have gone so far as to make it clear law at the present time that it is illegal to fish for salmon with any net, or with any species of engine or machinery which is a fixture, which is at all fixed or permanent even for a time in the water. And if I were asked to define the conclusions which I should derive from the Statutes and the decisions, it would be this—that it is 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" (Ld. Chan. Westbury in *Hay*, 1863, 1 M. H. L. 41). "Stake and bag nets" (*E. Kinnoul*, 1802, Mor. 14301, 4 Pat. 641; *D. Athole*, 1812, 1 W. & S. 590; *Carnegie*, 1829, 7 S. 284; *Colquhoun*, 1804, Mor. 14283, 4 Pat. 221; *Dalgleish*, 1812, 5 Dow, 282; *D. Athole*, 1826, 5 S. 153 (139); *Graham*, 1816, 6 Pat. 163; *Mags. of Dumbarton*, 1813, 6 Pat. 163; *Mackenzie*, 1881, 9 R. 186; *Fraser*, 1829, 5 W. & S. 57; *Mackenzie*, 1840, 2 D. 1078; *Allan's Mortification*, 1879, 7 R. 221; *E. Wemyss*, 1890, 18 R. 126); "stent nets" (*Coble Fishers of Don*, 1693, Mor. 14287; *Mackenzie*, 1830, 8 S. 796; *D. Queensberry*, 1771, Mor. 14279); "hang nets" (*Dirom*, 1796, Mor. 14282); "stoop nets" (*Erskine*, 1763, Mor. 14268); "sole or pock nets" (*L. Gray*, 1835, 13 S. 1089; *Mackenzie*, 1830, 8 S. 796), are all illegal. "Cairn nets" are also illegal (*Copland*, 13 June 1810, F. C.; *Forbes*, 1824, 1 W. & S. 583). They were at one time premitted in the Tweed, but are now prohibited by the Act 1857 (20 & 21 Vict. c. 148, s. 58). With regard, generally, to erections *in alveo*, the law does not seem clearly settled: but it is laid down by Ld. Pres. Inglis in *West*, 1876, 4 R. 207, that "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 passage of the fish that escape the lower heritor" (*D. Queensberry*, 1771, Mor. 14279; *M'Braire*, 1871, 9 M. 913; *D. Sutherland*, 1878, 5 R. H. L. 137).

Cruives are exempted from the rule against stationary engines: but they must be expressly granted by the Crown, or acquired by prescription

on a title with a clause of fishings (Bankt. i. 5. 75; Ersk. ii. 6. 15; Stair, ii. 3. 70; Bell, *Prin.* 1118; *Don Heritors*, 1665, Mor. 10840; *Mags. of Inverness*, 1775, Mor. 14257; *Lord Lovat*, 1880, 7 R. H. L. 122; *Grant*, 1778, Mor. 14297, 3 Pat. 679; *Duke of Argyll*, 1891, 18 R. 1094). They are regulated by the Act 1868 (31 & 32 Vict c. 123, Sched. F) (*Duke of Fife*, 1897, 34 S. L. R. 440). The chief object of the regulations is to secure a free passage for fish during the annual and weekly close time. See CRUIVES AND ZAIRES.

Stell Nets do not appear to be expressly prohibited, though this method of fishing, as generally practised, would seem to come under Ld. Westbury's definition of a fixed engine (see *supra*) (*Lord Lovat*, 1862, 1865, both unreported: Stewart, *Fishings*, 184, note *f*; *D. Atholl and Others* v. *Wedderburn and Others*, 1897, not yet decided). Stell nets are illegal on the Tweed (Stewart, *Fishings*, 313).

Dam Dykes must have a constant slop in the mid-stream as wide as is convenient without prejudicing the going of the mill (Act 1696, c. 33). This Act also prohibits fishing *at* dam dykes, but this does not mean *near* dam dykes; and it has been held "that the Statute was directed against those cases where the dam dykes were immediately subservient to, or made use of, in the fishings" (*Copland's Trs.*, 13 June 1810, F. C.; *Cunningham*, 1864, Hume, 715; *Forbes*, 1831, 9 S. 933, 5 W. & S. 384; *Kennedy*, 1869, 7 M. 1001; *Heritors of Don*, 1665, Mor. 10840; *Mags. of Dumfries*, 1705, Mor. 12776; *Arbuthnot*, 1812, 4 Pat. 337; *Gillies*, 1813, 5 Pat. 750). In the case of *Robertson* (1750, Mor. 14290) it was held that fishing by means of a dyke was permissible in respect of a charter and Act of Parliament, and immemorial possession in virtue thereof. The Act applies to the Tweed (*Duke of Roxburghe*, 1774, 2 Pat. 358). A heck or grating, with bars not more than three inches apart, must be constantly kept embracing the whole openings at the intake of every lade, across the lade immediately above the entrance to each mill wheel, and across the lower end of each tail lade at its entrance into the main river (31 & 32 Vict. c. 123, Sched. G, ss. 3, 4, and 5) (*Kennedy*, 1869, 7 M. 1001). Bye-laws and regulations in regard to dam dykes may be made in regard to them by the Fishery Board (25 & 26 Vict. c. 97, s. 6) and the Secretary for Scotland, on petition by any district board (31 & 32 Vict. c. 123, s. 9). By the Act 1868 (31 & 32 Vict. c. 123, s. 13) powers are given to District Boards to purchase, for the purpose of removal, any dam, with cruive or other fixed engine.

The use of *Dynamite* or any explosive for killing fish is prohibited in the United Kingdom by 40 & 41 Vict. c. 65.

The chief Acts dealing with salmon-fishings are 1862, 25 & 26 Vict. c. 97, and 1868, 31 & 32 Vict. c. 123. Under the Act 1862 three commissioners were appointed (s. 5), who issued bye-laws under the Act, which were confirmed by the Act 1868, s. 10, and are contained in schedules appended to that Act. Sched. A fixes the limits of fishery districts, and a point on each river marking the division between upper and lower proprietors. Sched. B fixes the limits dividing each river from the sea, and the limits of the Solway Firth. Sched. C fixes the annual close time for each river. Sched. D makes regulations for the due observance of the weekly close time. Sched. E regulates the meshes of nets. Sched. F, the construction and use of cruives; and Sched. G, the construction of mill dams, lades, and water wheels.

The *pollution* of salmon rivers is prohibited by sec. 13 of the Act 1862, as amended by sec. 16 of the Act 1868. "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, 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 £5; for the second offence, a penalty not exceeding £10, and a further penalty not exceeding £2 for every day during which such offence is continued; for the third or any subsequent offence, a penalty not exceeding £20, and a further penalty not exceeding £5 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 practical 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."

Close Time.—The weekly close time for every method of fishing except rod and line is from six o'clock on Saturday night to six o'clock on Monday morning (Act 1862, s. 7). The period during which the weekly close time is to run may be varied by the Secretary for Scotland, upon the application of any District Board, provided that the close time is always thirty-six hours (Act 1868, s. 9; *Custar*, 1878, 5 R. J. C. 39; *Osborne*, 1887, 1 White, 497; *Irving*, 1891, 19 R. J. C. 7). This weekly close time applies to rod-fishing as far as Sunday only is concerned, but does not include the six hours after six p.m. on Saturday, or the six hours before six a.m. on Monday (Act 1868, s. 15; *Couper*, 1874, 2 Coup. 547). This provision does not apply to the Tweed (s. 41).

The annual close time was the subject of very early legislation. In more recent times the Home-Drummond Act, 9 Geo. IV. c. 39, fixed a uniform close time for the whole of Scotland, excepting the Tweed and Solway. This uniform system was given up in 1862, when the commissioners appointed under the Act passed in that year fixed by bye-law the close time appropriate to each district for all methods of fishing except rod-fishing, and also for rod-fishing (Act 1868, Sched. C). The close time must continue for 168 days; but the Secretary for Scotland may vary the period of the close time upon the petition of any district board, provided always that the period is not less than 168 days (Act 1868, s. 9). Sec. 25 of the Act 1868 provides that "any person who shall sell or expose for sale, or have in his possession, any 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, shall be liable to a penalty not exceeding £5, and to a further penalty not exceeding £2 for every salmon so bought, sold, or exposed for sale, or in his possession; and any such 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." "Any district" includes the Tweed district, and therefore this section cannot be brought into operation so long as the Tweed district is open (*Chalmers*, 1886, 13 R. J. C. 17; *Wilsone*, 1884, 12 R. J. C. 12; *Stephenson*, 1879, 6 R. J. C. 33). The penalty for fishing during the annual or weekly close time and for other offences is provided by sec. 15. "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 or line; (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) during the weekly close time, or contravenes in any way any bye-law in force regarding the observance thereof; (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 bye-laws in force in the district; (4) who fishes for, or aids in fishing for, salmon with a net having a mesh contrary to any bye-law; (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) 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, chaff, or any shelling of corn into any river; (8) who in any way contravenes any bye-law—shall for every such offence be liable to a penalty not exceeding £5, and to a further penalty not exceeding £2 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, shall be in addition to the costs and expense of prosecution and conviction." Sec. 31 provides the further penalty that an offender shall, at the discretion of the Court, forfeit every boat, net, rod, line, gaff, spear, leister, or other instrument used for fishing which is found in his possession at the time of committing the offence. The size of mesh has been fixed by the commissioners, under the powers given by sec. 6 (6) of the Act 1862, as follows: "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 of 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 of the nets used with canvas, or the using of 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 bye-law" (Act 1868, Sched. E; *Mackenzie*, 1887, 14 R. J. C. 19; *Glen*, 1865, 5 Irv. 203). Sec. 17 prohibits the use or possession of any light or fire, spear, leister, gaff, or otter for catching salmon, or any instrument for dragging for salmon, under a penalty not exceeding £5, with forfeiture of the instrument and any salmon so taken: but an exception is made in favour of any person "using a gaff as auxiliary to angling with a rod and line." Sec. 18 provides a penalty for using *roe*. "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 £2, 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."

The taking of *Smolt* or salmon fry is prohibited by sec. 19. "Every person who shall wilfully take or destroy any smolt or salmon fry, or shall buy, sell, or expose for sale, or have in his possession, the same, or shall place any device or engine for the purpose of obstructing the passage of

the same, or shall wilfully injure or destroy 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 £5 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."

Sec. 20 prohibits the taking of unclean salmon. "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, shall be liable to a penalty not exceeding £5 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." What is an unclean and unseasonable fish depends upon the evidence of fishermen or other skilled persons, but the term is generally held to mean a salmon which has spawned and not yet returned to the sea. Sec. 22 provides that all salmon intended for exportation shall be entered for that purpose with the proper officer of customs at the place of exportation, and, if during the close time, the commissioners of customs must be satisfied that the fish have been legally captured, under penalty of forfeiture of the fish and a fine not exceeding £1 for each fish. Customs officers may open parcels, suspected to contain salmon, for inspection. Sec. 23 provides: "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 £10: 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." Sched. D contains the bye-law regulating the weekly close time with regard to stake and bag nets: "(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 to effectually 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." Power is given to water bailiffs, constables, watchers, or officers of any district board, or police officers, to search for salmon captured in contravention of the Act, and to enter and remain on lands for the purpose of the Act without being a trespasser (ss. 25, 26, 27). Sec. 28 provides that "any member of a 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 £5 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 expect 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." Sec. 29 provides for the apprehension of offenders. Sec. 30 provides that: "All offences under this Act may be prosecuted, and all penalties incurred under this Act may be recovered, before any Sheriff or any two or more justices acting together, and having jurisdiction in the place where the offence was committed, at the instance of the clerk of any District Board or of any other person. . ." A justice of the peace is not disqualified from trying any case under the Act by reason of his being a member of a District Board, but he cannot try any case for an offence committed on his own fishing (s. 34). Sec. 31 contains a very wide provision for forfeiture of any instrument for salmon taking found in possession of any person at the time of committing an offence, as well as any salmon found in his possession, and the Sheriff or Justices of the Peace may order the same to be destroyed or handed over to the District Board, or to the person prosecuting, to be disposed of as the Board or person may think fit (s. 32). Prosecutions are conducted under the Summary Jurisdiction Acts, 1864 to 1881, and the Criminal Procedure Act, 1887.

District Boards are constituted, and the method of their election and their powers defined, by the Acts 1862 (25 & 26 Vict. c. 97, ss. 18–24) and 1868 (31 & 32 Vict. c. 123, ss. 3–14). The Act 1862, Sched. A, fixes the limits of the districts, and the point of division on each river between upper and lower proprietors. The qualification of an upper proprietor is a

fishing entered in the Valuation Roll as of the yearly value of £20 or upwards, or, if not in the Valuation Roll, of half a mile of frontage to the river with a right of salmon-fishing: the qualification of a lower proprietor is a fishing entered in the Valuation Roll at the yearly value of £20 or upwards. The Board is formed of three members elected by the upper proprietors, and three members by the lower proprietors, "every proprietor of a fishing valued at more than £500 in the Valuation Roll having two votes at such election, and an additional vote for every £500 of rental, but not more than four votes in all," and the proprietor entered in the Valuation Roll as the largest fishery proprietor. The latter is also chairman of the Board, and has a deliberative as well as a casting vote. Mandataries may be appointed in writing by proprietors, or by members of a District Board (Act 1868, s. 8), and they may attend, act, and vote at any meeting of proprietors or a District Board (Act 1862, ss. 18, 19, 20). The Board continues in office for three years (Act 1862, s. 24), and the new election is made at meetings of upper and lower proprietors called by the clerk. When a District Board has lapsed, the Court of Session will, on petition, remit to the Sheriff to proceed in accordance with the methods of constituting the original Boards as laid down in Act 1862, s. 18 (*Campbells*, 1883, 10 R. 819; *Marquis of Ailsa and Others, Petrs.*, 1897). A District Board may sue and be sued in name of its clerk, but their title to sue is limited to their statutory powers (*Tay District Board*, 1887, 15 R. 40). It would appear that where no District Board exists, a proprietor of salmon-fishings cannot prosecute for a breach of a bye-law of the Salmon Fishery Commissioners (*Blair*, 1869, 7 M. 1126); but any person may prosecute for offences under the Acts 1862 and 1868 (*Blair, supra*; *Harvey*, 1869, 8 M. 84). Three members are a quorum, if there are more than six members, and two if there are less than six. A District Board may appoint a clerk, constables, water bailiffs, watchers, and other officers, and may combine with any other District Board for the purpose of the Act, and maintain a common staff of officers (Act 1862, s. 22). They may also impose a fishery assessment (s. 22), and borrow on the security of that assessment (Act 1868, s. 14). Under Act 1868, s. 90, a District Board may petition the Secretary for Scotland to do any of the following things: (1) to vary the annual close time in the district, provided the annual close time shall always be 168 days; (2) to vary the weekly close time in the district, or in different parts of the district, provided that the weekly close time shall always be thirty-six hours; (3) to alter the regulations with respect to the observance of the annual or weekly close time, in so far as they relate to the district; (4) to alter the regulations with respect to the construction and use of cruives and cruive dykes, or weirs, within the 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.

The *Tweed* has been the subject of special legislation, and is regulated by 20 & 21 Vict. c. 148; 22 & 23 Vict. c. 70; s. 31 of Act 1862 (25 & 26 Vict. c. 97); and s. 41 of Act 1868 (31 & 32 Vict. c. 123). The fishings are regulated by a Board of Commissioners, comprising all proprietors of fishings of the annual value of £30, or fishings of half a mile in length on one side of the river only, or quarter of a mile on both sides, and representatives from certain public bodies. The *close time* on the Tweed for nets, and for rod-fishing with any other bait than the artificial fly, is from 14 September to 15 February, and for rod-fishing with artificial fly, from 30 November to 1 February (Act 1859 (22 & 23 Vict. c. 70), s. 6). The weekly close time is from six o'clock on Saturday afternoon to

six o'clock on Monday morning. This does not apply to rod-fishing; and for stake and bag nets the close time is from low water before six o'clock on Saturday night to low water before six o'clock on Monday morning (s. 7): and failure to comply with the annual or weekly close time is exempt from penalty if due to storm or stress of weather.

Fixed nets and fixed engines are prohibited within the limits of the river or its mouth as laid down in the Act 1857 (20 & 21 Vict. c. 148), under a penalty not exceeding £20, with a daily penalty not exceeding £10 for each day the "engine" is maintained, and 10s. for each salmon taken. Stake and bag nets must only be used beyond the limits of the mouth of the river as laid down in the Act 1857, and must be employed and constructed in accordance with certain regulations. Mill dams erected subsequent to the passing of the Act must be constructed so as to allow the free passage of salmon up and down the main stream of the river in its ordinary and mean state. Those erected previous to the Act must be altered to comply with these conditions, and this may be done at the expense of the commissioners (20 & 21 Vict. c. 148, s. 56). They must also be provided with a heck placed in front of the water wheel (s. 59). Sec. 13 of the Act 1868 applies to the Tweed, and gives power to the commissioners to purchase, for the purpose of removal, dams, cruives, etc.; to remove natural obstructions; and to attach fish passes to waterfalls. Sec. 57 of the Act 1857 provides for the compulsory removal by the proprietor of all rocks, shoals, deposits of stones, gravel, sand, mud, etc., which interfere with the free passage of fish. Cairns in the river mainly adapted to cairn-net fishing must also be removed by the proprietor (s. 58). Sec. 62 prohibits unfair fishing. Sec. 63 prohibits the use of a leister or spear under a penalty not exceeding £10, and 10s. for every salmon so taken, with forfeiture of leister and fish: and by sec. 64 the possession of such a weapon within five miles of the river is prohibited under a penalty not exceeding £2, and the forfeiture of the weapon. Secs. 65 and 66 prohibit pollution. Sec. 73 provides that any person who catches a salmon while fishing for trout must deliver it to the proprietor of the salmon-fishing. Sec. 79 gives the Board of Commissioners power to levy an annual assessment upon all proprietors of fisheries.

Poaching on the Tweed is regulated by the Act 1859 (22 & 23 Vict. c. 70, s. 15). Night poaching, *i.e.* three or more persons in company illegally fishing at night, is punishable under the general Scotch Act 1862 (25 & 26 Vict. c. 97, ss. 27, 34). Sec. 14 of the Act 1859 prohibits the use of pout-nets, rake hooks, or other engines or nets, and the method of poaching called "sniggling" (*Rodger*, 1879, 4 Coup. 210; *Hislop*, High Court, 19 March 1879; *Murray*, High Court, 8 June 1891). A cleek or gaff may not be used from 15 September to 1 May, no other instrument being permissible during that period but a landing-net (s. 16). Sec. 18 of the Act 1868 prohibits the use of roe for fishing, and is applicable to the Tweed. The meshes of all nets, except herring, shrimp, and landing nets, must not be less than $1\frac{3}{4}$ inches from knot to knot (s. 13).

The *Solway* and its tributaries have also been the subject of special legislation. The Solway and its Scotch tributaries, except the Annan and the Esk and their tributaries, are still regulated by the Act 1804 (44 Geo. III. c. 45). The Act 1862 (25 & 26 Vict. c. 92) and the Act 1868 (31 & 32 Vict. c. 123), with the exception of sec. 25, apply to the Solway. Under the Act 1862, s. 6 (1) (2), the commissioners under that Act fixed the limits dividing the Solway from the sea, and also the limits of the Solway Firth.

The commissioners also fixed the close time for both net and rod fishing. Sec. 33 deals with fixed engines, by applying to the Scotch portions of the Solway the English Act 24 & 25 Vict. c. 109, and especially sec. 11, the practical effect of which was to make all fixed engines illegal, unless lawfully exercised in 1861 or the four preceding years by virtue of any grant, or charter, or immemorial usage (28 & 29 Vict. c. 121, s. 39). In 1877 the Solway Salmon Fisheries Commissioners Act (40 & 41 Vict. c. 240) was passed. The commissioners under that Act were appointed to inquire into the legality of all fixed engines erected or used for the taking of salmon in the waters and shores of the Solway Firth as the same had been fixed under the authority of the Salmon Fisheries (Scotland) Act, 1862, and in the rivers flowing into the same, and to abate or remove all such as were not, in their opinion, "privileged." "Privileged fixed engine" was defined to include only such fixed engines as were in use for taking salmon during the open season of one or more of the years 1861, 1862, 1863, 1864, in pursuance of any charter, grant, or immemorial usage (s. 4). Under the powers conferred by this Act the commissioners issued a list of all fixed engines sanctioned by them as "privileged," together with a memorandum of their proceedings.

One of the chief difficulties with which the commissioners had to deal was in regard to *paidle-nets*. In *Gilbertson* v. *Mackenzie*, 1878, 5 R. 610, it had been found that there was a public right to fish for white fish, including flounders, and all other kinds of fish except salmon and fish of the salmon kind, in the sea and along the shore of the Solway Firth, and that by means of stake or other nets or engines fixed on the shore, in such places and of such description as not to interfere with Mr. Mackenzie's right of salmon-fishing: under reservation of the right of either party to take such legal proceedings, the one against the other, as may be competent to prevent all undue or improper encroachment on, or interference with, his or their respective right of fishing. The fishermen using these nets admitted that they had no right to fish for salmon, and they claimed no certificate of privilege: and the commissioners, after hearing evidence, found that they were used for the taking of salmon, and ordered the removal of such of them as they had seen at Annan (Memorandum of Commissioners). This deliverance was appealed against in the case of *Coulthart* v. *Mackenzie*, 1879, 6 R. 1322; but the deliverance of the commissioners was upheld. In *Mackenzie* v. *Murray*, 1881, 9 R. 186, Mr. Mackenzie, the defender in the two former cases, sought interdict against certain white fishers erecting or continuing to use stake or paidle nets similar to those referred to in the former cases, during the open salmon season within the limits of his fishings. After a proof and remits to a man of skill, interdict was granted as regards certain specified places, and decree for the removal of nets erected thereon. A similar interdict, but extending both to the salmon-fishing season and the close time, was granted in *D. Buccleuch* v. *Kean*, 1890, 17 R. 829. Other engines, such as "half-nets," "poke-nets," and "raise-nets," have also given rise to controversy. It must always be a question of proof whether, in any particular instance, they are used for the purpose of taking salmon or impeding the run of salmon. Sec. 33 of the Act 1862 puts the Scotch waters of the Solway under the provisions of the English Act "as far as such provisions relate to the use of fixed engines for taking salmon." (See also Report by Commissioners on Crown Rights of Salmon-Fishing in Scotland, 1890; Royal Commission on Tweed and Solway Fisheries: Solway Firth Report, 1896, p. 15; Report of Solway White-Fishing Commission, 1892, p. 7.)

The Annan has been dealt with by a special Act, 1841 (4 Vict. c. 18), but is also subject to the general Acts of 1862 and 1868.

The Esk is regulated by the English Acts of 1861 and 1865 (28 & 29 Vict. c. 121. s. 63), but all offences committed within Scotch jurisdiction are to be dealt with under the Scotch Act, 1862.

Poaching, *i.e.* the taking of salmon or other fish of the salmon kind without having a legal right or permission from one having legal right, is punishable under 9 Geo. IV. c. 39, and 7 & 8 Vict. c. 95. Sec. 1 of the latter Act provides that "if any person, not having a legal right or permission from the proprietor of the salmon fishery, shall 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, whitling, 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 Justice of the Peace, and any such Sheriff or Justice may give such orders concerning the immediate disposal of the same as may be necessary" (*Anderson*, 1867, 5 Irv. 499; *Grant*, 1876, 3 R. J. C. 28; *O'Neill*, 1883, 10 R. J. C. 76; *Macintosh*, 1829, 1 Deas and And. 183; *L. Lovat*, 1886, 1 White, 119; *Hudson*, Q. B. Nov. 1863; *Euston*, 1844, 2 Broun, 95). Prosecution must follow within six months after the offence (9 Geo. IV. c. 39, s. 13). Imprisonment may follow non-payment of the penalty (*Lawson*, 1853, 15 D. 392).

Night Poaching is made a criminal offence by sec. 27 of the Act 1862 (25 & 26 Vict. c. 97). "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 of 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 immediately paid 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."

Trout-Fishing requires no express grant or prescriptive possession, but passes, in the case of private lochs and rivers, as a part and pertinent of the land (*Carmichael*, 1787, Mor. 9645; *Macdonald*, 1836, 12 S. 259; *Mackenzie*, 1830, 8 S. 816, 6 W. & S. 31; *E. of Aboyne*, 16 Nov. 1814, F. C.; *Baird*, 1836, 14 S. 396; *Cunninghame*, 1838, 16 S. 1080; *Stewart's Trs.*, 1874, 1 R. 338).

The right may, however, be reserved or given out expressly to another who is not proprietor of the lands, and may, in like manner, be carried by prescription on a general title, but the prescription must be exclusive (*Macdonald, ut supra*; *Scott*, 1635, Mor. 12771; *Scott*, 1869, 7 M. H. L. 35). It would appear that the right cannot be constituted as a separate feudal estate, like salmon-fishing, but must be connected with some heritable subject, nor probably can the right be acquired as a servitude (*Menzies*, 1854, 16 D. 827; *Patrick*, 1867, 5 M. 683). A written title either to the adjacent lands or the fishings is necessary, and the public, therefore, cannot prescribe a right of trout-fishing against a proprietor of a river or loch (*Montgomery*, 1861, 23 D. 635). A right of way along the bank of a river or loch does not give the public the right of fishing in a private stream or loch (*Ferguson*, 1844, 6 D. 1363; *Montgomery, ut supra*). Nor does the right in the public of being at or on a navigable, but non-tidal, river, for the purposes of navigation, entitle them to fish for trout therein (*Grant*, 1894, 21 R. 358). An agricultural tenant is not entitled to fish unless permitted by his lease (*D. of Richmond*, 4 Irv. 10; *Maxwell*, 1868, 9 M. H. L. 1). A right of salmon-fishing carries with it the lesser right of trout-fishing, but not necessarily to the exclusion of the right of trout-fishing possessed by the proprietor of adjacent lands. In order to exclude him, exclusive possession, with his acquiescence, for the prescriptive period would probably be necessary (Bell, *Prin.* 747). When different proprietors possess salmon and trout fishing in the same water, the latter right must be exercised so as not to cause injury to the former (*Carmichael*, 1787, 2 Hailes, 1033; *Mackenzie*, 1830, 8 S. 816, 6 W. & S. 31; *Sommerville*, 1859, 22 D. 279; *Forbes*, 1826, 4 S. 650; *Guthrie*, 1855, 17 D. 1002; *D. of Sutherland*, 1836, 14 S. 906; *Anderson*, 1867, 6 M. 117; *Stuart*, 1867, 6 M. H. L. 123). The question of conflict between the two rights is a jury question (Macfarlane, *Issues*, p. 590). Where a private loch is surrounded by the lands of two or more proprietors, the presumption is that each proprietor has a common right of fishing over the whole loch.

Trout-Poaching is prohibited by 8 & 9 Vict. c. 26, and 23 & 24 Vict. c. 45. The former Act prohibits all persons, except the proprietors of the adjacent lands or others having a right to fish, or holding a written permission from those who have a right to fish, from fishing for trout or other fish, under a penalty of £5 for each offence. The latter Act (s. 1) prohibits certain other methods of fishing, viz. double-rod fishing, cross-line fishing, set lines, otter fishing, burning the water, striking the fish with any instrument, or pointing; and also prohibits putting lime into the water, or any other substance destructive to trout or other fresh-water fish, with intent to destroy the same: "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."

Eel fishing, like trout fishing, belongs to the proprietor of the adjacent lands as a pertinent without proof of possession of the right, and it has been held that a right to eel cruives may be acquired by possession as a part and pertinent by the proprietor of adjacent lands.

[See Stair, ii. 3. 61; Ersk. ii. 6. 15; Bankt. ii. 3. 111; Bell, *Prin.* Stewart, *Law of Fishing*; Paterson, *Fishery Laws*; Rankine, *Landownership, Leases*; Duncan, *Manual of Salmon Fisheries Acts*.]

See RIVER; SEA AND SEASHORE.

Fixtures.—A fixture has been defined by an English judge as follows: "The meaning of the word is anything annexed to the freehold, that is, fastened to or connected with it, not in mere juxtaposition to the soil. Whatever is so annexed becomes part of the realty, and the person who was the owner of it when it was a chattel loses his property in it, which immediately vests in the owner of the soil, according to the maxim *quicquid plantatur solo, solo cedit*" (per Ld. Chelmsford in *Brand's Trs.*, 1876, 3 R. (H. L.) 16, at p. 23). The rule expressed in these words, or, as it is sometimes put, "*inædificatum* (*plantatum, satum*) *solo, solo cedit*," is recognised by all the authorities as a maxim of the law of Scotland (Stair, ii. 1. 40; Bankt. ii. 1. 18; Ersk. ii. 1. 15, ii. 2. 4; Bell, *Prin.* s. 1473). The legal questions which arise as to its application in any particular circumstances may be divided into two categories: one, whether the particular subject has or has not been annexed to the *solum* in a manner which the law recognises as constituting fixture; the other, whether, assuming an affirmative answer to that question, a particular party has a right to have the fixture removed, in a question with the owner of the *solum*. As in certain cases, notably in *Marshall* (1886, 13 R. 1042), these questions are confused, it may be pointed out at the outset, that the moveable or immoveable character of an article which has become a fixture does not depend in any degree upon the relationship of the parties between whom the question as to its ownership is raised. Whether these parties are heir and executor or landlord and tenant, the article, assuming the fact of fixture, has become immoveable and the property of the owner of the *solum*, and is none the less so because the executor in the one case, or the tenant in the other, may be entitled to disannex and assert a right of property in it (*Brand's Trs.*, 1874, 2 R. 258; rev. 1876, 3 R. (H. L.) 16, 1 App. Ca. 762; *Miller*, 1894, 21 R. 658; *Smith*, 1893, 21 R. 330; *Cowan & Sons*, 1894, 21 R. 812, per Ld. Wellwood, at p. 815; *Hobson*, [1897] 1 Ch. 182). Thus the machinery and other articles which are usually known as trade fixtures, if actually attached to the building, become *partes soli*, and the property of the landlord, although the tenant has a right to remove them at the end of the lease, and although, when so removed, they again become the property of the tenant (*Miller*, *supra*).

What constitutes Fixture.—The question whether a particular thing has become a fixture, that is, has become a part of the soil, or of some building attached to the soil, is not to be solved by the mere consideration whether it is, as matter of fact, affixed to the soil or building. That consideration, as well as the degree or extent of its attachment, is to be taken together with other elements. These elements are: whether it can be removed *integre, salve et commode, i.e.* without the destruction of itself as a separate thing, or of the soil or building to which it is attached; whether its annexation was of a permanent or quasi-permanent character; whether the building to which it is attached was specially adapted for its use: the intention of the person attaching it, and how far the use and enjoyment of the soil or building would be affected by its removal (per Ld. Wellwood in *Cowan & Sons*, 1894, 21 R. 812, at p. 817). From the number of these considerations it is plain that it is impossible to lay down any very exact rules as to what constitutes a fixture, and that each case must depend greatly upon its particular circumstances. The degree of attachment may be conclusive in extreme cases. Thus if an article is so firmly attached to the *solum* or to a building that it cannot be removed without resolving it into its constituent elements, there would seem no doubt that it is a fixture, whatever was the intention in so attaching it, or its adaptability to the

structure to which it is attached (*Elwes*, 1803, 2 Smith's L. C., 10th ed., 183; Bell, *Com.* i. 786; *Dowell*, 1874, 1 R. 1180; *Cochrane*, 1891, 18 R. 1208, per Ld. M'Laren). A thing may be so attached merely by its own weight and size; and thus large leaden vessels, standing on the floor of a manufactory, were held to be fixtures, though they were not attached to the floor in any way, because they could not have been taken out of the building without melting them down (*Niven*, 1823, 2 S. 270). But as a general rule the fact that an article is not attached to the *solum* by any artificial means, but solely by its own weight, is a strong indication that it is not a fixture (*Wansborough*, 1836, 4 A. & E. 884, barn resting on staddles: *ex parte Astbury*, 1869, L. R. 4 Ch. 630); a principle which forms a test which has been frequently applied to distinguish between fixed and moveable parts of machinery (*Fisher*, 1843, 5 D. 775; affd. 1845, 4 Bell's App. 286; *Longbottom*, 1869, L. R. 5 Q. B. 123). The law on this point has been expressed by Ld. Blackburn as follows: "Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels: and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel" (*Holland*, 1872, L. R. 7 C. P. 328, at p. 335: see remarks on this in *Hobson*, [1897] 1 Ch. 182). The question of intention, *i.e.* whether the article is annexed for the improvement of the *solum* or building, or merely for the better enjoyment of the article itself (see opinion of Blackburn, J., in *Parsons*, 1866, 14 W. R. 860), is probably mainly instrumental in establishing the rule, that whereas doors and windows, though easily moveable, are fixtures (*Johnson*, 1783, Mor. 5443, per Ld. Cockburn in *Fisher*, 5 D. 775, at p. 796), carpets, grates, pictures, and mirrors, if attached to the floor and walls by any ordinary method, are not (*Cochrane*, 1891, 18 R. 1208: *Nisbet*, 1880, 7 R. 575, per Ld. Blackburn in *Holland*, *supra*, at p. 335). It is difficult to understand on what principle gas-fittings have been held not to be fixtures (*Nisbet*, *supra*, per Ld. M'Laren in *Cochrane*, *supra*, at p. 1216). The consideration of special adaptation to the building was given effect to by Ld. Mansfield in *Lawton's Exrs.*, 1782, 1 H. Bl. 259, note, where it was held that salt-pans were fixtures, because the salt springs in which they were used were no use without them. It is also the foundation of a rule adopted in order to distinguish between the fixed and moveable ornaments of a house, which is, that those statues, pictures, mirrors, and the like, which form a part of the architectural design, and are not easy to replace, are fixtures (*D'Eyncourt*, 1866, L. R. 3 Eq. 382: *Norton*, [1896] 2 Ch. 497: *Snedeke*, 2 Kernan, 170; Amos on *Fixtures*, 3rd ed., p. 22; contrast *Nisbet*, 1880, 7 R. 575, and *Cochrane*, 1891, 18 R. 1208). Again, in certain cases the permanent or temporary character of the annexation is the ruling consideration. In such cases the permanency is to be judged relatively to the right of the person annexing, as the mere fact that the annexation is made by a party whose right to the subject is temporary, and that he intends to remove it when he leaves, does not prevent its becoming a fixture (*Brand's Trs.*, 1876, 3 R. (H. L.) 16; *Mews*, 1875, L. R. 7 H. L. 481). The meaning of temporary annexation may be shown by an illustration employed by Ld. Blackburn, in contrasting the anchor of a ship, which remains moveable though fixed in the soil, with the anchor of a

suspension bridge, which is a fixture (*Holland*, 1872, L. R. 7 C. P. 328). Another illustration may be hazarded in the booths or other temporary erections put up for a fair, which, it is presumed, remain moveable though temporarily fixed on the ground.

These general rules may be illustrated by a statement of some of the articles which have been decided to be or not to be fixtures. It will be convenient to take separately articles fixed to the soil, to a dwelling-house, and to a manufactory or mill.

Articles fixed to the Soil.—It may be taken as a general principle that all things planted in the ground with the intention that they should grow there become *partes soli*, though in certain cases, as will be shown later, the planter may be entitled to remove them. In this category are trees, shrubs, turf (*Burns*, 1880, 8 R. 226), and the vines in a vinery (*Jenkins*, 1862, 2 John. & H. 520). Similarly, the ordinary appurtenances of an estate,—gates, dykes, walls, and railings,—even though of an ornamental character, and as a matter of fact detachable, are fixtures (Stair, ii. 1. 40; *Tod's Trs.*, 1872, 10 M. 422; *Graham*, 1875, 2 R. 438; see *contra* as to temporary fencing, *Duke of Buccleuch*, 1871, 9 M. 1014). The same may be said of any building with foundations sunk into the ground, whether erected for agricultural or trading purposes (*Elwes*, 1803, 2 Smith's L. C., 10th ed., 183), or purely for pleasure, as a pinery or conservatory (*Ferguson*, 1885, 12 R. 1222; *Buckland*, 1820, 2 Brod. & B. 54; *Jenkins*, 1862, 2 John. & H. 520). And an opinion has been expressed that garden seats sunk in the ground, or a light wooden bridge thrown over a stream, would be fixtures (per Ld. Cockburn in *Fisher*, 1843, 5 D. 775, at p. 796; *D'Eyncourt*, 1866, L. R. 3 Eq. 382). But a building or article resting on, but not built into, the ground, or an erection on the ground, is not as a rule a fixture (*Wansborough*, 1836, 4 A. & E. 884; *ex parte Astbury*, 1869, L. R. 4 Ch. 630, at p. 639).

Articles attached to a Dwelling-house.—Of things attached to a dwelling-house, ordinary pieces of furniture, carpets, pictures, and mirrors are not fixtures as a general rule (*Fisher*, 1843, 5 D. 775 (Ld. Cockburn): *Cochrane*, 1891, 18 R. 1208). The principle governing exceptional cases, where they are part of a scheme of decoration, has been already stated. Doors and windows have long been established as fixtures (*Johnson*, 1783, Mor. 5443; *Graham*, 1875, 2 R. 438, per Ld. Ormidale, p. 441), whereas grates and gas-fittings are not (*Nisbet*, 1880, 7 R. 575). Ordinary mantelpieces would seem to be fixtures, ornamental ones not, or at least removable, in a question between heir and executor (*Bishop*, 1855, 24 L. J. Ex. 229; *Leach*, 1835, 7 C. & P. 327). A wall paper is of course a fixture (*D'Eyncourt*, 1866, L. R. 3 Eq. 382): and tapestry put up instead of a paper may be fixed so as to become so (*Norton*, [1896] 2 Ch. 497).

Machinery.—In the case of a manufactory it is established that machinery strongly built in, or specially adapted to the particular premises, is fixed (*Fisher*, 1843, 5 D. 775; affd. 1845, 4 Bell's App. 286; *Brand's Trs.*, 1874, 2 R. 258; revd. 1876, 3 R. (H. L.) 16, and 1878, 5 R. 607; *Dowall*, 1874, 1 R. 1180, per L. J. C. Moncreiff), while machinery merely resting on the building is not, unless it is of very exceptional size and weight (cases quoted above, and *Longbottom*, 1869, L. R. 5 Q. B. 123). The doubtful case would seem to be where machinery is attached to the building, but only with bolts and screws for the purpose of steadying it. A series of cases have established, in England, that the fact of its being affixed makes it a fixture (*Walmesley*, 1859, 7 C. B. (N. S.) 115; *Mather*, 1856, 2 Kay & J. 536; *Boyd*, 1867, L. R. 5 Eq. 72; *Longbottom, supra*; *Holland*, 1872, L. R. 7 C. P. 328, practically overruling *Hallawell*, 1851, 6 Ex. 295). In a Scotch case, however, the

Lord Justice Clerk (Moncreiff) intimated that he was not prepared to assent to this, and that he preferred the reasoning of Parke, B., in *Hallawell*, to that of Ld. Blackburn in *Holland* (*Dorrell*, 1874, 1 R. 1180).

Constructive Fixture.—In addition to those things which become fixtures by actual annexation to land or buildings, it is recognised that a thing not actually attached may become a fixture by constructive annexation. Constructive fixtures have been defined by Ld. Cockburn as "things so fitted and constructed as to belong specially to the particular machinery, and not to be equally suited to any other" (*Fisher*, 1843, at p. 832). A more general statement is made by Brett, M. R., speaking of fixed machinery: "Everything which is part of the machine is part of the land" (*Sheffield, etc., Building Society*, *infra*, at p. 358). Thus leathern belts, necessary for the machinery, but in themselves easily moveable, have been held fixtures (*Sheffield, etc., Building Society*, 1884, 15 Q. B. D. 358). The key of a door and the millstone of a mill are frequent illustrations (Ld. Cockburn in *Fisher*, *supra*; Crowder, J., in *Walmesley*, 1859, 7 C. B. (N. S.) 115, at p. 138). A point of some doubt would seem to be the case where there are duplicates of separable but necessary parts of machinery. In the case of *Fisher*, such duplicates were held to be moveables (5 D. at p. 832); but in a more recent English case they were accounted fixtures, on the ground that, although the machine might be complete without them, still it was a more perfect machine with them (*ex parte Astbury*, 1869, L. R. 4 Ch. 630, at p. 634).

Building an Accessary of a Moveable Subject.—It has been suggested that a moveable subject may remain moveable even when affixed in a building, if, from their relative values, it may fairly be assumed that the building is a mere accessary of the moveable. Professor Bell reports a case in which a telescope was held moveable under such circumstances and for that reason (Bell, *Com.* i. 787). It is doubtful whether this rule would be applied in a modern case (see *Tod's Trs.*, 1872, 10 M. 422).

Right of Removal. By Contract.—In passing from the question, What is a fixture? to the question, By whom may fixtures be removed? it may first be noted that it is within the power of anyone affixing a moveable subject to land, to stipulate by express contract for the right to remove it. He cannot, however, by any such stipulation, prevent the fixture becoming part of the land and the property of the landlord (*Hobson*, [1897] 1 Ch. 182). The result of this is that the right to remove, though valid in a question with the landlord or his personal representatives, would not be enforceable in a question with a singular successor in the lands. Thus where a party erected a gas-engine on a saw-mill, on a contract for payment by instalments, and under an agreement that he should have the right to remove it if any instalment was not paid, it was held that a mortgagee was entitled to the engine, and that the agreement would not be enforced against him (*Hobson*, *supra*, distinguishing *Cumberland Union Banking Co.*, [1892] 1 Ch. 415, and *Gough*, [1894] 1 Q. B. 713; cf. *Hogarth*, 1882, 9 R. 964).

In cases which are not ruled by express contract, the right to remove a fixture depends materially upon the character in which that right is asserted. Ld. Ellenborough, in a well-known passage, has pointed out that the question usually arises between three classes of persons, viz. heir and executor, liar and the executors of a liferenter, and landlord and tenant (*Elwes*, 1803, 2 Smith's L. C., 10th ed., 183, at p. 193). The right to remove is widest in the case of landlord and tenant, narrowest in that of heir and executor. Other cases are seller and purchaser, securities, the computation of a casualty, diligence, and valuation.

Between Landlord and Tenant.—The right to remove fixtures in a question between landlord and tenant, depends upon whether the subjects are used, under the lease, for trading, for agricultural, or merely for residential purposes. A leading English case (*Elwes*, 1803, 2 Smith's L. C., 10th ed., 183) established the rule that the right to remove trade fixtures did not extend to the case of an agricultural tenant, who therefore, if he erected buildings on his farm without any express contract, had to leave them at the end of a lease. This rule is recognised in Scotland (*Thomson*, 1822, 1 S. 307: Hunter, *Landlord and Tenant*, 4th ed., i. 313), with an exception in the case of fences (*Duke of Buccleuch*, 1871, 9 M. 1014). The Agricultural Holdings (Scotland) Act, 1883, s. 30, has removed this anomaly by providing that an agricultural tenant, who has put up engines, machinery, or buildings on his holding, without any obligation to do so, not in substitution for fixtures put up by the landlord, and without any right to compensation for them, may remove them at the end of the lease, or within a reasonable time thereafter, on certain conditions. See AGRICULTURAL HOLDINGS ACTS.

In a lease of subjects used for trade, manufacture, or mining, it has long been recognised that a tenant who has put up certain fixtures for the purposes of his trade has a right to remove them at the end of the lease (2 Smith's L. C., 10th ed., pp. 183 *seq.*; *Syme*, 1861, 24 D. 202; first established in *Poole's* case, 1704, 1 Salk. 368). The general description of trade fixtures may be said to include all trade appliances and machinery, and all buildings removable without being taken to pieces, with the limit, probably, that the subject from which the fixtures are removed must not be entirely destroyed by the removal (see list of articles held trade fixtures in Rankine, *Leases*, 2nd ed., p. 278). Nursery gardeners have been held to be traders, and to be therefore entitled to remove conservatories (*Syme*, 1861, 24 D. 202). It has been held, in England, that a tenant is not entitled to remove buildings so constructed that they could only be removed by pulling them down and removing the materials (*Whitehead*, 1858, 27 L. J. Ch. 474); but in a Scotch case opinions were expressed that a market gardener could remove the brick foundations on which his conservatories rested (*Syme, supra*); and in the House of Lords, in a case where such buildings were held removable under an exceptional system of land tenure, Ld. Bramwell intimated that they would also have been removable in a question between landlord and tenant (*Wake*, 1883, 8 App. Ca. 195, at p. 210). The right to remove fixtures may probably be enlarged or limited by an established local custom (Amos on *Fixtures*, 3rd ed., 66–69). It would appear to be established as a rule, in England, that a tenant who proposes to remove fixtures must do so before the end of the lease, on the ground that, after the relation of landlord and tenant has ceased to exist, the tenant has no further right to be on the premises (*Barff*, 1895, 73 L. T. 118, earlier cases collected there), but no decision has yet extended this rule to Scotland (see *Houldsworth*, 1877, 4 R. 369). It may be pointed out that the right of a tenant over trade fixtures is not, during the currency of the lease, a real right of property in the fixtures, but a personal right to require delivery of them from the landlord, and that this may therefore be transmitted in security, or absolutely, by assignation intimated to the landlord (*Miller*, 1894, 21 R. 658).

A tenant in a lease of residential subjects has not the same latitude of removal which is enjoyed in a trading lease. The contrast is shown in the case of conservatories, which a market gardener may remove (*Syme*, 1861, 24 D. 202), but an ordinary tenant may not (*Buckland*, 1820, 2 Brod. &

B. 54). A tenant, however, has the right to remove fixtures of an ornamental character, though the exact limits of the right have not been determined. Thus a tenant has a right to remove an ornamental mantelpiece put up by him, but no right to remove a plain one (*Bishop*, 1855, 24 L. J. Ex. 229). A similar right would seem to exist with regard to articles of ordinary domestic use. Besides pictures, carpets, and other things which are not fixtures (*supra*), the tenant of a house has been held to be entitled to remove bookcases screwed to the wall (*Birch*, 1833, 2 A. & E. 37), a pump (*Grymes*, 1830, 6 Bing. 437), wooden steps on a garden path (*Burns*, 1880, 8 R. 226), and poster beds. And from a recent case it would appear that the Court will very readily infer, from the terms of a lease, or even from the actings of the parties and the knowledge of the landlord that the fixtures were to be put up, a right in the tenant to remove them (*Ferguson*, 1885, 12 R. 1222; questioned in Rankine on *Leases*, 2nd ed., p. 283).

Between Fiar and Representatives of Liferenter.—The rights of the executor of a liferenter, in a question with the fiar as to removal of fixtures, are more extensive than those of an executor against the heir, less extensive than those of a tenant against the landlord (*Elwes*, 1803, 2 Smith's L. C., 183). The exact limits of those rights, however, are somewhat undefined. In *Martin* (1857, 26 L. J. Q. B. 129) the representatives of the rector of a parish were held to be entitled to remove hothouses, but this was a somewhat exceptional case; and in *D'Eyncourt* (1866, L. R. 3 Eq. 382), a case regarding the construction of a will, similar to the question between fiar and liferenter, the test put with regard to the decorations of a house was simply the question whether the articles in dispute were or were not fixtures (see also *Murthly Castle* case in Brown on *Fixtures*, App. A. "Entail"). On the other hand, it has been held, in England, that the representatives of a liferenter or other limited owner have a right to trade fixtures which is not apparently less than that of a tenant in a question with his landlord (*Lawton*, 1743, 3 Atk. 13, steam engine; *Ward*, 1887, 57 L. T. 20).

Between Heir and Executor.—In a question between heir and executor, it would seem that the rule *inædificatum solo, solo cedit*, applies in full force. Everything which is in the legal sense of the word a fixture goes to the heir (*Fisher*, 1843, 5 D. 775; affd. 1845, 4 Bell's App. 286; *Brand's Trs.*, 1874, 2 R. 258; revd. 1876, 3 R. (H. L.) 16). In this respect it is immaterial whether the fixtures were put up by a landlord on his own property or by a tenant on property held on lease, as the right of the tenant in trade fixtures, though not a right of property, is heritable in his succession (*Brand's Trs., supra*).

Between Seller and Purchaser.—In a question between seller and purchaser, the general rule is that a purchase of the lands includes a purchase of all fixtures, or, as it is sometimes put, the rule is the same as that between heir and executor (*Nisbet*, 1880, 7 R. 575; *Cochrane*, 1891, 18 R. 1208). Details may be found in the former case. But it has been pointed out that between seller and purchaser the true question is what was the intention of the parties to the contract; and thus, while pictures of small value might pass on the sale of a house, a picture of great value relatively to the value of the house would not (*Cochrane, supra*).

Right of Heritable Creditor to Fixtures.—The rights of a heritable creditor to fixtures attached to the lands conveyed in security have been much discussed in England, and certain points may be regarded as established. A mortgagee is entitled to all fixtures, whether they are affixed to the subjects before or after the mortgage (*Climie*, 1869, L. R. 4 Ex. 328;

Longbottom, 1869, L. R. 5 Q. B. 123; *Holland*, 1872, L. R. 7 C. P. 328; *Hobson*, [1897] 1 Ch. 182). In the same way, a mortgage of a lease will carry to the mortgagee the tenant's right to remove fixtures (*Meux*, 1875, L. R. 7 H. L. 481). And the right of the mortgagee is not affected by any personal agreements between the mortgagor and the person who supplied the fixture, relative to the right to remove it (*Hobson, supra*). Assuming the principle of these decisions to be applicable to Scotland, it would appear that a bond and disposition in security would give the bondholder a right over the lands and all fixtures (*Arkright*, 3 Dec. 1819, F. C.). In the case of trade fixtures erected by a tenant, the bondholder would acquire the property in them, subject to the right of the tenant to remove them (*Miller*, 1894, 21 R. 658). From the question never having been raised, it may be assumed that the tenant would have the same right of removal against the bondholder as he would have against the owner of the subjects; but it is difficult to see on what legal principle the tenant's right, which is merely a personal obligation of the landlord, can be available against the bondholder or any other singular successor in the lands. A security granted by a tenant over trade fixtures is in effect an assignation in security of an incorporeal right, *i.e.* of the right to remove the fixtures, and may be completed by intimation to the landlord (*Miller, supra*).

Fixtures between Superior and Vassal.—In the estimation of the annual value of lands in order to fix the amount due as a casualty of composition on the entry of a singular successor, it has been held that the annual value of fixtures is not to be included, unless they are of such a character that a tenant would not be entitled to remove them in a question with the landlord (*Marshall*, 1886, 13 R. 1042). Without questioning the result arrived at in this case, it may be pointed out that it seems to have been reached on the theory that trade fixtures remain the property of the tenant; and it is submitted that that theory cannot be maintained in view of the decision of the House of Lords in *Brand's Trs.* (3 R. (H. L.) 16; see other cases cited at commencement of this article).

Diligence to attach Fixtures.—The question whether a particular article should be attached by adjudication, as a part of the land, or by poinding, as a separate moveable, follows the rule which obtains between heir and executor. That is, if it is actually a fixture it is subject to adjudication, if not, to poinding. It would, however, appear that an article may be attachable either by poinding, as a moveable, or by adjudication, as a part of the lands (see argument on *Arkright*, 3 Dec. 1819, F. C., 8 F. C. 57). And it would seem to be doubtful by what diligence the right of a tenant in trade fixtures which he is entitled to remove can be attached. That right, as has been shown above, is incorporeal, and transmissible by intimated assignation, but is heritable in succession (*Miller*, 1894, 21 R. 658). The question would seem to be open whether such a right should be attached by adjudication or by arrestment.

Valuation of Fixtures.—Questions as to fixtures have arisen in the interpretation of sec. 42 of the Valuation Act, 1854 (17 & 18 Vict. c. 91), whereby it is provided that all machinery fixed or attached to any lands or heritages shall be considered as lands and heritages, and valued accordingly. This provision has been held to subject all fixtures to valuation, the argument that it should be confined to those which a tenant would not be entitled to remove being repelled (*Drumgray Coal Co.*, 1867, 11 M. 977; *Chalmers*, 1871, 11 M. 983; *Cowan & Sons*, 1894, 21 R. 812).

[Amos and Ferrard on *Fixtures*, 3rd ed.; Brown on *Fixtures*, 4th ed.; 2 Smith's *Leading Cases*; Notes to *Elwes* v. *Maw*e, 1 Bell, *Com.* 786;

Hunter, *Landlord and Tenant*, 4th ed., i. 294; Rankine, *Landownership*, 3rd ed., 108; Rankine, *Leases*, 2nd ed., 270.]

Flag, Law of the—The law of the country whereof a ship carries the flag (phrase used by Blackburn, J., in *Lloyd*, 33 L. J. Q. B., at p. 248; Dicey, *Conf. of Laws*, 589); the personal law of the shipowner (Westlake, 3rd ed., p. 262; *cp.* L. J. C. Monereiff in *Halmor*, 1887, 15 R., at p. 158, "the law of the home of the ship, which is substantially the law of the domicile of the owners"); where there are several local laws under the same flag, as in Great Britain and America, the law of the place of registry (Wharton, *Conf. of Laws*, 441). In its application, the law of the flag or the law of the ship is merely a special case of the law of the contract (Dicey, 590; *Lloyd*, L. R. 1 Q. B., at p. 120). It has been held to apply, in the absence of special provision, to the contract between shipowner and charterer, in respect of sea damage and its incidents (*Lloyd*, cit.; *In re Missouri Steamship Co.*, 1888, 42 Ch. D. 321, where the Court held the law of England to be adopted by the parties, it was both the law of the flag, and the *lex loci solutionis*). It determines and governs the extent of the authority conferred on the master of a vessel to bind the owners by a bottomry bond (*The Karnak*, 1869, L. R. 2 P. C. 505). In the absence of express stipulation at the time of shipment, it determines the power of the master to hypothecate the cargo (*The Gaetano and Maria*, 1882, L. R. 7 P. D. 137). "It is absurd to suppose that the mere fact of carrying the Dutch flag makes [a ship] a Dutch ship" (per Brett, L. J., in *Chartered Mercantile Bank of India*, 10 Q. B. D., at p. 535). It was also laid down there that the "nationality of a ship depends solely upon her ownership." Here the law of the flag was disregarded in accordance with the presumed intention of parties.

In *Halmor, Owners of the Immanuel* (1887, 15 R. 152) it was maintained that the bill of lading was by the law of the flag conclusive evidence of the amount of cargo shipped; but a majority of the Court held that this question was to be determined by the *lex fori*. Lord Rutherfurd Clark reserved his opinion.

In prize law, the flag is not conclusive evidence of national character. This depends on the domicile of the owner; and so a ship carrying a foreign flag may run a double risk of capture and condemnation.—[Boyd's Wheaton, 3rd ed., 457; Phillimore, iii. 734; Owen, *Declu. of War*, 20; Calvo, *Dict.*, *s.v.* "Drapeau."]

Flags.—The British flags are the Union Jack and the Royal Standard. In 1606 the banner of England (St. George), white, with a red cross, was incorporated with the banner of Scotland (St. Andrew), blue, with a white diagonal cross. In 1801 the banner of Ireland (St. Patrick), white, with a diagonal red cross, was introduced. Hence the Union Jack. On the Royal Standard, after 1603, the arms quartered were those of England and France, Scotland, and Ireland. Under the Georges the arms of Brunswick, and subsequently of Hanover, were introduced. In 1801 France, and in 1837 Hanover, disappeared, and the Royal Arms took their present form.

Flat.—See Common Interest.

Flogging.—See Whipping.

Floods.—See Damnum fatale.

Flotsam or floatsam, jetsam, lagan or ligan, and wreck are terms of English law which refer to goods or cargo which are found after a shipwreck. If the goods are cast upon the land they are wreck, but if they remain at sea they are known by one of the other names, according as they sink and remain under water unsecured (jetsam), or sink but are fastened to a cork or buoy on the surface (lagan), or float upon the surface (flotsam). "Flotsam," says Ld. Coke, "is when a ship is sunk or otherwise perished and the goods float on the sea; jetsam is when the ship is in danger of being sunk and, to lighten the ship, the goods are cast into the sea, and afterwards, notwithstanding, the ship perish. Lagan (*vel potius* ligan) is when the goods are so cast into the sea and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again." Goods are only flotsam so long as they remain at sea; whenever they are thrown upon the land they become wreck.

Flotsam, jetsam, and lagan belong to the Crown when the owners are unknown. Proprietors are allowed to claim them within a year from the date when they come into the possession of the receiver of wreck. Duty is payable upon goods found flotsam, jetsam, or lagan as on imported goods (57 & 58 Vict. c. 60, s. 569).

The definition of wreck in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 510), includes jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal water. Procedure for dealing with it is prescribed in that Act, ss. 518–529. See Wrecks.

Flumen, a river, is distinguished from a stream, *rivus*, by its greater size (*Dig.* 43. 12. 1. 1). A distinction was taken in Roman law between permanent (*perennia*) rivers, which flow all the year round, and winter torrents (*torrentia*), whose beds are dry in summer. The distinction between a "public river" and a "private river" also turned mainly upon the permanent or occasional nature of the flow of water. A public river is a permanent river (*Dig.* 43. 12. 1. 3), and it may be either navigable or not navigable. "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" (per Lord Monboddo in *Magistrates of Linlithgow*, 1768, 5 Bro. Supp. 935).

In modern legal terminology the terms "public river" and "private river" are 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.

In Roman law anyone had a right to freely sail a ship or boat on a public river, and use its banks for loading and unloading (*Dig.* 43. 14.

1. pr.). Doing anything to a river or its banks, that would impede the navigation or use of the banks, was prohibited (*Dig.* 43. 12. 1. pr.). The rights of the public were enforced by interdicts (*Dig.* 43. 14 1. 1; 43. 12. 1. pr.).

Where the servitude of stillicide or eavesdrop takes the form of a right to collect the water in rones, and get rid of it by spouts, it is known as *flumen* (Rankine, *Landownership*, 3rd ed., p. 462). See River.

Fodder and Straw.—See Straw.

Food and Drugs Act.—See Sale of Food and Drugs Act.

Force: Force and Fear.—See Extortion.

Forehand Rent.—See Leases; Rent.

Foreign (from Latin, *foras, foris, forinsecus*; low Latin, *foraneus*: Norman French, *foreyn*: outside of, belonging to another country, outlandish; in law, that which is outwith the territory or realm of a particular State or country. In Scots law, furth of Scotland).—In his *Digest of the Law of England with Reference to the Conflict of Laws*, Professor Dicey defines "foreign" as "not English." Similarly, for purposes of Scots law, foreign means "not Scottish," and applies to any person, thing, or act which may be so described. In this sense it is opposed alike to the terms "British" and "Colonial." Since the union of Scotland and England, the two kingdoms have been politically one; each is an integral part of the United Kingdom, and neither is, properly speaking, a foreign country with regard to the other. But "as to judicial jurisdiction, Scotland and England, although politically under the same Crown and under the supreme sway of one united Legislature, are to be considered as independent foreign countries, unconnected with each other" (per Ld. Chan. Campbell in *Stuart* v. *Moore*, 1861, rep. 23 D. 902). The relations of the two kingdoms to one another, in matters of law, are set forth in Articles 18 and 19 of the Treaty of Union, 1707, which are quoted and commented upon in the opinion of Ld. Fraser (Ordinary) in *Orr-Ewing*, 1884, 11 R. 600. In the same case, Ld. Pres. Inglis, correcting some observations of Jessel, M. R., in England, laid down as a general proposition (p. 630), that "in proper questions of jurisdiction, the judicatories of Scotland and England are as independent of each other as if they were the judicatories of two foreign States." The proposition was approved by the House of Lords on appeal (13 R. H. L. 1).

Foreign (including English) law is a matter of fact, to be distinctly averred in the pleadings, and proved *habili modo* like any other fact. The Act 22 & 23 Vict. c. 63 provides facilities for the more certain ascertainment of the law administered in one part of the Queen's dominions when pleaded in the Courts of another part thereof. And the Act 24 Vict. c. 11 is intended to afford similar facilities for the better ascertainment of the laws of foreign countries, when so pleaded. In both cases, the law is ascertained by means of a case stated by the Court in which it is pleaded

for the opinion of the Court which is versed in it. But these enactments are not imperative, and foreign law is more commonly ascertained by the examination of foreign lawyers as witnesses, or from their opinion obtained under judicial remit, or by the parties voluntarily. On the question of what the foreign law is, the judge must be guided solely by the evidence adduced, and is not entitled to apply his own knowledge, however familiar he may happen to be with the legal system in question. If, however, the evidence is conflicting or insufficient, he may investigate the foreign law for himself, consulting its text, or the writings of foreign authors, or the decisions of the foreign Courts (*Concha*, 1889, 40 Ch. D. 543; *Bradlaugh*, 1870, 5 C. P. 473). Similarly, if the evidence be that no technical signification is attached by the foreign law to the subject of decision, the Court may apply its own rules of interpretation (*Thomson's Trs.*, 1851, 14 D. 217). The House of Lords, however, as the Appeal Court of the United Kingdom, is entitled to apply its own knowledge of the laws of the three kingdoms, and is not bound, in deciding appeals, by the evidence led in the Courts of one country as to the law of the other (*Cooper*, 1888, 15 R. H. L. 23).

The Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), consolidates the various Statutes which regulate Her Majesty's jurisdiction in foreign countries. See Pigott on *Exterritoriality*.

The Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90), regulates the conduct of British subjects, during hostilities between foreign States with which this country is at peace, with regard to enlistment, fitting out vessels for warlike purposes, etc. (see *Lord Advocate* v. *Smith, Fleming, & Co.*, 1864, 2 M. 1032; *Sandoval*, 1887, 16 C. C. Ct. Ca. 206, 3 T. L. R. 441, 498; *Jamieson*, 1896, 2 Q. B. 425, 12 T. L. R. 551).

Foreign Marriages.—The marriage of British subjects abroad is now regulated by the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), and relative Order in Council of 28 October 1892. These consolidate the statutory law as to the celebration of foreign marriages which are not contracted in accordance with the *lex loci*. See Marriage.

Foreign Bills are regulated by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72. See Bills.

Foreigners may sue in the Courts of Scotland as readily as natives, but must sist a mandatary or find security for costs (Ersk. iii. 3. 33, note 140; *Trodden*, 1862, 24 D. 1360; Mackay, *Practice*, ch. xxxi). But the rule is relaxed in the case of English and Irish litigants (*Lawson*, 1874, 1 R. 1065; *Aitkenhead*, 1892, 19 R. 803). See Abroad.

The decrees of English and Irish Courts are not, properly speaking, however, foreign decrees, and are not scrutinised as such in Scotland (per Ld. Pres. Inglis in *Wilkie*, 1870, 9 M. 168). The Judgments Extension Acts (1868, 31 & 32 Vict. c. 54, and 1882, 45 & 46 Vict. c. 31) provide for the Courts of each of the countries of the United Kingdom enforcing the judgments of the other summarily, and various imperial Statutes declare the respective judicatories to be auxiliary to one another, as, *e.g.*, the Companies Acts and Bankruptcy Acts (*Wotherspoon*, 1871, 9 M. 510; *in re Low*, 1893, 10 T. L. R. 106; *English*, 1886, 14 R. 220).

Foreign Enlistment.—The Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90)—"an Act to regulate the conduct of Her Majesty's subjects during the existence of hostilities between foreign States with which Her Majesty is at peace"—provides that any person who, "without

the licence of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with Her Majesty," or, "whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign State as aforesaid," shall be guilty of an offence punishable by fine and imprisonment with or without hard labour (s. 4). There are also penalties against leaving the Queen's dominions with intent to serve a foreign State (s. 5); against embarking persons on false representations as to service (s. 6); against taking illegally enlisted persons on board ship (s. 7); against illegal shipbuilding and illegal expeditions (s. 8); against aiding the warlike equipment of foreign ships (s. 10); and against fitting out naval or military expeditions without licence (s. 11). See FOREIGN.

Foreign Law Ascertainment Act, 1861.—This Act (24 & 25 Vict. c. 11) was passed to afford facilities for the better ascertainment of the law of foreign countries, when pleaded in Courts within Her Majesty's dominions. See FOREIGN; PROOF.

Foreign Marriages Act, 1892.—This Act (55 & 56 Vict. c. 23) consolidates the enactments relating to the marriage of British subjects outside the United Kingdom. See FOREIGN; MARRIAGE.

Foreshore.—See SEASHORE.

Forestalling.—This crime against fair trading is dealt with, along with that of regrating, in the Act 1592, c. 150. By this Statute the crime of forestalling consisted in buying any merchandise, victual, or other thing coming by land or water, towards any fair or market, in burgh or in landward, to be sold in the same from any parts beyond the sea, or within the realm; or in making any contract or promise to buy the same, or any part thereof, before the said merchandise, victual, or other things shall be in the fair or market-place ready to be sold; or in making any motion by word, writ, or message for raising of the prices, or dearer selling, of any of the things above mentioned, or in dissuading anyone who is on the way to the market from carrying his commodity thither. The statutory penalties for forestalling were the same as those to which an ENGROSSER (*q.v.*) was liable.—[Hume, i. 510.] See FAIRS AND MARKETS.

Forests.—Tracts of land for the keeping of deer—known in law as forests—are included among the regalia of the Crown (see under REGALIA). According to Mr. Rankine (*Landownership*, 3rd ed., 148), "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."

Formerly all cattle straying in the king's forests were forfeited, two-thirds of the value thereof going to the Crown, one-third to the keeper of the forest (see 1535, c. 12; 1579, c. 84; 1592, c. 130). In 1680 (*M. Athole*, Mor. 4653) the Court of Session made a representation to the king against the granting of new forests, as prejudicial to the king's old forests and to his lieges; and since the date of that decision there is no instance of the exercise of the above-mentioned privilege.

The owner of a forest is not entitled to go upon the land of a neighbouring proprietor in pursuit of, or in order to drive back, deer that have strayed from the forest, nor can he prevent the neighbouring proprietor from shooting deer within his own march (*D. of Athole*, 1862, 24 D. 673; a decision in which Ld. Stair's dictum (*Inst.* ii. 3. 68), that deer are *inter regalia*, was rejected). On the other hand, one of two co-proprietors of a commonty, immemorially used for pasturage, was found entitled, notwithstanding the dissent of another co-proprietor, to drive off deer and prevent them from pasturing on the commonty (*Robertson*, 22 May 1810, F. C.; affd. 1 Dec. 1814, F. C. App.). Where, in a feu-charter of certain lands, shealings, and grassings, a superior reserved "all the deer that may be found hereafter within the bounds of the said shealings," this was held only to confer a right to deer captured or killed on the lands, not a right of hunting or stalking them (*Hemming*, 1883, 11 R. 93).—[See also Bell, *Prin.* s. 670 (2): Ersk. ii. 6. 14; Bankt. i. 562; Acts 1685, c. 20, and 1594, c. 124, as to killing of deer in time of snow.]

Forfeiture.—*Criminal.*—Forfeiture is the loss or deprivation of property or rights consequent on conviction for some offence. The best-known example of this, Escheat, which may be single or liferent, falls upon decree of fugitation or sentence of death pronounced in a criminal trial; and by statute it may be imposed as a penalty upon conviction for certain crimes, *e.g.* perjury, bigamy, deforcement and breach of arrestment. See ESCHEAT. The forfeiture in single escheat affects all moveables belonging to the rebel or the person convicted, or which may be acquired by him before its relaxation. Bonds are excepted which, although moveable as between heir and executor, are heritable *quoad* the fisk; and leases, although heritable *quoad* succession, are included, unless they are liferent leases and not acquired by assignation, in which case they fall under liferent escheat. In liferent escheat the forfeiture includes rent and other profits of such of the rebel's heritable subjects as are held of himself, whether they belong to him in property or barely in liferent. The fee remains in the rebel (*M'Crae*, 1839, Macl. & R. 645). The property forfeited under the single escheat goes to the Crown; under the liferent escheat, to the superior of the lands, with the exception of interest on bonds falling under the liferent, but not under the single escheat, which goes to the Crown (Ersk. ii. 5. 53; Stair, iii. 3. 15; Bankt. iii. 3. 2; Bell, *Prin.* s. 730).

"Forfeiture," says Stair (iii. 3. 28), "is the great confiscation comprehending all other penal confiscations, and is extended to the taking away of life, lands, and goods; for it is the penalty of the highest crime, to wit, treason." By the Act 7 Anne, c. 21, s. 5, the law of England with respect to the penalties on a conviction for treason or misprision of treason was made the law of Scotland. Accordingly, the sentence on a conviction for treason includes forfeiture of all moveable property, and of the convicted person's interest in his heritage, together with all dignities and honours,

It also operated corruption of blood, the effect of which was that no succession could pass to or through him; but no attainder for treason has now the effect of disinheriting an heir-at-law or prejudicing any right or title other than that of the attainted person during his life. The Act 33 & 34 Vict. c. 23 (ss. 1, 33) abolished corruption of blood and all forfeiture following upon a conviction for treason; but the Act does not extend to Scotland. The effect of the Act of 7 Anne upon an heir of entail whose ascendant in possession is convicted of treason, is to deprive him of the succession, which, after the death of the offender, passes to the next substitute, not a descendant of his body; and this effect cannot be evaded by irritant and resolutive clauses in the deed of entail (*Gordon*, 1751, 1 Pat. App. 508). By 1690, c. 33, it is provided that no forfeiture for treason shall prejudge tacksmen, creditors, superiors, vassals or heirs of entail, nor husbands or wives of the persons, and that all estates forfeited are to be subject to all real actions and claims against the same, and to all true and lawful creditors, whether personal or real. In the law of England, by which such claims must now be regulated, no provision is made for safeguarding the interests of personal creditors; and therefore, at the rebellions of 1715 and 1745, statutes were passed extending the rule as to heritable creditors to them (Ersk. iv. 4. 24; Hume, i. 546; Alison, i. 622. See ATTAINDER).

A conviction or misprision of treason is followed by forfeiture of the offender's moveables, and of the profits of his heritage during his life, *i.e.* single and liferent escheat (Ersk. iv. 4. 28; Hume, i. 551).

When a person has been sentenced to death or is fugitated, he loses his *persona standi in judicio*, as he is dead in law and (unless being an outlaw he is reponed) cannot sue or defend any action (Ersk. ii. 5. 60; Hume, ii. 270; Shand, *Prin.* i. 169).

When a Statute forbids the doing of any act for which particular implements are required or used, it is customary to include in the penalties for that act the forfeiture of the implements. Examples of this are to be found in the Poaching Prevention Act, 1862; the Salmon Fisheries (Scotland) Act, 1868; the Weights and Measures Act, 1878; the Herring Fishery (Scotland) Act, 1889; and many others. (As to forfeiture of bail-bond, see BAIL.)

Civil.—Forfeiture is the loss of property consequent on the breach of some condition upon which it is held. It may be legal or conventional. Recognition (see SUPERIORITY), or the forfeiture to the superior of the vassal's land consequent on the alienation of more than half thereof to a stranger without the superior's consent; disclamation (see SUPERIORITY), or the forfeiture to the superior of the vassal's whole feu, consequent on disowning or disclaiming the superior without ground; and purpresture (see SUPERIORITY), or similar forfeiture, consequent on a vassal encroaching on any part of the superior's property, or attempting to make it his own, are all now obsolete. A feu-right may still be lost by failure to pay the feu-duty to the superior for two years in succession. The tinsel of the feu does not operate in virtue of the failure to pay, but requires a declarator of irritancy to make it effectual, and forfeiture may be saved by payment at any time before decree is extracted. See IRRITANCY *ob non sol. can.* Tinsel of superiority (see SUPERIORITY) is not now obtainable, since entry with an immediate superior is co-incident with infeftment. A conventional forfeiture is effected by action of declarator founded on irritant and resolutive clauses contained in the deed constituting the right. An irritant clause is not sufficient without another clause resolving or bringing to an

end the right of the person contravening the condition. See IRRITANT AND RESOLUTIVE CLAUSES; ENTAIL.

Forgery.—Forgery is the most serious mode of committing crime by falsifying writings. It may be defined as the fabricating and uttering as genuine a writing feloniously intended to represent the genuine writ of another. The term falsehood, when applied to writings, does not necessarily signify that these writings contain untrue statements. A writing is none the less forged though it does not contain a single untruth. The crime consists in the putting it forth as the genuine writ of another person (*Fraser*, 1859, 3 Irv. 467). It will be noticed from the definition of forgery which has been given, that two things are essential to this crime: (1) that a writing be fabricated or falsified, (2) that it be uttered or used as genuine. Fabrication is only the initial or preparatory step in the commission of the crime of forgery. The crime is not completed till the fabricated writ has been uttered as genuine (*Hinchy*, 1864, 4 Irv. 561). Except in certain cases which are dealt with by statute (45 Geo. III. c. 89; 41 Geo. III. c. 57), a man may fabricate and falsify writings as much as he pleases, provided he abstains from uttering the writs thus falsified.

The leading points in connection with the fabrication and uttering of forged writings will now be considered.

A. *FABRICATION*—1. *Mode of Fabrication.*—It is immaterial by what means the falsification of a writ has been achieved, whether by the use of pen and ink, pencil, or engraving tools. It is also of no moment that the forgery is a clumsy one, or that a forged signature is misspelt (*M'Lennan and M'Kenzie*, 1840, Bell, *Notes*, 56). Nor does it matter that the forged document is invalid through some informality, such as want of stamping. It does not affect the criminality of the offence that the forged writ could not be put to any practical use in Scotland, even if it were genuine. Thus a person who attempted to use in Scotland a forged English medical diploma, which the law of Scotland does not recognise as a licence to practise, was held properly charged with forgery (*Myles*, 1848, Ark. 400). It is sufficient that the forged writ is seriously used, though no gain may result from its use (*Smith*, 1852, 1 Irv. 125; *Rhind*, 1860, 3 Irv. 613). It is forgery to use a false receipt in place of a lost one, though, as matter of fact, the sum referred to in the receipt had actually been paid. It has likewise been held to be forgery to place a false signature on the back of a deposit receipt, though such signature was not necessary to get payment of the money (*Henderson*, 1830, 5 Deas and Anderson, 151). A writ may be falsified in one of four different ways:—

(1) Where the whole writ and the signature are forged.

(2) Where the signature alone is forged.

(3) Where unauthorised writing is placed over a genuine signature.

(4) Where the body of a genuine deed, duly signed, is altered.

2. *The Forged Writ need not be Obligatory.*—If a forgery is seriously meant, and is not a mere jest, it does not affect the criminality of the offence that the false writ is not obligatory. A different view was indicated by Lord Deas in the case of *Imrie*, 1863, 4 Irv. 435. The institutional writers, however, are clearly of opinion that it is unnecessary that the forged writ should be obligatory (Hume, i. 140; Alison, i. 383; see also Macdonald, 73; *M'Leod*, 1858, 3 Irv. 79; *Rhind*, 1860, 3 Irv. 613; *Cregan*, 1879, 4 Coup. 313; *Daniel*, 1891, 3 Wh. 103).

3. *Imitation of a Person's Handwriting is Not Essential.*—It is not necessary that a person's handwriting should be imitated. It is forgery to sign one's own name with the intention of passing it off as that of a person of a similar name (*Menzies*, 1849, J. Shaw, 153; *Duncan and Cumming*, 1850, J. Shaw, 334); or to pass one's signature off as that of a partner of a firm when there is no such firm (*Hall and Others*, 1849, J. Shaw, 254). It is forgery to get a person to sign his name and then to pass it off as that of another person of the same name (*Hendry*, 1839, Bell, *Notes*, 49). The crime is also forgery when a person places the name of another upon a document on a false pretence that he gave authority to sign (*Taylor*, 1853, 1 Irv. 230). To adhibit to a document a fictitious name (*Hall and Others*, 1849, J. Shaw, 254) or the name of a dead person (*Aitchison*, 1833, Bell, *Notes*, 56) or of one who cannot write (Hume, i. 141), is forgery.

4. *Initials or Marks.*—It is forgery to sign by initials or mark and pretend the subscription is that of another (*Humphreys*, 1839, Bell, *Notes*, 50). And it does not matter whether or not this was the usual mode of subscription of the person whose signature the false writ purports to exhibit (*Cattanach*, 1840, 2 Swinton, 505; *M'Millan*, 1859, 3 Irv. 317).

5. *Forgery where Signature is Genuine.*—If the body of a deed, genuinely signed, is materially altered, this is forgery (*Mann*, 1877, 3 Coup. 376). This is also the case if a genuine signature is cut off from one deed and affixed to another, which is thereafter used as genuine. It is also forgery if unauthorised writing is placed over a genuine signature (*Brown*, 1833, Bell, *Notes*, 51). A bill-stamp, however, signed blank, may be filled up for any amount which the stamp will cover, there being an implied mandate by the subscriber to do this. But it is forgery if a bill is mutilated so as substantially to change the obligation it creates (*Forgan*, 1871, 2 Coup. 30; Mann, *ut supra*). There is no forgery, however, if what is written was intended or understood by the subscriber to be written, even though what has been written is false (*Fraser*, 1859, 3 Irv. 467).

6. *Signatures of Official Persons.*—It is forgery if, by means of false representations, notaries and witnesses have been induced to sign a deed as for a third party (*Dougherty and Others*, 1844, 2 Broun, 159). If notaries sign a deed on a fictitious narrative that they have been authorised to do so, the crime is forgery.

B. *Uttering.*—The crime of forgery is not complete until the forged document is uttered, that is, is feloniously used as genuine (*Edwards*, 1827, Shaw, 194). Proof of uttering is sufficient to ensure conviction, and it is immaterial that the origin of the fabrication is unknown.

Uttering is complete if a false writ has been used as genuine, or an attempt has been made to use it, although no success has followed. Thus there is uttering if a forged letter is posted (*Harvey*, 1835, Bell, *Notes*, 57; *Jeffrey*, 1842, 1 Broun, 337; *Smith*, 1871, 2 Coup. 1); or a cheque or bill presented at the bank (*Reid*, 1842, 1 Broun, 21); or a forged deed is registered for execution or publication. It is not settled whether registration of a forged document for preservation amounts to uttering (Hume, i. 154; Macdonald, 80).

If the forged document is given to another merely to be preserved or to be examined, there is no uttering (*Allan*, 1834, 6 S. J. 321; *Reid*, 1841, Bell, *Notes*, 58).

There is uttering if a blank bill-stamp with forged signatures upon it is presented to a person to be filled up and is then discounted or kept as a security (*Steedman*, 1854, 1 Irv. 360; *Potter*, 1854, 1 Irv. 458).

But there is probably no crime if such a document be merely handed to another to be written out (Steedman, *supra*; Macdonald, 80).

In order that uttering may be complete, the forged document must have been put out of possession of the accused. There is sufficient relinquishment of possession to constitute uttering, if the writ has been handed to an innocent accomplice who is deprived of it before he has put it to any use (*Aitchison*, 1835, Bell, *Notes*, 57). Uttering is also complete when a false deed which had been placed in another's repositories was allowed to be used as genuine after the death of this individual by the person who had placed it there (*Shepherd*, 1842, 1 Broun, 325). There is also uttering when a forged deed is produced in a judicial process, whether this is done by the party interested or by one instructed by him (*Adams*, 1820, Shaw, 21). It is doubtful, however, whether it is enough that the forged writ has been given or posted to an agent to be produced by him (*Adams, ut supra*; *Bailie*, 1825, Shaw, 131; *Wilson*, 1861, 4 Irv. 42).

The uttering must be felonious (*Waiters*, 1836, 1 Swinton, 273); but the intent is enough, and the crime is complete, though no result follows the uttering, as when a letter is posted but never reaches the person to whom it is addressed (*Harvey*, 1835, Bell, *Notes*, 57; *Jeffrey*, 1842, 1 Broun, 337; *Taylor*, 1853, 1 Irv. 230), or the letter is not used by the person who receives it (*Smith*, 1871, 2 Coup. 1).

Tribunal.—The crime of forgery is now invariably dealt with in the Court of Justiciary or in the Criminal Court of the Sheriff. The Court of Session has, however, a criminal jurisdiction in cases of forgery, although this jurisdiction has not been exercised for upwards of a century. The proceedings in the Court of Session may originate by a petition and complaint at the instance of a private party, with concurrence of the Lord Advocate, or at the instance of the Lord Advocate alone. In substance the complaint is an indictment, and must have a list of witnesses attached. It must be served on the accused, like an indictment, on an *induciæ* of fifteen days. Warrant to imprison the accused or to bring him before the Court for examination may be granted on the petitioner's application. The usual course was to examine the accused in presence of the Court, after the process was in court, but before commencing the proof. Then parties were heard, and judgment pronounced on the relevancy of the libel and defences. Thereafter, proof was taken, and, if it established the guilt of the accused, the forged documents were reduced and generally destroyed in presence of the Court. The Court of Session were in use to pronounce sentence when the crime committed was not judged worthy of death. When, however, a capital sentence was the appropriate punishment, the Court of Session merely reduced the deeds, found the accused guilty, and remitted him to the Court of Justiciary for sentence.

Indictment.—The Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35, sched. A), gives the following forms:—

(1) . . . You did utter as genuine a bill on which the name of John Jones bore to be signed as acceptor, such signature being forged by (*here describe in general terms how the bill was uttered, and add, where the bill is produced*), and said bill of exchange is No. of the productions lodged herewith . . .

(2) . . . You did utter as genuine a letter bearing to be a certificate of character of you, as a domestic servant, by Mary Watson, of 15 Bon Accord Street, Aberdeen, what was written above the signature of Mary Watson having been written there by some other person without her authority, by handing it to Helen Chisholm, of Panmure Street, Forfar, to whom you were applying for a situation (*here add, when the letter is produced*), and said letter is No. of the productions lodged herewith . . .

Proof of Forgery.—The three points which the prosecutor in a trial for forgery has to establish are these:—(1) That the deed is a forgery; (2) that it was uttered by the accused, or that he was art and part in the uttering; (3) that it was uttered by him feloniously, that is, that he knew the document uttered was a forgery.

(1) The usual evidence which is adduced to prove that a document has been forged, consists of the oath of the person whose signature has been imitated. If this person is alive, he must be produced and give evidence. In cases of sickness or absence from the country, one bank official may give evidence as to another's signature, and a clerk may swear to the signature of the firm-name by one of the partners. If the evidence of the person whose signature or handwriting has been forged cannot be obtained, the forgery must be established by indirect testimony. Thus, the writing alleged to be forged may be compared with undoubtedly genuine writing of the person whose signature or handwriting is said to have been imitated.

(2) Proof that the forged document was uttered by the panel usually consists of the testimony of witnesses who saw him utter the document, or of the person to whom he uttered it. It may be, and often is, the case, that the uttering was the work of an associate. It will then be necessary to prove, in addition to the uttering by the associate, the connection of this person with the panel. It is absolutely necessary to trace the forged writing back to the prisoner, otherwise a conviction cannot be obtained.

(3) The most difficult point to establish is that the uttering was done feloniously, that is, that it was done in the knowledge that the document was forged. This guilty knowledge must be, in the great majority of cases, the result of inferences deduced from what has been proved regarding the conduct or circumstances of the panel or the articles found in his possession. The conduct of the panel at the time of his apprehension is important. If he tried to run off, or to destroy the forged document, these circumstances point to guilty knowledge. If other forgeries are found in his possession, and especially if they are concealed on his person, the inference of guilty knowledge can scarcely be resisted.

Punishment.—At one time forgery was a capital offence at common law. The punishment of death was abolished, in cases of forgery, by 1 Viet. c. 84. The penalty is now penal servitude or imprisonment (Hume, i. 137; Alison, i. 423; Ersk. iv. 4. 67; Macdonald, 70; Anderson, *Crim. Law*, 126).

Forisfamiliation.—In Scots law the term is used in two senses; either to denote the status of a minor who has, during the father's lifetime, become freed from the parental authority, or to express the condition of a child who, having discharged his legitim, is, as regards succession to the father, no longer entitled to his legal rights as a "bairn of the house."

Used in the first of these senses,—its original and derivative meaning,—this term implies freedom from the *patria potestas* as an essential condition. The point of time at which the parental authority ceases by law is not clearly defined (see L. J. C. Inglis, *Harvey*, 1860, 22 D. 1198, p. 1208; Ld. Neaves, *Fraser*, 1867, 5 M. 819, p. 823); and although it is generally assumed to continue until majority, and, it has been said, even beyond this (Stair, i. 5. 13; but cf. Brodie's note, *l.c.*; More, *Notes*, xxxi; Bankt.

i. 6. 10: Ersk. i. 6. 55; More, *Leet.* i. 86), the father's control over the child is, after pupillarity, much weakened, and may during the years of minority be terminated by the act of the minor alone, by the father's express or tacit consent, or by circumstances showing the father's intention to abandon his curatorial power (*Harvey, v.s.*). In each particular case, accordingly, what amounts to forisfamiliation depends not so much upon the application of any legal rule as upon the question of fact whether the child is, in the circumstances of the case, to be regarded as emancipated from the father's authority.

Various sets of facts have been held to indicate the cessation of the parental authority and the forisfamiliation of the child. Thus, where a child has left his father's home and set up a separate establishment; or has married, especially in the case of a daughter, who thereby passes from her father's curatory to that of her husband (Stair, i. 5. 6; Ersk. i. 6. 54); or where he has a separate stock, the profits of which become his own, or carries on a distinct business, albeit he should remain in family with his father—in such cases the father's tacit consent to the determination of his authority and forisfamiliation of the child may be readily inferred (Stair, i. 5. 13; Ersk. i. 6. 53; Fraser, *P. & C.* 76, 349, 350). Bankton (i. 6. 8) considers a son's marriage as of little significance in questions of forisfamiliation, upon the ground that minors, even after marriage, remain under the power of their curators, to whom the father, as administrator-in-law, is equal. But the principle being the implied resignation by the father of his curatorial power, the conclusion is not supported, and, in the general case, a minor by marriage becomes thereby at once and completely emancipated from the paternal curatory (Stair, *v.s.*; Ersk. *v.s.*; L. J. C. Inglis, *Harvey, v.s.*).

But forisfamiliation will not be inferred from residence out of the father's house, from carrying on the father's business, or from being out at service for a short period (see *Thomson*, 1851, 13 D. 683), if the child does not earn his own livelihood, but remains dependent upon the father's aid (Ersk. i. 6. 55). Thus, where a son, an apprentice with 8s. a week, married and resided out of his father's house, this was held not to prove forisfamiliation (*Anderson*, 1828, 7 S. 78; *id.* 1832, 11 S. 10). Nor will forisfamiliation be effected as matter of course by the child's becoming major, if he remain *de facto* a member of the father's family (see *Fraser*, 1867, 5 M. 819).

The father's liability for the maintenance of a child ceases with forisfamiliation, unless the child falls again into indigence, when the natural obligation of the father to aliment the child will revive (*Campbell*, 1741, Mor. 448; Bell, *Prin.* s. 1630).

A minor's privilege of restoration against deeds executed to his lesion is not barred by forisfamiliation (Fraser, *P. & C.* 392; see *Dundas*, 1711, Mor. 9034).

As regards questions of settlement under the poor law, a minor not forisfamiliated cannot acquire a settlement by residence in his own right; if forisfamiliated, he acquires a residential settlement only by his own industrial residence, towards which his residence while in family with his father will not be imputed (Bell, *Prin.* ss. 2196, 2199; Guthrie Smith, *Poor Law*, 300, 330. See Poor Law).

In questions of succession, the term forisfamiliation is used to signify the position of a child who has either onerously or gratuitously discharged his right to legitim; but unless this has been done, the other circumstances mentioned above as placing a child *extra paterna familia* have of

themselves no effect in barring his claim to legitim (Bankt. i. 6. 12; *Russell*, 1623, Mor. 8177; Fraser, *Pers. & Dom. Rel.* i. 556). For what constitutes such renunciation or discharge by a child as will amount to forisfamiliation and bar his claim, see Stair, iii. 8. 45; Bankt. iii. 8. 16. 24; Ersk. iii. 9. 23; Bell, *Prin.* ss. 1583, 1587. See LEGITIM.

Forthcoming.—See FURTHCOMING.

Fortune-telling was formerly included under the crime of witchcraft, and was made punishable by death under the Statute of 1563, c. 73. This Act was repealed, however, by 9 Geo. II. c. 5, which ordained that no prosecution should thereafter be made on the charge of witchcraft: and, by the same Act, all persons pretending to occult skill, or undertaking to tell fortunes, might be sentenced to imprisonment for one year, and to stand in the pillory, and find security for their future good behaviour. The cases of *Warren*, 1768, and *Maxwell*, 1805 (Burnet, 173), and also of *Hutchison* or *Arrol*, 1818 (Hume, i. 174), were based on this Statute and upon the common law against cheating and swindling. Punishment of the pillory is now abolished. By the Act 5 Geo. IV. c. 83, s. 4, fortune-tellers were included, along with other vagrant characters, under the general category of rogues and vagabonds, and might be sent to prison for three months. This Act was made applicable to Scotland by 34 & 35 Vict. c. 112, s. 15. No prosecution has taken place under it until the case of *Smith* (23 R. J. C. 77). The Court quashed the conviction, holding that the complaint was irrelevant, in respect that it did not set forth that the accused had pretended to tell fortunes with intent to deceive and impose on anyone.

Forum competens.—See JURISDICTION.

Forum non conveniens.—The plea of *forum non conveniens* is directed to the consideration of the justice and expediency of trying an action in a particular *forum*. In the earlier Scotch cases the plea was commonly stated as *forum non competens*, which is properly a denial of jurisdiction: but the question raised is not one of the bare existence of jurisdiction, but rather of the exercise of a Court's discretion to decline, in certain circumstances, to exercise a jurisdiction which it undoubtedly possesses, and the correct style is therefore *forum non conveniens*. The plea is frequently stated, but seldom sustained. It is most commonly relied on by foreign defenders, who object to the operation of arrestments in founding jurisdiction against them in this country: but jurisdiction competently founded by arrestment being as extensive in its scope and operation as jurisdiction arising from any other source, the Court will not refuse to exercise it on the ground of a mere balance of convenience and inconvenience. "To refuse to entertain this action on the ground that it might be more appropriately tried in England, would really render jurisdiction by arrestment of funds of no use to the inhabitants of Scotland in the larger class of actions in which it is resorted to" (per Ld. J. C. Hope in *Parken*, 1846, 8 D. 367). A defender stating the plea must show that he will be put to an unfair disadvantage, and not merely that he is

less likely to succeed; and the Court must be satisfied not only of the inconvenience and possible injustice of trying the question in this *forum*, but that there is another competent *forum* to which not merely convenience, but the justice and expediency of the case point as the proper tribunal.

Actions in which the plea has been sustained have generally been dismissed, but they have sometimes been sisted or delayed, that the Court may find if the defender is in earnest in undertaking to meet his opponent in another *forum*. But in the case of *Sim* v. *Robinow*, 1892, 19 R. 665, Ld. Kinnear expressed the opinion that "if this Court is not a convenient *forum* for the trial of the cause, then the action ought to be dismissed, but, if this Court is a convenient *forum*, then I can see no reason why the action should not go on in the ordinary way."

The cases in which the plea has been sustained have, almost without exception, special features which make it difficult to lay down any general principle on the matter. They are "chiefly of two classes: first, where foreign executors have been called to account in this country for the executry estate situated in a foreign country. In these cases the question always was, whether it was for the true and legitimate interest of the executry estate and all the claimants that the distribution should take place where the executors have had administration. There is of course, in most cases, a strong presumption in favour of that consideration, and accordingly the plea is generally sustained in such cases. The law of the executry estate is the law of the country where administration is had; and there generally are the papers, the property, and the parties concerned. Another class of cases relates to partnerships. Here again there is a manifest expediency in trying all questions at the partnership domicile, where the books and property may be expected to be, and where the partners themselves concurred in carrying on business. In that class of cases also the Court is always willing to listen to this plea. It has regard to the interests of the whole parties generally" (per Ld. J. C. Inglis in *Clements*, 1866, 4 M. 592).

On these grounds the plea was *sustained* in the cases of *Brown*, 1830, 9 S. 224, and *Macmaster*, 1833, 11 S. 685, in which foreign executors were called to account in this country for executry estate situated abroad (and see *Grant's Trs.*, 1796, 3 Pat. App. 503; *Gillon & Co.*, 1864, 2 M. 776). But when the executor of an English will relating solely to English property was resident in Scotland, and was there sued for implement, the jurisdiction was sustained, on the ground that no order of the Court of Chancery, to which the defender offered to appeal, could at that time be enforced against him when resident in Scotland (*Peters*, 1825, 4 S. 107). And it may be said, generally, that except in special circumstances an English administrator, domiciled and resident in this country, may be sued here in an action dealing with the executry estate (*Morison*, 1790, Mor. 4601; *Scott*, 1797, Mor. 4845; *Campbell*, 1809, Hume, *Dec.* 258). The plea was *sustained* in the case of *Adamson's Exrs.*, 1893, 20 R. 738, where the executors of a deceased partner in an Indian business raised an action of count and reckoning in regard to the partnership against the surviving partner, who was living temporarily in Scotland. The defender stated that he had already entered into an accounting with the Administrator-General, Madras, who had, under the pursuer's instructions, taken out letters of administration, and the action was dismissed. The Court also gave effect to the plea in the somewhat exceptional case of *Tulloch*, 1846, 8 D. 657, where a foreigner, visiting this country, was sued for damages for neglecting his

duty as Commissioner and Attorney in Jamaica, and for a balance on his factorial accounts. The defender bound himself to answer in the Courts of Jamaica, and the action was sisted. As already stated, the action would now probably be dismissed. Again, in an action of accounting in the Court of Session against the English executors of one who died possessed of entailed estates in Scotland, and estates in the West Indies,—of all of which the English Court of Chancery had undertaken the administration,—the plea was *sustained* as regarded the rents of the West Indian property, but *repelled* as regarded the apportionment of the Scotch rents (*Martin*, 1879, 7 R. 329).

Of a different class from these executry and partnership cases was that of *Williamson*, 1884, 11 R. 596. There a widow used arrestments to found jurisdiction, and raised an action of damages against an English railway company for the death of her husband on a level-crossing. A question of the English law of trespass being involved, and the *locus* and all the witnesses being in England, the Court dismissed the action But the plea was *repelled* when a person, alleged to be a domiciled Englishwoman, arrested in Scotland funds belonging to the proprietors of an English newspaper which circulated in this country, and brought against them an action of damages for slander (*Longworth*, 1865, 3 M. 1049). In *Ferguson*, 1890, 18 R. 120, the Court of Session held that it would be improper to entertain, and accordingly dismissed, an action of declarator as to a testator's domicile, concerning which the Court of Chancery in England had already appointed an inquiry to be made. And it may be said generally, that where current jurisdiction exists, and a prior action has been raised in a foreign Court, the Court of Session may dismiss, sist, or modify an action subsequently raised to try the same question (Mackay, 124; *Munro*, 1839, 1 D. 1151: *Fordyce*, 1842, 4 D. 1334; *Cochrane*, 1857, 20 D. 178). The Court would probably refuse to exercise its jurisdiction against one of several defenders if the parties really interested as defenders were not subject to the jurisdiction (*Morley*, 1888, 16 R. 78).

It is essential to the success of the plea, that the Court should be satisfied that there is another *forum* in which the case ought to be tried; and in *Clements*, 1866, 4 M. 583, where an American sued in this country another American, against whom arrestments had been used, for implement of a contract entered into in the Confederate States of America, the plea was *repelled*, on the ground that the defender had failed to show a more convenient *forum*. Further, on the ground that the question depended on a mere balance of convenience, the plea was *repelled* in an action by one of two joint adventurers, who were temporarily resident in this country, against the other for an account of the proceeds of an adventure entered into in South Africa, and relating to mining shares there (*Sim*, 1892, 19 R. 665; and see *Lynch*, 1871, 9 M. 860). The objection was *repelled* in *Parken*, 1846, 8 D. 365, where a domiciled Englishman sued an English insurance company, against which jurisdiction had been founded by arrestment, for the amount of a policy prepared in London, but transmitted to Edinburgh agents, through whom it was delivered to the pursuer. The contract was admittedly regulated by English law, but the Scotch jurisdiction was upheld. Again, when the trustee in the sequestration of a deceased person raised a multiplepoinding in the name of an insurance company which had a domicile both in England and Scotland, and when the company objected to the *forum* on the ground that the fund was also claimed by English assignees, the plea was *repelled in hoc statu* (*Thomson*, 1868, 6 M. 310; and see *Posphate Sewage Co.*, 1876, 3 R. (H. L.) 77).

It may be added that the Court sometimes goes further than merely exercising, or refusing to exercise, its competent jurisdiction under the plea of *forum non conveniens*. Where it is the most convenient *forum*, and where action has been first taken in it, "or perhaps, in special cases, even although a prior action has been raised in the Court of another country" (Mackay, 124), the Court may interdict the parties from raising or prosecuting in a foreign Court proceedings to try the same question. "In such a case I think the prohibition should take the form of an interdict founded on the common-law right inherent in the Court" (Ld. Pres. Inglis in *California Redwood Co.*, 1886, 16 R. 1202). In that case the claimants in a Scotch liquidation were restrained from proceeding with an action in New York on the subject of their claim pending the liquidation (and see *Young*, 1846, 8 D. 774). On the other hand, the Court has refused to entertain an action the matter of which is already and properly the subject of an action in a foreign Court (*Ferguson, supra*; *Dawson's Trs.*, 1860, 22 D. 685; and see *Orr-Ewing's Trs.*, 1884, 11 R. 600, 13 R. (H. L.) 14.

[Mackay, *Manual*, 122 *et seq.*; Daniel, *Chancery Prac.* ii. p. 1475.]

See FOREIGN; JURISDICTION.

Four Forms, Letters of.—Letters of four forms was the name of the writ upon which anciently all diligence proceeded. The letters contained four separate charges to the person against whom they were directed to perform his obligation. They are said to be derived from ancient ecclesiastical practice, being a relic of the custom whereby a person before sentence of outlawry passed against him was cited four several times. Letters of four forms were displaced by letters of horning, at first in the inferior Courts and finally in the Court of Session by A. S., 16 Nov. 1613. —[See Kames, *H. L. T.*, Tract xi. and App. vii.; *Ross, Lect.* 266 *et seq.*]

Foxes.—Being considered as destructive vermin, foxes may be pursued, by persons injured, over the lands of others (*Colquhoun*, Mor. 4997). If any damage is done in the pursuit, the pursuer is liable. A distinction is drawn between pursuing foxes for purposes of public utility and hunting for amusement. In the latter case a person is no more entitled to enter the property of another in pursuit of a fox, than in pursuit of a hare or a partridge (*Marquis of Tweeddale*, Mor. 4992; Blair's *Justices' Manual*, 87, 88; Hutcheson's *Justice of the Peace*, iv. 12, s. 4 (vol. ii. p. 567)).

Franchise.

I. Parliamentary Franchise.

Prior to the passing of the Reform Act, 1832 (2 and 3 Will. IV. c. 65), members of Parliament for counties were elected by the freeholders, and those for burghs by the town councils. By that Act entirely new qualifications for the parliamentary franchise were enacted, and the old qualifications were superseded. Section 6, however, of the Statute provided "that all persons who at the passing of this Act (17 July 1832) 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 1831 have become the owners or superiors of land 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 hereinafter directed in the election of a member for such shire." These reservations were purely personal, and it is believed that no original freeholder is now on the register.

The new qualifications introduced by the Reform Act of 1832 were as follows:—In counties the franchise was conferred on (1) owners (joint or several) of any lands, houses, feu-duties, or other heritable subjects of the clear yearly value of £10 (s. 7); (2) tenants (joint or several) of lands, houses, or other heritable subjects — (*a*) for a period of not less than fifty-seven years, or for the lifetime of the tenant, whether in his personal possession or not, where the tenant's interest after paying rent and any other consideration due by him is not less than £10; (*b*) for a period of not less than nineteen years, the clear value of the tenant's interest being not less than £50; (*c*) the tenant being in possession and the yearly rent being not less than £50; or (*d*) the tenant having paid a *grassum* of £300 (s. 9). In burghs the franchise was conferred on occupiers either as proprietor, tenant, or liferenter, of any house, warehouse, counting-house, shop, or other building of the yearly value of £10, provided the occupancy had been for twelve months prior to the last day of July in each year. Residence for six months prior to 31st July in each year within the limits of the burgh or within seven statute miles thereof is a condition of the burgh franchise for all classes of claimants under the Reform Act, 1832. In counties, owners are required to possess their qualifications for six months and tenants for twelve months prior to the last day of July in each year, and in each case to retain their qualifications after that date until the Sheriff proceeds to consider their claims (ss. 7, 9, and 11; *M'Kenzie*, 1891, 19 R. 292, 20 S. L. R. 143).

By the Representation of the People (Scotland) Act, 1868 (31 & 32 Vict. c. 48), the qualification for an owner in a county was reduced to £5 of clear annual value, and the qualification for a tenant, if he should be in actual personal occupancy, was reduced to £14 of clear yearly value as appearing on the valuation roll. In both cases the owner's six months' ownership and the tenant's twelve months' occupancy, prior to the last day of July in each year, was required (ss. 5 and 6). In burghs the 1868 Act conferred the franchise on every inhabitant-occupier as owner or tenant of a dwelling-house within the burgh (s. 3), and dwelling-house was defined (s. 59) to 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 for the relief of the poor, either in respect thereof, or as an inhabitant of such parish." For the burgh franchises created by the 1868 Act residence within the burgh and not merely within seven statute miles thereof is necessary. It was further provided by this Act in regard to these franchises that the qualifications must subsist until the Sheriff proceeds to consider the claims. The 1868 Act further enacted as regards burghs (s. 4) that the sole tenant and occupant of lodgings of a clear yearly value, if let unfurnished, of £10 or upwards and who has resided in such lodgings during the twelve months immediately preceding the last day of July in each year, and has claimed to be registered as a voter at the next ensuing registration of voters, shall be entitled to be registered. It is unnecessary under this franchise to retain the qualification after the last day of July, and it is necessary to make a claim for each year. The 1868 Act further created the university constituencies, and enacted a separate franchise for these, entitling the chancellor, the members of the university

court, the professors for the time being, and the members of the general council of the universities to vote for the election of members to represent them in Parliament. An important provision of the 1868 Act was the general saving of existing franchises, s. 56 providing that "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 be entitled to vote for the same place in respect of more than one qualification." It is also important to note that nothing was repealed by this Act.

The Reform Act of 1884 (48 & 49 Vict. c. 3) extended (s. 2) to the counties the household and lodger franchises established in the burghs by the Act of 1868. It enacted what is known as the service franchise. This is not a new kind of franchise, but is merely an extension of the household franchise. Sec. 3 provided that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed . . . to be an inhabitant-occupier of such dwelling-house as a tenant." To render this provision effectual a new definition of "dwelling-house" was substituted for that contained in the Act of 1868, dwelling-house being now defined (s. 7, subs. 4) to mean "any house or part of a house occupied as a separate dwelling." Separate rating for the relief of the poor is accordingly no longer an essential condition of the household franchise. By the Reform Act of 1884 the tenant's occupation franchise in the counties was assimilated to that in the burghs to the effect that it was lowered from £14 to £10 of clear yearly value (s. 5). By s. 4, subs. 1, the franchise arising from ownership of feu-duties was abolished. Sec. 10 saved the rights of persons registered as voters at the date of the passing of the Act, and s. 12 declared that the franchises enacted were in substitution for, and accordingly repealed, the £50 county tenancy franchise and the £14 county occupancy franchise.

Owners.—Owners may be classed as (*a*) Proper Owners, (*b*) Joint Owners, and (*c*) Liferenters. Proper owners are those persons possessing the full right of property, that is, as defined by Erskine (ii. 1. 1.), "the right of using and disposing of a subject as our own except in so far as we are restrained by law or paction." There must be a title, but it need not be absolutely indefeasible. "No doubt, if the title is merely nominal it may be no title at all which the Court would sustain, but it is nowhere declared that if the title be defeasible, on any contingency, the proprietor or liferenter shall not be enrolled" (per Ld. Mackenzie in *Rutherford*, 1863, 2 M. 180). Thus heirs of entail are entitled to be registered as true owners. The title may be in the name of an individual, but if that individual is subject to control in the exercise of the franchise, his claim to be registered will be invalidated (*Hill*, 1871, 10 M. 3; *M'Kenzie*, 1891, 19 R. 297). On the other hand, though the title be in the name of trustees, beneficiaries will be entitled to be registered if their interest is truly of the nature of an heritable right (*Stewart*, 1869, 8 M. 13; *Skeate*, 1873, 1 R. 18).

By s. 8 of the Reform Act, 1832, it was provided that "all co-proprietors or joint owners 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 £10 . . . but not otherwise." This applies to counties, and the analogous provision applicable to burghs is s. 12 of the same Act. There was no limitation of the number of joint owners that may be registered under the Reform Act, 1832 (*Fox*, 1892, 20 R. 87). The Reform Act of 1868

introduced an additional £5 ownership franchise, and s. 14 of that Act provided 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, 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." This provision did not apply to the ownership franchise enacted by the Reform Act, 1832. The Reform Act, 1884 (s. 4, subs. 2), enacted that "where two or more men are owners either as joint tenants, or as tenants in common of an estate in any land or tenement, one of such men, but not more than one shall, if his interest is sufficient to confer on him a qualification as a voter in respect of the ownership of such estate, be entitled (in the like cases, and subject to the like conditions as if he were the sole owner) to be registered as a voter, and when registered to vote at an election." There is, however, the same proviso as in the Reform Act, 1868, as to owners acquiring their property by descent, marriage, etc., or being *bonâ-fide* partners carrying on trade. Sec. 10 of the Act of 1884 saved the rights of those on the register at the passing of the Act.

Liferenters are treated as owners, and they are either conventional liferenters, that is, persons entitled to a liferent by virtue of conventional provisions; or they are legal liferenters, or official liferenters. Legal liferents are courtesy and terce. Husbands are entitled to be registered as owners in right of their wives, and after their death in virtue of courtesy. The second husband of a tercer is also entitled to be registered (see s. 8 of the Reform Act, 1832, and s. 14 of the Reform Act, 1868). Official liferenters are also entitled to be registered as owners, as, for example, parochial ministers—after induction—upon their manses and glebes.

Tenants.—Under the Reform Act, 1832 (s. 9), as regards counties, there are four classes of tenants who require to have written leases before they can be registered—(*a*) tenants for life, (*b*) tenants for fifty-seven years and upwards, (*c*) tenants for nineteen years and upwards, and (*d*) tenants who have paid a *grassum* of £300. None of these require to be in the actual personal occupancy of the subjects. Tenants who pay £50 of yearly rent, and are in personal occupation either as principal tenants or as sub-tenants, are also entitled to be registered. These tenants do not require a written lease. By s. 6 of the Reform Act, 1868, tenants and occupants in counties of lands and heritages of the clear yearly value of £14 were entitled to be registered. In burghs, by virtue of ss. 11 and 12 of the Reform Act, 1832, tenants and joint tenants in personal occupancy were entitled to be registered. By s. 5 of the Reform Act, 1884, the occupation franchise in county and burgh was assimilated on a £10 basis. That Act repealed the enactment in s. 6 of the Reform Act, 1868, of the £14 occupation franchise in counties, but as it omitted to repeal s. 14 of the same Act as to joint tenants and occupants, it has been held that it is still necessary that joint tenants and occupants in counties should each possess an interest of not less than £14 per annum (*Wainwright*, 1893, 21 R. 162). For the occupation franchise, residence in the qualifying subjects is not an essential, although the words of the Statute are "actual personal occupancy" (*Richardson*, 1878, 6 R. 17; *Wetherhead*, 1878, 6 R. 20; *Johnston*, 1879, 7 R. 7; *Marrable*, 2 S. L. T. 242).

Inhabitant-Occupier. — It has already been seen that the household franchise was introduced in burghs by the Reform Act, 1868, and that

the Reform Act, 1884, in introducing it in counties and extending it, substituted a new definition of "dwelling-house." The Act of 1868 provided (s. 3) that "no man should . . . be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house." This does not prevent him, though he be a joint occupier of a dwelling-house, from being registered as a joint owner or joint occupier under the £10 occupation franchise if he is otherwise qualified.

Service Franchise.—This is an extension of the household franchise to enable those who occupy dwelling-houses as part of their remuneration to be registered. A person who has the exclusive use of a bedroom in a house may be qualified under this provision (*Ballingall*, 1886, 14 R. 127; *Gay*, 1887, 15 R. 90: *Atkinson*, 1885, L. R. 16 Q. B. D. 254; *Adams*, 1885, L. R. 16 Q. B. D. 239; *Stribling*, 1885, L. R. 16 Q. B. D. 246; *Wallace*, 1896, 24 R. 376. But see *Barnet*, 1895, L. R. 1 Q. B. 691, 1 Fox & Smith's Registration Cases, 412, and *Clutterbuck*, 1896, L. R. 1 Q. B. 396, 2 Fox & Smith, 59).

The dwelling-house must not be inhabited by any person under whom the claimant serves in the office, service, or employment by virtue of which he occupies his house. (See *Falconer*, 1891, 19 R. 295; *Walshe*, 1892, 20 R. 83; *Cruise*, 1892, 20 R. 79, and *Monyhan*, 1894, 22 R. 195.)

Lodgers.—Neither the Reform Act, 1868, which introduced the lodger franchise in burghs, nor the Reform Act, 1884, which extended it to counties, gives any definition of lodgings, and the term has not yet been the subject of judicial construction. A claim must be made annually (1868 Act, s. 4 and s. 19, subs. 3). In claiming, the statutory form and other provisions must be closely adhered to (*Meech*, 1892, 30 S. L. R. 64). The lodgings must be of the clear yearly value, if let unfurnished, of £10 or upwards. It is not necessary that that sum be paid annually by the lodger, provided he is truly a lodger, and his lodgings are of the statutory value (*Brown*, 1885, 13 R. 159; *Dickson*, 1888, 16 R. 143). A lodger is entitled to be registered who gets his lodgings as part of his remuneration (*Brown*, 1885, 13 R. 163; *Daly*, 1885, 23 S. L. R. 111). The value of the lodgings may be ascertained in any competent way, the amount actually paid by the lodger being, perhaps, the best test (*Kellie*, 1897, 24 R. 379). Prior to 1885, persons in joint occupation of lodgings could not claim to be registered. But by s. 13 of the Registration Act, 1885, it is provided that "where lodgings are jointly occupied by more than one lodger, and the clear yearly value of the lodgings, if let unfurnished, is of an amount which, when divided by the number of the lodgers, gives a sum of not less than £10 for each lodger; then each lodger if otherwise qualified . . . shall be entitled to be registered . . . provided that not more than two persons being such joint lodgers shall be entitled to be registered in respect of such lodgings." Where a claim is made by a lodger as sole tenant the joint use with others of house accommodation will not add to the value of his lodgings for the purpose of his claim, the value of the portion solely occupied by him being alone taken into account (*Gray*, 1890, 28 S. L. R. 168). The declaration annexed to the claim by a lodger is by virtue of s. 14 of the Registration Amendment Act, 1885, "*primâ facie* evidence of his qualification." It has been held accordingly (*Dalgleish*, 1894, 22 R. 198) that a lodger claim duly made must be admitted unless the *primâ facie* evidence set up by the declaration be rebutted by competent evidence. It has been held, however (*Stirling*, 1895, 23 R. 120), that the failure of a lodger to appear after two citations is sufficient to rebut the *primâ facie* evidence.

Successive Occupancy.—Sec. 12 of the Reform Act, 1832, provided for successive occupancy in burghs, enacting "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." This Statute did not recognise successive ownership. The Reform Act, 1868 (s. 13), enacted that "different premises occupied in immediate succession by any person as owner or tenant during the twelve calendar months next previous to the last day of July in any year, shall have the same effect in qualifying to vote for a burgh or county respectively as a continued occupancy of the same premises." It will be observed that this section includes owners when they happen to be also occupiers. It has been decided that the occupancy must be personal occupancy, and not mere civil possession (*Learmont*, 1875, 3 R. 5). The section last quoted of the Reform Act, 1868, has been held to apply to the lodger franchise, there being nothing in the Scottish Statute similar to the provision in the English Statute of the previous year (30 & 31 Vict. c. 102), providing (s. 4) that the lodgings shall be "part of the same dwelling-house." The successive occupancy must be within the same constituency. Prior to the passing of the Redistribution of Seats Act, 1885 (48 & 49 Vict. c. 23), it had been decided (*Stewart*, 1868, 7 M. 315) that occupancy in one division of a county cannot be combined with occupancy in succession in another division, where each division returns a member, so as to afford a qualification. By the Redistribution Act, 1885, the division of burghs into divisions returning separate members was for the first time made. Sec. 10 of that Act provides that "the occupation in immediate succession of different premises situate within a parliamentary borough shall, for the purpose of qualifying a person for voting in any division of such borough in respect of occupation (otherwise than as a lodger), have the same effect as if all such premises were situate in that division of the borough in which the premises occupied by such person at the end of the period of qualification are situate." Thus a different rule is applied in this respect in counties from that which is applied in burghs, and in burghs a different rule is applied in the case of tenants and occupants and inhabitant-occupiers on the one hand, and lodgers on the other. It has been held that the successive occupancy must be of a uniform character. Thus it is incompetent to combine in a county occupancy as owner with successive occupancy of other subjects as tenant (*Moncrieff*, 1868, 7 M. 315). In a burgh, however, occupancy as owner and occupancy as tenant in succession may be combined (*Hannah*, 1875, 3 R. 7). The household and the lodger franchise in succession cannot be combined (*Falconer*, 1891, 28 S. L. R. 195).

Disqualifications.—The following persons are disqualified from being registered as voters.

(*a*) Minors.
(*b*) Women.
(*c*) Fatuous or insane persons.
(*d*) Aliens, but it is sufficient if letters of naturalisation are obtained at any time prior to the disposal of the claim by the Sheriff.
(*e*) Assessors.
(*f*) Peers.
(*g*) Those who fall under the different statutory disqualifications as to non-payment of rates or receipt of parochial relief.

The Reform Act, 1832, made the proviso with regard to the £10 occupant in burghs (s. 11) that the claimant shall have paid on or before the twentieth day of July in each year all assessed taxes which shall have become payable by him in respect of the premises for which he claims previously to the sixth day of April then next preceding. The only tax which falls under this provision is the inhabited house duty. The Reform Act, 1868, in creating the household franchise in burghs now extended to the counties, and the £14 (now £10) occupation franchise in counties, made a proviso in each of these cases (ss. 3 and 6) that no man should be entitled to be registered as a voter who shall have failed to pay on or before the twentieth day of June in each year all poor rates, if any, that have become payable by him in respect of the premises for which he claims. The payment of poor rates is a condition of these franchises only where rates are imposed, and it is not necessary to impose them in the case of tenants and occupants of dwelling-houses in counties of annual rents of less than £4, because the rating body in counties has the power, if they see fit, to assess the owners of such small houses direct. Where that power is exercised, therefore, it follows that a man who occupies a dwelling-house of the annual rent of, say, £3, cannot be disqualified for non-payment of rates even though he fails to pay his rent, when a man who pays a £50 rent and fails to pay his poor rates is disqualified. So also a person entitled to the service franchise cannot be disqualified for non-payment of rates, because he is not rated.

Constituencies.—Before 1832 Scotland had forty-five members of Parliament, thirty elected by the freeholders of the counties and fifteen by the town councils of the burghs. The Reform Act, 1832, increased the number to fifty-three, thirty of whom were county and twenty-three burgh representatives. The Reform Act, 1868, increased the number to thirty-two county and twenty-six burgh members, and added two representatives of universities, making in all sixty members. The Redistribution of Seats Act, 1885, increased the total number of members to seventy-two, of whom thirty-nine are assigned to the counties, thirty-one to the burghs, and two to the universities.

For convenience of reference the following table of existing franchises may be useful:—

COUNTY.

A *Household Franchise.*—Householder, *i.e.* occupant as owner or tenant of any house or part of a house occupied as a separate dwelling.
Qualification.—Sole occupancy for twelve months prior to 31st July. For same period voter must not have been exempted from poor rates on ground of inability to pay, must have paid rates if any laid on him, and must not have been in receipt of parochial relief.

B *Occupancy Franchise.*—Occupant of any land or tenement of yearly value of £10 (*i.e.* need not be a dwelling-house).
Qualification.—Occupancy twelve months before 31st July. For same period must not have been exempted from poor rates on ground of inability to pay, must have paid rates if any laid on him, and must not have had parochial relief.

C *Service Franchise.*—Occupation by servant, in virtue of service, of dwelling-house (not also occupied by master) gives servant qualification as householder. See above, A.

D £10 *Lodger Franchise.*—£10 calculated on unfurnished value.

Qualification.—Occupancy and residence either as sole or joint lodger for twelve months prior to 31st July.

Must make a renewed claim each year to assessor after 31st July and before 21st September. No more than two joint lodgers are entitled to be registered.

E *Ownership* of heritable subjects of yearly value of £10 (if fiar and liferenter, the liferenter has the vote).

Feu-duties, except in the case of presently registered owners, no longer afford a qualification.

Qualification.—Possession requisite six months before 31st July, unless within six months the property has come by inheritance, marriage, etc.

F *Ownership* of lands and heritages of yearly value of £5 as appearing in the valuation roll. (Rules as to fee and liferent as above.)

Qualification.—Possession requisite six months before 31st July in all cases.

Tenants under leases of fifty-seven years or upwards are reckoned owners for this qualification.

Note as to E *and* F.—For the future, where there are joint owners, not more than one is registrable—unless the property has come by succession, marriage, or the like, or when they occupy the tenement as partners in trade, in which case the subject gives as many qualifications as the value will permit.

Husbands are reckoned owners of lands belonging to their wives.

G £10 *Interest* (after deduction of rent) as tenant for life, or under a lease of fifty-seven years or upwards, or £50 interest (after deduction of rent) as tenant for nineteen years.

Qualification.—Twelve months' possession before 31st July, but no occupancy requisite.

BURGH.

H *Householder.*

Conditions same as A.

J £10 *Occupant* (as in B).

Must have paid assessed taxes, payable in respect of premises, and not had parochial relief. Must also have occupied premises for twelve months prior to 31st July, and must have resided in burgh, or within seven miles, for six months prior to 31st July.

K *Service Franchise.*

Conditions same as C.

L £10 *Lodger.*

Conditions same as D.

M £10 *Owner* (liferenter, not fiar, when both exist).

Must have paid assessed taxes, payable in respect of premises, and not had parochial relief, and resided as in J.

II. Municipal Franchise.

The basis of the municipal register of voters is the parliamentary register. By the Municipal Elections (Scotland) Act, 1868 (31 & 32 Vict. c. 108), s. 3, the right of electing the town council was declared to belong to all such persons as are or shall be qualified to vote in the election of a member or members of Parliament for such burgh by virtue of the Reform Acts, 1832 and 1868, and as are duly registered as such voters, and also to all such persons within the burgh beyond the parliamentary boundaries

as would be qualified under the said Acts were the qualifying subjects within said boundaries. By the Municipal Elections Amendment (Scotland) Act, 1881 (44 Vict. c. 13), s. 2, it was provided that females unmarried, and married females not living in family with their husbands, should be registered as voters in the same way and under the same conditions as they would be if they were males. By the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), ss. 30 and 31, provisions are made conferring the franchise on the same classes of persons in police burghs as for parliamentary burghs and making provision for the making up of the register.

III. County and Parish Council Franchise.

By the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), the franchise is conferred on (1) every person registered as a parliamentary elector for a county or division of a county, subject, however, to the condition that failure to make payment of the consolidated rates as provided by the Statute shall be a disqualification, and (2) on the persons contained in the supplementary list directed to be prepared every third year for the purpose of the election. Such supplementary list is to contain (*a*) peers who would be qualified as parliamentary electors if they were not peers, and (*b*) women unmarried or married and not living in family with their husbands who would similarly be qualified as parliamentary electors if they were men. The parish council franchise is the same, the difference in the two rolls being merely that of geographical division. By s. 11 of the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58), provision was made for allowing any married woman to be registered on a county council, municipal, or parish register, provided that husband and wife shall not be registered in respect of the same property.

IV. School Board Franchise

"The electors shall consist of all persons being of lawful age and not subject to any legal incapacity whose names are entered on the latest valuation roll applicable to the parish or burgh 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 four pounds, 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" (Education Scotland Act, 1872, 35 & 36 Vict. c. 62, s. 2).

Fraud.—Professor Bell (*Prin.* s. 13) describes fraud as "a machination or contrivance to deceive." The varieties of fraud are infinite. As put by Mr. Ker (*Treatise on the Law of Fraud and Mistake*, p. 1): "Fraud, in the contemplation of a Civil Court of justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another. All surprise, trick, cunning, dissembling, and other unfair way that is used to cheat anyone is considered as fraud. Fraud in all cases implies a wilful act on the part of anyone, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to, either at law or in equity." Obligations and contracts are not binding if they have been effected by fraudulent means; for the consent obtained by

fraud is, apparent or fictitious, not real consent, which is the foundation of all valid obligations. Fraudulent misrepresentation may consist either in the statement of what is false (*assertio falsi*), or in the concealment of what is true (*suppressio veri*). But either the statement or the concealment must be of what is material to the party deceived: there must be *fraus dans causam contractui*, not merely *fraus incidens contractui*.

There are three characteristics of fraud in a legal sense: *First*, There must be dishonest intention on the part of the person alleged to have practised the fraud; for if a person has a *bonâ fide* belief in the truth of what he asserts, he is not guilty of fraud. *Second*, The fraud must be successful, and the party injured must have been thereby deceived. Where he who alleges fraud has knowledge of the deception employed, he has no remedy: *haud enim decipitur qui scit se decipi*. *Third*, The party deceived must sustain damage.

It may be here noted that the dishonest intention above referred to has nothing to do with bad or improper motive. For if a party makes a misrepresentation in point of fact, however innocent his motive may be, his responsibility in a civil proceeding is the same as though he had acted from a desire to injure others or to benefit himself. This possible absence of dishonest motive from civil fraud has given rise to the expression "legal," as opposed to "moral," fraud. The use of this term was strongly condemned by L. J. Bramwell in *Weir*, 1878, 3 Ex. D. 238. His Lordship said: "I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud or of anything else, except when some duty is shown and correlative right, and some violation of that duty and right. And when these exist, it is much better that they should be stated and acted on, than that recourse should be had to phrases illogical and unmeaning, with consequent uncertainty." The expression, however, is still constantly found (see judgments of the judges in the House of Lords in *Peek*, 1889, 14 App. Ca. 337, and of Ld. Rutherfurd Clark in *Menzies*, 1893, 20 R. H. L. 108). Sir Frederick Pollock, in his work on *Contracts* (p. 504), suggests the use of the term constructive fraud as better. (See Bell, *Prin.* ss. 13, 14: Stair, i. 9. 9: Ersk. iii. 1. 16: Ker, *supra*: Moncreiff on *Misrepresentation*: *Chesterfield* v. *Jansen*, 2 Ves. 125 (Ld. Hardwicke's classification of fraud).)

Misrepresentation: Innocent or Fraudulent.—Strictly speaking, misrepresentation has a wider signification in law than fraud. Persons are in many cases deceived by statements, and led to contract to their prejudice, when those making the statements have a *bonâ fide* belief in their truth, and have no intention to deceive. For the legal effects of innocent misrepresentation, see under ERROR; MISREPRESENTATION: *Stewart*, 1890, 17 R. H. L. 25; *Menzies*, 1893, 20 R. H. L. 108: *Adam*, 1886, 34 Ch. D. 582, 13 App. Ca. 308; *Woods*, 1893, 20 R. 477; *Blackiston*, 1894, 21 R. 417. It may be here noticed that while one who has been misled by fraudulent misrepresentation may either reduce a contract to which he has become a party, or bring a direct action of damages against the person responsible for the fraud, yet he who has been deceived by the innocent misrepresentation of another has no other remedy than to reduce the contract into which he has entered in error thereby induced. For the distinction between a representation and a warranty, see under WARRANTY.

Fraud: How committed.—Fraud may be perpetrated by words, or acts, or concealment. "Where a party designedly misrepresents a certain fact, for the purpose of misleading or imposing upon the other party to his

injury, he is guilty of positive fraud; *dolum malum ad circumveniendum.* Properly speaking, a representation is a statement or assertion made by one party to the other, before or at the time of the contract. Nor does it matter by what means such misrepresentation was effected—whether by silence, by acts, by words, or signs, or artifices of any kind; it is fraud if the party upon whom they are practised be actually deceived thereby" (Story, 5th ed., s. 632).

Fraudulent Statement.—The statement made must be false, but it is not essential that the party making it should know of its falseness. He is equally responsible if he make a statement recklessly, careless whether it be true or false, or if he tender information as true within his knowledge which he does not *bonâ fide* believe to be true. In *Reese River Silver Mining Co.*, 1869, L. R. 4 E. & I. App. 64, at p. 79, Ld. Cairns said: "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." Again, in *Evans*, 1853, 13 C. B. 777, Maule, J., said: "If a man having no knowledge whatever on the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself or to deceive a third party, he is in law guilty of a fraud, for he takes on himself to warrant his own belief of the truth of that which he asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may have been fraudulently made" (see the cases collected and discussed in the arguments and opinions in *Peek*, 1888, 37 Ch. D. 541, rev. 14 App. Ca. 337).

If, however, a man *bonâ fide* believes what he asserts to be true, he is not responsible in an action for fraud; and want of reasonable grounds for his belief does not conclusively establish absence of such belief (*Cullen's Tr.*, 1865, 3 M. 935). In *Lees*, 1882, 9 R. 807, Ld. Pres. Inglis, referring to the liability of directors of companies for statements contained in the prospectuses issued by them, said, at p. 853: "If they (*i.e.* the directors) make the statements in the *bonâ fide* belief that they are true, they are not guilty of fraudulent misrepresentation merely because, in the judgment of the Court or of a jury, they had not reasonable—which I understand to mean sufficient—grounds for believing the statements to be true; for this would make them answerable for the erroneous inference which they draw from the facts within their knowledge, which is only an error of judgment. A man making a statement on any subject which he believes to be untrue, though he does not know it to be false, is dishonest; but if he merely makes a statement which he does not actually believe to be true, that is a negative state of mind, and his honesty or dishonesty will depend on his relation to the facts which he states and to the persons whom he addresses." The different points here referred to were discussed in the House of Lords in the important case of *Peek*, 1889, 14 App. Ca. 337. The facts of that case were briefly these. A prospectus issued by a tramway company contained the following statement: "One great feature of this undertaking, to which considerable importance should be attached, is that, by the Special Act of Parliament obtained, the company has the right to use steam or other mechanical motive power instead of horses, and it is fully expected, by means of this, a considerable saving will result in the working expenses of the line, as compared with other tramways worked by horses." In point of fact, the company had not the right here represented—the employment of steam-power, granted

provisionally in their Act, being dependent on the sanction of the Board of Trade. When asked, the permission was refused, and the company went into liquidation. Thereupon a shareholder, who had taken shares on the faith of the prospectus, brought an action of damages against certain of the directors personally. The House of Lords, reversing the judgment of the Court of Appeal, held that the defendants were not liable in damages for the false statement made in the prospectus. It was held that the defendants *bonâ fide* believed that the company had the right to use steam-power: and that the absence of reasonable grounds for belief in this statement was not inconsistent with a *bonâ fide* belief therein. Ld. Herschell, however, having arrived at the above conclusion, added this important qualification to his judgment. "At the same time," he said, "I desire to say distinctly, that when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in possession of the person making it, are most weighty matters of consideration. The ground upon which an alleged belief was founded is a most important test of its reality." The decision in this case led to the passing of the Directors Liability Act, 1890 (53 & 54 Vict. c. 64), which has shifted the onus of proof in actions of damages brought against directors, promoters, and others responsible for the statements contained in the prospectuses of companies. Briefly stated, that Act provides that such persons are liable (*a*) for untrue statements in a prospectus, unless they establish reasonable ground for belief in their truth; (*b*) if the statements are made by experts, that they are correctly reported and were on reasonable grounds believed to be competent; and (*c*) if made by officials, the fact that they were correctly reported (see under Directors Liability Act, 1890).

If a person makes a fraudulent statement in the *bonâ fide* belief that it is true, but he subsequently learns that it is false, he is bound to communicate the truth, and will be held liable for fraudulent misrepresentation if he allow the other party to act in a belief in the statement as originally made by him (*British Equitable Insur. Co.*, 1869, 38 L. J. Ch. (N. S.) 314).

Statement of Fact.—There must be a false statement of what is matter of fact. No action lies for the sanguine expression of opinion as to the prospects of any venture or undertaking (*Dunnett*, 1887, 15 R. 131). If, however, it can be established—the proof is always difficult—that the opinion was not really entertained, an action for fraudulent misstatement of fact lies. In *Edginton* (1885, 29 Ch. D. 459, 479, 481) L. J. Bowen said: "There must be misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion." The same rules hold as to expressions of belief, intention, expectation, etc. So, too, mere exaggeration is insufficient to establish fraud, especially if the parties are dealing at arms' length, and no confidential relationship exists between them imposing a duty of frank and accurate statement. On the other hand, even the truth may be so stated as to be equivalent to a falsehood. In *Moens* (1842, 10 M. & W. 158) Alderson, B., said: "If a person makes a representation or takes an oath, of that which is true, if he intends that the party to whom the representation is made should not believe it to be true, that is a false statement." And a fraudulent statement of law, relied on by the party to whom it is made, may amount to a misstatement of fact (see cases in Moncreiff on *Misrepresentation*, 112 *et seq.*). But carelessness or recklessness in the statement of a point of law, where both parties are supposed to have equal means of knowledge, does not give rise to an action of fraud (see B. P. 14, note (*c*); *Brownlie*, 1880, 7 R. H. L. 66; *Rashdall*, 1866, 2 Eq. 750).

Ambiguous Statement.—If the statement complained of as fraudulent be ambiguous, a pursuer can only succeed if he show that he understood the words in the false sense. In *Smith*, 1881, 20 Ch. D. 27, at p. 45, Jessel, M. R., said: "A statement may be ambiguous: it may have one of two meanings, and the Court cannot decide which meaning it has . . . it may be so ambiguous that one judge cannot find out which of two meanings it has, another judge may take one meaning, and the third judge may take the other. It is for him (*i.e.* the plaintiff) to say, 'I relied on the statement in this meaning, that is the meaning I took; if it is ambiguous, it is the fault of the defendant; and relying on that, I entered into the contract.' But if the plaintiff will not tell us what he relied on,—if he says to the Court, 'Please to find out the meaning: I relied on the statements in the prospectus, and I relied upon them according to their meaning, whatever that meaning is,' —surely that will not do. The Court may think it means the very thing the plaintiff did not think it meant; and then are they to say he has been deceived because he took it in the wrong sense? That, of course, is impossible."

Fraudulent Acts.—Fraud may be perpetrated by art or design rather than statement. Thus in *Walters* (1861, 3 De G. F. & J. 724) Ld. Campbell said: "A single word, or a nod, or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient for a Court of equity to refuse specific performance of the agreement."

"So *a fortiori* would a contrivance on the part of the purchaser, better informed than the vendor of the real value of the subject to be sold, to hurry the vendor into an agreement without giving him the opportunity of being informed as to its real value, or time to deliberate and take advice respecting the conditions of the bargain."

Fraudulent Concealment.—Fraud may consist in the suppression of what is true, just as much as in the representation of what is false. If a man conceals a fact that is material to the transaction, knowing that the other party acts on the assumption that no such fact exists, it is as much a fraud as if the existence of such a fact were expressly denied, or the reverse of it expressly stated (*Peek*, 1873, 6 E. & I. App. Ca. at p. 400). Concealment, however, is of no importance, unless a party be under a duty to disclose (*Irvine*, 1850, 7 Bell's Sc. App. 186). Hence, in ordinary transactions, *e.g.* in the contract of sale, where parties deal at arms' length, there is no duty to disclose facts within the knowledge of either which may reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to fraud, unless it be with reference to a matter where the party concealing has means of knowledge which the other has not, and the latter is entitled to rely on the knowledge being imparted (see *Duthie*, 21 Jan. 1815, 15 F. C. 162). But anything in the nature of active concealment is fraudulent, as where, for example, details of the value of a property were given by a seller, and one material fact kept back (*Jones*, 1880, 14 Ch. D. 588). So, too, a partial statement may be equivalent to an untrue statement (*Arkwright*, 1881, 17 Ch. D. 301, p. 318, James, L. J.; *Emma Silver Mining Co.*, 1879, 11 Ch. D. 935).

Duty to Disclose.—A duty to disclose, failure in which is tantamount to fraud, may arise either (1) from the relationship existing between the contracting parties, or (2) from the nature of the contract. Under the first head come family transactions (*Menzies*, 1893, 20 R. H. L. 108), and, generally speaking, all transactions between parties where one of them

is placed in a position of confidence and trust towards the other. In *Macpherson's Trs.*, 1877, 5 R. H. L. 9, a sale was set aside on the ground that the fact was not disclosed that the agent for the seller was really personally interested in the purchase (see cases under CIRCUMVENTION, *Undue Influence*). Under the second head, it is in insurance contracts that the duty to reveal information is strongest, and particularly in marine insurance (see *Kinloch*, 22 Jan. 1813, F. C. 108; *Hutchinson & Co.*, 1876, 3 R. 682, B. P. 474; Arnould on *Marine Insurance*). (For the effect of concealment and misrepresentations by a person insuring his life, see *Buist*, 1878, 5 R. H. L. 64; *Scottish Widows' Fund and Life Assurance Society*, 1876, 3 R. 1078; *Foster*, 1873, 11 M. 351; *Weems*, 1884, 11 R. H. L. 48; and under WARRANTY). So, in cautionry, a creditor, if he take a guarantee to cover past defalcations of a dishonest servant as well as to make provision for his security in the future, without communicating the servant's dishonesty to the cautioner, is held to act fraudulently (*French*, 1893, 20 R. 966; *Smith*, 1829, 7 S. at p. 248; *Railton*, 1844, 3 Bell's App. 56, 7 D. 748, 8 D. 747; *Royal Bank*, 1844, 6 D. 1418). Again, by 30 & 31 Vict. c. 131, s. 38, it is provided that every prospectus shall specify the names of the parties to any contract entered into by the company or the promoters, directors, or trustees thereof, before the issue of such prospectus; and that any prospectus not specifying such name shall be deemed fraudulent on the part of the promoters, etc., as regards any person taking shares on the faith of such prospectus, unless such party have notice of such contract (*Arkwright*, 1881, 17 Ch. D. 301; *M'Morland's Trs.*, 1896, 24 R. 65).

Material Inducement.—No action on the ground of fraud lies unless the pursuer has been materially induced to act to his prejudice by the misrepresentation of the defender (*Attwood*, 1838, 6 Cl. & Fin. 444, 447). A statement may materially induce a person to act upon it, though it is not a material representation. Where, however, the statement is material and false, the onus rests upon the defender to show that it was not relied upon. Misrepresentations which are of such a nature as, if true, to add substantially to the value of the property or are calculated to increase substantially its apparent value, are material. In *Smith* (1884, 9 App Ca. 187) Ld. Blackburn, at p. 196, said: "If it is proved that the defendants, with a view to induce the plaintiffs to enter into a contract, made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement." The test of material inducement is not whether the pursuer's action would, but whether it might, have been different if the false statement had not been made. The misrepresentation founded on must be a proximate or immediate cause of the transaction; but it need not be the sole cause of the pursuer's acting as he did (*Edgington*, 1885, 29 Ch. D. 481, 483; *Peek*, 1887, 37 Ch. D. 574, 584). A pursuer cannot recover if it be shown that he had knowledge of the facts contrary to the representation, or if he has stated in terms, or showed clearly by his conduct, that he did not rely on the statements made to him by the defender (*Redgrave*, 1881, 20 Ch. D. at p. 21; *Attwood*, 1838, 6 Cl. & Fin. 232); nor if the means of informing himself are pointed out to him, and they are at hand (*New Brunswick Railway Co.*, 1862, 9 Cl. H. L. 711).

Damage.—The foundation of an action for fraud is *damnum et injuria*. Fraud without damage, or damage without fraud, gives no cause of action (*Pasley*, 1789, 3 T. R. 51). But an action lies if the fraud leads to any sort of damage (*Smith*, 1859, 7 Cl. H. L. 775; *Smith*, 1884, 9 App Ca. at p. 195).

Responsibility of Principal for the Fraud of an Agent.—A principal, though himself innocent, is civilly responsible for the fraud of an agent, provided the agent act within the scope of his employment and commit the fraud for the benefit of the principal (*Jardine's Trs.*, 1864, 2 M. 1101; *Barwick*, 1867, L. R. 2 Ex. 259; *Clydesdale Bank*, 1877, 4 R. 626; Moncreiff on *Fraud and Misrepresentation*, 32–65, 393–412; Bell, *Prin.* ss. 13*a*, 14, 224*b*, and cases there cited). But a false and fraudulent statement, made by a servant for ends of his own, though in answer to a question of a kind he was authorised to answer on his master's behalf, will not render the master liable in an action of damages (*British Mutual Banking Co.*, 1887, 18 Q. B. D. 714). An agent who commits a fraud is liable along with his principal for the consequences thereof, for all "persons concerned in the commission of a fraud are to be treated as principals; no party can be permitted to excuse himself on the ground that he acted as the agent or servant of another" (per Ld. Westbury in *Cullen*, 1862, 4 Macq. 424). See the question discussed as to which of two innocent parties is to suffer for the fraud of a third party in *Rose*, 1880, 7 R. 925.

The liability of a firm for the fraud of its partners is dealt with in the Partnership Act, 1890 (53 & 54 Vict. c. 39, ss. 10–12). On the same principle, companies are liable for the fraud of their officials, directors, secretary, etc. (*Addie*, 1867, 5 M. H. L. 86; *Houldsworth*, 1880, 7 R. H. L. 53; *Clavering, Son, & Co.*, 1891, 18 R. 652). A shareholder, however, has no remedy against the company unless he rescinds his contract to take shares. He cannot remain on the register of shareholders and sue the company for damages (*Houldsworth* and *Addie*, *supra*). As to cases where the fraud of a cedent is pleadable against an assignee, see *Scot. Widows' Fund*, 1878, 5 R. H. L. 64; and for the effect of fraud on the negotiation of bills of exchange, 45 & 46 Vict. c. 61, ss. 29 and 30 (*Young*, 1896, 23 R. 419).

Communication of Fraudulent Statement.—A fraudulent statement must be communicated to the person deceived. This may be done directly or indirectly through an agent or through some other person, by whom the deceiver knows that the statement made by him will or may be communicated to another, and that the latter will or may act upon it to his damage (Moncreiff, 61). The misrepresentation may also be made to the public generally, as in the case of statements in the prospectus of a company. But, as a prospectus is intended to induce persons to apply for shares in a company, and is not addressed to those who purchase their shares in open market, only original allottees, and not purchasers from them, have recourse against the promoters for misrepresentations contained therein (*Peek*, 1873, L. R. 6 E. & I. App. 377). So, too, in *Ed. Un. Brew. Co.*, 1893, 20 R. 581; affd. 21 R. H. L. 10, where a sale had been effected by A. to B. on a false basis, and thereafter B. sold to C. at a profit, it was held, in an action at the instance of B. and C. (1) that C. had no title to reduce, as he was not privy to the contract between A. and B., and (2) that B., who did not propose to give up the profit he had made, could not reduce, as he had suffered no damage, and that C., as his assignee, had no higher right.

Contract induced by Fraud is Voidable, not Void.—Where fraud or misrepresentation has induced essential error in the party to an obligation or contract, such obligation or contract is null and void, *e.g.*, if a man is induced to sign a conveyance when he supposes he is signing a testamentary deed (see under ERROR). But, in the ordinary case, where a man is induced by fraud to give his consent to an agreement, the transaction is voidable, not void. In *Clough*, 1871, L. R. 7 Ex. 26, Blackburn, J., at

p. 34, said: "The fact that the contract has been induced by fraud does not render the contract void, or prevent the property passing, but merely gives the party defrauded a right, on discovering the fraud, to elect whether he shall continue to treat the contract as binding, or disaffirm the contract and resume the property. . . . If it can be shown that [the party defrauded] has at any time, after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, his election is determined for ever. The party defrauded may keep the question open, so long as he does nothing to affirm the contract. . . . In such cases the question is, Has the party on whom the fraud has been practised, having notice of the fraud, elected not to avoid the contract, or has he elected to avoid it, or has he made no election? As long as he has made no election, he retains the right to determine it either way, subject to this, that if, in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind." The doctrine that a contract cannot be reduced unless *restitutio in integrum* be offered, and also unless the action be brought before third parties have acquired rights under the contract, is of most importance in cases where shareholders of companies seek to have their names removed from the list of shareholders on the ground that they were induced by fraud to take shares. As was seen above, a company cannot be sued in an action of damages for the fraud of its directors, hence if a shareholder cannot get his name removed from the list of contributories his only recourse is to bring a direct personal action against those of the directors or officials of the company on whose fraudulent statements he relied. Now, it is well settled that, after a company has gone into liquidation, it is too late for a shareholder to have his name removed from the register on the ground of fraud (*Oakes*, 1867, L. R. 2 E. & I. App. 325; *Stone*, 1877, 3 C. P. D. 282; *Graham*, 1865, 2 M. 559, 3 M. 617; *Addie*, 1865, 3 M. 899; affd. 5 M. H. L. 80; *Houldsworth*, 1879, 6 R. 1164; affd. 7 R. H. L. 53). As put by Ld. Kinnear in *Morgan* (*West*) *Gold Mining Co.*, *infra*: "When creditors have acquired rights by contracting with the company upon the strength of the register, which contained his (pursuer's) name, it is too late after liquidation, when the creditors' rights against the company have been converted into rights against the shareholders, to rescind the contract to take shares and withdraw from the register on the allegation that the contract was procured by fraud" (see also L. P. Inglis' remarks in *Tennant*, 1879, 6 R. 554). Even if the assets in the hands of the liquidator are sufficient to pay the creditors in full, a shareholder whose name is on the register at the date of winding up cannot rescind his contract and get rid of his liabilities as a member while the rights and liabilities of the shareholders *inter se* remain to be adjusted (*Burgess*, 1880, 15 Ch D. 509). And in certain circumstances, even before the date of actual liquidation, reduction may be incompetent (*Tennant*, 1879, 6 R. 554, 6 R. H. L. 69). But where shares in a public company are forfeited for non-payment of calls, the holder ceases to be a member, and becomes merely a debtor, of the company, and therefore is not barred by the subsequent liquidation of the company from pleading, in answer to a demand for payment of calls, that he was induced to take the shares by the fraudulent misrepresentations of the company (*Morgan* (*West*) *Gold Mining Co.*, 1891, 18 R. 772).

Partial Reduction. — A party cannot adopt a contract so far as beneficial and reject it so far as detrimental. In *Smyth*, 1891, 19 R. 81,

Ld. Kinnear, at p. 89, said: "It is very clear in law that a contract induced by fraud is not null and void, but voidable. It is valid until it is rescinded; and, accordingly, the party defrauded has in general the option, when he discovers the fraud, of rescinding the contract or of affirming it. But he must do either one or other. He cannot take the benefit of the contract so far as it is beneficial to himself and reject it in so far as it is burdensome to him. If he affirms it, he must affirm it in all its terms. If he reduces it, he must give up any benefit he may have before the fraud was discovered (see the doctrine of *restitutio* discussed in *Adam*, 1888, 13 App. Ca. 308). Although one beneficiary may be barred from reducing a deed by trustees, or be responsible for the consequences of a trustee's defalcations, a judicial factor, who represents all the interests of those benefited by the trust, would only be barred by the trustees showing bar against all the beneficiaries (*Adair's Trs.*, 1894, 22 R. 116, Ld. Young, at p. 121).

Proof of Fraud.—Fraud may, as a general rule, be proved by parole evidence; and this is so even though it is sought thereby to contradict the terms of a written agreement (Bell, *Prin.* s. 2257). So, too, in *Wink* (1867, 6 M. 77), proof of an alleged fraudulent trust to defeat the rights of future creditors was held not limited to writ or oath (see also *Elibank*, 1827, 6 S. 69; *Marshall*, 1859, 21 D. 514). On the other hand, it is *inter alia* provided, by 19 & 20 Vict. c. 60, s. 6, that "all representations and assurances as to the character, conduct, credit, ability, trade or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, etc., shall be in writing, and shall be subscribed by the person making such representations or assurances, or by some person duly authorised by him or them, otherwise the same shall have no effect." It has been held that these terms are comprehensive and imperative, and that no representations with the intent therein specified, however falsely and fraudulently made, have any legal effect unless reduced to writing (*The Clydesdale Bank Ltd. and Another*, 1896, 23 R. H. L. 22).

The averments on which a case of fraud is founded must be clear and specific. It is not sufficient to make a bare averment of fraud: the facts and circumstances from which fraud may be inferred must be set forth. Thus, in *Shedden*, 1852, 14 D. 721 (affd. 17 D. (H. L.) 18), Ld. Fullerton, at p. 727, said: "It is not enough for a party founding a reduction on the head of fraud, to state that fraud has been committed. Fraud is a general term, to be inferred from specific acts. The party, then, must state in what the fraud consists, and what the acts are from which the existence of fraud is to be inferred. And if the facts which he does state are clearly insufficient to support such an inference, the objection of irrelevancy must be sustained. Not that the general allegation of fraud is in itself irrelevant, but that the acts as averred are irrelevant to support the general allegation." (Cf. Ld. Justice Clerk and Ld. Young upon general averments of fraud in *Bonstead*, 1879, 7 R. 139; *Joel*, 1859, 22 D. 6; *Forth Marine Insurance Co.*, 1868, 10 D. 689, 6 Bell, 541; *Kirkpatrick*, 1850, 7 Bell, 186; *Leslie*, 1856, 18 D. 1047; *Broatch*, 1866, 4 M. 103; *Liverpool Palace of Varieties*, 1896, 4 S. L. T. No. 233 (necessity of averment of breach of duty to communicate where action brought on the ground of fraudulent concealment); *Burnett*, 1859, 21 D. 813; *Ehrenbacher & Co.*, 1874, 1 R. 1131 (no relevant averment of *fraus dans causam contractui*); *Tennant*, 1870, 8 M. H. L. 10; *Assets Co.*, 1897, 34 S. L. R. 353 (diligence granted for recovery of documents directed to establish general averments of fraud).) As to the inference of fraud to be drawn from facts and circumstances, see *Gordon*, 1730, 1 Pat. App. 47;

Allan, Stewart, & Co., 1790, 3 Pat. App. 191; *Grieve*, 1869, 8 M. 317 (presumption against deed by law agent in his own favour); and see under CIRCUMVENTION, *Undue Influence*.

If an action is brought against a firm for damages on the ground of fraud, the names of the partners who are alleged to have committed the fraud must be given. "Fraud is always personal; and though a firm may be responsible for the individual fraud of one of its partners acting within the scope of his authority, it is incompetent to charge the firm generally with the fraud" (per Ld. Kinnear in *Thomson & Co.*, 1895, 22 R. 432, at p. 437).

Remedies.—If a party has been induced to enter into a contract by the fraud of the other contracting party, two remedies are open to him, *i.e.*, either reduction of the contract, or an action of damages against the deceiver for the injury he has sustained. And although in contracts of sale the *actio quanti minoris* was formerly not recognised as part of the law of Scotland, it would appear that a party who had been led into the contract might sue for damages even where he had retained the goods (*Amaan*, 1865, 3 M. 526; *Dobbie*, 1872, 10 M. 810). For the remedies of a purchaser now, see Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, ss. 51 to 54; and under SALE. If, however, a person has been induced to enter into a contract by the fraud of a third party, he is not entitled to be relieved of the contract by the third party, but is only entitled to damages (cf. Lord President in *Thin & Sinclair*, 1896, 24 R. 198). Although an action of reduction is incompetent in the Sheriff Court, it is provided by the Act of 1877 (40 & 41 Vict. c. 50, s. 11), that "when in any action competent in the Sheriff Court, a deed or writing is founded on by either party, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof." In virtue of this provision, where a pursuer brings an action founded on a deed, a defender may state in defence that the said deed was obtained from him by fraud (Dove Wilson on *Sheriff Court Practice*, 60–63).

Fraud (Criminal Law). — Fraudulent conduct, which is punishable as criminal, is described in popular language as swindling or cheating. The essence of the offence consists in the employment of falsehood as the means of attaining a desired end.

1. *False Representations directly made.*—It is criminal to assume the character of a public official, such as a notary, clergyman, exciseman, tax-gatherer (*Cruickshank*, 1829, Shaw, 227), or sheriff-officer (*MacInnes and Macpherson*, 1836, 1 Swin. 198). It is a crime if an officer who is under suspension persists in discharging his official duties (*Miller*, 1843, 1 Broun, 529).

Again, it is an offence to personate another in order that the personator may obtain some advantage. Thus, personation of another in a court of justice is a crime at common law (*Rae and Little*, 1845, 2 Broun, 476), as it is now also by statute (37 & 38 Vict. c. 36). To personate a tradesman in order to get goods, or the owner of goods in order to get delivery, is criminal (*Michael*, 1842, 1 Broun, 472; *Hardinge*, 1863, 4 Irv. 347). It is likewise criminal to personate a collector for a public office or charity (*Cruickshank*, 1829, Shaw, 227), or the agent or servant of a person in order to obtain goods (*Walker*, 1839, Bell, *Notes*, 64). It is a crime to pretend to be a farmer so as to sell horses as sound which are unsound (*Hood*, 1853, 1 Irv. 236); or to be a pensioner, in order to get payment of

a pension or to obtain credit (*Meldrum and Reid*, 1838, 2 Swin. 117): or to be a person of means or position, in order to get credit (*M'Gregor and Inglis*, 1846, Ark. 49; *Kronacher*, 1852, 1 Irv. 62; *Macleod*, 1888, 2 Wh. 71).

To tell falsehoods to obtain advantage is criminal. Fortune-telling and Card-sharping (*q.v.*) fall under this denomination (see *Clark and Others*, 1859, 3 Irv. 409). Hume instances the cases of apprentices, and men who are diseased, obtaining the enlistment bounty, by stating falsely that they were not apprentices, and, in the latter case, that they were sound (Hume, i. 174).

It is a crime for a person to obtain a letter addressed to another and to open it (Hume, i. 174); to overcharge postage and appropriate the overcharge (*Reeves*, 1843, 1 Broun, 612): to make to the authorities a false accusation that another person is guilty of a crime (*Miller*, 1847, Ark. 355).

It is criminal to obtain goods or money by means of a cheque, when the person using the cheque knows he has no funds in bank with which to meet the cheque (*Witherington*, 1881, 4 Coup. 475). But, if there is no intent to defraud, there is no crime in drawing a cheque although it happens that there are no funds to meet it (*Rae and Linton*, 1874, 3 Coup. 67). It is a crime to obtain goods by means of false representations. These representations, however, in order to make the offence criminal, must have reference to a past or present fact, and not solely to future time (*Hall*, 1881, 4 Coup. 438).

2. *Where False Representations are not directly made.* — Under this category falls the case of a person obtaining goods or lodgings with the intention of not paying for them. This is criminal (*Wilkie*, 1875, 3 Coup. 102), although no false representations have been made (*Smith*, 1839, 2 Swin. 346: *M'Intosh*, 1840, 2 Swin. 511; *Harkins*, 1842, 1 Broun, 420; *Hall and Others*, 1849, J. Shaw, 254; *Kronacher*, 1852, 1 Irv. 62; *Rodger*, 1868, 1 Coup. 76; *Bradbury*, 1872, 2 Coup. 311; *Witherington, ut supra*; *Hall, ut supra*).

It is criminal to pretend that an article is genuine, and try to pass it off as such, when it is not so (*Bannatyne*, 1847, Ark. 361; *Paton*, 1858, 3 Irv. 208).

3. *Fraud in reference to Deeds.*—It is a crime to vitiate, in an essential part and to the prejudice of others, any genuine deed (*Fraser*, 1857, 3 Irv. 467; *Hutchison*, 1872, 2 Coup. 351). The crime consists in the vitiation of the deed, and is complete the moment this has been effected. No uttering of the vitiated document is necessary, as in the case of forgery, to make the crime complete. Thus, it is criminal fraudulently to add a figure to the sum set forth in a cheque (*Hutchison, ut supra*); to fill in a testing clause with a false date (*Stalker and Cuthbert*, 1844, 2 Broun, 70); to insert in a deed any unauthorised provisions (Hume, i. 160); or to conceal defalcations by making false entries in business books (*Gray*, 1827, Syme, 254).

It is also criminal to destroy or mutilate documents and business books, wilfully and fraudulently (*Murray and Scott*, Bell, *Notes*, 66; *Reid*, 1835, *ib.*; *Dunipace*, 1842, 1 Broun, 506; *Malcolm*, 1843, 1 Broun, 620; *Rattray and Others*, 1848, Ark. 406).

4. *False Weights and Measures, etc.*—It is a statutory offence (41 & 42 Vict. c. 49; 52 & 53 Vict. c. 21), as well as one at common law, to use false weights and measures. The deviation must be from a legal standard, must be a substantial deviation, and must have been in the knowledge of the person who used the false weights or measures.

It is also a crime, by the Sale of Food and Drugs Acts (*q.v.*), to adulterate foods and drugs. (See also Fertilisers and Feeding Stuffs Act.)

Stage at which Fraudulent Action becomes Criminal.—*Verbal Fraud.*—The general rule is that some result must follow a false verbal statement, showing that the imposition has been successful, in order that it may amount to a crime. The only exceptions to this rule are where one has maliciously accused another of committing a crime (in which case the offence is complete when the falsehood is uttered), and cases provided for by statute, such as those of persons professing sorcery or witchcraft.

Written Fraud.—If a document, such as a certificate of character, is fabricated, the crime is complete the moment the document is uttered (*Taylor*, 1853, 1 Irv. 230). Even if the writ is genuine, a crime may be committed by uttering it, as in the case of false executions, false certificates of banns of marriages, or of successful vaccination (*Webster*, 1872, 2 Coup. 339). If, however, a genuine private document is despatched, even though it contain falsehoods, no crime is committed until some result ensues, brought about by the falsehoods.

Practical Fraud.—Where, with the view of obtaining some advantage, an article is fraudulently displayed as genuine when it is not so, a crime has been committed. Thus, it is criminal to offer for sale adulterated oatmeal as if it were unadulterated (*Ballantyne*, 1847, Ark. 361), or to enter for a prize competition cattle with inflated skins and false horns (*Paton*, 1858, 3 Irv. 208). In these cases the objection was overruled that no result had followed the fraud—that no advantage had been gained by means of it. The last two cases may be contrasted with that of *Hood*, 1853, 1 Irv. 236, in which unsound horses were sold as sound by one who pretended to be a farmer when he was not. In this case the crime was not complete till the horses were actually sold, and advantage thus gained by the fraud. Under the category of practical fraud may also be classed all cases of vitiation of deeds, concealment of property by an insolvent person, or by a solvent person pretending to be insolvent (*Glendinnen*, 1875, 3 Coup. 171), and such like cases. Here the crime is complete when an overt act has been committed, combined with an intent to defraud (*Dick and Lawrie*, 1832, 5 Deas and Anderson, 513; *M'Intyre*, 1837, 1 Swin. 536; *Kippen*, 1849, J. Shaw, 276).

Indictment.—The Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35, Sched. A), gives the following form:—

> You did pretend to Norah Omond, residing there, that you were a collector for subscriptions for a charitable society, and did thus induce her to deliver to you one pound one shilling of money as a subscription thereto, which you appropriated to your own use.

A judgment of a full bench of the High Court of Justiciary declared that the words "falsely and fraudulently" do not require to be inserted in a charge whose language implicitly libels the crime of falsehood, fraud, and wilful imposition (*Swan*, 1888, 2 Wh. 137).

Previous Conviction.—It is competent to libel, as an aggravation of fraud and cheating, and of all other offences falling under the general head of falsehood, fraud, and wilful imposition, a previous conviction of any crime inferring dishonesty (50 & 51 Vict. c. 35, s. 63).

Punishment.—The punishment of fraud is fine, imprisonment, or penal servitude (Hume, i. 174; Alison, i. 364; Macdonald, 82; Anderson, *Crim. Law*, 122).

Fraudulent Bankruptcy.—Under this general term as commonly used fall the various offences against the bankruptcy laws which either at common law or by statute are punishable as crimes and offences

A narrower use of the term confines it to cases "where a person obtains sequestration by fraudulent means, or, having committed fraudulent acts in contemplation of bankruptcy, continues them down to the date of the sequestration" (Macdonald on *Criminal Law*, 96).

At common law a debtor who is either bankrupt or insolvent, or in contemplation of bankruptcy, is guilty of a crime if he secretes or puts away his property in order to cheat his creditors (Alison, i. 570, 571; Hume, i. 509; Macdonald, *ut supra*). One who aids the debtor may be charged as guilty art and part (*Sanyster*, 1896, 34 S. L. R. 65). The crime may take the form of actually secreting property (Alison, i. 570), or transferring it to particular or pretended creditors or relatives, or disposing of it by fictitious sales, or in other ways (see Macdonald, *ut supra*). A solvent person may be guilty of the crime if he conceals his property for the purpose of enabling him to obtain sequestration (or cessio), on pretence of his being unable to meet his engagements (*O'Reilly*, 1836, 1 Swin. 256).

The trial of such offences at common law may proceed either before the Court of Justiciary or before the Sheriff. The punishment is now penal servitude or imprisonment (Macdonald, *ut supra*).

By the Act 1621, c. 18, which was directed against fraudulent and collusive alienations to conjunct and confident persons without just cause, or to prior creditors in prejudice of the diligence of other creditors already begun, it was provided "that such bankrupts and dyvours, and all interposed persons for covering or executing their frauds, and all others who shall give counsel and wilful assistance unto the said bankrupts in the devising and practising of their said frauds and godless deceits to the prejudice of their true creditors, shall be reputed and holden dishonest, false, and infamous persons, incapable of all honours, dignities, benefices, and offices, or to pass upon inquests or assizes, or to bear witness in judgment or outwith in any time coming."

By the Act 1696, c. 5, it was provided that "if any person shall for hereafter defraud his creditors and be found by sentence of the Lords to be a fraudulent bankrupt, the decree of his fraud shall also be determined by the same sentence, and the person guilty not only held to be infamous *infamia juris*, but also be by them punished by banishment or otherwise (death excepted) as they shall see cause."

Under the Sequestration Act of 1814 (54 Geo. III. c. 137, s. 33) it was enacted that all bankrupts convicted of taking the oath (in relation to the surrender of their estates) falsely, should be held guilty of perjury and of fraudulent bankruptcy, and punished accordingly, and rendered incapable of holding any office of public trust or emolument, and that similar effects should attach to the failure to exhibit a true state of affairs, or to make a complete surrender, or to take the required oath, and that in either case the guilty party should forfeit every benefit or privilege arising from the Act, and be accounted infamous and incapable of giving evidence in any court of justice, or of sitting or acting in any assize or jury.

Criminal proceedings laid upon these Statutes are obsolete in practice. Prior to the Act 7 & 8 Geo. IV. c. 20, it was held that the Court of Session had a privative jurisdiction in cases of fraudulent bankruptcy (*Lord Advocate* v. *Duncan*, 1823, 2 S. 123; aff. 1 W. & S. 606; Shand, *Prac.* 1039); but by that Statute it was enacted that persons accused of the crime might be tried before the High Court of Justiciary or the Circuit Court, on indictment or criminal letters, as in other crimes. Proceedings in the Court of Session seem to have at one time been commonly originated by summons (*M'Kinnie*, 23 July 1748, Kilk. 54; Shand, *Prac.* 1039), but it

was ultimately held that no proceedings *ad vindictam publicam* could proceed in the Outer House (*Syme*, Mor. 14979; *Aitken*, 11 December 1810, F. C.); the only competent mode of proceeding, therefore, being by petition and complaint presented to one of the Divisions of the Court. The Court orders service and answers, and remits to the junior Lord Ordinary, "who shall hear the parties and prepare the cause, either by a remit to an accountant to examine the books of the bankrupt and to report, or by ordinary condescendence and answers." The Court may order further proof or investigation to be taken in such manner as it thinks fit (A. S., 11 July 1828, s. 90; Mackay, *Prac.* 588). A trial of a petition and complaint before a Lord Ordinary without a jury is competent, and a trial by jury is not now common (Mackay, *ut supra*; *Dudgeon*, 1876, 3 R. 974).

The Bankruptcy Act of 1856 (19 & 20 Vict. c. 79) does not contain any provisions as to the trial of offences against the bankruptcy laws criminally, except that it renders liable to a prosecution any person who is "guilty of wilful falsehood in any oath" made in pursuance of the Act (s. 178). The prosecution may proceed either at the instance of the Lord Advocate, or at the instance of the trustee with the concurrence of the Lord Advocate, provided that in the latter case the prosecution shall be authorised by a majority of the creditors present at a meeting to be called for the purpose; and on conviction, the accused, besides the awarded punishment, forfeits to the trustee, for behoof of the creditors, his whole right, claim, and interest in or upon the sequestrated estate, which is thereupon distributed under the sequestration, or, if it be closed, under a process of multiplepoinding (*ib.*). The Act further provides that where the Accountant of Court possesses information leading him on reasonable grounds to suspect "fraudulent conduct by the bankrupt, or malversation or misconduct on the part of the trustee or commissioners, such as may infer punishment," he shall be entitled to give information to the Lord Advocate, who directs such inquiry and takes such proceedings as he thinks proper (*ib.* s. 162). No prosecution under either of these sections is reported as having occurred in practice.

By the Debtors Act, 1880, as amended by the Bankruptcy Frauds and Disabilities Act, 1884, a variety of offences have been specifically defined, and provisions for their punishment made.

By the 13th section of the Debtors Act, 1880, it is provided as follows:—

"The debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence, and on conviction before the Court of Justiciary, or before the Sheriff and a jury, shall be liable to be imprisoned for any time not exceeding two years, or by the Sheriff without a jury for any time not exceeding sixty days, with or without hard labour"—

"(*A*) In each of the cases following, unless he proves to the satisfaction of the Court that he had no intent to defraud" (the intent to defraud need not be libelled or proved by the prosecutor; see opinions in *Howman*, 1891, 18 R. (J. C.) 30, 2 White, 617):—

"1. If he does not, to the best of his knowledge and belief, fully and truly disclose the state of his affairs in terms of the Bankruptcy (Scotland) Act, 1856, or the Cessio Acts, as the case may be" (see 19 & 20 Vict. c. 79, s. 81; 6 & 7 Will. IV. c. 56, s. 4: and 43 & 44 Vict. c. 34, s. 9).

> In a case under this subsection it was said that the indictment must set forth, "first, what the true state of affairs was: second, that the accused knew and believed it to be so: and third, that he did not disclose it" (*Lord Advocate* v. *Simpson*, 1883, 10 R. (J. C.) 73, 5 Coup. 293, per L. J. C. Moncreiff).

"2. If he does not deliver up to the trustee all his property, and all books, documents, papers, and writings relating to his property or affairs which are in his custody or under his control, and which he is required by law to deliver up, or if he does not deal with and dispose of the same according to the directions of the trustee."

Where an indictment under this enactment charged the accused with not having delivered up the books, documents, papers, and writings relating to and forming the vouchers and evidents or documents of debt for certain sums specified, it was held irrelevant, in respect it did not set forth either what the documents were, or that any such documents actually existed. "If the withholding of these documents is to be treated as a specific crime, then they must either be described so as to be identified, or at least it must appear on the indictment that the prosecutor has done all he could to describe them" (*Lord Advocate* v. *Simpson*, *supra*, per L. J. C. Moncreiff).

"3. If, after the presentation of the petition for sequestration or cessio, or within four months next before such presentation, he conceals any part of his property, or conceals, destroys, or mutilates, or is privy to the concealment, destruction, or mutilation of, any book, document, paper, or writing relating to his property or affairs" (see *Robertson*, 1885, 13 R. (J. C.) 1, 5 Coup. 664, where held that a person not a debtor nor insolvent could not be charged as guilty art and part of an offence under the Statute).

"4. If, after or within the time above specified, he makes, or is privy to the making of, any false entry in or otherwise falsifying any book, document, paper, or writing, affecting or relating to his property or affairs."

"5. If, within four months next before the presentation of the petition for sequestration or cessio, he pawns, pledges, or disposes of, otherwise than in the ordinary way of trade, any property which he has obtained on credit and has not paid for." (As to the necessity for specifying the particular mode in which property is alleged to have been disposed of, see *Lord Advocate* v. *Wilson*, 1882, 5 Coup. 48. As to "ordinary way of trade," see *ex parte Brett*, 45 L. J. Bank. 17; *Reg.* v. *Thomas*, 22 L. T. (N. S.) 138.)

"6. If, being indebted to an amount exceeding two hundred pounds at the date of the presentation of the petition for sequestration or cessio, as the case may be, he has not for three years next before such date kept such books or accounts as, according to the usual course of any trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions. (See *in re Mutton*, 19 Q. B. D. 102, where held that the corresponding provision of the English Bankruptcy Act, 1883, did not apply to the case of building speculations carried on by a shopkeeper.)

"(*B*) In each of the cases following:—

"1. If, knowing or believing that a false claim has been made by any person under the sequestration, he fails for the period of a month from the time of his acquiring such knowledge or belief to inform the trustee thereof.

"2. If, after the presentation of the petition for sequestration or cessio, or at any meeting of his creditors within four months next before such presentation, he attempts to account for any part of his property by fictitious losses or expenses.

"3. If, within four months next before the presentation of the petition for sequestration or cessio, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same." (See *Lord Advocate* v. *Macleods*, 1888, 16 R. (J. C.) 1, 2 White, 71. The representation must be false to the debtor's knowledge — see *Reg.* v. *Cherry*, 50 L. T. 466.)

"4. If, after the date of granting sequestration or cessio, or within four months prior thereto, he absconds from Scotland, or makes preparations to abscond, for the purpose of avoiding examination or other proceedings at the instance of his creditors, or taking with him property which ought by law to be divided amongst his creditors, to the amount of twenty pounds or upwards, or if he fails, having no reasonable excuse (after receiving due notice), to attend the public examination appointed by the Lord Ordinary or the Sheriff, or to submit himself for examination in terms of the Statutes.

"5. If, being insolvent, and with intent to defraud his creditors, or any of them, he makes or causes to be made any gift, delivery, or transfer of, or any charge on or affecting, his property."

By the 14th section of the Act it is provided that: "If any creditor, under any petition for sequestration, or cessio, or disposition *omnium bonorum*, wilfully and with intent to defraud, makes any false claim, or makes or tenders any proof, affidavit, declaration, or statement of account which is untrue in any material particular, he shall be deemed guilty of a crime and offence, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour."

By the Bankruptcy Frauds and Disabilities (Scotland) Act, 1884 (47 & 48 Vict. c. 16), s. 4, it is provided as follows: "Where an undischarged bankrupt obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a crime and offence, and may be dealt with and punished as if he had been guilty of a crime and offence under the Debtors (Scotland) Act, 1880, and the provisions of that Act shall apply to proceedings under this section." (An undischarged bankrupt "shall be deemed to include a person whose estate has been sequestrated, or with respect to whom a decree of *cessio bonorum* has been pronounced, and who has not received his discharge from a competent Court in Scotland" (*ib.* s. 3).) In construing this provision, difficulty has arisen as to whether there is incorporated in it by reference the proviso in sec. 13 of the Act of 1880, under head *A*, "unless he prove . . . that he had no intent to defraud," and conflicting opinions have been expressed on the question. The balance of opinion is in the negative (*Howman*, 1891, 18 R. (J. C.) 30, 2 White, 617; cf. *Small*, 1886, 13 R. (J. C.) 45, 1 White, 80; *Duncan*, 1886, 13 R. (J. C.) 36, 1 White, 43; *Lord Advocate* v. *Livingstone*, 1888, 15 R. (J. C.) 48, 1 White, 587. See also *Reg.* v. *Dyson*, 1894, 2 Q. B. D. 176). It is not necessary to the relevancy of a charge under the Act of 1884 that the prosecutor libel or prove an intent to defraud (*Howman, supra*).

It is the duty of the trustee in any process of sequestration or cessio to report all offences under the Debtors Act to the presiding judge, who shall on such representation, or of his own motion, direct information in all such cases as he thinks ought to be prosecuted to be laid before the Lord Advocate, who shall direct such inquiry and take such proceedings as he shall think fit (43 & 44 Vict. c. 34, s. 15).

Where any person is liable under any Act of Parliament or at common law to any punishment or penalty for any offence made punishable by the Debtors Act, such person may be proceeded against under such other Act of Parliament, or at common law, or under the Debtors Act, so that he be not punished twice for the same offence (43 & 44 Vict. c. 34, s. 16).

Fraudulent Enlistment.—See ENLISTMENT.

Fraudulent Preferences.—See Bankruptcy; Insolvency.

Freeholder.—See Franchise.

Freight.—In the sense here used, freight *proper* is an agreed-on or reasonable reward for the carriage of goods in ships, dependent on the delivery of, or the ability of the ship to deliver, the goods at their destination. *Dead Freight* is in substance a claim of damages for the loss of freight (see Dead Freight). *Back Freight*, or *Farther Freight*, is the compensation a ship is entitled to if, after carrying the goods to their destination, and waiting a reasonable, or the agreed-on, time to deliver them, she, acting reasonably, brings them back to the port of loading, or to another port than the agreed-on port of discharge, to get rid of them (see, *e.g.*, *Cargo ex "Argos,"* L. R. 5 P. C. 134). In all cases the ship earns her freight when she brings the goods to the proper place of discharge, and is ready and able to give delivery within the agreed-on, or reasonable, time for discharge. The subject of freight and the lien given at common law for it, have already, to some extent, been treated of, and it is not proposed to repeat what has been said. See Charter Party (*Freight*; *Lien*).

In a very recent case, where the charter gave a lien for freight, and also made provision for the receiver of the cargo checking the weight of the cargo delivered before he paid the freight, it was held that it was for the parties to make reasonable arrangements so as to give effect to both provisions (*Voyeman*, 2 Com. Ca. 81). This decision illustrates the well-settled rule, that where freight is payable on delivery, payment of freight and delivery are concurrent acts, to be reasonably done by the parties to give effect to the whole contract (*Thorsen*, 19 R. 743). Weighing to ascertain the amount of freight payable, in the absence of custom, falls on the ship. But in Scotland, in the grain trade, it has been held there is a custom for the merchant to bear the expense (*Watts, Ward, & Co.*, 26 S. L. R. 660).

While the principle that freight is dependent on the carriage of the goods to their destination underlies much of the law of the contract of affreightment, there is nothing to prevent parties making any lawful bargain on the subject. Accordingly, every variety of provision is made, alike as to the mode of calculating the ship's reward, the time of payment, and the use given of the ship.

A *rate* freight, that is, a freight calculated on the weight or quantity of the goods carried, is the ordinary case, where loss of the goods or any part thereof entails a corresponding loss of freight.

Lump Freight.—Where a ship is paid a single sum for the use of the ship by the goods agreed to be carried, there is no deduction from the freight if only part of the goods are lost. If any part is delivered, the *cumulo* sum is due (*Robinson*, L. R. 8 C. P. 465; *Merchant Shipping Co.*, L. R. 9 Q. B. 99).

Time Freight.—Sometimes the merchant hires the ship for a period of time, and the hire is an agreed-on sum based on time. It is generally bargained that the hire is to be paid weekly or monthly in advance, but a lien for any unpaid hire is also bargained for. The lien in such a case, and in other cases where the goods of third parties are shipped, will in general only extend to secure payment of the sub-freight agreed to be paid by the shipper of the particular goods. The extent of the lien depends on the terms of the bill of lading, and how far it subjects the holder to all the con-

ditions of the charter (see CHARTER PARTY (*Lien*)). The hire is payable though the ship may have been so damaged by sea perils, or other cause for which the owners are not responsible, as to be unfit for use for a time, unless there is a contrary agreement. But such agreement is now always to be found in time charters (see *Hogarth*, 1891, A. C. 48). Where the freight was payable monthly in advance, but was only to be paid for the time taken by the charterer, the charterer was held not bound to pay a whole month's hire in advance when it was clear he would not keep the ship for the whole month (*Tonnelier, and Bolckow, Vaughan, & Co.*, 2 Com. Ca. 121).

Advance Freight.—Frequently there is provision for payment of freight *in advance*; for advances against freight to meet disbursements, and for payment of freight, ship lost or not lost. The matter of advance freight has already been adverted to (CHARTER PARTY; *Freight*); and here one or two recent illustrative cases may just be noted: *Smith, Hill, & Co.*, 1891, 1 Q. B. 42, 792; *Oriental S.S. Co.*, 1893, 2 Q. B. 518; *The Primula*, 1894, P. 128.

A large part of our carrying trade is now done by merchants who charter ships for a voyage at a certain freight, and then sub-contract with shippers. Here again every variety of provision is made to protect the different interests. It is in connection with these charters mainly there are to be found cancelling clauses; clauses as to the point of time at which the charterer's liability ceases; clauses making anxious provision in regard to the collection of freight, partly by payment by the charterers, partly out of freight due under the sub-contracts as evidenced by the bills of lading; and clauses as to advance freight.

Under such charters various questions bearing on freight arise at the instance of the shipowner, or the merchant; questions relative to the capacity of the ship; the duty of the merchant to load the ship with an assorted cargo, so as to give the shipowner the freight he had in contemplation; what constitutes a full cargo; the mode of calculating the freight, etc. See, *e.g.*, (mode of calculating freight, measurement, increase of cargo in bulk on voyage) *Buckle*, L. R. 2 Ex. 333; (freight rate, lawful merchandise) *Southampton Steam Colliery Co.*, L. R. 6 Ex. 53; (freight measurement, loss of part of cargo) *Spaight*, L. R. 5 Q. B. D. 115; (recovery of owner's freight from charterer's bill of lading freight) *Jaunetzky*, 1 Com. Ca. 90; (freight for vacant space) *Potter*, 1 Com. Ca. 114; (charterer's right to increased freight payable under supplementary agreement between ship and sub-charterers) *Hoyland & Co.*, 1 Com. Ca. 274; (carrying capacity of ship) *Carnegie*, L. R. 24 Q. B. D. 45; *Mackill*, L. R. 14 App. Ca. 106; (carrying capacity, full and complete cargo) *S.S. Heathfield Co. Ltd.*, 2 Com. Ca. 55.

In such cases the real question is what is the true meaning of the contract made by the parties, and it is not necessary to set forth the particular facts of each. The principle deducible from them all is, that the Court will construe the charters, so far as consistent with the plain meaning of the words, to give effect to what, having regard to the whole circumstances, they hold the reasonable intention of parties.

Through freight is payable under a contract for the carriage of goods by more than one conveyance,—generally a land and sea transit,—and is one payment for the whole carriage. Sometimes one person makes himself liable for performance of the whole contract. In other cases each carrier is liable for his own portion of the transit only (see, *e.g.* of a through contract, *The Ocean S.S. Co.*, 7 T. L. R. 417).

Freight may be due to the shipowner or his assignee: to a mortgagee,

if he enters into possession before the contract of affreightment has been fulfilled by the ship's completion of her voyage; to a charterer; in short, to whomsoever the cargo-owner has agreed to pay the freight, or to anyone in his right. In the case of a mortgagee, where the shipowner had carried his own goods and entered in the bill of lading a nominal freight, and endorsed it, the mortgagee was not held entitled to claim a reasonable freight, as the shipowner, until the mortgagee takes possession, can use the ship reasonably as he sees fit (*Merchant and Exchange Bank*, L. R. 3 Ex. 233). This, however, is not the appropriate place for treating of the relative rights of owner and mortgagee in the matter of the former making contracts regarding the use of the ship.

Freight is payable by: (*a*) the shipper or person who makes the original contract under which the goods are carried, who remains liable throughout, unless he bargains to the contrary; nor, unless he has so bargained, can he complain if the shipowner, neglecting to take advantage of his lien, enforces payment from him, and him only (*Shepard*, 13 East, 565); (*b*) at common law, by the person who receives the goods, where the ship waives the lien which she has to secure freight, on a condition which the law then implies that the freight will be paid by the receiver. Where, however, the goods have been warehoused to preserve the lien for freight, and under the provisions of the Merchant Shipping Act the consignee has obtained delivery by paying to the warehouseman the sum for which the goods are held, there is no implied obligation on his part to pay freight further (*Furness Withy Co. Limited* (1895), A. C. 40); (*c*) by the consignee named in the bill of lading, and by the endorsee or holder of the bill of lading if the property has passed to him under the Bills of Lading Act, 1855. If the endorsee parts with the bill of lading prior to delivery of the goods, he ceases to be liable. The question which frequently arises in this last case is whether or not the property has passed by the endorsement of the bill of lading, the endorsee maintaining he is only an agent (see, *e.g.*, *Lordes*, 16 S. L. R. 539). See also Bill of Lading (*Liability of Endorsee for Freight*).

Insurance.—Freight is insured *eo nomine*. The mode of adjustment in case of loss has been already treated of (see Adjustment).

What constitutes a loss by the perils insured against will be stated later (see Marine Insurance).

Average.—How far freight contributes to general average has also been considered (see Average).

See Adjustment: Average; Bill of Lading; Charter Party; Marine Insurance; Carver on *Carriage of Goods by Sea*; Scrutton on *Charter Parties and Bills of Lading*; Abbott on *Shipping* (13th ed.).

Friendly Societies. — *History of Legislation.* — Although voluntary associations for the purposes of mutual relief and benefit have existed in various forms in this country for many centuries, it is only within the last hundred years that they have been regulated by Statute. In dealing with the law relating to friendly societies, it is necessary to trace briefly the course of legislation affecting them. The first Act, 33 Geo. III. c. 54, was passed in 1793, its purpose being for the "Encouragement and Relief of Friendly Societies." By this Act certain privileges and benefits were conferred on societies which brought themselves within the Act, the main requisite being that they should have their rules confirmed by justices; and though these privileges have been changed and modified by subsequent Statutes, the principle which underlies them has been con-

tinued to the present time. This Act was amended and extended on various occasions, until by 10 Geo. IV. c. 56 it was repealed, the law reconstructed, and the method was introduced of requiring the rules to be certified by a duly appointed barrister, afterwards by an amending Act, styled the Registrar of Friendly Societies. In 1850 the law relating to friendly societies was again consolidated and amended by 13 & 14 Vict. c. 115. In 1855, by 18 & 19 Vict. c. 63, all previous Statutes were repealed, and the law was once more consolidated and changed. Some of the benefits were extended to certain other classes of societies, and the distinction between "certified" and "registered" societies created in 1850 was abolished. Though afterwards amended in several particulars, this continued to be the principal Act till 1875, when, as the outcome of a Royal Commission on Friendly Societies, which sat from 1870 to 1874, the Act 38 & 39 Vict. c. 60 was passed. By it all the former Statutes were repealed, the law consolidated, and further provisions introduced. Various amendments were made in subsequent years, the last being in 1895, and these were authorised to be inserted and printed with the principal Act of 1875.

Finally, in 1896, the law was once more consolidated by 59 & 60 Vict. c. 25, which repealed the previous Acts. At the same time the societies known as Collecting Societies and Industrial Assurance Companies, which had come under special provisions in the previous Act, were treated under a special Statute, the Act being 59 & 60 Vict. c. 26.

I. Registered Friendly Societies.

Nature and Description of Societies under the Act 1896.

The societies that may be registered under the 1896 Act (59 & 60 Vict. c. 25) are divided into five classes, distinct from each other. These are—

1. Friendly Societies.
2. Cattle Insurance Societies.
3. Benevolent Societies.
4. Working Men's Clubs.
5. Specially Authorised Societies.

A society coming under one of these classes is, on registration, entitled to the privileges and subject to the provisions of the Act. In some matters special provisions are made to apply to one or other of these classes, but with these exceptions the provisions apply generally to all.

1. *Friendly Societies.*—The societies embraced under the first class, "Friendly Societies," are societies for the purpose of providing by voluntary subscriptions of the members, with or without the aid of donations, for—

(*a*) Relief of members and their relatives during sickness or other infirmity, bodily or mental, in old age or widowhood, or of orphans of members during minority. Formerly it was a question whether insanity was included, but the addition of the words "or mental," removes any doubt.

(*b*) Certain payments on birth or death.

(*c*) Relief of members when in search of employment, or in distress, or in cases of shipwreck, or loss or damage at sea.

(*d*) Endowment of members or their nominees.

(*e*) Insurance of implements of trade against fire to a sum not exceeding £15.

But no society insuring for an annuity over £50, or a greater gross sum than £200, can be registered under the Act (s. 8).

Societies formed for such purposes may be constituted as—

(1) *Societies having branches* (s. 17).

(2) *Dividing Societies, i.e.* having a periodical division of funds (s. 15).
(3) *Deposit Friendly Societies*, which provide for accumulating surplus of members' contributions for his own use (s. 42).
(4) *Collecting Societies*, which now come under the provisions of a special Statute.

In order to bring a society within the Act, it is not necessary that it should include all the objects stated, provided these are substantially the same (*Knowles*, 1884, 32 W. R. 432).

But Trade Unions cannot get the benefit of the Friendly Societies Acts (34 & 35 Vict. c. 31, s. 5), even though some of its purposes are akin (*Old*, 1890, 38 W. R. 415; *Farrer*, 1869, L. R. 4 Q. B. 602).

Married women may be members (s. 8 (1)), as well as minors over one year of age (s. 36). The Act contemplates the existence of societies consisting wholly of minors, and provides for the amalgamation of such juvenile societies with adult societies (s. 70 (5)).

2. *Cattle Insurance Societies.*—Under previous Acts only certain named animals could be insured against. This restriction is now removed. Insurance is only competent in case of loss by death, but the amount is unlimited (s. 8 (2)).

This class of societies, as well as Benevolent Societies, Working Men's Clubs, and Specially Authorised Societies, unless directed to the contrary, are exempted from making the quinquennial return (s. 28 (4)). Unlike other societies, money payable by members of Cattle Insurance Societies is recoverable by law (s. 31).

3. *Benevolent Societies*, being societies for any benevolent or charitable purpose.—This means a society established for the purpose of providing benefits for persons other than the members, their wives, or relatives. It must be for a particular, and not for general purposes of benevolence. Such societies cannot hold land exceeding one acre (s. 47 (3)). Along with Working Men's Clubs, they have not the power of nomination by which a member may nominate a person to receive a sum of money not exceeding £100 payable on such member's death (s. 56 (1)).

4. *Working Men's Clubs*, being societies for purposes of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation (s. 8 (4)).—A society for any one of these purposes may be registered. Such societies have, as stated above, no power of nomination, but are exempt from valuation.

5. *Specially Authorised Societies*, being societies whose purpose is authorised by the Treasury to come under the Act.—In their case the Treasury may limit the application of the Act to them, but such limitations must be stated in the rules of the society. Societies so authorised do not require to be registered under the Companies Act, 1862 (*Peat*, 1886, 34 W. R. 366). A list of the special authorities already granted by the Treasury will be found in Brabrook's *Law of Friendly Societies*, 13th ed.

Application of Act to Subsisting Societies.—Besides these societies which have by registration come under this Act, there are a great many unregistered societies, the exact status of which it is not easy to define. It will be noted that several provisions of the Friendly Societies Act, and the whole of the Collecting Societies and Industrial Assurance Companies Act apply to unregistered as well as registered societies.

Unregistered societies may be—
(1) Societies not established under any previous Acts.
(2) Societies so established.

The effect of sec. 101 (corresponding to sec. 6 of the 1875 Act), and of

the definition of "Registered Society" in sec. 106, is that every society that has obtained a legal constitution under any of the Acts beginning with 33 Geo. III. c. 54, is still in possession of that legal constitution. The Act applies to such as if they were registered societies. All societies, therefore, legally established under previous Acts, are entitled to the privileges and obligations imposed by this Act, though their purposes may not come within those above mentioned; but their rules are valid and binding only so far as not contrary to any express provisions of this Act.

Is a Friendly Society a Charity?—This question is of importance in deciding whether a society is entitled to a charitable bequest, or whether its funds are applicable *cy-près*. It is in some respects an open question, and concerns societies whether registered or unregistered. Institutions purely for the relief of poverty or distress are clearly charitable institutions, and in doubtful cases it is important to ascertain whether poverty is the essential qualification for participation in the benefits of the association. A society or association that raises funds by subscriptions and fines for the mutual benefit of themselves and their relatives is not a charity (*Mitchell*, 1878, 5 R. 954; *Bakers of Paisley*, 1836, 15 S. 200), even though some of the members had agreed that their widows should not take any benefit (*Cunnack*, 1895, 1 Ch. 489, and 1896, 2 Ch. 679).

A society whose members were to provide by subscriptions and fines a fund for their mutual benefit in sickness, lameness, or old age, poverty not being a necessity, is not a charitable institution (*Clark's Trs.*, 1875, 1 Ch. D. 497). But a friendly society was held to be a charity which was established to provide by subscriptions, contributions, and fines an "invested fund" for the relief, by means of annuities, of members, their widows, and children, *if in distressed circumstances*, and a legacy to the society, not being required for the remaining annuity, was applicable *cy-près* (*in re Buck*, 1896, 2 Ch. 727; see also *Pease*, 1886, 32 Ch. D. 154).

The Registry Office (ss. 1–7).—The registry office of societies throughout the United Kingdom is under the direction of one chief registrar and assistant registrars for England, Scotland, and Ireland respectively. These offices are held during the pleasure of the Treasury. The qualification for Scotland is an advocate, writer to the signet, or solicitor of not less than seven years' standing. The functions, duties, and powers of the central office and the different registrars are described secs. 2–4. A yearly report is made to Parliament by the chief registrar, and these may be consulted for much useful information. The salaries and expenses of the registry office are paid by the Treasury out of money provided by Parliament (s. 5). The Treasury has power to fix a scale of fees (s. 96), to appoint public auditors (s. 30), and to make regulations for carrying the Act into effect (s. 99).

Conditions of Registration.—In order to entitle a friendly society to register, it must have seven members at least. The application must be signed by seven members and the secretary, and be accompanied by a copy of the rules and a list of the trustees or officers authorised to sue or be sued.

No society can be registered under a name identical with, or bearing a deceptive similarity to, an already existing society, or likely, in the opinion of the registrar, to mislead the public. A similar provision is in force with regard to Trade Unions, Building Societies, and Industrial and Provident Societies. Should the registrar refuse on this account to register, there is an appeal under sec. 12. A society may change its name with the approval of the registrar (s. 69).

Societies that assure annuities must send, with their application for registry, their tables for such assurance, duly certified (s. 16).

A society doing business in more than one country shall be registered in the country in which its registered office is situate, but the registrars of the other countries must be furnished with copies of its rules and amendments (s. 14).

A society, on being registered, receives an acknowledgment of registry, which corresponds to the certificate of incorporation of a joint-stock company, and is conclusive evidence of its being registered, unless such registry be proved to have been suspended or cancelled (*Oakes*, 1867, L. R. 2 H. L. at 354). By sec. 100 the production of a document bearing the seal or stamp of the central office requires no further proof as evidence; and, unless there be evidence to the contrary, no further proof is required of the signature on a document of the registrar, inspector, or public auditor. If the assistant registrar refuse to register, the society has a right of appeal, in the first instance, to the chief registrar, and if he refuses, in Scotland, to the Court of Session (s. 12).

Societies with Branches.—Under the Act provisions are made for the registry of societies with branches, the establishment of new branches, and the registry of branches as societies (ss. 17–20). A "branch" is defined as any number of the members of a society, under the control of a central body, having a separate fund administered by themselves, or by a committee or officers appointed by themselves, and bound to contribute to a fund under the control of a central body (s. 106). A registered society or branch may contribute to the funds of, and take a part in the government of, another registered society without becoming a branch of it. Where the contributions are made to a medical society, this benefit extends to trade unions (s. 22). A body which has ceased, by secession or expulsion, to be a branch of a society is prohibited from using the name of that society in any way (s. 21). Any member so using the name is guilty of an offence, and liable to a fine not exceeding £5 (s. 84).

Cancelling and Suspension of Registry (s. 77.)—Registry may be cancelled by the chief registrar or the assistant registrars—

(*a*) At the request of the society, if the registrar thinks fit.

(*b*) With the approval of the Treasury upon proof that the acknowledgment of registry has been obtained by fraud or mistake, or that the society exists for an illegal purpose, or has wilfully, and after notice from the registrar, violated any of the provisions of the Act, or has ceased to exist.

Where cancelling is competent, the registrar may in lieu thereof suspend the registry for any term not exceeding three months, and may, with the approval of the Treasury, renew such suspension. Not less than two months' notice of proposed cancelling or suspension must be given to the society, and every suspension or cancellation must be duly advertised. An appeal from such may be made, as in the case of refusal to register, from the assistant to the chief registrar, and from him to the Court of Session.

Where a society has amalgamated or been converted into a company, the registry becomes void, and must be cancelled by the registrar.

Rules and Amendments.—An amendment of a rule includes a new rule and a resolution rescinding a rule (s. 106), and when made by a registered society, is not valid until registered; and for this purpose copies of the amendment, signed by three members and the secretary, are to be sent to the registrar. The registrar, if satisfied, issues an acknowledgment of registry of such amendment. If he refuse, the same mode of appeal is competent as in the case of refusal to register a society (s. 13).

The rules of societies established under earlier Acts are valid in so far as they are not contrary to any express provision of this Act.

The registrar's certificate, though essential to the validity of the society's rules, is no bar to them being challenged on a fundamental objection in a Court having jurisdiction (*Davie*, 1870, 9 M. 96). But the registration of an amendment precludes challenge on the ground of mere irregularity in the procedure (*Rosenbery*, 1889, L. R. 22 Q. B. D. 373).

Under the earlier Acts, rules and amendments, in order to be valid, had to be confirmed by justices of the peace, and under later Acts to be certified by the registrar. New rules not confirmed, though acted on for over thirty years, were held not to be valid (*R.* v. *Godolphin*, 1838, 8 A. & E. 338), and in such a case the old rules would still remain in force (*Meredith*, 1856, 1 C. B. (N. S.) 216). Alterations on the rules of any society, registered or unregistered, properly made, will be binding on all members, whether assenting or not, except that a society cannot by such alterations deprive a member of any relief, annuity, or other benefit to which he was formerly entitled, unless he has agreed to the alteration. So it was held incompetent for the managers of a friendly society to alter the constitution so as to deprive persons interested of certain benefits (*Steedman*, 1842, 4 D. 1441). But it would be different if a member had expressly contracted to be bound by future alterations on the rules (*Wilson*, 1887, 22 Q. B. D. 381).

Where an unregistered society, on the death of a member, paid the death allowance to a relative, such mode of payment being in accordance with the rules of the society, it was held that the deceased member's administrator could not recover the money, the rules forming the contract between the member and the society (*Ashby*, 1888, 21 Q. B. D. 401). A list of the matters to be provided for by the rules will be found in the 1st Sched. of the Act.

Duties and Obligations (ss. 24–29).—A registered society

(1) Must have a registered office.

(2) Must appoint trustees in the manner prescribed.

(3) Must submit its accounts annually for audit.

(4) Must send to the registrar an annual return of its funds.

(5) Must, with certain exceptions, make a quinquennial valuation of its assets and liabilities.

(6) Must keep in an exposed place in its office a copy of its last balance-sheet and valuation.

Failure to do what is thus required will constitute an offence.

Obligations of Officers.—An "officer" is defined as any trustee, treasurer, secretary, or member of the committee of management of a society or branch, or person appointed by the society or branch to sue or be sued on its behalf (s. 106). Every officer of a registered society having receipt or charge of its money must, if required by the rules, give security, and must render accounts when called on (ss. 54 and 55).

If an officer neglects or refuses, on demand, to pay over funds belonging to the society, or to give an account, the trustees may sue upon the bond of caution, or apply to the Sheriff Court for an order against the officer (s. 55).

Where the treasurer of a friendly society had, by the rules, to find security for his intromissions, and the society was guilty of gross neglect in regard to the control exercised by them over the treasurer, such neglect was held sufficient to free his cautioners from liability (*Thistle Friendly Society of Aberdeen*, 1834, 12 S. 745).

Privileges of Registered Societies.—These include (ss. 33–37)—

(1) Exemption from the penalties under the Unlawful Societies Act 1799, and the Seditious Meetings Act, 1817.

(2) Exemption from stamp duty.

(3) Power to transfer stock by order of the chief registrar.

(4) Priority of claim over other creditors in the case of the death or bankruptcy of an officer, or the use of any diligence against him.

(5) Power to admit minors above one year of age as members.

(6) Power to subscribe to hospitals or charitable institutions for securing benefit to members.

(*a*) *Nature of Preferential Claim.*—With regard to the fourth privilege stated, this preferential claim has been given to friendly societies since the earliest Statutes, and has been described as "very liberal, and perhaps more liberal than just, that all creditors, however meritorious, shall be sacrificed to the demand of a friendly society" (per Ld. Eldon in *Ross*, 1802, 6 Ves. 802). Such right is not lost by an omission on the part of the society, as failure to examine the treasurer's books (*Absolum*, 1862, 32 L. J. Ch. 786).

(*b*) *Extent of Preferential Claim.*—Such prior right extends over stock-in-trade, furniture, etc., not specifically belonging to the society (*Atkins*, 1882, 51 L. J. Ch. 406); and holds good even though moneys received by such officer for the society are not in his possession *in specie*, and cannot be traced (*Miller*, 1893, 1 Q. B. 327).

It is a question whether such claim would prevail against the Crown.

Such priority applies only to formally appointed officers (*Ashley*, 1801, 6 Ves. 440; *Ross, supra*). It does not apply in the case of bankers appointed by the society to receive moneys (*Orford*, 1 De G. M. & G. 483; *Whipham*, 1844, 3 M. D. & G. 564); nor to an incorporated banking company (*Swansea Friendly Society*, 1879, L. R. 11 Ch. D. 768).

Such prior right only applies to moneys held by officers in virtue of their office, independent of contract, and not to debts due by them as individuals (*Amicable Society of Lancaster*, 1801, 6 Ves. 99; *Stamford Friendly Society*, 1808, 15 Ves. 280; *Welch*, 1894, 42 W. R. 320; and see *Riddell*, 1842, 3 M. D. & G. 80 (a case of the treasurer of a savings bank)).

Rights of Members (ss. 38–43).—These include—

(1) Right to a copy of the rules, for which society may charge any sum not exceeding one shilling.

(2) Right *gratis* to copies of last annual return and balance-sheet.

(3) Right to inspect the books.

(4) Right to insure for benefits.

The amount of such benefits is restricted, it being provided that no member, or person claiming through a member, is entitled to receive from one or more societies or branches a gross sum exceeding £200, including bonuses, or an annuity over £50 (s. 41). It has to be noted also that where a society assures an annuity over £30, it loses the privilege of exemption from income tax.

(5) Power to accumulate surplus contributions.

(6) Special exemptions to members who are militiamen or volunteers, when in discharge of their duty as certified by the commanding officer (s. 43).

Property and Funds.—(*a*) *Vesting and Description.*—These are vested in the trustees for the time being, who are only liable to the extent of the sums received by them, and not for any deficiency (s. 49). On their death, resignation, or removal, the property vests in succeeding trustees without the necessity of any conveyance or assignation, except in the case of stock or securities in public funds (s. 50).

In all legal proceedings such property is sufficiently described as the property of the persons named as trustees of the society (s. 51).

(*b*) *Legal Investments.*—Every registered society may invest its funds in a Post Office or Trustees Savings Bank, or in the public funds, or with the National Debt Commissioners, or in the purchase of land, or in any other security (not personal) expressly directed by its rules (s. 44).

Under sec. 52 special provisions are made for investments with the National Debt Commissioners, and a statutory rate of interest is fixed.

(*c*) *Loans to Members.*—A loan may be made to a member provided he has been a member for one year, and the sum does not exceed one-half of the amount of an insurance on his life (s. 45).

And, subject to certain restrictions and out of a special fund, a society may grant loans to members on their personal security with or without sureties (s. 46).

Where the trustees of a friendly society lent out of the surplus funds of the society a sum of £300 to A. on the security of a joint and several promissory note made by A., B., and C., none of the makers being a member of the society, and C. having died, the trustees made a claim on his estate, it was *held*, on appeal, that as it was not alleged that the money was borrowed for an illegal purpose, the contract was not illegal, but merely unauthorised, and that the trustees were not barred from making good their claim (*Coltman*, 1881, L. R. 19 Ch. D. 64).

(*d*) *Holding of Land.*—Except in the case of benevolent societies, there is no limit to the extent or value of land (including heritable subjects of every description) which may be held, purchased, or taken on lease by a registered friendly society (s. 47).

Payments on Death of Member.—(*a*) *Certificate is required.*—Before any such payment is made by a registered society, a certificate of death must be produced, except in cases of death at sea, death by colliery explosion or other accident, where the body cannot be found, or any death certified—in Scotland by the procurator-fiscal—to be the subject of inquiry (s. 61).

(*b*) *Member's Right of Nomination* (ss. 56 and 57).—Every member of a registered society has the right to dispose of a sum, payable on his death, by nomination.

This nomination being of the nature of a statutory will, the provisions of the Statute must be strictly complied with. The requisites are—

(1) The member nominating must not be under sixteen years of age.

(2) The nomination must be in writing, and delivered to the registered office of the society.

(3) The sum payable must not exceed £100, and includes contributions to, or deposits in, separate loan account, and sums accumulated, as under sec. 42, with interest.

(4) The person nominated must not be an officer or servant of the society, unless the husband, wife, father, mother, child, brother, sister, nephew, or niece of the nominator.

(5) Any revocation or variation must, like the nomination itself, be in writing and delivered.

(6) The member's marriage operates *ipso facto* as a revocation.

(*c*) *Intestacy of Member* (s. 58).—Where no nomination is made, and member dies intestate, the society has power, without letters of administration, to distribute the sum among such persons as appear to a majority of the trustees, upon such evidence as they may deem satisfactory, to be entitled by law to receive that sum. Where the member is illegitimate,

payment may be made to those persons the trustees deem would have been entitled to the sum had he been legitimate, or, if no such persons exist, the society will deal with the money under the direction of the Treasury. The trustees ought to make some reasonable inquiry before payment; but should it afterwards transpire there was an error in payment,—as, for instance, if the member left a will of which the society had no notice,—the trustees are not liable, and the claimant's remedy is against the recipient of the money (see *Cruickshank*, 1875, Guthrie's *Sh. Court Cases*, 2nd series, 185). The same section (s. 60) provides that payment to a nominee in ignorance of a subsequent marriage is a valid discharge to the society.

The sum payable must not exceed £100. Otherwise it can only be paid to the legal representatives of the deceased, and is subject to estate duty (s. 59).

Payments on Death of Children (ss. 62–67).—(1) The provisions under the Friendly Societies Act dealing with such payments apply to all unregistered as well as to registered societies, including trade unions (39 & 40 Vict. c. 22, s. 2); and they are also extended to collecting societies and industrial assurance companies (59 & 60 Vict c. 26, s. 13). They also extend to companies registered under the Companies Acts for burial insurance, which are not subject to the Life Assurance Companies Acts (*Newbold Friendly Society*, 1893, 2 Q. B. 128).

(2) The sum to be insured on the death of a child, either in one or more societies, is restricted to (*a*) £6 where child under five years, (*b*) £10 where child under ten years of age.

In such cases no payment will be made except to the parent, or personal representative of the parent, and only on production of a certificate of death issued by the registrar under certain conditions, including satisfactory evidence by a medical certificate, or otherwise, of the cause of death.

(3) A society failing to comply with the provisions of the Act in regard to such payments, where children under ten, will be guilty of an offence, as will also be a person attempting to evade the provisions of the Act, as by producing a false certificate (s. 84).

The penalty for such offence may be sued for by the registrar of births, deaths, etc., without the concurrence of the procurator-fiscal, in the case of unregistered as well as registered societies (*Scott*, 1876, Guthrie's *Sheriff Court Cases*, i. 211; see *Wilson*, 1896, 34 S. L. R. 208).

(4) These provisions do not apply where the person insuring has an interest in the life of the person insured.

As to what constitutes an insurable interest, see *Barnes*, 1892, L. R. 1 Q. B. 864 (where it was held that a promise to the mother of a child to take care of the child, and help to maintain it, constituted an insurable interest in the child's life), and *Halford*, 1830, 10 B. & C. 726.

Change of Name of Society (s. 69).—A registered society has power to change its name by special resolution, but

(1) The approval of the chief registrar is necessary;

(2) The rights and liabilities of the society or its members are not affected thereby.

Amalgamation.—Two or more registered societies may, by special resolution (which is defined under s. 74), amalgamate; or, similarly, one registered society has power to transfer its engagments to another society willing to undertake them. The statutory requirements are set forth in sec. 70, and are similar to those provided for the case of dissolution.

Conversion into Company.—A registered society has power, by

special resolution, to convert itself into a company under the Companies Acts, 1862–1890, or to amalgamate with or transfer its engagements to any such company (s. 71).

The rights of creditors are not to be prejudiced by any such amalgamation or transfer (s. 72).

Inspection of Society's Affairs (s. 76).—Upon application of one-fifth of the members of a registered society, or of 100 members only where the society consists of 1000 and not exceeding 10,000, or of 500 members of a society exceeding 10,000, the registrar may, with the consent of the Treasury, appoint inspectors to examine into the affairs of the society, and to report thereon, or may call a special meeting of the society. Evidence of the good faith of the application must be furnished, and the registrar may, if he think fit, require them to give security for costs, and shall direct by whom the expenses of the inspection or meeting are to be defrayed.

Disputes (s. 78).—1. *Classes of Disputes within the Act.*—With the object of avoiding the expense of litigation, the Friendly Societies Acts have always made provisions for the settling of disputes. The present Act provides a mode for the settlement of every dispute between

(*a*) A member, or person claiming through a member, or under the rules of a registered society or branch, and the society or branch, or an officer thereof; or

(*b*) Any person aggrieved who has not for more than six months ceased to be a member of a registered society or branch, or any person claiming through such person aggrieved, and the society or branch, or an officer thereof; or

(*c*) Any registered branch of any society or branch, and the society or branch of which it is a branch; or

(*d*) An officer of any such registered branch, and the society or branch.

(*e*) Any two or more registered branches of any society or branch, or any officers thereof respectively.

2. *Mode of Settlement.*—(*a*) *By Rules of Society.*—Where there is a direction in the rules of the society as to the mode to be adopted, the decision given in accordance therewith is final and binding on all parties. Such a rule generally refers the matter to an arbiter or arbiters.

Under certain conditions the mode so provided may be varied, for

(1) The parties may by consent (unless expressly forbidden by the rules) refer the dispute to the registrar, or

(2) Where the rules themselves prescribe a reference to the justices, the dispute has now to be determined by a Court of summary jurisdiction, or by consent of parties in the County Court, *i.e.*, in Scotland, the Sheriff Court of the county.

(*b*) *Where no Rules, or such not complied with.*—Where there is no provision in the rules, or where no decision is made within forty days after an application to the society for a reference under its rules, the parties may apply to a Court of summary jurisdiction, or to the County Court, being in Scotland the Sheriff Court. Where the arbitrators under the rules gave a decision, a Court of summary jurisdiction has no jurisdiction to hear a complaint that the decision by the arbitrators was improperly made, such decision being valid until set aside, and it may be a question whether a Court of law can set such a decision aside (*Bache*, 1894, 1 Q. B. 107).

(*c*) *Power to State a Case to the Court of Session, and recover Documents.*—Notwithstanding anything contained in the Arbitration Act, 52 & 53 Vict. c. 49, or in any other Act, the Court or person to whom, under the rules,

the dispute is referred may, though not compelled to do so, state a case on any question of law for the opinion in Scotland of either Division of the Court of Session, and such Court or person may also grant warrant for the recovery of documents and examination of havers as might be granted by any Court of law.

In the case of *Linton*, 1895, 23 R. 51, it was held that an action in the Small Debt Court, relating to a dispute between a friendly society and one of its members, is not prescribed as to its mode of review by the Small Debt Act of 1837, s. 31, but may be competently appealed on a case stated as provided by the Friendly Societies Act, and in such a case it is not a fatal objection that the action as originally laid did not expressly refer to the Act.

3. *Jurisdiction of Courts of Law.*—Where there are rules of the society directing the settlement of disputes, the words of the Act "shall be decided" are imperative, and oust all other jurisdiction, except (1) such as is conferred by the consent of parties; (2) as arises when no decision is made within the prescribed time; and (3) when a case is stated to the Court of Session (*Manson*, 1840, 2 D. 1015; *Cooper*, 1825, 3 S. 454; *Manners*, 1872, 10 M. 520; *Crisp*, 1832, 8 Bing. 394; *Reeves*, 1852, 17 Q. B. 995; *Clark*, 1896, 4 S. L. T. 166; *Morrison*, 1894, 2 S. L. T. 353); but the onus of showing that a complaining party has lost the ordinary right to maintain an action lies on him who denies such right (per Ld. Hagan in *Mulkern*, 1879, 4 App. Ca. 182).

Where, by the rules of a friendly society, disputes were referred to the Sheriff of the county, it was held that review by the Court of Session of a judgment on the merits was excluded, but that review by the Sheriff-Principal of a judgment of the Sheriff-Substitute, dismissing the action as incompetent, was not excluded (*Leitch*, 1870, 9 M. 40).

Again, where the rules of a building society provided that disputes should be referred to arbitration, but there was no provision as to the manner in which arbitrators should be elected, it was held that the Building Societies Act, 1874, s. 35, did not apply, and that the Sheriff had jurisdiction at common law, so that his decision was subject to appeal (*Galashiels Provident Building Society*, 1892, 30 S. L. R. 730).

Where matters in dispute are determined by the society's rules, a Court of law may interfere where the decision is not properly and regularly arrived at (*M'Kerman*, 1873, 11 M. 550; *R.* v. *Grant*, 1849, 14 Q. B. 43). But it would require very strong averments, amounting practically to an abuse of their office, to enable a Court of law to interfere with the decision given by the persons appointed under the rules (*Rombach*, 1896, 4 S. L. T. 264). In *Armitage*, 1855, 2 Kay & J. 211, it was held that the Court had no jurisdiction to interfere with the award given by the arbitrators under the rules, unless there was an error upon the face of it, or it was shown to have been corruptly obtained. In this case, Wood, V.-C., said: "The Legislature intended carefully to provide that these societies should not be dragged before Courts of law or equity, if it could possibly be avoided, and has taken care to enact that the whole discussion of their affairs shall be disposed of in a cheap and summary manner by the decision of an arbitrator or justices, as the parties shall choose; and when they have once made their election, the power of the justice or of the arbitrator, acting always within the rules of the society, is complete, and is not subject to revision by any Court of law or equity." See also *Evans*, 1854, 3 El. & Bl. 363.

The jurisdiction conferred on the Sheriff under the Friendly Societies Act of 1855 was privative (*Davie*, 1870, 9 M. 96).

Under the Act of 1875 and subsequent Acts, the words of the section providing for a dispute being taken, in certain events, to the Sheriff Court, are permissive and not peremptory. While the section confers jurisdiction on the Sheriff Court, it does not exclude the jurisdiction of the Supreme Court, there being no negative words or no words of exclusion (*Royal Liver Friendly Society*, 1887, L. R. 35 Ch. D. 332).

4. *Disputes within the Act.*—The disputes within the Act must be between the society and a person in his capacity as member. Where the relationship between the parties is different, the ordinary legal remedies are applicable (*Mulkern*, 1879, 4 App. Ca. 182; *Morrison*, 1849, 19 L. J. Exch. 20).

Disputes within the Act cover a claim raising a question whether the second wife of an enrolled member was entitled to enrolment and to the benefits of the society (*Stone*, 1894, 63 L. J. Q. B. 471); and questions as to the distribution of a fund in the hands of the trustees (*Grinham*, 1852, 7 Ex. 838).

So in an action against a savings bank arising out of a dispute with a depositor, such disputes being by 26 & 27 Vict. c. 87, s. 48, referred to the registrar of friendly societies, the registrar's decision was held to be final even where the question involved was whether a savings bank or its depositor should suffer from a forgery (*Melrose*, 1896, 4 S. L. T. 270 and 391).

5. *Disputes not within the Act.*—(*a*) *Generally.*—With regard to these, the ordinary legal remedies being applicable, the jurisdiction of Courts of law is not ousted.

These include questions as to whether a society, in making an alteration on its rules fundamentally affecting its constitution, conformed to the necessary conditions (*Davie*, 1870, 9 M. 96; but see *Hoey*, 1858, 4 C. B. (N. S.) 718).

So the claim of a society upon its treasurer for misappropriating, and keeping in his hands the moneys of the society, is not a dispute within the meaning of the Act (*Sinden*, 1861, 3 El. & E. 633).

The clause providing for settlement of disputes in the Act regulating industrial and provident societies is similar to that under Friendly Societies Acts. So an action by an executor to recover a sum alleged to be due to deceased by an industrial and provident society, in which liability was denied by reason of arrangement with deceased, was held not to be a dispute within the Act (*Symington*, 1894, 21 R. 371).

(*b*) *As between Society and expelled Member.*—The jurisdiction of the Courts is not ousted where the substance of the question is whether the litigant opposed to the society has or has not the rights of a member (per Lord President in *Symington, supra*, at 376, approving of *Prentice*, 1875, L. R. 10 C. P. 679, and *Willis*, 1892, 61 L. J. Q. B. 606). The latter case expressly decided that disputes under the Act did not include a dispute as to whether a person expelled was entitled to be reinstated. It was thought that the extension of the words of the Act so as to include "any aggrieved person who has not for more than six months ceased to be a member," would have the effect of bringing disputes of this class under the Act; and in the case of *Rombach*, 1896, 4 S. L. T. 264, the Lord Ordinary (Kincairney) appears to have adopted this view. It has, however, since been decided, in the Court of Appeal in England, that these words did not extend the provisions of the section to a class of disputes not previously within it, *e.g.* disputes as to the title of a person to be a member of the society, and that, following the cases of *Prentice* and *Willis* (quoted *supra*), in such disputes the juris-

diction of a Court of law is not excluded (*Palliser*, 1897, L. R. 1 Q. B. 257).

Where a member was improperly expelled, it was held that the funds of the society were liable in damages to the expelled member for the wrong done to him through violation of the society's rules by the office-bearers (*Blue*, 1866, 4 M. 1042).

Termination of Societies (ss. 78–83).—It has been noticed above that a society may continue its existence by amalgamation or, in another form, by conversion into a company, and that in such a case its registry will, on request, be cancelled.

The existence of a registered friendly society may also be terminated—

(*a*) by the occurrence of an event declared in the rules to be the termination of the society;

(*b*) voluntarily, by the act of the members;

(*c*) compulsorily, by the award of the registrar.

(*b*) *Voluntary Dissolution* requires, in the case of friendly societies and branches, the consent of five-sixths in value of the members, including honorary members, and of all those receiving any relief, annuity, or benefit, unless the claims of such have been duly satisfied, or adequate provision made for the purpose. In the case of other classes of societies registered under the Act, the consent of three-fourths of the members is required. Such consent must be testified by their signatures to the instrument of dissolution. Signatures given by agents are not good (*Aitken*, 1892, 29 S. L. R. 456).

In *Rudd*, 1896, 2 Ch. 554, 65 L. J. Ch. 781, the question was raised, but not decided, whether, in a society composed of minors, an instrument of dissolution signed by their fathers, guardians, or agents would suffice.

Where a juvenile branch of a society was, by the rules, to be *governed* by a committee of the society, it was held, on appeal, that this was a fundamental rule of the society, and that the juvenile branch could not be dissolved without the consent of the committee of the society (*idem*).

Whether or not proxies will be allowed in voting depends on the rules.

Though the majority binds the minority to a dissolution, they cannot alter their rights under the rules, so as to bind them to liabilities they had never undertaken (*Kemp*, 1895, 1 Ch. 121; *Botten*, 1895, 2 Ch. 441; see also *Brownlie*, 1883, 10 R. H. L. 19).

The *instrument of dissolution* must be made in due form, and set forth the intended appropriation or division of the funds, or refer this to the chief registrar (s. 79).

(*c*) *Compulsory Dissolution.*—Upon the application of a fixed number of members, the registrar may make an investigation into the affairs of the society, and, if satisfied that the funds are insufficient to meet the claims, may, if he think it expedient, dissolve the society by award, and make directions for the disposal of its assets. Such award may be suspended by him for a period. The dissolution of a society must in every case be advertised by the registrar within twenty-one days in the *Edinburgh Gazette* and a local newspaper, and, failing proceedings within three months thereafter by any member to set it aside, such dissolution will be final. Notice of seven days must be given to the central office by anyone intending to take proceedings to set aside the dissolution. A member having a claim on the funds of the society is not entitled to take proceedings to set aside the registrar's award merely on the ground that he is dissatisfied with the provision made for satisfying his claim (*Wilmot*, 1892, L. R. 1 Q. B. 812).

Disposal of Unexpended Funds.—(*a*) *Where Society dissolved.*—As stated above, where a registered society is dissolved under the Act, the intended appropriation or division of its funds and property is set forth in the instrument of dissolution, or is stated in said instrument to be left to the award of the chief registrar.

(*b*) *Where Society defunct, they are* Bona vacantia.—The question arises as to what is to become of the funds of a society which, through the death of all the members and of all persons entitled to its benefits, and the consequent failure of its objects, has become defunct; and in which there is no provision in the rules to provide for such a contingency. Assuming that the society is not a charity, and that therefore the unexpended funds are not applicable *cy-près*, it is not of importance in such a case whether the society is under the Friendly Societies Acts or not, as the law will be equally applicable to any associated body of persons formed for mutual benefit.

In *Mitchell*, 1878, 5 R. 954, it was *held* that where the membership was reduced to one, and no means existed under the constitution for electing new members, the surviving member and annuitants had no right to divide the funds among themselves. The question was considered, but not decided in this case, as to how the funds were eventually to be disposed of. Ld. Deas said: "I do not entertain much doubt that where money is subscribed for a particular purpose which totally fails, the money belongs to the subscribers and their representatives, if it can be ascertained who they were and are."

The matter has since been decided in the Court of Appeal in England in the case of *Cunnack*, 1896, L. R. 2 Ch. 679, reversing 1895, L. R. 1 Ch. 489. The circumstances were, that all the members of a friendly society had died by 1879, that in 1892 the last annuitant died, and that the society then had a surplus or unexpended fund of £1250. It was *held* by Chitty, J., that there was a resulting trust in favour of the ordinary members of the society from time to time, or their respective representatives, in shares in proportion to the amount contributed by each such ordinary member to the funds of the society, and that the amounts paid as fines or forfeitures, and annuities received by widows, were not to be taken into account. This decision was, however, reversed by the Court of Appeal, who held that the funds of the society passed to the Crown as *bona vacantia*. Where, therefore, a society is in such a position, the proper course would be for the trustees, judicial factor, or persons having an interest and title, to raise an action to have it declared that the property and funds of the society belong to the Crown as *bona vacantia*.

Offences and Penalties.—A list of statutory offences is given in sec. 84. Officers of the society committing an offence are held equally to be offenders, unless they can prove ignorance, or an attempt to prevent the offence being committed (s. 85).

Under sec. 87 it is a crime

(*a*) To furnish rules, etc., to persons on the pretence they are the rules of a registered society, and with intent to mislead them.

(*b*) To knowingly make a false or fraudulent statement in any statutory declaration under the Act.

The same section also enacts

(*c*) That the person guilty of obtaining any property of a society by false representations or imposition, or of withholding and misapplying any such property, shall be liable on summary conviction to a fine not exceeding £20 and costs, and be ordered to restore such property, or in default thereof to be imprisoned with or without hard labour for a term not exceeding three months.

This section, dealing with *Misapplication of Funds*, corresponds to sec. 64 of the Industrial and Provident Societies Act, 1893, and is a re-enactment of sec. 24 of the 1855 Act, with the following important amendments:—

(1) The complaining member need not be authorised by a general meeting, but may be authorised (*a*) by the society, the trustees, or the committee of management, or (*b*) by the chief registrar, or any assistant registrar under his authority.

(2) The element of false representation or imposition is expressly limited to the offence of obtaining possession, and is not required to be proved where the offence charged is withholding or misapplication. The decision of *Barret*, 1872, L. R. 7 C. P. 405, is therefore no longer applicable.

Under sec. 88, any person wilfully falsifying a balance-sheet, contribution-book, return, or other document, is liable to a fine not exceeding £50.

Any other offence under the Act, for which a penalty is not provided, is liable to a fine not exceeding £5 (s. 89). Such fines are recoverable in a Court of summary jurisdiction, *i.e.* in Scotland the Sheriff Court of the county (s. 102), and the persons entitled to sue are the chief registrar, any assistant registrar, or any person aggrieved. Fines imposed by the rules are recoverable in the same manner, but penalties imposed by the rules must not be contrary to the provisions of the Act. Where an officer of a friendly society was charged with misappropriation of money, and an order for payment was made, and he failed to implement the order, he was imprisoned for two months. The trustees of the society then sued to recover the amount which the defender ought to have paid. Held that the conviction and punishment was a bar to the pursuer's action for payment (*Vernon and Others*, 1891, L. R. 1 Q. B. 400).

Any person may appeal from any order or conviction under the Act in accordance with the provisions of the Summary Jurisdiction Scotland Acts (s. 93).

While fines are recoverable at law, a member's contributions are not, they being voluntary (s 23)

Legal Proceedings (s. 94).—(*a*) *Title to sue.*—A registered society or branch (1) may sue or be sued through the trustees of the society or branch, or any other officers authorised by the rules, without other description than the title of their office.

(2) In actions at the instance of a member or person claiming through a member, it may be sued in the name of any officer or person who receives contributions or issues policies on behalf of the society or branch within the jurisdiction of the Court in which the proceedings are brought; but the words "on behalf of the society or branch" (naming the same) must be added.

Where an unregistered friendly society was divided into lodges, it was held that an action must be directed against the society, or its central committee, and not against the particular lodge to which the party suing belonged (*M'Kerman*, 1873, 11 M. 548).

In the case of *Simpson*, 1874, 2 R. 129, a branch or court of a society was suspended by the executive council of the central body, and the minority of such court was authorised by said council to assume the name and number of the suspended court. The majority continued to meet as if no suspension had taken place, and appointed trustees to raise an action as trustees of the said court for declarator that they were entitled to the custody of the moneys, etc., of the said court, and for their delivery. It was *held* that they had not instructed a title to sue.

(*b*) *Service.*—The summons or other writ is sufficiently served by

personal service on the officer or other person sued, or by leaving a true copy at the registered office of the society, or at any place of business of the society, within the jurisdiction of the Court, or, if such office or place of business be closed, by posting the copy on the outer door thereof.

In all cases where personal service is not made, or a true copy left as aforesaid, a copy of the summons or writ must be sent in a registered letter addressed to the committee at the registered office of the society, and posted at least six days before any further procedure.

II. Collecting Societies and Industrial Assurance Companies.

1. *Description.* — These two classes of societies are really friendly societies, and were treated under distinct sections of the 1875 Act, but the enactments relating to them have now been consolidated under a separate Act of 1896 (59 & 60 Vict. c. 26). This Act adopts several of the provisions of the Friendly Societies Act, 1896, viz. those sections relating to the appointment of inspectors, the calling of meetings, and dissolution, as applicable to collecting societies, and the sections relating to payments on the death of children as applicable to industrial assurance companies. The societies coming under the provisions of this Act are: all collecting societies and industrial assurance companies that receive contributions or premiums by means of collectors at a greater distance than ten miles from their registered office or place of business, and, in the case of industrial assurance companies, at less periodical intervals than two months

Collecting societies include societies or branches unregistered as well as registered.

An industrial assurance company is described as "a person or body of persons, whether corporate or unincorporate, granting assurances on any one life for a less sum than £20" (s. 1).

Unless specially provided, as, *e.g.*, in the case of payments on the death of children (s. 13), the Act does not apply to industrial assurance companies the premiums of which are receivable at greater periods than two months.

Where a society was registered as a company under the Companies Act, but was not registered under the Friendly Societies Act, and under the memorandum and articles of association members who paid subscriptions fortnightly to the collectors of the society were entitled to receive certain sick pay, and sums for funeral expenses incurred on the death of their children, and a subscription card was issued to each member on which the collectors entered the contributions received from time to time, it was *held* that the society was not within the definition of the Life Assurance Companies Act, 1870, as being persons "who issue or are liable under policies of insurance upon human life," but that these words should be rejected as inconsistent with the context, that therefore it was a society under the Friendly Societies Act, and was rightly convicted for a contravention of the provisions of said Act with regard to payments on the death of children under ten (*Newbold Friendly Society*, 1893, L. R. 2 Q. B. 128).

2. *Duties and Obligations.*—Among those imposed by the Act are—

(1) A collecting society must furnish every member or family with a copy of its rules and duly signed printed policy at a charge of one penny.

(2) A collecting society or industrial assurance company

(*a*) Cannot enforce forfeiture of a policy or benefit without fourteen days' previous notice (s. 4) (see *Taylor*, 1882, 46 L. T. (N. S.) 168);

(*b*) Cannot transfer a member to another society or company without his consent. As to circumstances held to be a contravention of the Act in this respect, see *Refuge Assurance Co.*, 1889, 2 White, 373);

(*c*) Cannot accept a transfer without notice to the society from which the transfer is sought to be made (s. 5).

Contravention of either of the two last-named is a statutory offence (s. 14).

As to what is a relevant charge, see *Mackintosh*, 1885, 13 R. (J. C.) 96.

(3) A collecting society must have open for inspection, seven days before the annual meeting, a copy of its balance-sheet, and send a copy to any member on demand.

(4) A collecting society must have annual returns certified by an accountant (not an officer of the society) (s. 6).

Societies subject to these special provisions must set them forth in their rules (s. 10). A society may obtain a certificate of exemption from these provisions from the chief registrar should he think fit. While such certificate, which may be revoked, is in force, the society shall be dealt with as if it were a friendly society under the Friendly Societies Act, 1896 (s. 11).

Collectors.—1. *Definition* (s. 17).—"Collector" includes every paid officer, agent, or person, howsoever remunerated, who by himself, or by any deputy or substitute, collects contributions for a collecting society or industrial assurance company, or holds any interest in a collecting book thereof.

There are exceptions, the term being expressly declared not to include

(*a*) The secretary or other officer receiving contributions;

(*b*) Any officer appointed to superintend and receive moneys from collectors within a specified area, not being himself a collector;

(*c*) Any agent appointed and remunerated by members, and not under the control of the society or company, or of any officer thereof.

2. *Disqualifications* (s. 8).—Collectors are disqualified under a penalty from

(*a*) Being a member of the committee;

(*b*) Holding any other office except that of superintending collectors within a specified area;

(*c*) Voting at, or taking part in, the proceedings of any of the meetings.

Disputes.—Sec. 7 provides that all disputes within the Act, notwithstanding anything in the rules to the contrary, may be referred to the Sheriff Court of the county having jurisdiction; and that the Court may then settle the dispute according to the provisions of the Friendly Societies Act, 1896.

This section is merely enabling, and does not therefore oust the jurisdiction of the superior Courts, unless the rules of the society prescribe the mode of settlement of disputes in the way provided by the section (*Royal Liver Friendly Society*, 1887, L. R. 35 Ch. D. 332).

Offences.—The provisions of the Friendly Society Act, 1896, with respect to offences and the procedure to be adopted, apply to offences under this Act, and extend to unregistered collecting societies and to industrial assurance companies as if they were registered societies (s. 14).

Wilful falsification of a contribution or collecting book is punishable by

a fine not exceeding £50, recoverable by the chief or assistant registrar, or any person aggrieved (s. 15).

III. Miscellaneous Matters.

1. *Recovery of Subscriptions.*—Except in the case of cattle insurance societies, and in some cases of specially authorised societies, the subscriptions of members are not recoverable at law (s. 23).

2. *Liability of Funds.*—The funds of a friendly society may be liable for a wrong done to a member through violation of the society's rules by the office-bearers (*Blue*, 1866, 4 M. 1042). In another case, where the Court set aside a resolution by the members of an unincorporated friendly society to dissolve the society and divide the funds, it was held that the whole expenses might be paid out of the funds of the society (*Milne*, 1859, 22 D. 33).

3. *Assignation of Shares in Security.*—Where a friendly society made a payment to a member on account of his shares after he had assigned them in security of a debt due by him, without such assignation being intimated to the society, it was *held* that the society was not liable to the assignee for the sum so paid.

Ld. Young said: "It is not necessary to decide whether shares in a friendly society can be assigned as security for a debt, though it is almost impossible to avoid forming an opinion on the question. My own opinion is that they cannot, otherwise than by substituting the creditor in the debtor's place as a member of the society" (*Grigor*, 1887, 15 R. 56).

4. *Exemption from Income Tax.*—By the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 88, the stock, dividends, or interest of any friendly society legally established under any Act relating to friendly societies are exempt from the duties chargeable under Sched. C of that Act, provided that the sums assured, or the amount of annuity granted by any such society to any individual, or to any person nominated by, or to claim under, him, shall not exceed £200 or £30 respectively, and that the exemption of property invested in public securities in the Bank of England shall be claimed and proved by any trustee or treasurer of any such society, or by any member thereof, before the Commissioners for Special Purposes.

By the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 49, friendly societies which are not debarred from the benefit of the exemption granted by the last-mentioned Act, in respect of property chargeable under Sched. C, are also entitled to exemption in respect of all their interests and other profits and gains chargeable under Sched. D, as under Sched. C.

By the Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 12, friendly societies which are entitled to the benefit of exemption from Sched. C are also entitled to the like allowances, in respect of any charge under Sched. A to be made on the lands, tenements, hereditaments, or heritages belonging to the society, as are granted to colleges and other properties mentioned in No. VI. of that Sched. in sec. 61 of the said Act 1842.

Any person who has made insurance on his own life or the life of his wife, or contracted for any deferred annuity on his own life or the life of his wife, in or with any friendly society legally established under any Act relating to friendly societies, is entitled to deduct the amount of the annual premium before ascertaining the amount liable to be assessed for income tax, or, if he has paid duty, to claim repayment (16 & 17 Vict. c. 34, s. 54; 18 & 19 Vict. c. 35, s. 1); but the premiums payable in respect of such insurances must not be made for shorter periods than three months (18 & 19 Vict. c. 35, s. 1).

IV. Unregistered Friendly Societies.

The Friendly Societies Act, 1896, consolidating previous enactments, applies almost exclusively to "registered societies," which include societies legally established under previous Statutes, though not actually registered. The only exceptions which apply to unregistered societies are sec. 43 as to members in the milita, and secs. 62–67 as to payments on the death of children.

The provisions of the Collecting Societies and Industrial Assurance Companies Act, 1896, apply to all such classes of societies, whether registered or unregistered.

Apart from these exceptions, it is difficult to define and determine the exact position and status of an unregistered society. Such societies, when formed for general and laudable purposes, and not for the acquisition of gain by the society or its members, are not necessarily unlawful, though they may have failed to acquire a statutory status by registration, and are not entitled to the facilities, exemptions, and privileges conferred by Statute. Many of the decisions above quoted will therefore apply equally to them.

At one time such societies were held to be partnerships, but this is now doubtful. A club was also formerly regarded as a partnership, though it is now to be distinguished; and an unregistered friendly society seems to partake more of the legal character of a club. Like it, it has no corporate existence. Unregistered societies may be illegal by Statute in two ways.

(1) The Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4, enacts that no company, association, or partnership consisting of more than twenty persons shall be formed, after the commencement of the Act, for the purpose of carrying on any business which has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under the Act, or is formed in pursuance of some other Act of Parliament.

If a society therefore is one having for its object the acquisition of gain, it will be rendered illegal by want of registration.

In *Jennings*, 1882, 9 Q. B. D. 225, an unregistered mutual benefit society, from its nature was held to be illegal under the above section, and so unable to maintain an action. So also was a loan society through not being registered (*Shaw*, 1883, 11 Q. B. D. 563).

But an association formed before the Act was held not to be affected by not being registered (*Shaw*, 1883, 12 Q. B. D. 117).

The question whether or not a society is formed for gain is itself not always easy to decide; for the English Courts have gone so far as to hold that a mutual marine association, though it had not for its object the acquisition of gain by the association itself, had for its object the acquisition of gain by the individual members, and had therefore no legal existence if not registered under the Companies Act, 1862 (*Padstow Total Loss and Collision Assurance Association*, 1882, L. R. 20 Ch. D. 137).

According to this decision, all societies which have a rule or practice of dividing funds would appear to be illegal.

(2) In certain circumstances it might be contended that an unregistered society fell within the Life Assurance Companies Act, 1870, 33 & 34 Vict. c. 61, which applies to any person or persons, corporate or incorporate, *not being registered under the Acts relating to friendly societies*, who issue, or are liable under, policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life within the United Kingdom (see *Newbold Friendly Society*, 1893, L. R. 2 Q. B. 128). Failure

by societies under this Statute to comply with its somewhat onerous provisions involves heavy penalties.

It is therefore clear that it is safer for all friendly societies to be registered, and thus, besides becoming entitled to the benefits of the Act, to evade any questions as to their legality.

[Brabrook's 13th ed. of Tidd Pratt's *Law of Friendly Societies*; Fuller on *Friendly Societies*; Davis on *Friendly Societies*.]

See BUILDING SOCIETIES; CLUBS; INDUSTRIAL AND PROVIDENT SOCIETIES; TRADE UNIONS.

Fructus pendentes are fruits not yet separated from the subject which produced them. See FRUITS.

Fructus percepti are fruits separated from the subject which produced them. See FRUITS.

Fruits are natural, industrial, and civil. *Natural Fruits*, by our usage, include all fruits which, like trees, shrubs, and natural grasses, grow for a tract of years together without the aid of human industry and cultivation. On the principle of accession they are deemed *partes soli*, and accordingly, when not yet separated from the ground (called by the Romans *fructus pendentes*), they pass, on the death of a proprietor, to his heir, and on the sale of lands, to the purchaser. They must likewise, on the termination of *bona fides*, be restored by the *bonâ fide* possessor to the true owner (Stair, ii. 1. 2, 34; Ersk. ii. 1. 14, 26, ii. 2. 4, and ii. 6. 11; 2 Bell, *Com.* 2; Bell, *Prin.* s. 1473).

Industrial Fruits are those which are produced by the annual industry and culture of man, as wheat, barley, or turnips. These fall not within the rule applied to natural fruits, but are deemed a manufacture from the seed, and so, even before separation, go with the property of the seed and labour to the sower, on the principle *messis sementem sequitur* (authorities cited *supra*). In the case of a liferent of lands, the general rule is that the liferenter is entitled to the use of all natural and industrial fruits (Bell, *Prin.* s. 1045), but this rule does not apply to trees, a liferenter being only entitled to (1) brushwood and ordinary windfalls, (2) timber required for the maintenance and repair of fences and buildings on the liferented estate, and (3) such timber as coppice wood, which is cut down as it ripens, and springs again from the roots (Rankine, *Landownership*, pp. 636–38, and authorities there cited). The right of the liferenter to natural fruits not yet separated from the ground ceases with his death; the right to the industrial crop then growing passes to his executors (Ersk. ii. 9. 65; Bell, *Prin.* s. 1045). While trees and shrubs are, as a rule, held to be natural fruits, there is authority for the view that plants and shrubs in a nursery garden, kept for sale, are to be included in the category of industrial fruits (*Gordon*, 1806: Hume, *Dec.* 188: *Bythe*, 1837, 16 S. 232; *Syme*, 1861, 24 D. 202, per Ld. Deas, at p. 214). With regard to artificial hay, it was formerly held, in questions between the heir and executor of a deceased proprietor (*Sinclair*, 1744, M. 5421; *Wight*, 1796, M. 5446; but see *Gordon*, 1806, Hume, *Dec.* 188), and a liar and the representatives of a life tenant (*Tweeddale*, 19 Nov. 1816, F. C.), that hay of the second crop, from grass seeds sown with white crop, was heritable before separation from the ground; but

it has more recently been decided that, as between landlord and waygoing tenant, hay from grass seeds sown with the penultimate white crop is an industrial crop (*Keith*, 1825, 4 S. 267; *Lyall*, 1832, 11 S. 96), and the authority of the older decisions would thus appear to be doubtful.

Fruits, both natural and industrial, when separated from the subject which produced them (*fructus percepti*), are moveable property, and, in conformity with the rule applicable to property in moveables, they are presumed to belong to the person in possession of the principal subject at the date of separation, though this presumption may be rebutted by evidence that the possessor was *in malâ fide*. A *bonâ fide* possessor accordingly is not bound to restore such fruits to the true owner on the termination of *bona fides* (Ersk. ii. 1. 25, 26). Similarly, such fruits, being *in bonis* of the proprietor or liferenter, do not pass on the sale of lands to the purchaser (Ersk. ii. 1. 14), nor on the expiry of a liferent to the fiar.

Civil Fruits are the rents and profits of subjects not in the immediate occupation of the owner, liferenter, or *bonâ fide* possessor. In the case of a liferent of heritage, the general rule is that the liferenter has the right to use all the civil fruits of the subject liferented (Ersk. ii. 9. 56), but to this rule there are certain exceptions. Thus terce does not include a right to feu-duties (*Nisbet*, 13 S. 517), nor has a liferenter by constitution a right to casualties (*Ewing*, 10 M. 678). Again, while all liferenters have a right to such minerals as are necessary for the use of the mansion-house and estate, the right of a simple liferenter extends no further (*Dickson*, 2 S. 152, (N. E.) 138), whereas a liferenter by reservation has been found entitled to carry on mines which were being worked at the commencement of the liferent (*Eiston*, 9 S. 716).

Civil fruits, like natural and industrial, are acquired *percepticne*. Where the payments are not connected with the produce of land, as in the case of profits arising from the daily labour of workmen in fishings, mines, and other industrial pursuits, they are held to accrue *de die in diem* (Bell, *Prin.* s. 1497; Ersk. ii. 9. 66), and this rule has been extended by the Apportionment Acts of 1834 (4 & 5 Will. IV. c. 22) and 1870 (33 & 34 Vict. c. 35) to all periodical payments. It is, however, settled that these Acts are not so framed as to take away from the lessor's executor any benefit which he previously enjoyed (*Campbell*, 11 D. 1426; *Blaikie*, 11 D. 1456; *Herries*, 11. M. 396), and it is therefore necessary to inquire what his rights are apart from Statute. At common law the rents of lands and houses are deemed to be reaped or *percepti* at the legal terms of payment (*i.e.* Whitsunday and Martinmas) where payment is conventionally postponed, or at the date when payment is actually exigible, if that precede the legal term. In the case of farms, both arable (*Campbell*, 11 D. 1426) and pastoral (*Blaikie*, 11 D. 1456), the rent is payable in respect of the crop, and the rent for the crop for each year is legally due, the first half at Whitsunday and the remainder at Martinmas. The like rule holds in the case of grass parks let for the season, April to December (*Swinton*, 20 June 1809, F. C.). So also in the case of houses, though the rent is payable for possession, the first half-year's rent is legally due at Whitsunday, even though that be the term of entry, and the second at Martinmas (*Binny*, 28 Jan. 1820, F. C.; *King*, 6 S. 422). Whitsunday and Martinmas have also been recognised as the legal terms of payment of mineral rents and lordships, at least where these are taken payable according to terms (*Weir's Executors*, 8 M. 725). The common-law rule of apportionment, accordingly, as between liferenter and fiar, where payment is conventionally postponed, is that one-half of the rent payable in respect of the

crop or possession of any year vests in the liferenter if he survive the term of Whitsunday, and the remainder if he survive the term of Martinmas. The same rule serves also to fix the different interests of the heir and executor of a proprietor in relation to the rent payable for the crop or possession of the year in which the proprietor dies, and of the *bonâ fide* possessor and true owner in regard to the rent for the year in which the *bona fides* of the former terminates (Kames, *Elucid.* art. 9; Bell, *Prin.* ss. 1047, 1499 *et seq.*, and cases there cited; 2 Bell, *Com.* 8; Ersk. ii. 1. 26, and ii. 9. 64; Rankine, *Landownership*, 79–80 and 643–47, and *Leases*, 321–27). Upon the sale of an estate, the division of rents between the seller and purchaser is, in the absence of agreement to the contrary, regulated by the same principles (*Sinclair*, 10 D. 190; *Murray*, 1670, Mor. 15888; *Arbuthnot*, 1750, Mor. 13337).

The results of the common law, therefore, are: (1) that the legal terms, and not (except in the case of forehand rents) the conventional, must be looked to in questions of vesting, and (2) that survivance of a term vests in a person entitled to draw rent what is legally due at that term, but nothing more. No alteration is made by the Apportionment Acts upon the first of these rules, but rents are to be "considered as accruing from day to day" (s. 2 of Act of 1870), and the effect of the Acts is—in the case of backhand rents—to vest in the lessor, and transmit to his executor, such proportion of the rent of the half-year in which he dies as corresponds to the period of his survivance (*Campbell*, 11 D. 1426; *Blaikie*, 11 D. 1456); and—in the case of forehand rents—such proportion of the rent payable at the term following his death as corresponds to the period during which he survived the preceding term (*Herries*, 11 M. 396). The opinion has been expressed that the terms of the existing Apportionment Act (of 1870) are wide enough to apply to questions between vendor and purchaser (per Ld. Gifford in *Maxwell's Trustees*, 1 R. at p. 126), but the contrary has been decided in Ireland (*Dawson's Estate*, L. R. 21 Ir. 441).

See Apportionment Acts; Bona fides: Heritable and Moveable; Liferent.

Frustra probatur quod probatum non relevat. —See Evidence.

Fuel.—See Feal, Divot, and Fuel.

Fugitation is the sentence pronounced by the High Court of Justiciary against one charged with crime, who, having been duly cited to appear before that Court, fails without just excuse to obey the citation. The condition which results from the sentence is known as "outlawry."

I. *Competency.*—Sentence of fugitation can be pronounced only by the High Court of Justiciary, at Edinburgh or on Circuit, and by that Court only in the following circumstances:—

(*a*) When the accused person is: (1) a domiciled Scotsman, (2) a Scotsman by birth settled abroad, who has committed a crime in the course of a visit to Scotland, or (3) a foreigner who has been apprehended and liberated upon bail on a charge of crime committed during his passage through, or residence in, Scotland (Hume, ii. 50, 57). It does not appear that a foreigner can be fugitated who is

charged with a crime committed in Scotland, but has not been apprehended and admitted to bail, although fugitation was pronounced under these conditions in the *Ardlamont* case (*Monson, etc.*, 1893, 1 Adam, 114).

(*b*) When the accused person has received a valid and legal citation or notice to appear (Hume, ii. 271; Alison, ii. 352; *Hannah*, 1883, 5 Coup. 346). Counsel may attend in his absence and state objections to the sufficiency of the citation, but not to the indictment. If the accused is admittedly furth of Scotland, counsel must hold an express mandate (*Forrest*, 1823, Shaw, 103; *Grant*, 1827, Syme, 245; *Crocket*, 1864, 4 Irv. 556).

(*c*) When the accused person fails to appear at any diet of which he has got notice, and no just excuse is established on his behalf by medical certificates on soul and conscience, oaths of witnesses, or other evidence, the prosecutor being entitled to lead proof to rebut such evidence (Hume, ii. 269; Alison, ii. 349; *Hannah*, 1883, 5 Coup. 346). If illness is alleged, its origin must be satisfactorily explained (*Alcock*, 1857, 2 Irv. 615). Absence abroad on the public service has been accepted as an excuse (Alison, ii. 351).

(*d*) When the public prosecutor appears, insists in the charge, and moves for fugitation (Hume, ii. 265, 269; Alison, ii. 344, 349). He can move for forfeiture of the accused's bail-bond without sentence of fugitation, if he thinks fit to do so (*Rodger*, 1879, 4 Coup. 301).

The Court, in addition to pronouncing sentence of fugitation, may declare the accused's bail-bond (if any) to be forfeited, and grant a new warrant for his apprehension and committal to prision till liberated in due course of law (Hume, ii. 272; Alison, ii. 350). The cautioner in the bail-bond cannot plead objections to the citation in bar of fugitation, but may do so in bar of forfeiture (*Smith*, 1836, 1 Swin. 301; *Cook*, 1832, 5 Deas & And. 513; *Laird*, 1838, 2 Swin. 26 and 178; *Crocket*, 1864, 4 Irv. 556).

II. *Effect.*—Sentence of fugitation puts the accused person outside the law, from which he can claim no benefit. Until reponed against the sentence, he can hold no office of trust; cannot appear in a civil or criminal Court as pursuer, defender, witness, or juror; cannot be admitted to bail when reapprehended; and may be denounced as a rebel, whereby his moveable estate escheats to the Crown, and, after a year, the profits of his heritable estate for his lifetime are forfeited to the superior (Hume, ii. 207, 272; Alison, ii. 350).

III. *Recal.*—The sentence may be recalled or relaxed in various ways:—

(1) *De jure*, with or without a motion for reponing, when the outlaw is arraigned at the bar of the High Court on the same charge under a new indictment (Hume, ii. 272; Alison, ii. 353; *Miller*, 1850, J. Shaw, 288; *Clyne*, 1875, 3 Coup. 149).

(2) On his own petition, when he has been reapprehended, and desires to be admitted to bail (Hume, ii. 272; Alison, ii. 353; *Hinchy*, 1864, 4 Irv. 559).

(3) On his own petition, when he offers to surrender his person and stand his trial (Hume, ii. 273; Ailson, ii. 351; *Sweeney*, 1894, 1 Adam, 392).

(4) On a petition by his widow and children, when his failure to appear was caused by his death before citation (*Webster*, 1858, 3 Irv. 285).

The Court are not bound to recal fugitation, except in the case first mentioned, and may annex to the reponing such conditions as they think fit regarding bail, costs, etc. (Hume, ii. 274; Alison, ii. 351). If a petition is

presented, it is intimated to the Lord Advocate, who may appear or not as he thinks proper (*Webster* and *Sweeney, supra*).

IV. *Inferior Courts.*—The inferior Courts in Scotland cannot pronounce sentence of fugitation (Hume, ii. 69; Alison, ii. 350). If a person charged with crime before one of those Courts fails to appear after due citation and without just excuse, his bail-bond, or the caution deposited for his appearance, is declared to be forfeited, and a new warrant may be granted for his apprehension and committal to prison till liberated in due course of law (*ib.*). If he has not found bail, the Court may impose a moderate unlaw or fine (Hume, ii. 70). The cautioner in the bail-bond may plead objections to the citation in bar of forfeiture (see I. *supra*). Forfeiture of the bail-bond may be declared after the diet has been deserted *pro loco et tempore* (*Morrison*, 1854, 1 Irv. 599); but the better course is to forfeit the bond without deserting the diet.

Fugitive Offenders are persons accused or convicted of certain specified offences, who have fled from one part of the British Empire to another, and are recovered in pursuance of the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69). For the recovery of fugitives from one jurisdiction to another within the British Isles, see Backing a Warrant; and of fugitives to or from a foreign country, see Extradition.

I. Application of Statute.

A fugitive is primarily a person who is *accused* of having committed in one part of Her Majesty's dominions an offence to which the Statute applies, and who has left that part and is found in another part (44 & 45 Vict. c. 69, s. 2). The term also includes a person *convicted* of such an offence, who is unlawfully at large before the expiration of his sentence (*ib.* s. 34). The Statute applies to treason, piracy, and every offence which is punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour, rigorous imprisonment, or confinement in prison combined with labour, for a term of *twelve months* or more, or by any greater punishment, notwithstanding that it may not be an offence in the part where the fugitive is, or to which he is on his way (*ib.* s. 9). The following countries are each deemed to form *one part* of Her Majesty's dominions:—(*a*) the British Isles, *i.e.* Great Britain and Ireland, Isle of Man, and Channel Islands (*ib.* s. 37); (*b*) any other British possession, *i.e.* a territory or group of territories forming part of Her Majesty's dominions under one central Legislature (*ib.* s. 39); and, (*c*) as regards British subjects and persons subject to the Queen's jurisdiction, and under the conditions of each Order, any place out of Her Majesty's dominions in which Her Majesty has jurisdiction, and to which the Act has been extended by Order in Council, *e.g.* Cyprus, Turkey, Egypt, China, Japan, Corea, Zanzibar, Morocco, Siam, Persia, various parts of Africa, etc. (*ib.* s. 36).

II. Fugitives from Scotland.

When it is suspected or discovered that a fugitive has left Scotland and is in, or on his way to, a place to which the Act applies, the Scottish police inform the procurator-fiscal, who reports to the Crown Agent by letter or telegram. The latter communicates with the Lord Advocate and Home Secretary. In case of urgency, the Colonial Office may telegraph to the colony, asking for the provisional arrest of the fugitive. If a warrant for

the offender's arrest in Scotland has been hastily prepared, it may be advisable that a fresh one should be made out, on a new petition or information containing greater detail, and in particular a distinct allegation that the offence charged is punishable in Scotland by *at least* twelve months imprisonment with hard labour. Great care must be taken to have the warrant in correct form, the depositions complete in material points, and the necessary copies duly authenticated. The following documents are transmitted by the procurator-fiscal, through the Crown Agent, to the Home Office: (1) A letter briefly stating the facts, accused's supposed whereabouts, the means of tracing and identifying him, and whether it is desired that his provisional arrest should be asked by telegraph; (2) the petition or information and relative warrant to apprehend, *in duplicate*; (3) the depositions of witnesses; (4) a certified copy of the depositions; and (5) an indemnity for all expenses (unstamped), signed by the injured party or the informer. The guarantee or indemnity for expenses cannot be dispensed with, unless the Lord Advocate sees fit to do so in a case of great gravity or public importance. The depositions must contain evidence: (*a*) raising a strong or probable presumption that the fugitive committed each of the offences mentioned in the petition or information and warrant; (*b*) showing that those offences are punishable in Scotland, on indictment or complaint, by punishment of the degree above mentioned; and (*c*) giving a description of the fugitive sufficient for purposes of identification, with, if possible, a photograph. The depositions may be taken in absence of the accused (44 & 45 Vict. c. 69, s. 29). The certified copies should be authenticated by the magistrate who issued the warrant, and before whom the depositions were taken. The police officer who is to go out for the fugitive should see the warrant and depositions signed and certified, in order that he may be in a position to prove the signatures (*ib.* s. 29). The seal of the Secretary of State is affixed to the documents (2), (3), and (4) above mentioned, one set of which (including the *original* depositions) is returned, to be taken out by the officer, and the other set (including the *certified copies*) is sent through the Colonial Office to the Governor of the colony. The officer may either go out at once with the warrant, or wait until the arrest of the fugitive is notified by telegraph; but in either case he must not interfere in any way, beyond giving information or evidence, and must leave the case to be dealt with exclusively by the colonial authorities. The procedure in the colony is similar to that described in next paragraph *mutatis mutandis*. The officer is furnished with proper credentials from the Colonial Office, on application made by his chief constable through the procurator-fiscal and Crown Agent. His name and date of departure are intimated to the Home Secretary through the same channels. The Act makes provision for the return of the fugitive to Scotland by sea (*ib.* ss. 25, 27, 28).

III. Fugitives to Scotland.

When it is suspected or discovered that a fugitive has left a place to which the Act applies, and is in, or on his way to, Scotland, the Government, or the judicial or police authority of that place, gives information to the Scottish police by letter or telegram, stating that such person has committed a certain offence, that a warrant of arrest has been issued, and that proceedings for his return will be taken under the Statute. The fugitive may be apprehended either under a *provisional warrant* or an *indorsed warrant* (44 & 45 Vict. c. 69, s. 2). In case of urgency, a police officer or a representative of the colony presents to any Sheriff or Sheriff-Substitute a petition or

information, craving him to issue a provisional warrant for the apprehension of the fugitive (*ib.* ss. 4 and 39). The Sheriff may grant the warrant on such information and under such circumstances as would, in his opinion, justify its issue if the offence had been committed within his jurisdiction (*ib.* s. 4). It may be backed for execution outside his territory (*ib.*). See BACKING A WARRANT. He must forthwith send to the Home Secretary a report of the issue of the warrant, together with the petition or information and depositions (if any), or certified copies (*ib.*). The Home Secretary may, if he think fit, discharge the person apprehended under the warrant (*ib.*). The fugitive, when apprehended, is taken before a magistrate in the usual course, and is by him remitted to the Sheriff or Sheriff-Substitute of the county of *Edinburgh* (*ib.* s. 30). The officer who made the arrest accompanies his prisoner to Edinburgh, and attends the hearing there. If an "indorsed warrant" cannot at once be produced, the Sheriff of Edinburgh may remand the prisoner from time to time, not exceeding seven days at any one time, to allow of its production (*ib.* s. 5). An indorsed warrant is one issued in the part which the fugitive has left, and indorsed (as regards fugitives in *Scotland*) by the Home Secretary, or one of the police magistrates at Bow Street, or a judge of the High Court of Justiciary (*ib.* ss. 3 and 39), any one of whom may indorse the warrant, if satisfied that it was issued by some person having lawful authority to do so (*ib.* s. 3). The indorsement is signed by the indorsing authority (*ib.* s. 26). It authorises all or any of the persons named in the indorsement, and of the persons to whom the warrant was originally directed, and also every police constable and officer of the law within the British Isles, to execute the warrant by apprehending the fugitive and bringing him before a magistrate (*ib.*). When such a warrant, duly indorsed and authenticated, is presented to a Sheriff, it must be received by him as a warrant regular and valid in all respects (*Carlin*, 1885, 5 Coup. 649). When the fugitive has been apprehended on an indorsed warrant, or (if he has been apprehended on a provisional one) after production of an indorsed warrant, the Sheriff of Edinburgh hears the case (*ib.* s. 5). He has, subject to the provisions of the Act, the same jurisdiction and powers, and proceeds in the same manner, as if the fugitive were charged with an offence committed within the county of Edinburgh (*ib.*). He satisfies himself: (*a*) that the warrant is duly indorsed and authenticated; (*b*) that the prisoner is sufficiently identified as the person named in the indorsed warrant; (*c*) that the offence charged is one to which the Act applies: and (*d*) that, upon the evidence produced, a strong or probable presumption according to the law of Scotland is raised that the prisoner committed such offence (*ib.*). These points may be established by depositions, official certificates, and judicial documents, authenticated in the manner specified in the Act (*ib.* s. 29). If satisfied, the Sheriff commits the fugitive to the prison of Edinburgh, to await his return; informs him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for liberation to the High Court of Justiciary; and forthwith sends to the Home Secretary a certificate of the committal, and such report of the case as he may think fit (*ib.* ss. 5 and 39). The prisoner may present to the High Court of Justiciary a bill of suspension and liberation (*Carlin, supra*); and that Court may, on sufficient grounds being shown: (*a*) discharge him absolutely; (*b*) liberate him on bail; (*c*) order that he shall not be returned until after a specified period; or (*d*) make such other order as seems just (*ib.* s. 10). Upon the expiration of fifteen days after the fugitive has been committed to prison (if he does not apply to the High Court), or after the final decision of the Court (if his application has been

refused), the Home Secretary may, if he thinks it just, grant warrant for his return (*ib.* s. 6). The Act makes provision for his temporary detention in custody, and removal to the part from which he fled (*ib.* ss. 6, 25, 27, 28). If not removed within one month after his committal, the High Court of Justiciary will, on his application, order his discharge from custody, unless sufficient cause is shown to the contrary (*ib.* s. 7). After his arrival at the place from which he fled, if he is not prosecuted for the offence charged within six months, or if he is acquitted, the Governor of that place may, on his request, cause him to be sent back to Scotland free of cost, and with as little delay as possible (*ib.* s. 8).

Funeral Expenses.—The funeral expenses of a deceased person are counted amongst the privileged debts which fall to be paid by his executors out of any estate belonging to him first coming into their hands, without inquiry as to the solvency or otherwise of the executry estate. They properly include the expenses of a funeral and burial suitable to the apparent condition of the deceased. "The rule followed in such cases is, that everything which is necessary for the proper and decent interment of the deceased, according to the custom of the place where this happens, forms a part of the funeral expenses, which are privileged before other debts. And as it must often happen that the circumstances of the deceased are altogether unknown to those who take the charge of ordering his funeral, it will be held that all such expenses as, according to his rank and apparent circumstances, are required by the usage of the place, are privileged, even though his funeral ought to have been more moderately conducted had his insolvency been known."—[Stair, More, *Notes*, ccclxii., *ep.* cases cited in 2 Ruling Cases, 147; Ersk. iii. 9. 43; Bell, *Prin.* 1402 *et seq.*; Bell, *Com.* ii. 147 *et seq.*] See also DEATHBED EXPENSES; PRIVILEGED DEBTS.

Fungibles are those things which may be consumed by use, and which may be estimated by weight, number, or measure. Where such a thing as, for instance, corn, wine, etc., is lent, it obviously cannot be used without a transference of the proprietary right to the borrower. Fungibles have therefore been made the subject of a special contract of loan, known as *mutuum*, which is a real contract by which one gives, or transfers, a fungible to another, without hire, for use by consumption, on an engagement to restore as much of the same thing at a stipulated term.

The loan of money is therefore hardly *mutuum*, owing to the usual stipulation for the payment of interest.

The consumption of fungibles may either be natural, as in the case of corn, wine, etc., or civil, in which case the actual substance of the thing is not destroyed, but the primary use of it is, as in the case of paper used for writing.

It was formerly the practice to make certain things which were not in their nature fungible the subjects of the contract of *mutuum*, known as steelbow (Bell, *Com.* ii. 6. 12).

The contract of *mutuum* imposes no obligation on the lender, who can demand a quantity of the commodity corresponding in kind, quality, and value to that originally lent. Although the Roman law permitted a *quasi-usufruct* of fungibles, we have no equivalent except, perhaps, the liferent of money. Furniture, however, although it suffers wear and tear, is not

consumable by use, and it is therefore the proper subject of a liferent. The rule of Roman law, however, with regard to usufruct in fungibles does not apply, for the liferenter is not bound to replace or renew the articles.—[Bell, *Prin.* 137, 1043; Ersk. iii. 1. 18; Stair, i. 10. 12, i. 11. 1, and ii. 1. 33.]

Furious: Furiosity.—See INSANITY.

Furious and Reckless Riding and Driving.—Riding horses or driving vehicles furiously in a public place to the danger of the lieges is punishable (cases in Hume, i. 192; Macdonald, 194, 195; *Calder*, 1877, 3 Coup. 494). The punishment is penal servitude, imprisonment, or fine, according to the degree of culpability.

Furlough.—See DESERTION (MILITARY, ETC.).

Furniture.—Furniture is included amongst *invecta et illata*, over which, in urban subjects, the landlord's hypothec for rent extends (Ersk. *Inst.* vi. 6. 64; Stair, i. 13. 15, iv. 25, 2 and 3; Bankt. i. 17. 11; Bell, *Prin.* s. 1276; Bell, *Com.* ii. 29, 30). In this connection it is unnecessary to define what is included under the term furniture, as the wider class of *invecta et illata* will include all articles which are capable of being described by the term (as to its meaning in testamentary writings, see *infra*). Questions of some delicacy have arisen as to how far furniture, in the subjects let, which is not the property of the tenant, is liable to the landlord's hypothec. Bankton (i. 17. 11) classes among subjects for hypothecation not only the tenant's own goods, but "such of other men as are used as furniture to the same, for by consenting to their being applied to that use the owners are understood to agree to their being subject to the rent." The decisions on the subject endeavour to find a mean between two conflicting positions,—the presumption, on the one hand, expressed by Bankton as above, and, on the other, the rule that no man may pledge the property of another. Since "a man cannot pledge property which is not his own, *Res aliena pignori dare non potest*, all the cases in which either express pledge or tacit hypothec is admitted are exceptions from that rule, and proceed on a presumption of the consent of the real owner by the possession voluntarily given, and the title of such possession as implying consent" (*Jeffray*, 1836, 15 Shaw, 43, per Ld. Moncreiff, at p. 45, note). The decided cases on this subject may conveniently be considered according as they deal with property (1) lent on hire, (2) lent on gratuitous loan or deposit, (3) belonging to inmates other than the tenant.

(1) *Articles lent on Hire.*—Where the whole, or substantially the whole, furniture of the subjects is had on hire the strongest case for the landlord exists; it has been decided that in such cases the landlord's hypothec applies (*Wauchope*, 1805, 2 B. C. 31, F. C. 638, Hume, 227; *Stewart*, F. C., 8 App. p. 449; *Nelmes & Co.*, 1883, 11 R. 193). As to single articles, there is less certainty. Questions as to the position of single articles, such as sewing-machine or pianoforte, possessed by the tenant on what is known as the "hire-purchase system," have been the subject of conflicting decisions in the Sheriff Court; though it is probably settled law

that articles so hired are not the property of the hirer until fully paid for, there is no authoritative decision as to how they are affected by the landlord's hypothec (see Bell, *Prin.* s. 1276, and Sheriff Court cases there cited; also *Penson*, 6 June 1820, F. C. 47; *Bell*, 12 R. per Ld. Shand, at p. 464). In the case of *Adam*, 1863, 2 Macp. 6, Ld. Deas (at p. 8) says: "I am not aware of any authority for holding that forms used for an evening party, or china for a dinner party, may be sold for payment of rent, although they happen to be in the house on the day the sequestration is used."

(2) *Articles on Loan or Deposit.*—In the cases under this head the decisions have been less favourable to the landlord. In *Cowan*, 1804, B. C. 31, furniture gratuitously lent, and standing in the house along with other furniture, partly the property of the tenant, partly had by him on hire from a broker, was held not to be subject to the hypothec. In *Wilson*, 17 December 1813, 17 F. C. 494, 695, the hypothec was held to be good over the furniture of a bankrupt tenant allowed to remain in the house by his creditors, on the ground, apparently, that the landlord had allowed the tenancy to continue on its security; but in the case of *Adam*, 1863, 2 Macp. 6, where furniture, the property of an absconding Crown debtor, was sold under Crown diligence, and allowed by the purchaser to remain in the house for the use of the debtor's wife, it was held that the furniture was freed from the hypothec by the sale, and that in the circumstances (nine weeks after the sale) the right had not revived. Much less was furniture held to be subject to hypothec, brought into a dwelling-house by the tenant, who was "tortiously withholding it against the true proprietor, and pending legal proceedings to recover it" (*Jeffray*, 1836, 15 S. 43).

(3) *Property of Inmates.*—This is the least favourable case for the landlord: it has been held that a pianoforte the property of a daughter of the tenant, and kept within the subjects, was not subject to the landlord's hypothec (*Bell*, 12 R. 962, and cases there cited).

In testamentary writings the term "furniture" has been interpreted by decisions to include all articles of domestic use, but not books or wine (*M'Nab*, 1797, Mor. 2303; *Ker*, 1745, Mor. 2274; *Rankeillor*, 1709, Mor. 5759; *Cunninghame*, 1737, Mor. 12660, 5 Bro. Supp. 195; *Cochran*, 1775, Mor. 8280; Bell, *Prin.* s. 1885; M'Laren on *Wills*, s. 629). In the case of *Cochran* above cited, the question of the meaning of a liferent of furniture was considered, and in a note on the same case, Bell, *Ill.* ii. 141, the author says: "It would seem: 1. That a liferent of furniture gives the full use of it everywhere *salva rerum substantia*. 2. That giving the liferent of furniture is only demonstrative, and the furniture may be carried thence. 3. That where, as in the *Culross* case, it is combined with a mansion-house, it is held only as an accessory to the possession of the house (see also Bell, *Prin.* s. 1043; M'Laren on *Wills*, 1665; Fraser, ii. 1343-44).

Where a marriage contract contains a conveyance of furniture to the wife, the wife has been held to have no preference over the husband's creditors, nor even to rank on the husband's sequestrated estate (*M'Donald*, 1793, Mor. 5848; *Darling*, 1851, 14 D. 296; *Brown*, 1850, 13 D. 373; *Campbell*, 1848, 10 D. 1280), on the principle that the wife's property being the husband's, the reputed ownership remains in him. The case, however, is different where the property of the furniture is in the wife before marriage, and excluded from *jus mariti* in the marriage contract (*Young*, 1855, 17 D. 998).

[Bell, *Prin.* s. 1946; Fraser, *H. & W.* i. pp. 691, 692.]

See HYPOTHEC; INVECTA ET ILLATA; LIFERENT.

Furthcoming.—When a creditor has duly constituted a debt against his debtor, and has arrested funds or other moveable property in the hands of a third party, he is entitled to raise an action of furthcoming or forthcoming, in order that the funds or subjects arrested may be transferred to him. The parties to the action are the pursuer, who is the arrester, and the defenders, who are (1) the arrestee, in whose hands arrestments have been used, and (2) the debtor, against whom the original decree has been obtained, and who is called the common debtor or principal debtor. The conclusions of the summons are, that the arrestee should make furthcoming and pay to the pursuer the sum owing by him, the arrestee, to the common debtor, and arrested in the arrestee's hands by the pursuer, or of so much thereof as will satisfy the debt due by the common debtor to the pursuer, and the expenses of the arrestment. If the subject arrested is not money, the conclusions of the summons will vary according to circumstances. "Every species of moveable property may be validly arrested, provided the diligence can be effectually worked out. But in order that that may be done, the summons of furthcoming must be so framed as to be applicable to the specific subjects attached by the diligence" (*Lucas's Trs.*, 1894, 21 R. 1096). Where the subject arrested is a ship, the action which takes the place of the furthcoming is an action of arrestment and sale. The conclusions are that the ship should be sold under warrant of the Court, and that the price obtained (or a part of it sufficient to pay the debt due to the arrester) should be paid to him. In one case, where the shares of a company had been arrested, an action of declarator was brought to have it found that, by virtue of the arrestment, the property of the debtor's shares had passed to the arrester (*Alison*, 1707, Mor. 707). An action of declarator and furthcoming was held competent in a case where the subject arrested was an insurance policy (*Bankhardt's Trs.*, 1871, 9 M. 443).

Furthcoming may be brought on arrestments used on the dependence of an action, provided decree has been subsequently obtained (Stair iii. 1. 36). If arrestments on the dependence have been loosed on caution, and a decree is afterwards obtained, the arrester may raise an action equivalent to an action of furthcoming against the cautioner. To this action the arrestee and the common debtor ought also to be called as defenders (*Macdonald*, 1834, 12 S. 654). In a furthcoming, any person who claims an interest in the subjects arrested may appear and be sisted as defender (*Loudon*, 1856, 18 D. 856).

The arrestee called as defender in an action of furthcoming may plead that he has no funds or goods in his hands belonging to the common debtor capable of arrestment, or that the arrestment used was irregular; for any irregularity in the diligence invalidates any action which proceeds on it. If compensation be not pleaded by the arrestee during the dependence of the furthcoming, he cannot raise the question later, with the common debtor (Bell, *Com.* ii. 64). In the event of several arrestments having been used in the hands of an arrestee, and a furthcoming being brought on one of them, the proper course for the arrestee is to raise a multiplepoinding calling all the arresters, and to get the furthcoming sisted. The arrestee may also plead payment or compensation, or any other defence against the arrester which he might have pleaded to an action brought against him by the common debtor (*Houston*, 1849, 11 D. 1490). He may also refer the existence of any debt to the oath of the common debtor. The oath of the common debtor will be effectual against the arrester unless the common debtor has been made bankrupt when he made oath (*Forbes*, 1711.

Mor. 12464). On the ground that the oath of the cedent does not hurt the onerous assignee, a reference to the common debtor's oath is not allowed where there has been an intimated assignation (Ersk. iii. 6. 16). The arrestee is not entitled to plead any defence which is open to the common debtor, as, for instance, that there is no debt due by the common debtor to the arrester (*Houston*, 1849, 11 D. 1490). But this rule makes it important that the common debtor should be made a party to the furthcoming, so that he may state any defence he has against the arrester. If there is any informality in the arrestment or the furthcoming, the decree against the arrestee will not save him from a claim at the instance of the original creditor (Bell, *Com.* ii. 64). The arrestee is accordingly entitled to plead that the common debtor has not been called (*Smith*, 1826, 5 S. 8). In one case it was held that, where the common debtor had lost his Scotch domicile after decree of registration had been pronounced against him, it was unnecessary to use arrestment *jurisdictionis fundandæ causa* in order to make him a party to subsequent furthcoming (*Burns*, 1844, 6 D. 1352). The decision in this case was somewhat special, and the opinions of the judges have been commented upon (*Wightman*, 1858, 20 D. 779). But *Burns* was followed by Ld. Kincairney (Ordinary), in a case where the common debtor had no Scotch domicile, and a decree against him obtained in England had been registered under the Judgments Extension Act (*Valentine*, 1897, 5 S. L. T. 64). See also, as to effect of Judgments Extension Act, 1868, *English Coasting and Shipping Co. Limited*, 1886, 14 R. 220. The arrestee is also entitled to plead that the decree on which the arrestment proceeds is invalid, on the ground that the common debtor was not subject to the jurisdiction of the Court that pronounced it (*Smith*, 1826, 5 S. 8).

The common debtor may plead in the furthcoming any defence which would have been competent to him in the original action for the debt, and, in addition, he may plead any informality in the arrestment or the execution.

The procedure in an action of furthcoming is similar to that in an ordinary action. If the subject arrested is money, the decree of furthcoming directs that it be paid by the arrestee to the arrester towards satisfying his debt. But where the arrested subject consists of goods or corporeal moveables, the decree, in place of ordering the arrestee to deliver the goods themselves to the pursuer, ordains them to be sold by public sale, and the price to be delivered to the pursuer. When the interlocutor ordering sale has been pronounced, the pursuer's right to the subjects arrested is established, and cannot be defeated by another creditor afterwards poinding the goods (*Muirhead*, 1735, Mor. 687). A warrant for sale may be pronounced by the judge although there is no specific conclusion for sale in the summons, at least in the case of corporeal moveables, as it is assumed that the arrestee would offer the goods *ipsa corpora* in order that he might not be "decerned for making furthcoming a liquid sum for the price" (Stair iii. 1. 38; *Lucas' Trustees*, 1894, 21 R. 1096). Such an order was pronounced where the subjects arrested were the shares of a company (*Valentine*, 1897, 5 S. L. T. 64).

The procedure in an action of arrestment and sale of a ship is not unlike the procedure in a furthcoming where goods have been arrested. A warrant for sale is concluded for in the summons. The usual interlocutors ordering inventories, valuations of the ship and its contents, and granting warrant for its sale, are printed in Mackay's *Manual*, 382. This action may be brought before the debt on which the ship has been arrested in security has been constituted, and conclusions for the constitution of the debt may

be combined with the other conclusions of the summons (*Taylor*, 1831, 9 S. 265).

The expenses of the furthcoming cannot be obtained out of the funds arrested (*May*, 1825, 4. S. 79). It is competent to conclude for the expenses of the arrestment along with the amount contained in the decree on which the arrestment was used, and decree for the expenses of the furthcoming may be taken against the common debtor. There is usually no conclusion for expenses against the arrestee, but they are sometimes craved in the event of his appearing and offering opposition to the action.

An action of furthcoming may be brought either in the Court of Session or in the Sheriff Court. By sec. 47 of the Sheriff Court Act of 1876, 39 & 40 Viet. c. 70, it was provided that a furthcoming might be brought in the Sheriff Court to whose jurisdiction the arrestee was subject, even though the common debtor should not reside within the jurisdiction. The Small Debt Act of 1837, 1 Viet. c. 41, s. 9, gave similar power in regard to Small Debt Furthcomings, and the Debts Recovery Act, 30 & 31 Viet. c. 96, s. 5, incorporated the above-cited section of the Small Debt Act, and made it apply to the Debts Recovery Court.

[Mackay, *Manual*, 379; Shand, *Practice*, 570.] See ARRESTMENT.

Gable.—See COMMON GABLE.

Game Laws.—Different branches of this subject, or of cognate subjects, sometimes treated under this generic head, will be found dealt with in the articles undernoted, viz.—

BIRDS (WILD) PROTECTION ACT.
CLOSE TIME.
DEER.
DOG LICENCE.
FORESTS.
GAMEKEEPER.
GAME LICENCE.
GROUND GAME ACT.
GUN LICENCE.
HARES.
LEASE.
MUIRBURN.
PIGEONS.
POACHING.
POISON.
RABBITS.
SPRING-GUNS.
SWANS.
TRESPASS.
VERMIN.
WARREN.

Cæsar records of the ancient Germans, *Vita omnis in venationibus et in studiis rei militaris consistit.* The description held good of their descendants or kinsmen, the ancient Scots, for down to the close of the Middle Ages warfare and the chase were the favourite, if not almost the sole, occupations of the Scottish people. Devotion to the chase can be traced throughout the Statute book, and has left an impress upon our laws which is not yet effaced. Before noticing, however, the history of the game laws in Scotland, it may be well to ascertain the meaning of the term game.

Game—What Animals included.—Different enumerations of the kinds of animals to be included under the term are contained in different Statutes. But the term is a popular, not a statutory or a legal one, and, speaking broadly, all animals are game which comply with the following conditions—

(1) The animal must be a land one: a salmon, being aquatic, is not game. (2) It must be pursued for the sake of sport: a mite, not being a beast of the chase, is not game. (3) It must be edible: a fox, not being fit for human food, is not game. All animals which comply with these three conditions are game, and all such animals have statutory protection in some form or another. On the other hand, all such animals are not included in every Act regulating the protection or the capture of game. And some, like wood-pigeons, are not enumerated in any of the game Statutes.

The Close Time Act (13 Geo. III. c. 54) mentions hares, partridges, pheasants, grouse, ptarmigan, black game, snipe, and quails.

The Night Poaching Act (9 Geo. IV. c. 69) provides that for the purposes of the Act, the word game shall include hares, pheasants, partridges, grouse, black game, and bustards.

The Day Trespass Act (2 & 3 Will. IV. c. 68) includes "game" and woodcock, snipe, quails, landrails, wild ducks, and rabbits.

The Poaching Prevention Act (25 & 26 Viet. c. 114) enumerates hares, pheasants, partridges, eggs of pheasants or partridges, woodcock, snipe, rabbits, grouse, black game, eggs of grouse or black game.

The Game Licence Act (23 & 24 Viet. c. 90) applies to "game" and woodcock, snipe, quails, landrails, rabbits, and deer.

It appears, therefore, that the following animals are enumerated in one or other of the modern Statutes still in force: of birds—grouse, black game, ptarmigan, partridge, pheasant, woodcock, snipe, quail, landrail, bustard, wild duck; and of quadrupeds—deer (including roe), hares, and rabbits. In addition to these, it may be mentioned that capercaillie are by some considered a variety of black game or of grouse, and therefore as protected. Capercaillie are mentioned in obsolete Act (1621, c. 30) anent the sale of game.

Current Legislation.—The restrictions in the older Statutes in regard to the pursuit of game had reference either to the place, the times or seasons, or the means employed in capture.

Place.—As regards the place, the idea of exclusive private right of sport over unenclosed ground did not obtain in early times unless the land were part of a royal forest specially granted to some subject. The earliest Statutes dealing with the matter restrain the slaying of game, not in other people's property generally, but "in others' closes or parks, or cunningaires (warrens)." Such are the Statutes 1474, c. 60; 1503, c. 69; 1535, c. 13; 1579, c. 84; 1587, c. 59. The penalties imposed by some of these Statutes were of extraordinary severity, and it is difficult to believe that they were actually exacted. By 1579, c. 84, for example, the punishment for breaking into dovecots, warrens, or parks was declared to be £10 for the first offence, £20 for the second, and £40 for the third, besides the amount of the damage done; and where the offender was not responsible in goods, he was to suffer eight days on bread and water for the first offence, fifteen days for the second, and "hanging to the deid" for the third.

Seasons.—As regards the times or seasons for the killing of game, a close time for winged game was from time to time fixed by Acts of the Scottish Parliament. Such are the Acts 1427, c. 108; 1555, c. 57: and 1707, c. 13. Under this head reference is made to the article upon Close Time. The prohibition of the taking of deer and ground game in time of snow was a matter to which great importance seems to have been attached by the early Scottish legislators. There is a series of Acts dealing with the matter, to which belong an ancient Statute of Robert III. in 1400; 1457, c. 88; 1474, c. 60; 1535, c. 14; 1621, c. 32. These provisions are now in desuetude (*Donald*, 1828, Syme, 303).

Mode of Capture.—The mode in which game might be taken was also matter of anxious provision. A strong prejudice appears for long to have prevailed against firearms, which were obviously regarded as unsportsmanlike and wantonly destructive. The use of snares and nets for the capture of deer and hares was also prohibited. The hound and the hawk appear to have been regarded as the manly and sportsmanlike instruments of the chase. To this series of Acts belong 1424, c. 36; 1551, c. 9; 1567, c. 16: 1597, c. 270; 1707, c. 13. Here again the penalties were sometimes of extraordinary severity. The Act of 1551 extorts a shudder even from Sir George Mackenzie: "This Act, inflicting the pain of death and confiscation of moveables upon such as shoot at deer, wild fowl, or wild beasts, is deservedly in desuetude."

Landed Qualification.—The Act 1621, c. 31, "anent hunting and haulking," ordains "that no man hunt or haulk at any time hereafter who hath not a plow of land in heritage, under the pain of one hundred pounds." This Act was ratified and confirmed by 1685, c. 20, and is still in force (*Trotter*, 8 Jan. 1809, F. C.). The extent of the ploughgate is doubtful, but it is generally taken to be about one hundred imperial acres (see Irvine on *Game Laws*, p. 53, note). The land must be held in actual property: tenancy, on however long a tenure or servitude, will not suffice (*Hoptoun*, 17 Jan. 1810, F. C.; *Wellwood*, 1874, 1 R. 507; *Forbes*, 1 Feb. 1809, F. C.; *Aboyne*, 16 Nov. 1814, F. C., 6 Pat App. 380). A qualified person may grant permission to shoot over his own lands to a person who is not himself qualified (*Trotter*, 8 Jan. 1809, F. C.), an indulgence which deprives the whole rule of much of its importance. Shooting with fowling-pieces is "hunting and hawking" (*Trotter, supra*), but snaring hares is not (*Cassilis*, 1826, Shaw (Just.) 146).

Sporting Right an Incident of Ownership.—The right to kill game was at one time regarded more as a general franchise, entitling the person qualified to kill game at least upon all unenclosed land (and nineteen-twentieths of the land of Scotland were unenclosed), not being a royal forest, than as a right limited to the area of which the qualified person was proprietor. But whatever may have been the original theory of the law, by the beginning of the seventeenth century, the exclusive right of the owner of the soil had come to be recognised, at all events in the more civilised parts of Scotland. Erskine (ii. 6. 6), however, mentions that even in his time a doubt was entertained whether a person, otherwise qualified to kill game, might not hunt or shoot over the property of another without being guilty of trespass. The question arose, first, with reference to enclosed lands, with the result that the exclusive right of the owner was affirmed (*Watson*, 1763, Mor. 4991: *Tweeddale*, 1778, Mor. 4992).

A like result was subsequently reached in regard to unenclosed lands, and the judgment was affirmed by the House of Lords (*Breadalbane*, 1790, Mor. 4999; affd. 1791, 3 Pat. 221). The right to kill game is therefore, in Scotland, an incident of the right of property in land. The right may be delegated either gratuitously or for payment. Whether it can be permanently alienated *in toto* is doubtful, but apparently it may be communicated as a servitude or *quasi* servitude in favour of neighbouring lands (see *Huntly*, 1896, 23 R. 610). The extent of the right to pursue wounded game across the march into the property of another is an open one, and in practice is governed by comity (see per Ld. Mackenzie in *Donald*, 1828, Syme, 303, and also *Dig.* 41. 1. 5).

At one time it appears to have been doubted whether a tenant might not prohibit his landlord from hunting on the lands let, as being injurious to the tenant's interests, and in derogation of the grant contained in the

lease. But the right of the landlord was upheld, subject, however, to liability for any extraordinary damage which the tenant could instruct (*Ronaldson*, 1804, Mor. 15270; see *Grahame*, 1810, Hume, 641). There is a long series of decisions dealing with the matter (Irvine, 71 *et seq.*), and it is well settled that for any extraordinary increase of the head of game the landlord may be held liable. How far this rule has been affected by the provisions of the Ground Game Act of 1880 is discussed in the article dealing with that Act. The Game Laws Amendment Act of 1877 provides that where, under a lease dated after 1 Jan. 1878, or by presumption of law, the lessor shall reserve the sole right of killing game, the lessee shall be entitled to recover in the Sheriff Court compensation for the damage done to his crops in each year, in excess of such sum as may have been set forth in the lease as the amount of the annual damage for which it is agreed no compensation shall be due, and if no such sum shall be set forth in the lease, then in excess of the sum of forty shillings. This provision, however, has been largely superseded by the Ground Game Act of 1880, and is now almost a dead letter. Even if a lease stipulates that no damage shall be recoverable in respect of injury done by game, damages may be awarded if the increase of game has been so enormous as to deprive the tenant of the use of the subjects of tenancy (*Cadzow*, 1876, 3 R. 666). The landlord has a right of relief for game damages against the tenant of his shooting responsible for the increase of game, even although there be no stipulation for relief in the lease (*Byrne*, 1875, 3 R. 255). A tenant cannot claim game damages in respect of any year for which he has already paid the full rent without reservation of his claim (*Broadwood*, 17 D. 340). The tenant is not entitled systematically to scare all game off his farm, in order to prevent his landlord enjoying sport (*Wemyss*, 1847 10 D. 204).

[Irvine, *Game Laws*: Oke, *Game Laws.*]

Game Licence.—See Licence to Kill Game; Licence to Sell Game.

Gaming and Betting.—*Civil.*—The Roman law in regard to gaming and betting has been generally adopted as the common law of Scotland. By that law all agreements to engage in a game were *sponsiones ludicræ*. The word *sponsio* seems first to have been applied to a wager in a civil suit in which, as in the semi-criminal procedure of the *sacramentum*, the litigants staked a sum of money, to await the decision of the judge or arbiter. It was afterwards applied to an agreement to take part in a trial of skill or dexterity. But a distinction was drawn by the Roman jurists, which has not been altogether followed in Scotland. "Ludi apud Romanos alii liciti fuerunt, alii illiciti. Liciti in quibus ars dominatur . . . Illiciti sunt ludi in quibus fors prædominatur nec pro virtute certamen sit" (Voet, *Com. on D.* 11. 5). In the latter case "senatusconsultum vetuit in pecuniam ludere" (*D.* 11. 5. 2. 1) and the Roman law did not merely ignore the existence of such games, but visited all persons implicated with heavy penalties. In the case of *ludi liciti*, restricted by Justinian to five in number (*C.* 3. 43. 1), the exception seems to have covered not only the wager implied in the fact of entering as a contestant, but even bets by others on the result.

In Scotland, all games have to some extent been dealt with alike, on the ground that "Courts of justice were instituted to enforce the rights of

parties arising from serious transactions, and can pay no regard *sponsionibus ludicris*" (*Wordsworth*, 1799, M. 9524). Gaming is not unlawful in the sense that it is punishable as a crime, but the Courts will refuse to consider questions which arise out of games. This rule is, however, subject to limitation. Although the Court will not decide who is the winner of a competition, nor enter into a consideration of the rules of a game for the purpose of determining whether deceit or foul play has been used to secure the victory, yet if, after the race has been run or the game played and the winner decided, any question of law should arise in regard to the patrimonial rights of parties, the Court will not refuse to entertain it. And the fact that the relation in which the parties are is due to a *sponsio ludicra* will not debar it from so doing; nor is it an objection that these rights cannot be determined without an examination of the rules of the game (*Paterson*, 1830, 8 S. 573; *Graham*, 1848, 10 D. 646; *Paterson*, 1866, 4 M. 602; *Calder*, 1871, 9 M. 1074; *Noble*, 1889, 5 S. L. Rev. 199; *Murray*, 1896, 23 R. 981). Thus an action will lie against the custodier of a prize or the holder of the stakes of a race for delivery or payment to the declared winner. The Court will not decide whose duty it is to declare the winner. All matters relating to the conduct of the race or game must be decided according to the rules of the game or the agreement of parties, and such matters will not be reviewed by the Court (*Graham, supra*; *O'Connell*, 1864, 3 M. 89; *Calder, supra*).

Wagers and lotteries are by the common law of Scotland regarded as *pacta illicita*. Those who enter into such agreements can found no action upon them. Even after the drawing is over and the winner decided, he is not in a position to enforce delivery (*Christison*, 1881, 9 R. 34; *M'Laren*, 1878, 2 Guthrie, *Sh. Ct. Cases*, 105; see LOTTERY). Nor can the winner of a bet demand payment (*Bruce*, 1787, M. 9523; *Wordsworth, supra*; *Gordon*, 1804, M. *voce* "Pactum Illicitum," App. 3; Bell, *Com.* i. 300). A wager is defined by Anson as "a promise to give money or money's worth upon the determination or ascertainment of an uncertain event; the consideration for such a promise is either something done or given by the other party, or a promise to do or give, upon the event determining in a particular way" (*Law of Contract*, 8th ed., 181). A contract is none the less valid because the profit or loss to either party is dependent upon an uncertain condition, but it is not binding when it is in reality a wager, though having the form of a contract. The contract of insurance is essentially of the nature of a wagering contract, but, except in the case of what are known as wagering policies (see INSURANCE), is not so recognised by the law. Such a contract cannot in any sense be considered a *sponsio ludicra* (*Wordsworth, supra*).

The first Scots Act which deals with the subject of gaming and betting is 1621, c. 14. That Act provides that if more than one hundred merks be won at cards or dice within twenty-four hours, or more than that sum be won within the same period at wagering on horse-races, the surplus is to belong to the kirk-session of the parish where it was won, to be used for the poor of the parish. The last reported case in which effect was given to this statutory provision is dated 1774 (*Macnrll*, M. 9522), but so late as 1854 an action, founded on this Statute, was sustained in the Sheriff Court at Falkirk (Sh. Robertson—*Begg* v. *Coiles*, Rep. in *Falkirk Herald*, 12 October 1854). In 1864 Ld. Deas expressed the opinion that the Act was not in desuetude, and would still be enforced—"that this Statute remains in force," he said, "I have no doubt whatever" (*O'Connell* 3 M. 89; *Park*, 1668, M. 3459; *Straiton*, 1688, M. 9506; Bell, *Com.* i. 300). The Act 9 Anne, c. 14, which has been made the basis of decision in Scotland (*Paterson, supra*; *M'Coul*, 1767, M. 9518), provides that "all notes, bills, bonds, judgments, mortgages,

or other securities or conveyances whatsoever . . . where the whole or any part of the consideration . . . shall be for any money or other valuable thing whatsoever won by gaming . . . or by betting on the sides or hands of such as do game . . . shall be utterly void, frustrate, and of none effect." It was accordingly held that bills and bonds granted for a gaming debt were void even in the hands of an onerous endorsee (*Elliot*, 1826, 5 S. 37; *Hamilton*, 1832, 10 S. 549; *White's Trs.*, 1819, 5 S. 39). But this Act is repealed by the Gaming Act, 1835 (5 & 6 Will. IV. c. 41), in so far as it provides that "any note, bill, or mortgage shall be absolutely void." In place thereof they are to "be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration," the effect of which is regulated by secs. 27, 29, 30, and 38 of the Bills of Exchange Act, 1882. This does not affect the case of a personal bond, but the onerous assignee may sue for repetition of what he has paid for the assignation, on the ground of the implied warrandice *debitum subesse* (*Ferrier*, 1828, 6 S. 818). Most of the Act of Queen Anne was repealed and various other provisions enacted, including the nullity of all contracts "by way of gaming or wagering," by the Gaming Act, 1845 (8 & 9 Vict. c. 109), but this Act does not seem to apply to Scotland. A supplementary Statute (16 & 17 Vict. c. 119) expressly does not. The object of the former would rather seem to have been to extend to England what was already the common law of Scotland (*Boyd*, 1855, 17 D. 513; *Foulds*, 1857, 19 D. 803; *O'Connell*, 1864, 3 M. 89; *Calder*, 1871, 9 M. 1074; *Russell*, 1894, 1 S. L. T. 533; *Alston*, 1895, 2 S. L. T. 473).

When a gaming or betting debt has been paid, the rule applies *melior est conditio possidentis*. There is no repetition at common law (*Wordsworth*, 1799, M. 9524), even when it is averred that the money was won by a preconcerted system of cheating (*Paterson*, 1866, 4 M. 602). But where one party to a wager has staked money with a stakeholder, he would seem to be entitled to recover it from the depositary, so long as it has not actually been paid over to the winner (*Diggle*, 1877, 2 Ex. D. 422; *Trimble*, 1879, 5 App. Ca. 342; *Robertson*, 1886, 2 S. L. Rev. 64); and this is not affected by the Gaming Act, 1892 (*O'Sullivan*, [1895] 1 Q. B. 698). By sec. 5 of the Betting Act, 1853 (extended to Scotland by the Betting Act, 1874), money received as a deposit on a bet by the keeper of any house, office, room, or place used for betting, may be recovered.

The loser will have no action of damages for the loss of money of which he has been defrauded by cheating at cards, where facility and circumvention or some similar ground is not averred. The mere facts that certain persons concocted a plan to win money from him by cheating at cards, and that they succeeded, will instruct no claim (*Paterson*, 1866, *supra*).

Where gaming debt is pleaded as a defence to liability on a bond or bill, particular specification of time, place, and circumstance must be made, and without this the defender's averment will not be admitted to proof (*Don*, 1858, 20 D. 1138). The onus of proving that it was granted for such a debt is of course on the defender in the claim, or the suspender of a charge on the bill or bond (*Ainslie*, 1851, 14 D. 184).

Wagering on Differences.—A not uncommon form of wagering is what is known as "time bargains" or "contracts for differences." The reported cases refer almost exclusively to transactions on the Stock Exchange; but there is no distinction between wagering on the prices of stocks and shares and wagering on the prices of wheat, iron, or any other commodity. There may be gambling where there is no gaming, and one who has entered into a transaction as a mere speculator is not debarred thereby from maintaining

an action, provided he does not found upon a wagering contract (*Mollison*, 1889, 16 R. 350). "A man goes to a broker and directs him to buy and sell so much stock, as the case may be. That may be, in the eye of the purchaser, a gambling transaction, or it may not. If he means to invest his money in the purchase of the stock which he orders to be bought, that undoubtedly is a perfectly legitimate and real business transaction. If he does not mean to take up his stock,—if he means to sell again before the settling day arrives,—that may be a gambling transaction so far as he is concerned, but it is not necessarily a gambling transaction so far as the broker is concerned; and in order to be a gambling transaction such as the law points at, it must be a gambling transaction in the intention of both the parties to it" (dictum of Cave, J., approved by House of Lords in the *Universal Stock Exchange Co. Ld.* v. *Strachan*, 1896, App. Ca. 166). To constitute a wagering contract, these are necessary: there must be two parties, opposed to each other directly or through the intermediary of brokers, of whom one must lose; both must intend the transactions to be fictitious, neither being bound to give or accept delivery of the stock, shares, or goods (*Boyd*, 1855, 17 D. 513; *Thacker*, 1878, 4 Q. B. D. 685; *Foulds*, 1857, 19 D. 803; *Risk*, 1881, 8 R. 729; *Newton*, 1884, 11 R. 554; *Heiman*, 1885, 12 R. 406; *Gillies*, 1885, 13 R. 12; *Mollison*, *supra*; *Shaw*, 1890, 17 R. 466; *Liquidator of the Universal Stock Exchange Co. Limited* v. *Howat*, 1891, 19 R. 128; *Mole*, 1894, 2 S. L. T. 365; *The Universal Stock Exchange Co.* v. *Strachan*, *supra*). The question whether the transactions are real or fictitious is one to be proved by evidence. The fact that the contract is in writing and *ex facie* enforceable is not conclusive of its reality, nor is it necessarily fictitious if no delivery has followed or was expected to follow, but only payment of differences (*Shaw*, *supra*). "No doubt if it could be shown that there was a sub-contract or latent understanding that the contract for delivery of stock was not to be enforced, then the case would result in a contract for differences . . . . And, again, if there be an obligation legally enforceable to deliver stock, the mere circumstance that the speculator in his own mind does not mean to enforce the contract, but is content to take his differences when offered to him, will not make the contract one for differences which the law will not enforce" (per Ld. M'Laren, *ib.*). A contract to deal in differences only may be proved by a course of transactions which clearly shows that such was the real agreement of parties (*Heiman*, *supra*; *The Universal Stock Exchange Co. Ld.* v. *Strachan*, *supra*).

If the Court is satisfied that what it is dealing with is a wagering contract, it will not consider the case at all, although the contract is one to be construed by the law of another country, under which it is valid and enforceable (*Heiman*, *supra*).

Rights of Agents and Brokers.—The question was raised in *Foulds* (*supra*) whether the broker through whom wagers on differences were entered into could recover his commission from his constituent. This was not decided; but in the case of *Knight & Co.* (1892, 19 R. 959), the pursuers, a firm of betting agents, were found entitled to maintain an action for money disbursed on behalf of their principal, who had employed them to make bets for him, and had lost. The converse has been held in England, namely, that a principal who has commissioned an agent to make bets for him may sue for payment of money received by the agent on his behalf (*Bridges*, 1885, 15 Q. B. D. 363). The *ratio decidendi* in these cases was that they depend on another contract than the contract of wager, to wit, that of agency, and that "there is no such legal taint in betting as to infect all the contracts which are in any way related to it" (per Ld. Pres.

Robertson in *Knight & Co., supra*). On the other hand, a commission agent who had omitted to make bets as instructed by his constitutent, was held not liable to be sued for damages for breach of contract, on the ground that if the bets had been made the money won would not have been recoverable from the loser (*Cohen*, 1889, 22 Q. B. D. 680). By the Gaming Act, 1892, it is provided that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the 8th and 9th Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services relating thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." But this Act probably does not apply to Scotland (*Russell*, 1894, 1 S. L. T. 533; *Alston*, 1895, 2 S. L. T. 473, 12 S. L. Rev. 111; *M'Sorley*, 1897, 5 S. L. T. 7). In England, it has been held to apply although the agent who paid the debt was not concerned in any way in the transactions by which it was incurred, and although no knowledge of the money being due for a gaming debt was brought home to him (*Tatam*, [1893] 1 Q. B. 44). Money lent to be repaid only in the event of a wager terminating in a particular manner, is money paid in respect of a wager, and its recovery is struck at by the Act (*Carney*, [1897] 1 Q. B. 634).

Criminal.—The only form of sport which is specifically penalised in Scotland is cock-fighting (Cruelty to Animals (Scotland) Act, 1895, s. 2), but some others may be punished under different heads of crime. Thus, prize-fighting is punished as breach of the peace; and those which involve cruelty to animals may be liable to prosecution under the Act of 1850 (*Johnstone*, 1892, 20 R. J. C. 37, 3 White, 432).

There is a recognised distinction between lawful and unlawful gaming, the latter being generally such as it is the policy of the law to discourage as of a demoralising tendency. Accordingly, various provisions have been enacted which prohibit unlawful gaming in certain places, and the keeping of places where such gaming is carried on. The Act 1621, c. 14, enacts "that no man shall play at cards nor dyce in any common house, town, hostelrie, or cookes houses under the pain of £40 money of this realme, to be exacted of the keeper of the saids inns or common houses for the first fault, and losse of their liberties for the next." Under the Public House Statutes it is a breach of certificate for the holder of a hotel or public-house licence to "permit or suffer any unlawful games" on the premises. But there are in Scotland no games which are in themselves unlawful, all Statutes prohibiting the playing of particular games, without reference to the place where they are played, being in desuetude. A lawful game does not become unlawful by being played for a stake, and dominoes is not an unlawful game (*Hoggan*, 1889, 2 White, 282). The Prevention of Gaming (Scotland) Act, 1869 (32 & 33 Vict. c. 87, s. 3), provides: "All chain droppers, thimblers, loaded dice players, card sharpers, and other persons of similar description who shall be found in any public place or in any grounds open to the public or in any public conveyance in possession of implements or articles for the practice of chain dropping, thimbling, loaded dice-playing, card-sharping, or other unlawful gaming, or who shall in any such place, grounds, or conveyances exhibit such implements or articles in order to induce or entice any person to engage in any such game, or who by any such fraudulent act or device shall cozen and cheat, or attempt to cozen and cheat, any person in any public place, or in any grounds open to the public, or in any public convey-

ance, may be convicted," etc.; and sec. 406 of the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), contains a wider provision to the same effect. In the case of a prosecution under a similar section in the Aberdeen Police and Waterworks Act, 1862, but which contained the expression "and other swindler of that or any similar description," it was held that the accused, who exhibited a wheel of fortune for which he sold 8 tickets at 1d. each, and announced that he would keep 3d. and pay 5d. to the winner, was not a swindler in the sense of the Act (*Melvin*, 1890, 18 R. J. C. 10, 2 White, 555). The Burgh Police Act, by sec. 393, prohibits the assembling of two or more persons in any street or open place "for the purpose of engaging in lotteries, betting, or gaming"; but such a place must be one to which the public has access at all times by right or permission, not private and enclosed, to which admission is only obtainable at particular times and on payment (*Young*, 1893, 20 R. J. C. 62, 3 White, 487); and it is no contravention of this section for two persons meeting on the street to make a bet, although one of them is proved to be a professional bookmaker (*Bonnar*, 1896, 23 R. J. C. 39). It is unnecessary, in a charge under this section, to specify the persons with whom the accused assembled if they are in fact unknown to the prosecutor (*Walker*, 1894, 22 R. J. C. 22, 1 Adam, 523).

It was stated in *Greenhuff* (1838, 2 Swin. 128) that the keeping of a gaming-house is an offence indictable at common law, but prosecutions for keeping a gaming or betting house are, as matter of practice, always founded upon Statute. The statutory provisions relating thereto are contained in the Betting Acts, 1853 to 1874 (16 & 17 Vict. c. 119, and 37 & 38 Vict. c. 15), the Burgh Police Act, s. 407, and Municipal Police Acts, containing provisions similar to those in the public Acts. The Statutes 12 Geo. II. c. 28, and 18 Geo. II. c. 34, directed against gambling-houses, do not apply to Scotland (*Greenhuff, supra*). The Betting Act, 1853, s. 1, provides: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same," or others on their behalf, "or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto," or for the purpose of receiving money as deposits on bets; "and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law." The Act forbids the owner or occupier to keep such house, etc., or permit the same to be used by another for either of these purposes, and provides a penalty on any person using the same, and on the manager of a house, etc., kept for any such purpose (s. 3). They are forbidden to receive deposits on bets, or give any acknowledgment, note, security or draft on receipt entitling any person to payment of any money on a betting contingency (s. 4). The Burgh Police Act includes a gaming-house as well as a betting-house in its scope, and by both these Statutes power is given to the police to enter such gaming or betting house, and seize all implements for carrying on the forbidden transactions. Every person found within the premises without lawful excuse is liable to punishment under the Burgh Police Act, and it is not necessary to prove "that any person found playing at any game was playing for any money, wager, or stake." There is only one reported case in the Scots Courts in which the words "house, office, room, or other place," in the Betting Act, 1853, were the subject of interpretation, and it conflicts to some extent with the English decisions. It was held here that a racecourse, 20 acres in extent, is not a "house, office, room,

or other place" in the sense of the Statute, and that, even if it were, the proprietor who saw that betting was being carried on by betting men at races held there, and did not try to prevent it, although he gave them no special facilities, did not "knowingly and wilfully permit" the use of it for betting (*Henretty*, 1885, 13 R. J. C. 9, 5 Comp. 703). The following is a summary of the principal English decisions. The "place" does not require to be roofed (*Shaw*, 1868, L. R. 3 Ex. 137), or indeed to be a structure, permanent or temporary, so long as it is a fixed and ascertained spot or area (*Bows*, 1874, L. R. 9 C. P. 339). A moveable box placed within the ring on a racecourse, upon which a betting man stood, has been held to come within the expression (*Gallaway*, 1881, 8 Q. B. D. 275), and also an enclosed piece of ground used for pigeon-shooting (*Eastwood*, 1874, L. R. 9 Q. B. 440). A person who moved about in a reserved portion of a field used for dog-races, and made bets with various other persons, was held not liable for "using a place" for betting with persons resorting thereto (*Snow*, 1885, 14 Q. B. D. 588; *Whitehurst*, 1890, 17 Cox, 70). On the other hand, a book-maker who occupied a particular spot on a well-defined piece of vacant ground, which he had no authority to use, and made bets with persons who resorted there for that purpose, was found to come within the Statute (*M'Inancy*, [1897] 1 Q. B. 600: *Liddell*, [1896] 1 Q. B. 295; *Hornsby*, [1892] 1 Q. B. 20; *The Queen* v. *Worton*, [1895] 1 Q. B. 227); and a book-maker who moved about within an enclosure known as Tattersall's Ring, on a racecourse, was held liable for "using a place"—viz. the enclosure—for betting (*Hawke*, [1897] 1 Q. B. 579). But the case of *Hawke* has been overruled, and *Gallaway* and *Eastwood* adversely commented on, by the Court of Appeal in *Powell* ([1897] 2 Q. B. 242). In that case Ld. Esher, M. R., said: "It seems to me that the place must be a place used for betting which can, for the purpose of betting, be not unreasonably deemed to be a place of the same kind as a house, office, or room used for the purpose of betting. It need not be a building built like a house, room, or office, it need not be a covered place, it need not be railed off or boarded off, so as to prevent physical access to it except through a particular part of the railing or hoarding; but it must be a defined space capable from its condition of being used by a person who desires so to use it as if it were his house, room, or office, used by him as such for his betting business." And as to what constitutes use, he said: "There are and must be some essential rights of a person using a place as his house, his office, or his room, different from the rights as to it of persons who are not using it as their house, office, or room. He must have some rights of user peculiar to himself and exclusive of their rights, if any. . . . The user by a person of a place as if it were his room or office necessarily implies some exclusive right in him as against some other persons." Lindley, L. J., and Lopes, L. J., were of opinion that the word "place" could not be held to include such an enclosure as Tattersall's Ring. A tenant of recreation grounds has been found liable for permitting the use of the place by other persons for the purpose of betting, when betting-men were in the habit of resorting there to carry on their business during the progress of sports. The tenant was aware of this practice, and did nothing to prevent it (*Haigh*, 1874, L. R. 10 Q. B. 102). The manager of recreation grounds which belonged to a company, and where betting was carried on during the sports, was held not liable for acting as manager of a "house, office, room, or other place kept or used" for the purpose of betting, on the ground that the primary purpose for which the place was kept was not betting, but racing (*The Queen* v. *Cook*, 1884, 13 Q. B. D. 377). The Act does not

apply to the case of members of a private club betting with each other within the club premises (*Downes*, [1895] 2 Q. B. 203).

In a charge for keeping a gaming or betting house it is not necessary to specify whether a gaming or a betting house is kept, or to specify particular persons with whom the accused betted, if they are unknown to the prosecutor (*Duff*, 1892, 20 R. J. C. 33, 3 White, 399).

It is illegal to send, exhibit, or publish any letter, circular, advertisement, etc., whereby it is made to appear that any house, office, room, or place is kept for making bets or for exhibiting betting lists, or to invite anyone to resort there for the purpose of betting (Betting Act, 1853, s. 7), or whereby it is made to appear that information or advice will be given with regard to the making of bets, or that anyone will make bets for another, or with intent to induce any person to apply to any place or person for betting information or advice, or inviting any person to make or take a share in a bet (Betting Act, 1874, s. 3). It has been held, in England, that an advertisement offering to give information about a race must, to be in contravention of these Acts, do so for the purpose of bets being made in a betting-house (*Cox*, 1883, 12 Q. B. D. 126). By the Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), it is illegal for anyone, for the purpose of earning profit, to send to a person whom he knows to be a minor or pupil any document inviting such person to enter into any betting transaction, or to apply to any person or place for information in relation thereto. If the document is sent to a person at any place of education, knowledge of minority is presumed (ss. 1, 3, 7).

The Cruelty to Animals (Scotland) Act, 1850 (13 & 14 Vict. c. 92, s. 2), and the Burgh Police (Scotland) Act, 1892, s. 405, penalise the keeping, or using, or acting in the management of any place for the purpose of fighting, baiting, or worrying any animal, or permitting any place to be so used, or taking part in any such sport. But taking part in such sport means doing so in a place kept for the purpose (*Brown*, 1892, 19 R. J. C. 22, 3 White, 183).

The Burgh Police Act, s. 381 (26), also prohibits the playing of games in any street to the danger or annoyance of the residents, but expressly permits them on a common or public park.

Gaols.—See PRISONS.

Garbales decimæ.—See DECIMÆ GARBALES.

Gas.—The Gas and Water Works Facilities Act, 1870, 33 & 34 Vict. c. 70, and the Gas and Water Works Act, 1870, Amendment Act, 1873, 36 & 37 Vict. c. 89, provide for obtaining powers by provisional order for the construction of gas works; for the manufacture and supply of gas in a district; for raising capital for these purposes; and for enabling companies or persons supplying gas to amalgamate their undertakings. A provisional order may be obtained by "any company, companies, or person." The consent of the local authority of the district is required before a provisional order can be obtained, and the consent of the road authority where power is sought to break up any road under the road authority's control (1870 Act, ss. 3 and 4). The Gas Works Clauses Act, 1847, 10 & 11 Vict. c. 15, and the Gas Works Clauses Act, 1847, Amendment, 1871, 34 & 35 Vict. c. 41,

provide for the construction of gas works and the supply of gas. These two Acts are construed together, and they only apply when incorporated with a special Act "authorising the construction of gas works" (1847 Act, ss. 1–5). It is to be noted that in Scotland the words "undertakers" and "commissioners" in these Acts mean the "gas commissioners" who are appointed to execute the provisions of any private Gas Supply Act or the Burgh (Scotland) Gas Supply Act, 1876.

Construction of Works and Supply of Gas.

Lands. — Gas commissioners must not manufacture gas or residual products, except upon the lands described in the special Acts, and they must not store gas, except upon those lands, without the previous consent in writing of the owner, lessee, and occupier of every dwelling-house situate within three hundred yards of the limits of the site where such gas is intended to be stored (1847 Act, s. 5). The commissioners may sell and dispose of lands vested in them, and the provisions of the Lands Clauses Consolidation Act, 1845, ss. 128 and 132, apply to such sale.

Breaking up Streets.—Powers are given to the commissioners to break up streets, open drains, lay pipes, make sewers, and erect lamps; but private ground may not be interfered with without consent. Any exercise of the powers given in regard to streets must be under the superintendence of the persons who control the management of the streets, and notice must be given to them by the commissioners of the intention to break up the streets (1847 Act, ss. 6–12).

Breaking up Streets.—Attorney-General v. *Sheffield Gas Consumers Co.*, 1853, 3 De G. M. & G. 309; *Reg.* v. *Sheffield Gas Consumers Co.*, 1853, 18 Jur. 146; *Reg.* v. *Longton Gas Co.*, 1860, 2 E. & E. 651; *Goldsmid*, 1866, L. R. 1 Ch. 349; *Attorney-General* v. *Cambridge Consumers Gas Co.*, 1868, L. R. 4 Ch. 71; *Edgware Highway Board*, 1874, L. R. 10 Q. B. 92; *Mayor, etc., of Preston*, 1886, 53 L. T. 719.

Supply of Gas.—The commissioners may enter into contracts with any person for lighting or supplying with gas any public or private building, or for providing any person with pipes, burners, meters, and lamps, and for the repair thereof. They may enter into any contract with the commissioners, trustees, or other persons having the control of the streets within the limits of any special Act for lighting the same with gas; for providing such commissioners, trustees, or persons with lamps, lamp-posts, burners, and pipes for such purposes, and for the repair thereof (1847 Act, s. 13). The commissioners, if required, must supply gas to all premises within twenty-five yards of a main pipe (1871 Act, ss. 11, 36), and they must also supply public lamps within fifty yards from any of the mains (1871 Act, ss. 24, 36). It is to be observed that the Board of Trade may relieve the gas commissioners under any special Act from their obligation to supply gas, if the Board are satisfied that any part of the area under the special Act is sufficiently supplied with electric light, and that the supply of gas in such part has ceased to be remunerative to the gas commissioners (The Electric Lighting Act, 1882, s. 29).

General Provisions.—The Acts of 1847 and 1871 also make provision for *Testing Gas, Waste and Misuse of Pipes, Injury to Pipes, Fouling Water and Nuisances, Recovery of Gas Rents, Meters, etc.*

Sale of Gas.

The Sale of Gas Act, 1859, 22 & 23 Vict. c. 66; the Sale of Gas Amendment Act, 1860, 23 & 24 Vict. c. 147, and the Sale of Gas (Scotland) Act,

1864, 27 & 28 Vict. c. 96, provide for regulating the measures used in the sale of gas; but these Acts have no operation until adopted in counties by the justices (now the County Council L. G. Act, 1889, s. 11 (5)), and in royal burghs by the magistrates.

Fouling Water and Nuisance.

By the Gas Works Clauses Act, 1847, 10 & 11 Vict. c. 15, s. 21, the penalty imposed on a gas company for fouling a stream with gas washing is £200 and £20 for each day during which the nuisance continues. By the Public Health Act, 1867, 30 & 31 Vict., s. 27, a penalty not exceeding £50 is imposed for causing water to be corrupted by gas washing. In *Hopkins* (30 L. J. Exch. 60) a penalty was imposed although the percolation of gas washing was caused by the fault of another than the gas company.

Burgh Gas Supply.

The Burgh Gas Supply Act, 1876, 39 & 40 Vict. c. 19, amended in its 18th section by the Burgh Gas Supply Act, 1893, 56 & 57 Vict. c. 52, makes provision for lighting burghs in Scotland with gas, and also for the regulation of the supply. Any place having town councillors or commissioners of police elected under any general or local Acts of Parliament may adopt the provisions of this Act (s. 4). The Act does not empower the burgh adopting it to supply gas within any part of the area of supply over which the town council or commissioners of police of any other burgh or any gas company, incorporated by Act of Parliament, or any company, partnership, or person authorised by any provisional order confirmed by Act of Parliament have statutory powers to supply gas (s. 2).

Commissioners.—The commissioners who execute the Act when adopted are the town council in any burgh having a town council, and in any other burgh the commissioners of police (s. 7). The commissioners may appoint a committee of their number for the execution of the Act, to be called the "Gas Committee" (s. 8). Two or more burghs who have adopted the provisions of this Act may amalgamate for the purposes of the Act, and the joint committee is called "The Joint Gas Committee." Secs. 10–17 provide for meetings of the "Gas Committee," and for the auditing of books and accounts.

Powers and Obligations of Commissioners.—The commissioners may (subject to the provisions of the Act) erect, lay down, improve, extend, and maintain gasworks, gasometers, and pipes for the distribution of gas, and execute all such works as may be necessary for the efficient manufacture and supply of gas for public and private purposes, and may purchase, acquire and hold lands and other property for these purposes, and may carry on any such operations and business as are usually carried on by gas companies. The commissioners must not manufacture or store gas, or any residual products, upon any lands without the previous consent in writing of the owner, lessee and occupier of every dwelling-house situate within three hundred yards of the limits of such lands (s. 18). Before proceeding with such manufacture or storage the commissioners shall give notice in writing to every owner, lessee and occupier of every dwelling-house situate within three hundred yards of the limits of the land in question and by advertisement published once a week for two weeks in any newspaper circulating within the burgh, of their intention to proceed with such manufacture and storage, and in the event of any owner, lessee, or occupier refusing or delaying to give the consent provided for in the Act for more than ten days after the last date of publication of such advertisement,

the Sheriff may, on the application of the commissioners, and after such investigation and enquiry as he may deem necessary, by a deliverance under his hand find and declare that such consent may be dispensed with, and such deliverance shall be final and not subject to review, and the Sheriff shall make such finding as to the expenses of the application as shall seem to him just in the circumstances (Burghs Gas Supply (Scotland) Act, 1876, s. 2). The commissioners may sell superfluous lands (s. 19), and they may purchase any undertaking in a burgh for the supply of gas which is carried on by a company not incorporated by Act of Parliament, or authorised by provisional order confirmed by Act of Parliament (s. 20). This may be done compulsorily and the price may be fixed by arbitration under the Lands Clauses Consolidation (Scotland) Act, 1845 (s. 21). The consideration given in the purchase may be a capital sum of money or annuities or partly a capital sum of money and partly annuities, provided the annuities expire within forty years from the date of the purchase (ss. 22–26).

Borrowing Powers.—The commissioners may borrow on mortgage any money which may be necessary for the purchase or erection of gas works for a burgh, and they may mortgage in security the rates or charges leviable by them under the provisions of the Act. The commissioners may also borrow on credit on a cash account. The sums borrowed must be applied in the payment of the mortgage and other debts of the company, and in carrying the other purposes of the Act into execution. Further money borrowed must not be applied to works acquired or to be constructed or to the expenses of management or to any expenses properly payable out of revenue (ss. 27–37).

Guarantee Rate.—The commissioners must fix, impose, and levy a rate termed "The Gas Contingent Guarantee Rate" to pay any annuities and any interest due thereon, and the interest of money borrowed or to be borrowed under the provisions and for the purposes of the Act. This assessment is imposed, levied and collected on property situated within the burgh, on the requisition of the commissioners, by the authority empowered by law to levy any assessment for police purposes (s. 39).

Sinking Fund.—In every year after the second year from their commencing to supply gas the commissioners must set apart as a sinking fund a sum of not less than one-fortieth part of the sums borrowed, until such sums are paid. The fund is only applicable to the redemption of mortgages and annuities and must be lodged in bank, or invested in Government or on heritable securities in the name of "(*name of burgh*) Gas Commissioners" (s. 40).

Gas Rents.—The commissioners from time to time fix the price to be paid for gas to be supplied during any succeeding year or half-year, and until such price is altered by the commissioners the price so fixed remains in force, provided that the price shall be such as will raise sufficient income to discharge all the costs and expenses of and incident to the manufacture and distribution of the gas made, together with the interest on all money borrowed in respect of the works, and to provide the sinking fund required by the Act, and to provide for a depreciation and renewal fund sufficient to maintain the works in perpetuity, and for all charges incident to the occupation of such works. The moneys received in respect of and incident to the manufacture and distribution of gas must be applied to such purposes only, and any balance at the end of a year is carried to the debit or credit of the succeeding year. The prices charged for gas must be the same to all consumers under like circumstances, and the revenue of the gas works must

be credited with an amount for the gas consumed for public purposes, calculated at the rates charged to private consumers, which amount shall be a charge upon the rates leviable for public lighting (s. 41).

Breaking up Streets, etc.—When for the purposes of the Act the commissioners require to break up a street under their control they are not required to give any notice of their intentions to do so (s. 44). The commissioners may lay any pipe, branch, or other necessary apparatus, with the consent of the owner or occupier of any building, and may with the like consent provide and set up any apparatus necessary for securing to any building a proper and sufficient supply of gas, and for measuring and ascertaining the extent of such supply (ss. 44 and 46).

Supply of Gas.—The commissioners, on the request in writing of the owner or occupier of any building or part of a building within one hundred yards of which any main of the commissioners is laid, must furnish to such owner or occupier a supply of gas for such building or part of a building on condition that the person if required gives reasonable security for the gas to be supplied, pays for the cost of laying pipes from the main, and if required pays in advance the estimated cost of laying the pipes (s. 45). The commissioners may contract to light adjoining burghs and to supply gas to adjacent districts (ss. 42, 43). Consumers of gas supplied by commissioners must consume the gas by meter. The meter is subject to inspection by an officer appointed by the commissioners, and he may at all reasonable times enter any building or land lighted with gas supplied by the commissioners, in order to inspect the meters, fittings and works for the supply of gas. The register of the meter is *primâ facie* evidence of the quantity of gas consumed. Notice must be given to commissioners in the case of putting up and removing meters; meters must be kept in repair by the consumer. Penalties are imposed for fraudulently injuring meters, and in case of wilful waste of gas the commissioners may cut off the supply and sue for damages (ss. 47–53).

Pressure of Gas—Quality of Gas.—The gas supplied by the commissioners to any consumer of gas must be supplied at such pressure as to balance a column of water from midnight to sunset not less than six-tenths of an inch, and from sunset to midnight not less than eight-tenths of an inch in height at the main, as near as may be to the junction therewith of the service pipe supplying such consumer. The gas must be at least of such quality as to produce from a union jet or other burner approved by the Board of Trade, a light equal in intensity to the light produced by fourteen sperm candles of six in the pound burning one hundred and twenty grains per hour (ss. 56–58). The commissioners must maintain an apparatus to test the illuminating power of gas, and any five consumers may by order in writing appoint some competent person, not being one of themselves, to test the illuminating power and purity of the gas, the costs of such experiment to be paid according to the result of the examination (ss. 58 and 59).

Recovery of Gas Rates.—The commissioners may by proceedings in Court recover gas rent or any rate or sum whatever due under the Act, including the cost of cutting off the gas if it has been cut off by the commissioners (s. 61).

Provisions as to Gas in Burgh Police Scotland Act, 1892.

The Burgh Police Scotland Act, 1892, provides that the authority in regard to gas in a burgh shall be the provost, magistrates, and town council or commissioners (s. 42). The commissioners may obtain additional

powers as to gas supply by provisional order from the Secretary for Scotland (s. 45). Sec. 99 provides that the commissioners shall make provision for lighting in a suitable manner all the streets, and all other places within the burgh, which in their judgment should be lighted at the public expense, and shall provide, erect, and maintain such a number of lamps, lamp-posts, and lamp-irons and other appurtenances, as may be necessary for that purpose, and shall light, or shall enter into contracts for lighting, and cause to be lighted, such lamps by means of gas, or such other light of an improved kind, subject to the provisions of the Electric Lighting Act, 1882, or any Act or Acts amending or superseding the same, as they may find expedient; and the commissioners are hereby authorised to order the lamp-irons, lamp-posts, and lamps to be fixed, either upon the sides of the causeways, streets, and roads, or upon the kerbstones of the pavements or footways, or at or upon the rails, or in or upon the walls or buildings on the sides of the streets, as they shall think proper, without being liable to any claim for compensation thereanent. The Gasworks Clauses Act, 1847, the Gas and Water Works Facilities Act, 1870, the Gas Works Clauses Act, 1871, and the Gas and Water Facilities Act (1870) Amendment Act, 1873, and any Act amending the said Acts, are, except in or so far as they are expressly varied by the Burgh Police Act, 1892, incorporated with it. . . . The expression "light of an improved kind" in the above-quoted section has been held to include oil lamps (*Fleming and Others, and Liddesdale District Committee of Roxburgh and Others*, 4 S. L. T. No. 329). The Act further makes provision for *penalties for breaking lamps* (ss. 100, 101), *price of gas and testing* (ss. 102, 103), *lighting common stairs or passages* (s. 105), and *lighting public buildings* (s. 175).

Special District Lighting.

Under the provisions of sec. 44 (1) (*a*) of the Local Government (Scotland) Act, 1894, special districts may be formed in a county for lighting purposes, and for the adoption for such purposes of all or any of the provisions of secs. 100–105 of the Burgh Police (Scotland) Act, 1892. When a lighting district is formed the district committee may adopt the Burghs Gas Supply (Scotland) Acts, 1876 and 1893, and any amending Act; but in such case the provisions of the Local Government Act, 1889, with respect to capital, expenditure, borrowing, and audit of accounts apply in lieu of the corresponding provisions in the Burghs Gas Supply Acts. In interpreting these Acts the expression "burgh" is to taken as meaning special lighting district; "commissioners," "town council," and "commissioners of police" are to be taken as meaning district committee (Local Government Act, 1894, s. 44 (10)).

Gazettes are evidence of various acts of State, such as addresses received by the Crown, proclamations and orders in Council, and the like; and mere production is sufficient without further proof (Bell, *Prin.* s. 2209: Dickson, s. 1112; Taylor, s. 15; *R.* v. *Holt*, 5 T. R. 436; *Attorney-General* v. *Theakson*, 8 Price, 89: *Picton's* case, 30 How. St. Tr. 493: *Van Omeron*, 2 Camp. 44). The Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), amended by 45 Vict. c. 9,—the provisions of both Acts were extended to the Board of Agriculture by the Act 58 Vict. c. 9, and have been applied in certain other Acts, *e.g.* the Naturalisation Act, 1870 (33 & 34 Vict. c. 14, s. 12 (5)), the Post Office Act, 1870 (33 & 34 Vict. c. 79, s. 21), the

Prisons (Scotland) Act, 1877 (40 & 41 Vict. c. 53, s. 58), the Military Lands Act, 1892 (55 & 56 Vict. c. 43, s. 17 (3)),—makes the London, Dublin, or Edinburgh *Gazette primâ facie* evidence of any proclamation, order, or regulation issued by Her Majesty or the Privy Council, or by or under the authority of the Commissioners of the Treasury or Admiralty, Secretaries of State, Board of Trade, Local Government Board, Education Department, and Postmaster-General. Observe that the entire *Gazette* must be produced: a cutting from it is not sufficient (*Reg.* v. *Lowe*, 15 Cox, Cr. Ca. 286). But a *Gazette* is not evidence of personal acts or rights of which the connection with State affairs is slight, *e.g.* a royal grant of land to a subject (*Reg.* v. *Holt*, *ut supra*); unless it be made admissible by Statute. In some cases the *Gazette* is made conclusive evidence (see, *e.g.*, the Extradition Act, 1870, 33 & 34 Vict. c. 52, s. 5). A *Gazette* notice relating to private interests with which the Crown has no concern is proof of publication, but not of the fact published. It does not, in the absence of express enactment (see, *e.g.*, the Partnership Act, 1890, s. 36 (2)), raise a presumption of knowledge, unless it can be shown that he whom it is sought to bind by it has read it or is acquainted with it (Bell, s. 2209; Taylor, s. 1666; Dickson, s. 1113). This principle was applied, in an old case, to a notice of dissolution of partnership, the question being as to the right of action of the old correspondents of a firm against a retiring partner (*Godfrey*, Pea. 155, n.; *Jenkins*, 1 Stark, 419; *Hart*, 2 M. & W. 484; cf. *Campbell*, 1803, Hume, 755; *Sawers*, 24 Feb. 1815, F. C.; *Bertram*, 1822, 1 S. 313). It has also been applied to a notification of the blockade of a foreign port in a suit on a ship policy against a firm of underwriters; the view being that while such notification would, as between nation and nation, bind the subjects of the State to whom it was given, it would not affect the relations of private persons *inter se* (*Harratt*, 9 B. & C. 712; Taylor, s. 1665).

[Dickson, *Evidence*, ss. 1112, 1113; Taylor, *Evidence*, ss. 15, 1527, 1662–1665.] See Cessio; Sequestration.

General Assembly.—See Church Courts.

General Disposition.—See Disposition.

General Service.—See Service.

General Ship.—The contract for the conveyance of merchandise in a *general* ship is that by which the master and owners of a ship, destined on a particular voyage, engage separately with various merchants, unconnected with each other, to convey their respective goods to the place of the ship's destination (Abbott, *Merchant Ships*, 5th ed., 212). It is the pure contract *locatio operis mercium vehendarum*.

When a ship is destined to be thus employed, the fact is usually made known to merchants and to the public by advertisement. The shipowner in the case of a *general* ship is a common carrier (Bell, *Prin.* s. 411; *Nugent*, L. R. 1 C. P. D. 19, 423). He is bound to take whatever goods are offered (Bell, *Prin.* ss. 74, 412), if there is room and the goods are of the kind which he professes to carry (Bell, *Prin.* s. 159; *Johnson*, 1849, 18 L. J. (N. S.) Ex. 366). He may refuse to take dangerous goods

(Merchant Shipping Act, 1894, s. 448). Although a vessel is on charter, if she is put up by the master as a *general* ship and the charter is unknown to the shipper, she is to be regarded as a *general* ship (*The Figlia Maggiore*, 1868, L. R. 2 A. & E. 106).

The agreement for the carriage of goods, called the contract of affreightment, may be proved by parole. It is sometimes completed by the mere acceptance on the part of the shipper of the terms of the shipowner's advertisement. More commonly there is a special contract between the shipper and the shipowner, or his representative. The parties may make any stipulations they please, modifying their common-law obligations. Such stipulations or conditions are usually embodied in the bill of lading, which serves the double purpose of a receipt by the master of the ship for the goods, and a document preserving evidence of the terms of the contract. See Bills of Lading, vol. ii. p. 125.

The obligations of parties to the contract of affreightment in a *general* ship, in the absence of express stipulations, may be summarised as follows :—

The shipowner undertakes—

1. That the ship is capable of receiving the sort of cargo for which she is engaged (Bell, *Com.* i. 548; Abbott, 5th ed., 224; *Stanton*, L. R. 7 C. P. 421, 9 C. P. 390; affd. H. L. 3 Asp. M. C. (N. S.) 23: *Tattersall*, 1884, L. R. 12 Q. B. D. 297).

2. That the goods will be received on board with care and skill, and properly stowed (Bell, *ut supra*; Abbott, *ut supra*; *Blakie*, 1859, 28 L. J. C. P. 329, opinion of Willes, G., at p. 331; *The Freedom*, 1871, L. R. 3 C. P. 594).

3. That the ship shall be seaworthy, that is to say, that she shall be tight, stanch, and strong, properly manned, and provided with all necessary stores, and in all respects fit for the intended voyage (Bell, *Com.* i. 549; *Lyon*, 1804, 5 East, 428; *Wilkie*, 1815, 3 Dow, 57; *Steel & Craig*, 1877, 4 R. (H. L.) 103; *Gilroy*, 1892, 20 R. (H. L.) 1). The obligation to provide a seaworthy ship includes responsibility for a latent defect (*The Glenfruin*, 1885, L. R. 10 P. D. 103). The obligation to have the ship properly manned includes an obligation to take a pilot when necessary (Bell, *Com.* i. 553; Abbott, 222); and where pilots cannot be had, in case of neccessity to take the aid of persons locally acquainted with the navigation (*Thomson*, 1826, 4 S. 670). The obligation to have all necessary stores includes the necessary ship's papers (*Levy*, 1816, 1 Stark. 212). The ship must not be overloaded (Bell, *Com.* i. 548; Abbott, 224); nor may the master in time of war take on board any contraband goods, whereby the ship and cargo might be liable to forfeiture or detention (Abbott, *ut supra*).

4. That the ship shall be ready to sail at the agreed upon or advertised time (*Shadforth*, 1813, 3 Camp. 385; *Jackson*, 1874, L. R. 10 C. P. 125).

5. That the ship, when ready, shall sail without undue delay (Bell, *Com.* i. 554; *Tennent*, 1843, 5 D. 639; *The Wilhelm*, 1865, 2 Mar. Cas. 343).

6. That the master will prosecute the voyage by the shortest and most direct course consistently with safety and the usual practice, and navigate the ship with skill and care (Bell *Com.* i. 553: Abbott, 239; *Turnbull*, 1799, Hume, 300). Deviation from the course of the voyage is thus not permitted, unless for the purpose of saving life (*Stewart*, 17 January 1810, F. C.; *Davis*, 1830, 6 Bing. 716; *Scaramanga*, 1880, L. R. 5 C. P. D. 295; *Glyn*, 1893, A. C. 351).

7. That every possible care will be taken of the goods during the voyage, and reasonable exertion used for preserving them if damaged (*Notara*, 1870, L. R. 5 Q. B. 346; 1872, 7 Q. B. 225; *Adam*, 1890, 18 R. 153).

8. That the goods will be delivered in good condition at the port of delivery (Bell, *Com.* i. 557). The manner of delivery is regulated, in the absence of agreement, by the custom of the port.

The responsibility of the shipowner for the safety of the goods under his charge is grounded in our law upon the edict NAUTÆ CAUPONES STABULARII (*q.v.*), the rule of which is that the persons comprehended under it being once chargeable with goods, they must answer for their restitution in the same condition, unless the goods have perished or suffered injury by the king's enemies or inevitable physical accident (Bell, *Com.* i. 559).

That the goods the shipowner has undertaken to carry have been captured by the king's enemies, or have perished or been damaged by a peril of the sea, frees the shipowners completely from responsibility for breach of any of the obligations enumerated. The question what is a peril of the sea then becomes one of great importance. The subject is too large to be discussed here, and reference is made to Abbott, Part III. chap. iv., and the case of *The Xantho*, 1887, L. R. 12 App. Ca. 503. A good illustration of what is not, and what is, a peril of the sea is to be found in this: it has been decided that damage done to cargo by rats is not a peril of the sea (*Laveroni*, 1852, 8 Ex. 166; *Kay*, 1867, L. R. 2 C. P. 302), whereas if rats eat through a pipe, thereby causing sea-water to come in and damage the cargo, the damage is held to be caused by a peril of the sea (*Hamilton*, 1887, L. R. 12 App. Ca. 518). Capture by pirates is a peril of the sea (Abbott, 254; *Pickering*, 2 Roller's Abridgment, 248; *Barton*, Comb. 56; Bell, *Com.* i. 559). Theft is not (Bell, *Com.* i. 470; Molloy, *De jure Maritimo*, ii. 3, 14; *Steinman*, [1891] 1 Q. B. 619). Fire is not, at common law.

The responsibility of the shipowner has, however, been limited by Statute. The shipowner is not responsible for loss by fire (Merchant Shipping Act, 1894, s. 502). He is not responsible for the loss of gold, silver, diamonds, watches, jewels, or precious stones, the true nature and value of which have not been declared (*ib.*). He is not responsible for loss caused by the fault of a pilot compulsorily employed (*ib.* s. 633; *Clyde Navigation Trustees*, 1876, L. R. 842; affd. H. L. 3 R. (H. L.) 44). He is not responsible for loss or damage to goods, when the loss occurs without his actual fault or privity, to a greater amount than eight pounds for each ton of the ship's tonnage (*ib.* s. 503). If claims for damage exceed this amount, the shipowner may apply to the Court to determine the amount of his liability, and the Court will distribute the amount rateably amongst the claimants (*ib.* s. 504: see *The Victoria*, 1888, L. R. 13 P. D. 125; *Rankine*, 1877, 4 R. 725: *Carron Co.*, 1885, 13 R. 114).

The obligation upon the shipper is to pay the freight and any average contribution for loss on the voyage. See FREIGHT.

The shipowner or master has a lien over the goods for freight. He has also a lien for average (Bell, *Prin.* s. 1426; *Crookes*, 1879, L. R. 5 Q. B. D. 38: *Huth*, 1886, L. R. 16 Q. B. D. 735; M. S. A., 1894, ss. 494 *et seq.*). The saving of the lien is effected, although delivery of the goods may be given, by the consignee signing an average bond. But the shipowner or master cannot compel the consignee to sign a bond unreasonable in its terms (*Huth, supra*). The shipowner's right of retention does not extend to a general balance. He is not entitled to retain the goods for arrears of freight on other goods (*Stevenson*, 1824, 3 S. 291).

The construction of the contract of affreightment when there is conflict of laws is matter of difficulty. It would seem as if *primâ facie* the law of the flag would apply (*Lloyd* v. *Guibert* 1865, L. R. 1 Q. B. 115), but it is a question of the intention of the parties; and the Courts of law, in construing the

contract, must look at all the circumstances, and gather from them what was the intention of the parties as to the law by which the contract is to be governed (see CHARTER PARTY, vol. ii. p. 398; *in re Missouri S.S. Co.*, 1889, L. R. 42 Ch. D. 321; *Chartered Mercantile Bank of India*, 1883, L. R. 10 Q. B. D. 521; *The Industrie*, [1894] P. 58, where the law of the place where the contract was made was applied, and the law of the flag rejected; see also an American case, *Liverpool and Great Western Steam Co.*, 1889, 129 U.S. 397, *The Montana*). The manner of proving the contract and the method of enforcing it depend on the *lex fori* (*The Immanuel*, 1887, 15 R. 152).

German.—Persons are said to be *german*, or connected by full blood, who are born or descended of the same father and mother (Bell, *Prin.* s. 1651). In Scotland, relationship of full blood is reckoned to extend as far as the evidence of propinquity will reach (Craig, ii. 17, s. 11; Ersk. iii. 10, s. 2; Bell, *Prin.* s. 1652). See DEGREES OF KINSHIP; SUCCESSION.

Gestio pro hærede.—In Roman law *heredes extranei* did not acquire an inheritance until they had accepted it by their own free act. In the earlier law it was customary for heirs to express their intention by making a formal declaration before witnesses (*cretio*). In the later law the act of entering on an inheritance was effected either by an informal declaration or by conduct from which an intention to be heir could be inferred. A person thus informally accepting an inheritance was said *pro herede gerere*. The question whether a particular act implied *gestio pro herede*, was one of fact (*Dig.* 29. 2. 20, 21, 26, 42). An heir who had, by meddling with the property of the deceased, shown his intention to take up the inheritance, could not afterwards disclaim the inheritance unless he could claim relief on more special ground, *e.g.* minority.

Gestio pro hærede (Scots Law).—See PASSIVE TITLE.

Gift.—See DONATION; GIFT OF BASTARDY.

Gift of Bastardy.—The sovereign as *ultimus hæres* succeeds to the property, both heritable and moveable, of a bastard who dies without lawful heirs of his body and intestate. Frequently, however, the Crown makes a gift of such property. An application for a gift should be by petition "To the Right Honourable the Lords Commissioners of Her Majesty's Treasury," and the petition and all subsequent communications, affidavits, and certificates should be forwarded to the Queen's and Lord Treasurer's Remembrancer. After the presentation of a petition for a gift, the fact of the estate having fallen to the Crown is advertised twice, at intervals of two months, in the *Edinburgh Gazette*, and in two newspapers having the largest circulation in the district in which the deceased resided. Objections, answers, and replies by competing claimants are then lodged, the statements being supported by documentary evidence, such as certificates from parochial and other registers, letters written by the deceased, affidavits by persons cognisant of the facts, etc. On the expiry

of twelve months from the date of the first advertisement, the Crown decides whether to make a gift, and in the event of competing claims, to whom such gift shall be made. By the deed of gift, the Crown donates the bastard's estate and effects, with power to the donatory to institute an action of declarator of bastardy, which is necessary to complete the title of the donatory to the estate so gifted to him (Stair, iii. 3. 44: Ersk. iii. 10, 5: Bell, *Prin.* s. 1669; M'Laren, *Wills*, i. 79 and 80). See LAST HEIR.

Glebe.—The minister of every civil landward parish, and the minister of the first charge (if there be more than one) of a burghal parish with a landward district attached to it (*Mags. of Arbroath*, 1883, 10 R. 767), is entitled, in addition to half an acre for manse, offices, and garden, to a glebe of four acres Scots (equal to about five acres imperial) of arable land, and alternatively to sixteen soums of pasture land,—a soum being sufficient to provide grazing for one cow. Four acres is the *minimum* extent for an arable glebe, and for every acre short of this, four soums of pasture land fall to be designed. The lands primarily liable to be set apart as glebe are kirk lands lying nearest the kirk; failing such, the glebe will be designed out of temporal lands.

It is not clear when glebes were conferred originally, but there is abundant evidence that, centuries prior to the Reformation, a portion of ground was assigned to each parson, even before provision was made for a dwelling-house or manse.

The ancient Statutes relating to glebes are: 1563, c. 72; 1572, c. 48: 1592, c. 118: 1593, c. 165; 1606, c. 7: 1644, c. 31: 1649, c. 45: and 1663, c. 21. The more modern Acts are: The Small Stipends Act, 1824, 5 Geo. IV. c. 72; The Glebe Lands Act, 1866, 29 & 30 Vict. c. 71; The Ecclesiastical Buildings and Glebes Act, 1868: and The United Parishes Act, 1876, 39 Vict. c. 11, which is applicable to a united parish in which there is more than one glebe, and from which united parish a portion has been disjoined and erected into a parish *quoad sacra*.

It does not appear that the heritors are under obligation to fence or enclose a glebe, unless such enclosure be plainly essential to its full and unmolested use by the incumbent.

Where there is no glebe, or a glebe of less than the statutory extent, application falls to be made to the presbytery under the Act of 1868, which prescribes the procedure to be observed. The heritor whose lands are designed, unless they be the only kirk lands in the parish, has recourse against the other heritors; but this right of relief lies only against the heritors for the time and their heirs, and is not a *debitum fundi*. The last-mentioned Statute provides that the proceedings may be brought under the review of the Sheriff. From the Sheriff appeal may be taken to the Lord Ordinary in Teind Causes, whose judgment is declared to be final.

The crop on the glebe at the minister's death, or on his translation to another charge, belongs to his representatives or to himself, as the case may be. Should the glebe be let, the rent for the period to which the crop sown at the termination of the minister's incumbency applies belongs to him or (failing him) to his representatives (*Taylor*, 1853, 2 Stuart, 538).

The authority of the presbytery is indispensable to the excambing of a glebe, and it is at least expedient, although not actually necessary, that the heritors' consent be also sought.

The minister may dig peats and cut down trees on the glebe: he may

also lease the subjacent minerals; but he is not entitled to more than the income derived from the invested rents or lordships (*Minister* v. *Heritors of Newton*, 1807, M. "Glebe," App. 6).

The glebe of an ordinary civil parish is held without any written title, and is termed allodial. If properly designed, glebe lands are not subject to teind (Act 1578, c. 6). They are also exempt from poor rates, but not from school rates.

The Act of 1866 has proved to be a source of substantial benefit to the Church, something approaching one hundred glebes having been dealt with during the thirty years which have since elapsed. Under the old law glebe lands could not be feued or leased except by means of a private Act of Parliament. The glebes of St. Cuthbert's (Edinburgh) and Govan have been feued in virtue of special parliamentary powers. The Court of Teinds has, for over thirty years, authorised feuing on the application of the minister, who must previously obtain the approval of his presbytery, followed by the consent of two-thirds at least in value of the owners of land in the parish, the *minimum* ownership entitling an heritor to jurisdiction being £100 a year. On judicial authority to feu or lease being granted, and the *minimum* feuing rate or rent fixed, any proprietor whose lands are conterminous with the glebe may, within thirty days of the date of leave to feu or lease, intimate his willingness to acquire the whole or part of the glebe dealt with on such terms as the Court may determine: but any such offer must be unconditional (*Fogo, Gl. of Row*, 9 Nov. 1868, 7 M. 88). If the pre-emptive right be exercised by such owner taking the lands in feu, he will (unless it be arranged otherwise) fall to pay the usual duplicand every nineteenth year. The form of charter sanctioned for glebe-feuing contains a duplication clause: so that, the Conveyancing Act, 1874, notwithstanding, that provision is binding upon anyone exercising the right of pre-emption, and that without express stipulation (*M'Laren, Fraserburgh Gl.*, 15 July 1878). This seems to arise from the fact that the Court, not the minister or superior, fixes the terms on which the adjoining owner may acquire in feu. No fine or grassum is to be paid, but the full annual value of the ground feued or leased must be specified in the charter or the building lease. The purpose to which duplicands are primarily applicable is the extinction of the costs, charges and expenses necessarily incurred in obtaining leave to feu, and in constructing roads, drains, etc. After all such debt affecting the *dominium directum* has been paid off, future duplicands will be payable to the minister for the time being as part of his stipend.

On the death of a minister (s. 15) the feu-duties and rents payable under Act 1866 fall to be dealt with in the same manner as the Ann. Should the vacancy be prolonged, the heritors and the presbytery may uplift the proceeds of the glebe and apply the same towards the supply of religious ordinances during the vacancy.

Unless the minerals in a glebe have been leased prior to an application for leave to feu, the Court will not allow these to be reserved, in respect that underground operations might so injuriously affect the buildings erected as to seriously impair the security for the feu-duties. Presumably the feuar should, for the like reason, be prohibited by his charter from working the minerals, or from conveying them to the proprietor of an adjoining mineral field.

When a portion of glebe lands is acquired by the heritors, for the purposes of sepulture, the ground must be purchased out and out. The price fixed falls to be consigned before decree of sale is extractable,—the

free proceeds being invested at sight of the Court for the benefit of the incumbent. It seems unnecessary, here, to refer to the various modes of investing glebe moneys which have received judicial sanction. It may, however, be pointed out that, where part of a glebe has been acquired, not by virtue of the Act of 1866, but in terms of the Lands Clauses Consolidation Act, 1845, the consigned price is dealt with by the Court of Session (not the Court of Teinds), on the application of the minister with consent of the heritors and the presbytery.

If the cost of the original petition for authority to feu part of a glebe have been decerned a permanent burden on the glebe till extinguished as provided in the Act, it may be assumed (the point does not appear to have been determined) that the expenses of a second application for power to feu the remainder will have to be borne by the applicant personally, whether he be the original petitioner or no. The ground for this would seem to be that leave to feu the whole of a glebe can be obtained at as little cost as leave to feu a part.

[See Connell on *Par.* 337; Duncan, *Par. Eccl. Law*, 474; Elliot on *Feuing of Gl.* (1878), and on *Teind Court Procedure* (1893); Black, *Par. Eccl. Law*, 100; Mair, *Digest* (1895); and Rankine on *Landownership*, 639.]

Gold and Silver Mines.—All mines of gold and all silver mines, "when three halfe pennies of silver may be fined out of the pound of leade," are, by 1424, c. 12, declared to belong to the king, and they form part of the *Regalia minora*. They remained inalienable until near the end of the sixteenth century, when by an Act, 1592, No. 12 (*Thomson's Acts*, iii. 536), they were allowed to be feued to the proprietor of the ground, or to strangers, on the owner's refusal, under burden of the delivery to the Crown of one-tenth of what is brought up. This permission is held to imply a right to the proprietor to demand such a feu in his character of owner of the soil (*E. of Hopetoun*, 1750, Mor. 13527), and it is not restricted to immediate vassals of the Crown, but extends to all proprietors of land, though holding of subject-superiors (*D. of Argyle*, 1739, Mor. 13526). Unless an intention is shown to keep the estates separate, a grant so made to the proprietor unites the mines and the lands, so that an adjudication of the lands carries the mines in preference to a later adjudication of the mines (*Oughterlony*, 1755, Mor. 164); and mines so acquired were held to be included in a general deed of entail (*E. of Breadalbane*, 1875, 2 R. 826). But they do not pass as "parts and pertinents" in a conveyance of the lands unless expressly named (2 Stair, 3. 60; *Lord Advocate* v. *Sinclair*, 1865, 3 M. 981; affd. 5 M. H. L. 97; *Lord Advocate* v. *M'Culloch*, 1874, 2 R. 27; *E. of Breadalbane*, 1875, *cit.*). A barony title, though a good title for prescription of *regalia*, does not seem to carry them of itself unless they are expressly granted (*Lord Advocate* v. *Cathcart*, 1871, 9 M. 744, per Ld. Pres. Inglis; *D. of Montrose*, 1848, 10 D. 896).

Gold Plate.—See Silver and Gold Plate.

Golfing.—A customary right to play the game of golf has been recognised in burgh property (*Kelly and Others* (*Burntisland* case), 1810, note in 9 D. 293; *Sanderson* (*Musselburgh* case), 1859, 21 D. 1011, 22 D. 24). Such a right is not of the nature of a servitude (*Sanderson, ut supra*)—

"benefit to a dominant tenement being out of the question" (Rankine, *Landownership*, 3rd ed., 368: cf. Bell, *Prin.* s. 990, and *St. Andrews Ladies' Golf Club*, 1887, 14 R. 686, per Sheriff Mackay, at p. 692).

Goods in Communion.—See COMMUNIO BONORUM.

Goodwill.—Goodwill may be generally described as that element in an existing and well-established business which warrants a reasonable expectation that it will be able to attract to itself and retain customers to a greater degree than could a newly started but otherwise precisely similar business. Goodwill in this sense may be regarded as attaching to any or all of three factors of such a business (Clarke on *Partnership*, i. 430). (1) It may be *local, i.e.* associated with the premises in which the business is carried on being "the advantage which is acquired by an establishment, beyond the value of the capital and fixtures employed therein, in consequence of the general public patronage which it receives from habitual customers on account of its local position or reputation of celebrity and comfort, or even from ancient partialities" (per Ld. Fraser in *Drummore*, 1886, 13 R. 540). There are classes of trade as to which experience shows that, even where premises are otherwise equally adapted to the trade, the fact that business is already established in one set of premises gives to this an advantage over the other. This local aspect, "the probability that customers will resort to the old place" (per Ld. Eldon in *Cruttwell*, 17 Ves. 335), bulked largely in the earlier decisions, notably in the view taken of goodwill by Ld. Eldon, who may be said to have been the originator of goodwill in the legal sense. Local goodwill is still of considerable importance, especially in connection with retail concerns, and, among these, notably in those connected with licensed premises. (2) Goodwill may be *personal, i.e.* bound up with the personality of the party who has built up the business. This is mainly important in regard to the practices of professional men, the personal element occasionally becoming so strongly marked as to do away with the possibility of transferring the goodwill apart from personal stipulations as to non-competition and introductions (per Ld. Fraser, *loc. cit.*). (3) Goodwill may attach to what, for want of a better expression, may be termed the "*connection*" of a going business. It is as pertaining to this that goodwill is chiefly of value as a subject of commerce in the case of wholesale concerns. In the case of a great shipping business, *e.g.*, it has been found that neither change of locality nor of persons is of any great moment where the "connection" (including the old name) remains. On strict analysis, no doubt, in practically every case of goodwill there is an element present pertaining to each of the three factors mentioned. But, for the proper understanding and reconciliation of many of the modern cases, it is essential to keep in view the fact that goodwill may be so closely identified with one of the three as for legal purposes to render those portions of it which attach to the other two, negligible quantities.

The law regulating goodwill is, comparatively speaking, of modern growth. Transactions in what was practically goodwill were well known in the market-place long before goodwill itself had come to be seriously considered and defined by the Courts. Under the conditions of trade prevalent in earlier times such transactions were naturally bound up with personal agreements restrictive of competition, and it is mainly on these that the older cases bear (*e.g. Stalker*, 1735, Mor. 9455). As above stated, Lord

Eldon is entitled to the credit of having practically founded this branch of the law. He had occasion to consider goodwill in a number of cases, and formally embodied his conclusions in a series of "declarations" in the leading case, *Cruttwell* (17 Ves. 335). These "declarations" have been amplified and developed in a large series of later decisions, chiefly English, as the result of which goodwill has come to be recognised as in itself a definite subject of property, having value and capable of transfer, with incidents of its own quite apart from any personal stipulations by which the transferor may become bound. To goodwill alone attention is in this article, so far as may be, confined, the law regulating those personal facts which are so frequently embodied in transfers of it being treated under RESTRAINTS ON LIBERTY and RESTRAINTS ON TRADE.

NATURE OF GOODWILL.

Definitions.—Connection with a particular trade or business which is at the time being carried on is essential to goodwill; without this it can have no existence (*Robertson*, 28 Beav., per Romilly, M.R.). Once, however, established in connection with such a business, it is treated as a species of property susceptible of money valuation, capable of being transferred, and subject generally to the ordinary incidents of ownership. Of the many definitions which have been given of goodwill, the substance seems to be compressed into two. In *Churton* (John. 174), Wood, V.-C., defined it as "every positive advantage, as contrasted with the negative advantage of the late partner (or owner) not carrying on the business himself, that has been acquired by the firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter connected with the benefit of the business." In *Trego* (L. R. App. Ca., [1896]), Ld. Herschell approved this definition, adding: "It is the connection thus formed, together with the circumstances, whether of habit or otherwise, which tend to make it permanent, that constitutes the goodwill of a business. It is this which constitutes the difference between a business just started, which has no goodwill attached to it, and one which has a goodwill" (see various definitions collected and commented on in Allan's *Law of Goodwill*, pp. 6 *seq.*).

RIGHTS CARRIED BY TRANSFER OF BARE GOODWILL, WITHOUT MORE.

The rights which may be obtained by one acquiring bare goodwill, unaccompanied by any personal agreements imposing restraint on the transferor, fall under one or other of two general classes—

A. *RIGHTS TO POSSESSION OF OLD PREMISES AND STOCK.*—As already indicated, goodwill is in some cases closely identified with the possession of certain specified premises; and it may be so to such an extent even as to leave practically no other marketable element which can be disposed of apart from the right to the premises (cf., *e.g.*, *Philp's Exrs.*, 1894, 21 R. 482). The local goodwill so attaching passes to the party acquiring right to the premises as a pertinent of these (cf. *Baird*, 1878, 5 R. 416; *Bell's Trs.*, 1884, 12 R. 85; *Brown*, 1896, 34 S. L. R. 570; and see cases cited in Allan, *Law of Goodwill*, p. 14). A mortgagee of the premises may thus acquire the benefit of it (*Chissum*, 5 Russ. 29; *Pile, ex parte Lampton*, 3 Ch. D. 36); but it seems open to question whether one acquiring the premises otherwise than by title derived from a former trader, would be entitled to represent himself as the successor of the latter. On the other hand, where a trader transfers goodwill, the mere transfer seems to carry such right as the vendor has in the premises, and this even in the case of gratuitous transfer,

such as bequest (*Blake*, John. 732). Where the premises are merely leased, the reversion of the lease will be carried. Where the tenant has no right other than a yearly tenancy, a sale of goodwill would seem to carry by implication the vendor's introduction to the landlord, and interest in obtaining a renewal (*Brown*, 1896, 34 S. L. R. 570). In this case the widow and executrix of a publican with a yearly tenancy, who had obtained a transfer of the licence, and a fresh let from the landlord, being sued by a creditor of her husband's as *lucreta* by the goodwill, Lord Kyllachy held that the limit of her liability was the amount which might have been obtained for the goodwill from a purchaser taking it merely as an introduction to the landlord, and in the knowledge that the widow was to be a competitor. The reputation of the trader may add to the local value of goodwill, but the transfer by any other than the trader of the premises in which the business has been built up would not seem to bar him from separately transferring the element of goodwill, which is founded upon reputation and connection, if this could, without fraud on the public, be maintained in connection with other premises suitably situated.

B. *Right to carry on the Old Business, and to represent that the same is being carried on by the Transferee.* — The purchaser (*Cruttwell, supra*) or other transferee (*e.g. Blake, supra*) acquires a right to carry on the old business, and to represent that it is the identical business which is being so carried on. This right is exclusive (*Hogg*, 8 Ves. 215; *Churton*, John. 174); and it infers in the transferee a right to sue for damages, or to obtain interdict against anyone (including the vendor) unlawfully infringing it (*Walker*, 19 Ch. D. 355, 363, and *Burrows*, 1 N. R. 156).

This main right includes, as incidental to itself—

(1) *The Sole Right of Use of the Old Trade Name.*—It follows from *Churton*, and has since that case been accepted law, that among the advantages carried by transfer of goodwill is included every advantage incidental to the trade name (cf. per Wood, V.-C., *loc. cit.*, and *Levy*, 10 Ch. D. 436, 445). This equally applies whether the name be that of a proper firm or of a periodical or newspaper (*Bradbury*, 27 Beav. 53; *Longman*, 2 N. R. 67), or the name attached to business premises (*Hudson*, 39 L. J. Ch. 79), or of a trade specialty (*Mitchell*, 37 L. T. (N. S.) 268, 766). This right is exclusive against all the world, the party who acquires the business getting the name as essential for preventing the public from being deceived. It is upon this ground that he is entitled to interdict against such use as might (intentionally or otherwise) deceive the public. It even seems unnecessary to aver fraud (per Giffard, L. J., in *Lee*, 5 Ch. App. 161). A mortgagee, however, who acquires right to the premises, but who has not used, and does not intend to use the name, is not entitled to interdict against others deriving title from the mortgagor (*Beazley*, 22 Ch. D. 660). Indeed, it seems doubtful on principle whether he has any right himself to use it except where, as above noticed, the goodwill is essentially local.

The purchaser must merely hold himself out as succeeding to and continuing the business of his authors. He must not identify himself with them. In England, it has been held that a person trading with the successor under the belief that he is dealing with the actual transferor, is entitled to resile from his contract (*Boulton*, 2 H. & N. 564; *Cundy*, 3 App. Ca. 459, 465); but *quære* whether, in Scotland, such error, apart from fraud, would be in every case considered so essential as to justify reduction. Even in England, interference by way of injunction seems incompetent (cf. *Levy, supra*, per James, L. J., at p. 448). The assignors are, moreover, entitled to

have the name so used as not to expose them to risk (see cases cited in Allan, p. 23, note *n*). But failure to apply for restraint does not *per se* infer liability on the transferors for contracts subsequent to the transfer, provided the transfer has been duly notified (*Newsome*, 2 Camp. 617); and the right is entirely personal to the transferors, and will not be enforced where the goodwill is derived from a deceased partner (*Webster*, 3 Swans. 490 N.); nor where the transferor has changed her name by marriage (*Levy, supra*); nor where the assignee prefixes "late" before the old name (*Churton, supra*).

(2) *The Right to Exclusive Use of Trade Marks.*—By the Patents, Designs, and Trades Marks Act, 1883 (46 & 47 Vict. c. 57, s. 70), it is provided that: "A trade mark when registered shall be assigned and transmitted *only in connection* with the goodwill of the business concerned, in the particular goods or classes of goods for which it is registered, and shall be determinable with that goodwill." It is clear, therefore, that, in harmony with the policy of guarding the public from fraud, the trade marks of a concern can only be passed in connection with goodwill. Such a mark cannot exist apart from a business (*Cotton*, 44 L. J. Ch. 90; *ex parte Lawrence Bros.*, 44 L. T. (N. S.) 98). It seems also settled that, unless where so completely personal as of necessity to import that the goods sold under it have been manufactured by a particular individual, the trade marks pass both under such general assignments as include goodwill, and on the transfer of mere goodwill by itself (cf. *Cooper*, 26 Beav. 293, per Romilly, M. R.; *Hall*, 4 De G. J. & S. 150; *Burry*, 4 De G. J. & S. 352; *Clements*, 19 W. R. 599). In *Churton*, Page-Wood, V.-C., in the opinion already cited, expressly treats firm-names and trade marks as ruled by identical principles in this respect, and holds both to pass as incidents of mere goodwill. The party acquiring right must register his title (46 & 47 Vict. c. 57, ss. 78, 87).

(3) *The Benefits of Agreements in Restraint of Trade.*—Even where a transferor himself undertakes no personal obligation in favour of the transferee, there may be such obligations restraining third parties from trading associated with and already in existence for the protection of the business. In so far as these are lawful at all (on which cf. RESTRAINTS ON TRADE; RESTRAINTS ON LIBERTY), or are not purely personal, they are transferable to assignees (*Hitchcock*, 6 A. & E. 438); and apart from express assignation, they pass upon the assignment of goodwill, without more (*Bonwell*, 24 Beav. 307; *Jacoby*, 49 L. T. (N. S.) 335; cf. per Brett, M. R., and Bowen, L. J., at 337, 338). In *Westacott* (1889), an unreported case (noticed by Allan, p. 31), this implied assignation was held to result from a transfer by the trustee on a bankrupt estate. Where goodwill on a dissolution of copartnery is not sold, but divided between the partners (see *infra*), such restrictive agreements enure for the joint and several benefit of the partners, and cannot be discharged by any one of them (*Palmer*, 36 Ch. D. 411).

Other rights necessarily following upon those already noticed will best appear in considering

THE POSITION OF A TRANSFEROR OF GOODWILL AFTER TRANSFER.

A trader compulsorily deprived of the goodwill of his business is identically, and a trader voluntarily parting with such goodwill is, save in one important particular, in the same position towards the party who has acquired his business as is any other member of the public. To the lay mind it is startling that if one buys or otherwise acquires a business and its goodwill, the transferor may immediately, unless restrained by some personal agreement, enter into competition with him even by starting next

door. This, however, is well settled law. In *Cruttwell* the lawfulness of the late possessor of the business so doing was affirmed in the case of a judicial sale by the trustee on a bankrupt estate. The necessity or propriety of extending this rule to the case of a voluntary transferor has been more than once questioned by judges of eminence (see per Lindley, L. J., in *Pearson*, 27 Ch. D. 145; and Herschell, L. C., in *Trego*, L. R. App. Ca. 1896, 12 T. L. R. 80). But the rule is now too well settled to admit of doubt (see *Cook*, 27 Beav. 456; *Johnson*, 34 Beav. 63; *Hall*, *supra*; *Churton*, *supra*; *Trego*, *supra*).

In exceptional circumstances a restraint on competition may, however, be implied (*Cooper*, 3 Doug. 413; *Harrison*, 2 Madd. 198). It has been held to be equitable, on the sale of goodwill as part of a firm's assets, that express notice should be given in advertising the sale that absence of competition is not an element in the sale (*Johnston*, 34 Beav. 63; *Hall*, 33 L. J. Ch. 204); and although this is probably not essential, it is desirable. The possibility of competition by the vendor is always a consideration which an agent for an intending purchaser ought to make clear to his client.

In entering into competition, however, the transferor must refrain from in any way representing or even suggesting that he is carrying on the identical business, either by statements that he is the successor in trade to his former business, or by using the old trade marks or colourable imitations thereof, or by using his own name in such a way as to mislead, even along with the words "late" or "from" (see cases cited in Allan, p. 63); but if not done so as to mislead, he is not debarred from stating that he at one time carried on, or was a partner in, the business transferred (*Hookham*, L. R. 8 Ch. D. 91). The right of one who parts with a business by voluntary transfer to solicit the continued support of former customers has been the subject of much controversy and many contradictory decisions in the lower Courts. It at last received authoritative solution by the House of Lords in the case of *Trego* (L. R. App. Ca., [1896]), in which the House, reversing the judgment of the Courts below, overruling *Pearson* (*infra*) and approving *Labouchere* (*infra*), held that a transferor of goodwill is not entitled, in course of carrying on business similar to that sold by him, to take advantage of the connection previously formed by the old firm, and of the knowledge of that connection which he has acquired, by directly and specifically appealing to those who were customers of him or his firm before the transfer. Such conduct, being contrary "to the good faith of the contract," will be ground for a Court of equity granting an injunction to restrain it (see per Ld. Herschell, *loc. cit.*). A partner having access to the books and documents containing particulars of the business connection, but excluded by the terms of the contract of copartnery from any interest in goodwill, was therefore held liable to be restrained from copying or making the same, in order that the extracts so made might be used by him in a competing business upon the dissolution of the partnership. The series of cases which culminated in *Trego*, although now superseded by the decision therein as regards this particular point, contain *dicta* which are invaluable as indicating the evolution of the law of goodwill, and pointing to the appropriate solutions of still unsettled questions (see *Cruttwell*, *supra*; *Labouchere*, L. R. 13 Eq. 332 (in which restraint affirmed); *Walker*, 19 Ch. D. 355; *Ginesi*, 14 Ch. D. 596; *Pearson*, 27 Ch. D. 145 (overruling *Labouchere*); cf. also *M'Kirdy*, 16 D. 1013, per Ld. Benholm). The application of the rule laid down in *Trego* to the case of one who is involuntarily deprived of goodwill seems doubtful. This case simply restored the law to the position in which it stood prior to a decision

in *Pearson*, which has overruled *Labouchere*, with which latter case the injunction granted in *Trego* is in terms identical. While *Labouchere* was still authoritative, it had been expressly held that it would be contrary to the policy of the Bankruptcy Laws to extend its principle to compulsory alienations under them (see *Walker, supra*); and the ratio of the decision seems to extend to any other case of involuntary alienation (cf. *Ginesi, supra*). There seems to be nothing in *Trego* to throw doubt on the soundness of this view. While a voluntary transferor may not solicit or specifically and directly appeal to former customers, it is well settled, despite some contrary *dicta* by Jessel, M. R., in *Ginesi*, that he is nevertheless at liberty to deal with them if they of their own accord come to him (*Leggot*, 15 Ch. D. 306, in which the Court of Appeal reversed Jessel, M. R.; cf. also per Ld. Herschell in *Trego*). A vendor seems also entitled, in the event of old customers returning to him, thereafter to approach them in the ordinary course of business, and probably also to solicit business from former customers of a kind which is not included within the scope of that formerly carried on by him. To sum up, a purchaser of goodwill acquires, as between himself and the vendor, the right (1) to carry on the old business, (2) under the old name (with any modification necessary to protect the vendor), (3) to represent himself to customers as the successor to the old business, (4) to use and have registered in his name the trade marks thereof, and, (5) in the case of a voluntary alienation only, to restrain the vendor by interdict from "either by himself, his partners, agents, or servants applying privately by letter, or personally, or by traveller, to parties who prior to the sale were customers of the old business, with the view of inducing them to deal with himself, or not to deal with the vendee" (see terms of injunction in *Trego*).

From the point of view of process, the case of *M'Kirdy* (16 D. 1013) is important. There the pursuer had retired from business under an agreement whereby he was to receive as compensation from his two partners £2500 over and above his share of capital and profits. He duly retired, and after some time brought action against Paterson, the only one of the partners who then continued the business, for payment of the £2500. This Paterson resisted, on the ground that M'Kirdy had set up a new firm carrying on the same business, and had solicited and withdrawn customers, thus, it was contended, committing a breach of the agreement inferring forfeiture. Some difference of view prevailed among the judges whether the acts complained of were, if proved, contrary to the agreement. Ld. Benholm looked on the price as being for "the value of future profits to be derived from the existing constituents and customers of the firm," and expressed an opinion that pursuer was not entitled to divert to himself those very customers whose employment was to be the source of those profits. He, however, concurred with the other judges in holding that the pursuer, having *primâ facie* put his partners in possession of what he had sold to them, any infringement by pursuer of the terms of the contract such as that alleged could not competently be put forward in defence to the claim for the price, as inferring a forfeiture thereof—although, if the breach were clear, it might be founded on, even in defence, by way of damages. It was further observed that it was a serious question whether Paterson, who was only one of the two who had remained in the firm when the pursuer retired, and had since separated from the other, and dropped the firm style, had any title to plead the forfeiture, the sale having been to the firm.

Before considering the various occasions giving rise to transfers of goodwill, it is proper to notice one class of business, viz. the practices of

professional men, in regard to which it has been doubted whether there is any room for goodwill at all. It is obvious that in the case of many professional men the value of their practice depends upon confidence in themselves personally, and that, accordingly, the bare goodwill of their business, apart from personal agreements as to abstention from practice, or as to recommendations by them, could carry little, if anything, to parties acquiring it. Accordingly, in many such instances the Courts have held that there was no appreciable goodwill,—(see, *e.g.*, *Austin*, 2 De G. & J. 626, *Arundell*, 52 L. J. 537, and *Burns, Aitken, & Co.*, 2 Guthrie's *Sel. Cases* (solicitors); *May*, 20 Ch. D. 705, and *Bain*, 5 R. 416 (physicians); *Hitson*, 29 L. R. Ir. 176 (stockbroker),—and there are *dicta* in these cases which seem to go the length of denying that a professional man's business can have any goodwill in the strict sense (cf., *e.g.*, per Jessel, M. R., in *May*, 20 Ch. D. 718, and per Moncreiff, L. J. C., in *Bain*, 5 R. 422). Such *dicta* are, however, it is submitted, to be regarded as laying down a proposition in fact rather than a principle of law. This view seems quite consistent with the passage in Smith's *Mercantile Law*, on which nearly all such *dicta* are based. "When the profits of a business result almost entirely from confidence placed in the personal skill of the party employed, as in the case of surgeons or attorneys, *the goodwill is too insignificant to be taken notice of*" (Smith, 9th ed., 193). In *Bain* v. *Munro* (5 R. 416), the leading Scottish case, there were special circumstances present. The defender, the widow of a doctor, had sold her husband's practice, together with the heritable property in which this had been carried on, which belonged to herself. On being called to account by a creditor of her late husband for the value of the goodwill of the practice sold, the Court held that no element of the price represented any goodwill which had been *in bonis* of the deceased. It appeared, however, that the doctor had been ill for long before his decease, and that his practice had fallen off; that the purchaser relied mainly on the introductions of the widow and her son; and that he would not have bought the goodwill apart from the house. Ld. Gifford, while on these grounds concurring in the judgment of the Court, strongly dissented from the view that there was anything inherently different in a doctor's from any other business as regards the possibility of goodwill; and he indicated that, had there appeared to be anything for which an executor could have got a price in the special case apart from the house and personal introductions, the widow would have been accountable for it (5 R. p. 424; cf. also note by Mr. Sheriff Guthrie in *Burns, Aitken, & Co.*, *supra*). Of course in many, if not in most, instances of disposal during life, the bare goodwill of a professional practice is valueless apart from a covenant restraining practice; but when death has intervened to prevent competition there seems nothing in principle against even such a practice having a saleable goodwill. It has been held that in such a case goodwill may attach to premises, and it is difficult to see any valid reason why it should not also attach to "connection." It may be suggested that the decision in *Trego*, involving, as it does, that no one who has not right thereto as a partner or otherwise can avail himself of a business connection, books, etc., for purposes of solicitation of customers, may tend to give an increased value to goodwill in such cases. In *Bain*, *e.g.*, it does not appear that the widow could now otherwise than *qua* executrix well make available to the purchaser for purposes of introduction, information obtainable only from the books of the deceased. It may frequently be difficult to say in particular cases what is the value of the personal goodwill, and what of the goodwill available as one asset, but "there are undoubtedly cases of

professional businesses which are not so dependent on personal qualifications but that some of the goodwill may be transferred without recommendation or introduction" (Allan, p. 46). In *Donald* (21 R. 246) the trustees of a retired Indian engineer, who, without having any business premises or staff, had, subsequent to his retiral, made about £300 per annum by procuring and exporting presses to natives and others, apparently chiefly personal acquaintances, were sued for failure to realise the goodwill of this source of income, and were held liable therefor—the value being taken as £300. In the case of *Smale* (1850, 3 De G. & Sm.),—a case very similar to *Bain*,—the widow and executor of a surgeon-dentist having sold the goodwill of the deceased's business (with an undertaking for her personal exertions in introducing the purchaser) for an annuity of £100 to be paid to her for five years, the purchaser taking stock and premises at a valuation, held by Knight Bruce, V.-C., on a creditor's suit, that the whole or a part of the annuity belonged to the estate of the testator (cf. *Morgan*, 79 New York Reps. 490).

Disposal of Goodwill by Voluntary Sale.—The various rights and duties arising out of transfer of bare goodwill have already been fully considered, and as it is in the particular case of transfer by voluntary sale that they are all most completely present, any recapitulation is unnecessary, but on the occasion of such sales it is, however, often possible and expedient to stipulate for personal covenants restrictive of competition which are not implied in bare goodwill, and, if such are to be included, care must be taken to see that they are in such terms as not to be void as contrary to public policy (see RESTRAINTS ON LIBERTY; RESTRAINTS ON TRADE). Express agreement, too, as to the method of use of the old name may save trouble and prevent litigation. Where the goodwill is largely *local*, it is important to acquire rights to the premises, and in such cases the transaction may properly be made conditional on a proper title to these being procurable (*Tweed*, L. R. 1 C. P. 39). Where a name is rather designative of premises than properly social, it will require very clear provision in order that a purchaser of goodwill who does not take the premises may be able to restrain one subsequently acquiring the premises from continuing to use it (*Cowan & Miller* (*Sun Foundry* case), 122 R. 833). Where goodwill of licensed premises is bought, particular care should be taken to make the sale conditional on transfer of the licence being obtained; and if the business is a hotel, over-restraints on competition should be bargained for. Unless where heritable property is included, writing does not seem to be essential for a transfer of goodwill. Where, however, a written assignation is taken (in which the technical word "goodwill" should as matter of expediency be used), it is settled that goodwill is "property" in the sense of the Stamp Acts, and that an *ad valorem* stamp is required, even in cases where what is transferred consists entirely of obligations to introduce, and restrictive covenants (*Potter*, 10 Ex. 147, see per Pollock, C. B., 157; *Com. of Inland Rev.* v. *G. & S. W. Rwy. Co.*, 12 App. Ca. 321). This applies to an assignation *inter socios* (*Potter*). Where goodwill is sold in conjunction with specific premises, specific implement will be enforced; in other cases it seems to be in each instance a question of circumstances whether the remedy is appropriate (see Allan, 89–91). If the consideration be an annuity by way of share of profits, there is an implied undertaking by the purchaser to carry on the business, and he will be liable in damages if he wrongously fail to do so (*MacIntyre*, 52 L. J. C. P. 254). In sale for such a consideration the vendor, on the purchaser's bankruptcy, ranks as a preferred creditor (Partnerships Act, 1890, s. 3). It may be

observed that, from the standpoint of the purchaser, sales on dissolution of partnership and at death fall to be treated as voluntary sales, special covenants being, however, generally unobtainable in the former, as they are unnecessary in the latter, case.

Disposal by Way of Mortgage or Security.—Where property has been made the subject of a heritable security, the whole goodwill, so far as local, *i.e.* as identified with the premises, goes to the mortgagee. In *Pile, ex parte Lambton* (3 Ch. D. 36), where an arbiter, in awarding £11,960 for property, assessed £2800 as compensation for loss of profits, in a competition as to this between the mortgagor's executor and the mortgagee the whole sum was given to the latter, as being of the nature of compensation for the value of the business as inhering in the premises. In England, a mortgage of goodwill, or share and interest in a business, apart from premises, has been recognised (Allan, p. 77); and the right to use the firm-name has also been subject of express mention in a mortgage. The latter is, however, useless unless the mortgagee or his assignee intends to carry on the business (*Beazley*, 22 Ch. D. 660).

Transmission in Consequence of Bankruptcy.—Subject to certain limitations, goodwill is an asset which, on sequestration in bankruptcy, passes to the trustee for behoof of creditors. It is not indeed specially mentioned in the Act of 1856, as it is in the English Act of 1883, but the vesting clauses (Bankruptcy Act, 1856, ss. 102 and 103) are quite wide enough to embrace it. This proposition is, however, subject to two qualifications. (1st) Where the goodwill is entirely local, then it goes, with the heritage to which it effeers, to the person entitled thereto as mortgagee or otherwise, so that the trustee will only get the benefit of it where the heritage goes to him (cf., *e.g.*, *Bain, supra*). If there is any part forming a marketable asset irrespective of the premises, he may sell this. (2nd) Where the goodwill is so essentially dependent on personal qualities as to be intransmissible apart from personal covenants and introductions, the trustee cannot utilise it. For whereas the trader can sell rights, the trustee can only sell property; and a trader is not deprived by a judicial sale of his right of free competition, even among former customers (*Ginesi*, 14 Ch. D. 596). In cases, however, where a bankrupt, on an erroneous view of his obligation, concurred in selling goodwill with personal stipulations, the Courts have shown indisposition to disturb the transaction (cf. *The Buxton, etc., Publishing Co.*, 1 C. & E. 527). And a trustee may be able to obtain the benefit of a sale which he could not himself enforce. Where, *e.g.*, anterior to sequestration, a bankrupt has sold personal goodwill with restrictive covenants in return for an annuity, the trustee has been held entitled to attach the annuity (*Neale*, 28 L. J. 45). The trustee may resell the business to the bankrupt (*Ritson*, L. R. 3 C. P. 473).

Disposal on Dissolution of Partnership.—Goodwill, so far as marketable, falls, on the dissolution of a copartnery, to be treated as an asset of the firm, and realised along with the rest of the partnership property for behoof of all the partners (Lindley, 6th ed., p. 445; Clarke, 436). In dividing the company property, any partner is, in the absence of agreement, entitled to have it brought to public sale, and is not bound to fix a value at which he will either part with his own share or acquire that of the others (*Marshall*, 1816, 19 F. C. 101; *Stewart*, 14 S. 72). In *Stewart's* case this rule was applied even although several years had elapsed since dissolution. Where at the time of dissolution, however, the firm was insolvent, nothing was held to be payable for goodwill by a partner who, continuing to carry on the business, had converted it again into a paying concern (*Broughton*, 44

L. J. Ch. 526). But sale can only be enforced on the footing that the other partners may carry on a similar business in competition (*Cooke*, 27 Beav. 456), and notice has been ordered to be given of this incident (*Johnston*, 34 Beav. 63; *Hall*, 33 L. J. (Ch.) 204). Where there is a marketable personal element in the goodwill of a business which is in the main local, a partner who, through ownership of the premises, had obtained the advantage of this on dissolution, has been held liable to recompense his partners therefor (*Mellerst*, 28 Beav. 453; *Pawsey*, 13 Ch. D. 698; *Walker*, 27 Ch. D. 640). Where the local element attaches to premises held on lease, and a partner has surreptitiously obtained renewal of the lease in his own name, the others are, on ordinary principles of partnership law, entitled to have the lease realised as truly partnership property (*Featherstonehaugh*, 17 Ves. 298, and cf. *M'Whannell*, 18 S. 914; see also *Aitken's Trs.*, 8 S. 753, where dissolution occurred during natural course of lease). So if a partner have otherwise obtained the benefit of goodwill, he must, in general, account therefor (*Stewart* and other cases, *supra*), and, pending settlement, the Courts will protect it (*Turner*, 3 Giff. 442). But sale may be waived; and if waived, each partner will have an equal right to share in goodwill, just as in the other assets (Lindley, p. 449; *Banks*, 34 Beav. 566). The same principles apply to the case of dissolution by death of a partner as to dissolution by agreement or efflux of time. The view that on death goodwill "survived" to the other partners—a view not countenanced by what Scotch cases there are (see, *e.g.*, *Aitken's Trs.*, *supra*)—is now discredited even in England. Although a surviving partner may by force of circumstances obtain the benefit of goodwill without payment by reason of its being unsaleable if he is to be free to compete, still, wherever the goodwill has a saleable value the survivor cannot sell it for his own behoof, but it must be dealt with for joint benefit of the survivors and representatives of the predeceaser (cf. Lindley, 6th ed., 445, and Allan, 63–66).

In the case of bankruptcy of the firm the goodwill is dealt with as already explained. Bankruptcy of an individual partner is just a special case of dissolution, the trustee being entitled to his interest.

These observations apply to cases where there is no provision in the deed of copartnery as to the disposal of goodwill on dissolution. Where there are such provisions, they of course receive effect. It is well to use the word "goodwill," as there are contradictory decisions as to whether it is embraced in such general words as "stock," "estate and effects," etc. (Lindley, p. 449, and cases cited *ibi*). The time of duration still to him may sometimes be an element in fixing the value under such agreements (*Austin*, 2 De G. & J. 626). Even where his partner would in ordinary course obtain the whole benefit without payment on the predecease of his copartner, he may competently be bound in the contract to make a payment, by way of annuity or otherwise, therefor, such obligation not being held to be one without consideration (*Featherstonehaugh*, 25 Beav. 382). Under an agreement whereby a surviving partner was to pay for six months from the predeceaser's death the share of profits to which the latter would have been entitled to the latter's executor "for behoof of his widow, child, or children," it was held that the payment did not fall into the deceased's executry, but fell to be divided equally between the widow and an only child (*Adamson's Trs.*, 18 R. 1133).

Disposal on Death—Heritable or Moveable Nature of Goodwill.—It follows from the recognition of goodwill as property, that, where capable of existence at all independently of the trader, it may continue to exist after his death, and pass to his representatives. It is in this connection that goodwill first

appears as a legal entity, a case regarding it being reported so far back as 1744 (see Allan, p. 56). Questions have, however, frequently arisen as to what representatives were to get the benefit of it, *i.e.* whether it should be treated as heritable or moveable estate. Each case appears to have been decided largely on its own merits, without the formulation of any general rule. The following propositions seem, however, to be deducible from the decisions: (*a*) Where any goodwill is purely personal and intransmissible apart from introductions, it cannot be regarded as at all *in bonis* of the deceased, and anyone in a position to give the introductions may retain any price obtainable therefor (*Bain, supra*). (*b*) Probably only the deceased's representatives may use his books and other private sources of information as to his connection for the purpose of canvassing his customers (see *Trego, supra*); and any price to be had therefore would go to his executors (cf. *Robertson*, 28 Beav. 529, *dicta* in *Bain, supra*). (*c*) Where entirely attached to the heritable property in which either business is carried on, it will be heritable, and go to the heir or other party entitled to the heritage (*Bain, supra*). (*d*) Even where essentially local, if the premises do not go to the heir, there may be a marketable element in goodwill "considered as an introduction to the landlord," and this will fall into executry (*Brown*, 34 S. L. R. 570). (*e*) Obviously this cannot apply where the trader owns the premises, and the heir succeeds to them and so himself becomes landlord (*Kelly*, 29 L. R. Ir. 429, C. A.). (*f*) Nor where the executor has been a competitor with the new tenant for a renewal (*Philp's Exr.*, 21 R. 482). (*g*) Where goodwill is separable from premises, it is moveable, and goes to executry (cf. *dicta* in *Bain, Brown, supra*, and *Donald*, 21 R. 246). (*h*) Even where mixed, the executors may get the benefit of the moveable element indirectly in some form other than a payment from the heir exposing the whole subjects as a going concern, and including in the sale the goodwill and right to use name (*Bell's Trs.*, 12 R. 85). Here a pottery having been sold as a going business for a large sum, of which a part was for plant, and the purchaser being obliged to take over the stock-in-trade at a high figure, *held* that, apart from the enhanced price which the subjects, heritable and moveable together, brought as a going business, there was no separate value attributable to goodwill. Goodwill may be the subject of bequest, and in bequeathing it it is important to see that the wording is such as to pass what is intended to be conveyed, as otherwise, if the goodwill be mainly local, the views of the testator may be stultified by the heritage going off to the heir (*in re Henton*, 20 W. R. 702; *Robertson*, 28 Beav. 529).

Goodwill as a Subject for Compensation upon Compulsory taking of Lands.— Where the compulsory taking of lands is authorised under the Lands Clauses Consolidation Act, 1845, or the Railways Clauses Consolidation Act, 1845, goodwill is, to a certain extent, an element to be regarded in awarding compensation: and even where these Acts are not incorporated in private Acts, the latter generally contain similar provisions. In a question with a mortgagee or non-occupying owner, it is only strictly local goodwill which can be allowed for. In the case of a lessee, tenant, or occupying owner, the criterion is rather what he would give to be allowed to continue business in the same premises, than what he could get from another for his interest. "The amount of damages is not the absolute amount of loss which you would sustain if, the moment you got notice to quit, you instantly gave up your business: but it is the amount of damage you will sustain measured by this, that you have done what was reasonable and proper, by endeavouring to get another place, and if you cannot get another place, or if the place is at all inferior, you are entitled to damages for the difference" (per

Sheriff Allison in *Ramsey* v. *City Union Ry. Co.*, 24 March 1866, cited in Deas on *Railways*, 2nd ed., p. 300; cf. also *Bidder*, 4 Q. B. D. 432, per Ld. Bramwell; *Comrs. of I. R.* v. *G. & S. W. Ry. Co.*, 12 App. Ca. 321, per Herschell, L. C.). Compensation for goodwill is frequently assessed on the basis of so many years' purchase; and where this basis is taken, the gross drawings must, of course, be reduced by deducting wages, including, probably, where the claimant is himself actively engaged, a sum in name of "wages of superintendence" earned by him, unless he is rendered unable to use his personal business aptitude to equal purpose elsewhere on being extruded (cf. as to this, *Strain's Trs.*, 20 R. 1025.) Where the lands are not themselves taken, but are injuriously affected, it rather seems that mere goodwill is not in itself an "interest in land" damage to which gives right to compensation (*Ricke's* case, L. R. H. L. 175). Where, however, there is physical interference with the land, or with some right incident thereto, such as right of access, this entitles to compensation, and proof of damage to goodwill might possibly be relevant. The cases, however, are too numerous and involved to admit of advantageous condensation here: reference may be made to Deas on *Railways*, 2nd ed., part iv. ch. ii. p. 302, etc. In the case of injury by severance, compensation seems to be more freely allowed than where no land is taken (cf. Allan on *Goodwill*, ch. vi.).

Goodwill as affecting Rateable Value.—In Scotland, a payment made by a tenant to his landlord in respect of goodwill is "a consideration other than the rent," which falls to be taken into account in entering the value of the subjects on the roll (*Selkirk*, 14 R. 579; *M'Nally*, 14 R. 582, (public-houses); *Wilson*, 21 S. L. R. 545: *Drummond*, 13 R. 540, and cases cited *ibi*; *Glasgow Iron Co.*, 11 M. 989 (ironworks)). The general rule is thus expressed by Ld. Fraser: "It has been decided that where a sum of money is paid to the landlord which is said to be for goodwill, this is to be taken, in the general case, as simply a payment in advance of rent. At all events it is a consideration other than the rent which the parties insert in the lease. I have had occasion repeatedly to point out the distinction between the payment of a sum of money in name of goodwill to the landlord on the occasion of a lease, and a payment made by an incoming tenant to an outgoing tenant during the currency of a lease. In the former case the payment for goodwill is taken into account in entering the value in the Valuation Roll, in the latter case it is not" (per Ld. Fraser in *Selkirk*, 14 R. 579, at 580). Such a payment for tenant's goodwill was in one case held to be exempt, even although the late tenant was herself one of two *pro indiviso* proprietors of the premises (*Nicholson*, 23 S. L. R. 603): and while a sum payable to the landlord falls to be taken into account as a consideration other than the rent, it by no means follows that the quotient of the whole sum, divided by the number of years, falls to be added to the nominal rent. It is a question of circumstances in each case whether part of the sum is not paid in consideration of other than local elements of goodwill (see, *e.g.*, *Wilson*, 21 S. L. R. 548: *Selkirk*, *supra*, especially per Ld. Fraser, at p. 581). In the case last cited an obligation by the landlord not to compete with his tenant was instanced with approval as a fitting counterpart for a portion of such a payment.

Gowpen (in colloquial Scots, a double handful, *i.e.* as much as can be held by both hands placed together and hollowed).—One of the payments due to the miller's servants under the obligation of thirlage, known as sequels. See BANNOCK; SEQUELS: THIRLAGE.

Grace, Act of.—See Act of Grace.

Grace, Days of.—See Days of Grace.

Grandfather: Grandchildren.—See Degrees of Kinship; Aliment; Succession.

Grass.—In an ordinary lease of an arable farm the tenant enters at Whitsunday to the houses, grass, and fallow lands; and to the crop lands at the separation of the crop, or Martinmas. His term of removal from grass lands is therefore Whitsunday, when he relinquishes all the pasture proper; but an outgoing tenant is entitled to reap, as waygoing crop, the hay sown down during the last year of his lease. In the older cases on this point the hay crop was held to belong to the heir, as against the executor (*Sinclair*, 1744, Mor. 542; *Wright*, 1796, Mor. 5446; *M. Tweeddale*, 19 Nov. 1816, F. C.); but in the case of *Keith* (1825, 4 S. 267), followed in 1832 (*Lyall*, 11 S. 96), it was held that hay sown with the penult crop, and yielding its first crop in the year of removal, is included in waygoing crop, apparently on the ground that, according to the modern system of husbandry, hay is an industrial crop and not natural, as in the days of the earlier decisions quoted. (See Ersk. ii. 2. 4; Rankine on *Leases*, 387 *et seq.*; Bell, *Prin.* s. 1270; Hunter, *Landlord and Tenant*, ii. 486.)

In grass farms the landlord's hypothec extends over grass mail if the land is sublet to grazing tenants, but not over the beasts of others grazing on the lands, except to the extent of the grass mail, so long as unpaid (30 & 31 Vict. c. 42, s. 5).

See Crop; Grass of Ministers; Hypothec; Lease.

Grass of Ministers.—What is known as minister's grass must not be confused with "Grass Glebe." The first statutory provision of the former was made in 1649, which (c. 45) ordained that "every minister have a horse and two kyes grass, and that by and attour his gleib." The grass *glebe*, on the other hand, is the substitute for the statutory arable glebe of four acres in parishes where there is no arable land liable to designation, or not the full extent, lying adjacent to the kirk.

Minister's grass is over and above the glebe (arable or pastoral, as the case may be); and although this originally fell to be designed out of temporal lands, the Act of 1663, c. 21, provided that it should be "designed out of kirk lands," and that "if there be no kirk lands lying near the minister's manse out of which the grass for one horse and two kine may be designed, or otherwayes, if the said kirk lands be arable land, in either of those cases ordains the heritors to pay to his minister and his successors yearly the sum of £20 Scots . . . the heritors always being relieved, according to the law standing, off other heritors of kirk lands in the said paroch." No specific distance from the manse is here stated, and the question of nearness would thus appear to emerge only where in a parish there are two or more tracts of kirk lands. The provision of £20 Scots is obviously made for the benefit, not of the heritor possessing kirk lands lying in grass, but of the minister, who may elect whether he will have the money-equivalent in place of grass at an inconvenient distance

from his house. If there be two tracts of grass land in the parish, that nearest the manse will be designated, the holder of it seeking partial relief from such heritors as possess kirk lands lying more remote.

The surrogatum of £20 Scots *per annum* cannot be increased (*Carfrae*, 13 May 1814, F. C.). Once the money-substitute is accepted with the presbytery's sanction, the right to "grass" is effectually excluded (*Minister of Dollar*, 9 July 1867, F. C.).

Grassum.—A grassum is a slump sum or fine, paid in consideration of a right which is to endure for a term of years, *e.g.* a contract of lease or of ground-annual.

In our older law a grassum was a distinguishing mark of the heritable right known as a rental, and from the payment of a grassum a presumption arose in favour of this tenure (Stair, ii. 9. 20: Ersk. ii. 6. 37): but the facilities thus afforded for raising an immediate fund rapidly led to its application to many other forms of right having *tractum futuri temporis*. In our more recent law, questions concerning grassums have been practically confined to cases arising under leases.

In all contracts involving periodical payments, the taking of a grassum by the creditor therein resolves into a *pro tanto* anticipation of such payments, and thus necessarily diminishes the amounts payable during the currency of the right.

In the case of an absolute proprietor, his power of administration being burdened by no equity in favour of successors in the subject, he may contract in relation thereto on what terms he pleases, and so no question as to his right to stipulate for and to take grassums can arise. Accordingly, however large the grassum, a lease by a fee-simple proprietor is secure from challenge by singular successors (Bell, *Com.* i. 69; Bell, *Prin.* s. 1201), or by creditors, apart from the operation of the Bankruptcy Statutes, or unless struck at as a fraud upon completed diligence. Thus a long lease with large grassum, granted after an inhibition has been laid against the granter, will not be sustained, although ordinary administrative leases are not affected by such diligence (*Wedgwood*, 13 Nov. 1817, F. C.). Provided also that the rent be not elusory and sufficient to satisfy the Act 1449, tenants under leases with grassums have the same protection against successors of the lessor, as tenants under ordinary leases (Bell, *Prin. r.s.*: Ersk. *Prin.* ii. 6. 10); although they seem at one time not to have been in all points so favoured by the law (see *Dalzell*, 1674, Mor. 4685).

Where, however, a person has only a limited or fiduciary title to the subject, he is bound to exercise his powers of administration consistently with the legitimate interests of his successors. In such cases, accordingly, the taking of grassums is prohibited at common law, as being a forestalling of the rents, to the prejudice of subsequent heirs, and outwith a fair and ordinary administration of the subject.

Thus, while fair and ordinary leases by heirs of entail are good at common law, leases in which grassums are taken are reducible at the instance of succeeding heirs of entail, as being in effect frauds upon the entail, and an alienation *pro tanto* of the uses and profits of the estate. The cases arising out of the Queensberry leases finally determined, after conflicting decisions (see *Leslie*, 1779, Mor. 15530), that a prohibition in an entail against alienation strikes against leases with grassums (*Duke of Queensberry*, 1807, Mor. App. *voce* "Tailzie," No. 15, 2 Dow, 90, 5 Pat. App. 758. See also *Turner*, 1807, Mor. *l.c.* No. 16, 1 Dow, 423; *Malcolm*, 1807,

Mor. *l.c.* No. 17: affd. 2 Dow, 285). A prohibition against disponing, or against letting with diminution of the rental, will be similarly construed (*Stirling*, 20 February 1821, F. C.; *Elliot*, 1821, 1 Sh. App. 16, 89; Bell, *Prin.* ss. 1228, 1752). Nor will a power in the entail to set tacks "without evident diminution of the rental" support such leases, although the apparent rent be not below that formerly taken (*Duke of Queensberry*, *v.s.*; *Earl of Wemyss*, 17 November 1815, F. C.; 25 May 1813, F. C.: affd. 1 Bligh, 339, 6 Pat. App. 465 *seq.*): for, in estimating the true rent, the value of fines or grassums paid must be computed (*Earl of Wemyss*, *v.s.*; for a special case in which this omission was held not fatal to the lease, see *Duke of Buccleuch*, 1827, 6 S. 128); and the Court may, in a question with the tenant, refuse to support such a lease, even for a restricted period (*Earl of Wemyss*, *v.s.*). If the original lease be reducible on the score of a grassum having been taken, the device of surrendering and taking a new lease without grassum will not avail (*Earl of Wemyss*, *v.s.*; *id.* 1821, 1 S. 202); and bonds or bills taken by heirs of entail for annual sums during the currency of the leases will be accounted as truly representing current rent, and adjudged to belong to subsequent heirs (see *Denham*, 1761, Mor. 15512). The remedy of the substitute heir is a declarator of irritancy of the contravener's right, and reduction of the offending lease, not an action of damages for loss sustained (*Marquis of Queensberry*, 15 Nov. 1815, F. C.: 1820, 6 Pat. App. 550: 1826, 4 S. 320, 6 S. 706: rev. 4 W. & S. 254).

On the other hand, the terms of the deed of entail may be such as to admit of leases with grassums being granted, as, for example, where the deed contains no prohibition against alienation, or against letting with diminution of the rental (Bell, *Com.* i. 69: Bell, *Prin.* s. 1228). So, where an entail authorised tacks at a stated rent, tacks granted at such rents will not be challengeable although a grassum be taken in addition thereto (*Earl of Elgin*, 1821, 1 Sh. App. 44; *Wellwood*, 1823, 2 S. 475): nor in such cases is the heir of entail under any obligation to distribute the grassum, or to invest it for behoof of succeeding heirs (*Wellwood*, *v.s.*).

The various Statutes enlarging the powers of heirs of entail have adopted the principle of the common law, and the sanction of nullity is adjected to contracts of feu, lease, or ground-annual in which grassums have been taken (see 10 Geo. III. c. 51, s. 7 (Montgomery Act); 6 & 7 Will. IV. c. 42, s. 1 (Rosebery Act): 11 & 12 Vict. c. 36, s. 24 (Rutherfurd Act); 16 & 17 Vict. c. 94, ss. 14, 15 (Entail Act, 1853, extending to heirs of entail the powers under 8 Vict. c. 19, s. 10 (Lands Clauses Act)); 45 & 46 Vict. c. 53, s. 8 (Entail Act, 1882)).

The principles which regulate the taking of grassums by heirs of entail apply with equal force to the case of liferenters and others who have only a limited interest in the subject, the test in each case being whether the lease or other right in question has been granted in the course of a fair and ordinary administration. In a question between fiar and liferenter a grassum falls to be treated on the principles applicable to bonuses or other extraordinary profits, and will go to the fiar (*Ewing*, 1872, 10 M. 678. See BONUS).

Grassums in leases by royal burghs are, it is thought, prohibited at common law on similar principles (Rankine, *Leases*, 36) In the case of leases of glebes there is a statutory prohibition of grassums (29 & 30 Vict. c. 71, s. 3): while in mineral leases by the Crown, power to take grassums has been expressly conferred by Statute (29 & 30 Vict. c. 62, s. 3).

For the purposes of the franchise, the Reform Act of 1832 made

special provision to meet the case of tenants under leases with grassums (2 & 3 Will. IV. c. 65, s. 9. See ELECTION; LAW).

Where an informal lease for a term of years is sought to be set up on the principle of *rei interventus*, the payment of a grassum may often afford strong confirmatory evidence (*Macrorie*, 18 December 1810, F. C.: see *Earl of Aboyne*, 1810, Hume, 847; Rankine, *Leases*, 123).

See, generally, Ersk. iii. 8. 29, Ivory's note; More, *Notes*, clxxxv; Bell, *Com.* i. 69; Bell, *Prin.* ss. 1201, 1228, 1752; Bell, *Convey.* ii. 1033; Menzies, *Convey.* 739; More, *Lect.* i. 559, 560; Rankine, *Leases*, pp. 56 *seq.*, 137.

Gratuitous Deed.—See CONJUNCT AND CONFIDENT; CLAUSE OF RETURN; WARRANDICE.

Gravestones.—As the heritors have the regulation of churchyards (see BURYING-PLACE), it is their right to control the erection of gravestones and other erections in churchyards. "The heritors must have the right to grant or refuse permission to place tombstones over the graves, and to determine the manner in which they should be placed, as upright or flat; and it can scarcely be doubted that, if necessary, the heritors might cause such gravestones to be removed" (Dunlop, *Par. Law*, pp. 72, 76: *Cunningham*, 1778, 5 Bro. Supp. 415; *Ure, etc.* v *Ramsay*, 1828, 6 S. & D. 916, quoted in Dunlop, *supra*, p. 76; *M'Bean*, 1859, 21 D. 314).

Great Avizandum.—See AVIZANDUM.

Great Seal.—See SEALS.

Gregorian Code.—See CODEX.

Ground-annual.—Ground-annual is a yearly duty or revenue payable from land, and made a real burden upon it either by reservation or constitution. It is substantially the same as a feu-duty, for which it may be considered a substitute, as it is practically unknown except when sub-feuing is prohibited.

(1) *Ground-annuals from Church Land.*—When the Church lands merged in the Crown at the Reformation, they were parcelled out in various lordships, the grantees being called Lords of Erection. After a series of Acts of Annexation (see ANNEXATION) the Lords of Erection in the beginning of the seventeenth century resigned their superiorities to the Crown with the exception of the feu-duties, which were to be retained until a price agreed upon for their redemption was paid. The power of redemption was renounced by the Crown on the eve of the Union, and the feu-duty became payable in perpetuity to the successors of the Lords of Erection as a "ground-annual." This real burden has in practice been usually conveyed by resignation and infeftment only (Bell, *Prin.* 885, 886).

(2) *Ground-annuals in Building Feus.*—The chief importance of the ground-annual is in connection with building speculations in and near towns. The feuars of lands, of which the sub-infeudation is validly

prohibited by conditions imposed prior to the commencement of the Conveyancing Act of 1874, frequently find it to their advantage to dispose of the land in lots in consideration of an annual rent or ground-annual rather than for a price immediately payable. In the older practice such ground-annuals were constituted merely by disposition with reserved real burden and sasine thereon; but this gave no active title of possession, and its place has been taken by the modern contract of ground-annual. The instrument closely resembles a feu-contract, the same general conditions as to irritancies, nuisances, servitudes, etc., being contained in both: "but in principle the object and effect of the two deeds are perfectly distinct. By the feu-contract an annual return from land is sought to be secured *by the reservation of an intermediate feudal superiority.* The object of the contract of ground-annual is to secure a similar yearly return by burdening the infeftment of the disponee *without creating a new fee.* The feu-contract is employed where there is no obstacle to the reservation of a permanent mid-superiority: the contract of ground-annual is resorted to when the creation of a subaltern right is conventionally prohibited or practically inexpedient. The yearly return in one case is a proper feu-duty, not dependent upon publication in the register; in the other it is a real burden merely, and to be effectual must be duly published" (*Jurid. Styles*, 5th ed., vol. i. p. 132).

In the existing practice, the seller, in consideration of the ground-annual, which is made a real burden, and of the other obligations undertaken by the purchaser, sells and dispones the lands. The purchaser binds himself to pay the ground-annual, and further, and without prejudice to the real burden and personal obligations for payment, sells and dispones to the seller not only a ground-annual to be uplifted from the lands, but also the lands themselves in security of payment The contract being recorded by warrant of both parties, the seller not only has his real security, but he has also an active title, and all the remedies of a heritable creditor in a bond and disposition in security: he can poind the ground, raise an action of maills and duties against tenants, and enter into possession of the lands.

Questions have been raised as to the continuing personal liabilities of the purchaser or grantee in the original contract of ground-annual after he has transferred the lands to a third person. It now seems to be established—contrary to the doctrine laid down in *Peddie's Heirs* (1846, 8 D. 560)—that unless there be an express provision to the contrary, the personal liability of the original disponee continues, although he has transferred the subjects to a third party; and the latter is not personally affected, although, of course, the lands remain liable into whosoever's hands they may come (*Small*, 1849, 11 D. 495; rev. 1853, 1 Macq. 345; *Gardyne*, 1851, 13 D. 912; rev. 1853, 1 Macq. 358; *Brown's Trs.*, 1852, 14 D. 675; rev. 1855, 2 Macq. 40; *Marshall's Tr.*, 1888, 15 R. 762).

In *Marshall's Tr., supra*, the Court held that an obligation in a contract of ground-annual to erect buildings imposed no personal obligation which transmitted against a singular successor: further, the Court doubted whether an obligation to build could be validly declared a real burden.

In *Bell's Trs.* (1896, 23 R. 650) it was held that the annual payments under a contract of ground-annual being truly the interest on a debt of which the principal is the capital values of the annual payments, the creditor was entitled to the benefit of the proviso in sec. 118 of the Bankruptcy (Scotland) Act, 1856.

A ground-annual differs from other real burdens and heritable securities in remaining heritable in every respect as regards the succession of the

creditor (Conveyancing Act, 1874, s. 30); and it differs from a feu-duty in that the real security is destroyed by the negative prescription if the ground-annual is omitted from the titles for forty years (Craigie, *Heritable Rights*, 260).

Interest is not due on arrears of ground-annuals (*Scott Moncrieff*, 1835, 4 S. 61).

If land burdened with a ground-annual be divided and resold in lots, each lot is liable for no more than the portion of ground-annual with which its title burdens it (*Thomson*, 1828, 6 S. 526; Bell, *Prin.* 888).

Ground-annuals, like other real burdens, may be assigned, conveyed, and extinguished, and titles thereto may be completed, as nearly as may be in the same manner as in the case of heritable securities constituted by infeftment in terms of the Consolidation Act, 1867 (Conveyancing Act, 1874, s. 30).

The following is given in the *Juridical Styles*, vol. i. p. 134, as an example of a contract of ground-annual containing all the usual and generally necessary clauses:—

It is *Contracted* and *Agreed* between *A.* [*designation*], heritable proprietor of the area of ground hereinafter disponed, *of the first part*, and *B.* [*designation*], *of the second part*, in manner following, viz.: The said *A.*, *in consideration* of the ground-annual and other prestations hereinafter undertaken by the said *B.*, has sold, and hereby *sells* and *dispones*, to and in favour of the said *B.* and his heirs and assignees whomsoever, heritably and irredeemably, *All and Whole* that area of ground (here describe the ground disponed, and if it be only part of larger subjects belonging to *A.*, add, Which area of ground is part of All and Whole, etc.—here describe or validly refer to *A.*'s whole subjects), with the pertinents of said area of ground hereby disponed, and the said *A.*'s whole right, title, and interest, present and future, therein (if the subjects of which the area of ground is part are held by *A.* under reservations, burdens, conditions, etc., already constituted by a duly recorded deed, refer to these in terms of Schedule II. of the Consolidation Act of 1868): *And Declaring* that these presents are granted, and the foresaid area of ground is disponed, with and under the real and preferable lien and burden of the payment by the said *B.* and his foresaids to the said *A.* and his heirs and assignees whomsoever of the yearly ground-annual of £ sterling to be uplifted and taken by the said *A.* and his foresaids furth of and from the area of ground before disponed, and whole houses and buildings erected or to be erected thereon or furth of any part or portion thereof and readiest rents maills and duties of the same, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the term of for the half-year preceding, and the next payment at thereafter, and so forth, continuing in the regular and punctual payment of the said yearly ground-annual at the said two terms of Whitsunday and Martinmas in all time coming, with a fifth part more of each of said termly payments in name of liquidate penalty in case of failure, and the interest thereof at the rate of pounds per centum per annum from and after the respective terms of payment of the same until paid: *And Paying* the further sum of £ at the term of in the year and at the same term in every year thereafter, in name of grassum, and that over and above the ground-annual of the year in which the same shall become payable, with interest and liquidate penalty in case of failure in the punctual payment thereof, all as provided with reference to the termly payments of said ground-annual: *And Declaring further* that the said area of ground is hereby disponed to the said *B.* and his foresaids with and under the following additional burdens, declarations, conditions, obligations, and others, viz.:—*First*, The said *B.* and his foresaids shall be bound to repay to the said *A.* and his foresaids a proportionate part of the sums which may have been or may yet be expended by them in the formation of the street (*or* streets) fronting the area of ground hereby disponed, and the common sewers therein, corresponding to the frontage (*or* frontages) of the area of ground hereby disponed along the said street (*or* respective streets); and the said *B.* shall be bound, jointly with the other parties interested therein, to maintain the said street (*or* streets) and sewers in good repair in all time coming: *Second*, The said *B.* and his foresaids shall be bound, so far as not already done, to erect within months of the date of his entry, upon the said area of ground hereby disponed, good and substantial buildings, which shall be of stone and slated, and according to

plans to be submitted to and approved of by the said *A.* or his foresaids; and the said buildings so to be erected shall be capable of yielding a yearly rent of at least double the amount of the foresaid yearly ground-annual; and the said *B.* and his foresaids shall be bound to maintain and uphold the said buildings in such good order and repair as will make them yield the foresaid rent in all time coming: *Third*, That the said *B.* and his foresaids shall be bound and obliged to keep the said buildings erected on the piece of ground hereby disponed, or which may hereafter be erected thereon, constantly and adequately insured against loss by fire, preferably to all other insurance, with a responsible insurance company, to the satisfaction and in the name of the said *A.* and his foresaids, and regularly to pay the premiums of insurance thereon and report discharges thereof to the said *A.* and his foresaids as the same fall due: and in the event of the buildings on said piece of ground being destroyed by fire, then the sum or sums which may be received under the insurances to be effected as aforesaid shall be retained and applied at the sight of the said *A.* and his foresaids either towards the erection of new buildings on the said piece of ground in place of those which may be so destroyed, or in repairing the injury which said buildings may have sustained: and in the event of the said *B.* and his foresaids refusing or failing to insure the said buildings in manner foresaid, or to pay the premiums upon the said insurance regularly as the same become due, it shall be in the power of the said *A.* and his foresaids to insure the said several buildings in their own names at the expense of the said *B.* and his foresaids and to advance the premiums of the said insurance, the said premiums so to be advanced being always, with the interest thereof at the rate of per centum per annum, to be repaid by the said *B.* and his foresaids: *And further declaring* that in the event of the said *B.* and his foresaids at any time allowing two years' payment of the said ground-annual to be resting-owing and unpaid, or in the event of their failing to erect and maintain buildings on the ground sufficient for securing the said ground-annual in the manner before mentioned, or of their failing to keep the said buildings constantly insured as aforesaid, or to pay the premiums on the said insurance, then and in any of these cases this Contract of Ground-Annual and all following thereon shall, in the option of the said *A.* or his foresaids, become void and null, and the said area of ground shall, with the buildings thereon, revert and belong to the said *A.* and his foresaids: *Which* irritancies shall nevertheless always be purgeable before declarator or at the bar, but only on payment of all expenses, both judicial and extra-judicial, which may have been incurred by the said *A.* and his foresaids: *And* which ground-annual or grassum, interest, and consequents, and the whole sums which may be advanced by the said *A.* and his foresaids in effecting the foresaid insurance, and in paying the premiums thereon as aforesaid (but declaring that in the event of the said *B.* or his foresaids assigning or disponing the said area of ground, the personal obligation undertaken by him for payment of the said ground-annual, grassum, premiums of insurance, interest, penalties, and others, shall subsist against him and his foresaids until, and only until, buildings shall be erected on the said area of ground above disponed, in terms of the obligation to that effect before written, any law or practice to the contrary notwithstanding), and the whole burdens, declarations, conditions, obligations, and others before written, shall be and are hereby created and declared to be real liens and burdens upon and affecting the area of ground above disponed, and buildings erected or to be erected thereon, and as such are along with the present clause appointed to be recorded in the Register of Sasines as a part of these presents, and inserted or validly referred to in all the future conveyances and investitures of the said piece of ground, otherwise these presents and all following thereon, and the said conveyances and investitures and all following thereon, shall be null and void, and the said piece of ground and buildings thereon shall revert, return, and belong to the said *A.* and his foresaids in the same manner as if these presents had never been granted: *With entry* at the term of : *And* the said *A.* assigns the Writs; conform to inventory annexed and subscribed by the parties as relative hereto, but in respect they form the title to other subjects belonging to the said *A.* of greater value than those hereby disponed, the same are not delivered, the said *A.* being bound, as he hereby binds himself and his foresaids, to make the same forthcoming to the said *B.* and his foresaids, at their expense, on all necessary occasions, on receipt and obligation for redelivery thereof within a reasonable time and under a suitable penalty: *And* the said *A.* assigns the Rents: *And* he binds himself to free and relieve the said *B.* and his foresaids of all feu-duties, casualties, and public burdens: *And* the said *A.* grants Warrandice: *For which causes* and *on the other part*, the said *A. Binds* himself and his foresaids *to make payment* to the said *A.* and his foresaids of the foresaid ground-annual of £ sterling for the said area of ground, payable at the terms, and with grassums, interest, and penalties all as before specified, and to perform the whole other prestations, conditions, and obligations incumbent on him and his foresaids under these presents: *And for further security* to the said *A.* and his foresaids

of the payment of the said ground-annual, grassums, interest, and consequents before specified, and performance of the said prestations, obligations, and conditions ollering thereto, the said *B.*, without prejudice to, but in corroboration of, the right of the said *A.* and his foresaids, in virtue of the burdens and provisions under which the said area of ground is disponed, and of the above written personal obligation, hereby *Assigns*, *Dispones*, and *Makes over* to and in favour of the said *A.* and his foresaids, not only *All* and *Whole* a yearly ground-annual of £ sterling, to be paid to and uplifted by him and his foresaids furth of and from *All* and *Whole* the area of ground above disponed, and buildings erected or to be erected thereon, and that at the terms, and with grassums, interest, and penalties all as before specified, but also *All* and *Whole* the said area of ground, and buildings erected or to be erected thereon, bounded and described as aforesaid, and whole rents, maills, and duties thereof, but always with and under the whole reservations, burdens, conditions, and others hereinbefore referred to, or at length set forth, and that in real security to the said *A.* and his foresaids of the payment of the said yearly ground-annual, half-yearly payments thereof, grassums, interest, and penalties all as before mentioned, and of the performance of the obligations, and prestations applicable thereto, in so far as incumbent on the said *B.* and his foresaids by these presents: *And* the said *B.* assigns the Writs: *And* he assigns the Rents in security as aforesaid: *And* he grants Warrandice: *And* both parties hereto consent to the registration hereof for preservation and execution: In Witness Whereof, etc.

If the ground-annual is to be redeemable at a fixed price, the following clause should be inserted after that specifying the grassum or duplication:—

But declaring that the said ground-annual, grassums, interest and penalties shall be redeemable by the said *B.* or his foresaids at any term of Whitsunday or Martinmas that shall happen within years from and after the term of next, by their making payment to the said *A.* or his foresaids of the sum of £ sterling, and of all arrears and interest thereof, or by their consigning the same in any of the banks in Scotland incorporated by Act of Parliament or Royal Charter, upon three months' premonition in Writing to be given to the said *A.* or his foresaids personally or at his or their dwelling-place if within Scotland, and if furth thereof at the office of Edictal Citations in Edinburgh: on payment or due consignation whereof the said ground-annual, grassums, interest and penalties shall cease and determine, and the said *A.* and his foresaids shall be bound and obliged to deliver to the said *B.* and his foresaids (at the grantee's expense) all writings necessary for renouncing and discharging the said ground-annual, grassums, interest and penalties.

(*Jurid. Styles*, vol. i. 139.)

[Bell, *Prin.* 887; Bell, *Com.* i. 29; Bell, *Convey.* ii. 1155; Menzies, *Convey.* 843; Ersk. *Inst.* ii. 3. 52; *Jurid. Styles*, i. 132.]

See Annualrent Right; Burdens.

Ground Game Act, 1880 (43 & 44 Vict. c. 47).—The objects of this Act, as set forth in the preamble, were to further the interests of good husbandry, and to provide better security for the capital and labour invested by occupiers of land in the cultivation of the soil, by enabling them to protect their crops from injury and loss by ground game.

Prior to the passing of the Act an agricultural tenant was at common law entitled to destroy the rabbits upon his holding for the protection of his crops, but this was a right which might be limited or excluded by the terms of his lease. To hares, a tenant had no right at common law. The effect of the Act was twofold—

(1) To give to the occupier the right to kill hares.

(2) To make the right formerly possessed by the occupier to kill rabbits, and the right conferred by the Act itself to kill hares, inalienable by any contract or agreement. It is provided (s. 2) that where the occupier of land is entitled, otherwise than under the Act, to ground game, he shall still retain a concurrent right to take ground game although he lets the right to another party. It is further provided (s. 3) that any

agreement which purports to divest an occupier of his rights under the Act shall be void. It has been held, in England, that this section is meant to apply only as between landlord and tenant, and that a lease is not void whereby the occupier purports to let to a third party the exclusive right to ground game (*Morgan*, 1895, 1 Q. B. 885).

But the occupier's right to kill ground game, though inalienable, is not exclusive. The proprietor has a concurrent right along with the tenant to ground game, and the Act contains a number of provisions intended to adjust the rights of parties. The restrictions upon the occupier's rights have reference to (1) the persons by whom those rights may be exercised; (2) the seasons in which they may be exercised; and (3) the manner in which the ground game may be taken or destroyed.

I. The right to kill ground game may be exercised—

With firearms by
- (1) The occupier himself.
- (2) One other person authorised by the occupier in writing, and answering to one or other of the descriptions under (2) *infra*.

In any other legal way by
- (1) The occupier himself.
- (2) Persons authorised by the occupier in writing, who must be either—
  - (*a*) Members of his household resident on the farm;
  - (*b*) Persons in his ordinary service on the farm;
  - (*c*) One other person *bonâ fide* employed by the occupier for reward to destroy ground game.

The term occupier is not defined by the Act, but it would probably be held to include any person in possession of land for the purpose of agriculture. In one case (*Stuart*, 1884, 12 R. (J. C.) 9, 5 Coup. 526) it was suggested that a visitor to a tenant for a week fell within the description of "a member of his household resident on the land in his occupation." But the soundness of a construction so elastic may well be doubted. Every person authorised by the occupier in writing must produce the document on demand by any person having a concurrent right to the ground game, and, in default of his doing so, he is not to be deemed to be an authorised person.

II. In the case of moorlands and of unenclosed lands (not being arable lands or portions of moorlands or of unenclosed lands of less than twenty-five acres and adjoining arable lands) a close time, so far as the rights conferred by this Act are concerned, is provided from 1 April to 10 December inclusive.

III. The Act (s. 6) prohibits the killing of ground game "by any person having a right of killing ground game under this Act *or otherwise*"—

(1) With firearms between the expiration of the first hour after sunset and the commencement of the last hour before sunrise.

(2) By spring traps, except in rabbit holes.

(3) By poison.

The title to prosecute for contravention of this section has been held by at least one judge to be in the public prosecutor only (*Bedford*, 1883, 20 R. (J. C.) 65). The effect of the words "or otherwise" in this section has been much canvassed. The natural construction is to read the section as a prohibition against all parties having right to kill ground game. This is the view which has been indicated by the Scottish judges, though it has not been necessary to make it a ground of judgment (*Fraser*, 1882, 10 R. 396). The opinion in the case of *Bedford*, cited in the case above, is in the same direction; for if the Act complained of be a public wrong, it can hardly

be prohibited in the case of one person and not of another. But, on the other hand, in an English case (*Smith* v. *Hunt*, 1885, 54 L. T. (N. S.) 422) it was held that the prohibition did not extend to any person whose right was that arising from ownership. This decision proceeded upon a speculation about the intention of the Legislature which has been shown to be quite erroneous. In both countries it has been held that, in any event, the prohibitions extend to the case of an agricultural tenant who has right otherwise than under the Act to take hares or rabbits (*Fraser*, *supra*; *Saunders* v. *Pitfield*, 58 L. T. (N. S.) 108). With reference to the provision in regard to setting spring traps, it has been held that the trap must be set in the hole and not in a scrape in the neighbourhood of, but not in, the hole (*Brown*, 1882, 9 R. 1183), and that "rabbit hole" means "rabbit burrow," and not any perforation which a rabbit may happen to have made (*Fraser*, *supra*).

The occupier is exempted (s. 4) from an obligation to take a game licence in respect of his exercise of his rights under the Act, but if he kills hares he must take a gun licence (see GUN LICENCE). The Act does not apply (s. 5) where the holding, or the right of shooting over it, is under a lease which subsisted prior to the date of the passing of the Act (7 September 1880). A sporting tenant is (s. 7) to have the same right to institute legal proceedings in connection with game as if he were the owner of the soil (Johnston, *Agricultural Holdings and Ground Game Acts*; Forbes Irvine on *Game Laws*; Oke on *Game Laws*).

The Act seems to leave open the question whether the tenant may still, in certain circumstances, have a claim against his landlord in respect of the ravages of ground game, or whether he must rely upon his own exertions to protect his crops. Upon the authority of a case decided prior to the Act (*Inglis*, 1871, 10 M. 204), it would appear that a tenant can have no right to damages for injury done to his crops by ground game which he has a right and facility to destroy; but that, on the other hand, a tenant is not barred in respect of his rights under the Act from prosecuting a claim for damages done to his crops by rabbits from neighbouring coverts, into which he was debarred from entering for the purpose of destroying them. A tenant, therefore, may still, in exceptional circumstances, have a claim for damages in respect of injury done by rabbits from the neighbouring coverts, but he can have no claim for damages on account of injury by hares or rabbits which can be as readily killed on his own farm as on the adjoining land.

Grounds and Warrants.—See REDUCTION.

Growing Corn.—See CORN.

Guaranty (Mercantile).—As a *nomen juris*, guaranty includes only some of the obligations which the term is popularly used to denote. It covers all proper CAUTIONARY OBLIGATIONS (*q.v.*). Without much stretch of practical fitness, it applies also to written engagements which bind two or more persons conjunctly and severally, or as co-principals, for one and the same debt, where the creditor is aware that, as among the obligants themselves, some are merely sureties for the rest. Since the benefit of DISCUSSION (*q.v.*) was taken away from cautioners by sec. 8 of the

Mercantile Law Amendment Act, 1856, the only substantial difference between proper cautionary obligations and obligations classed as correal, in respect of their being so expressed as to make each of two or more debtors liable for the whole debt, has consisted in the Beneficium Divisionis (*q.v.*) still left to cautioners. Correal obligations, therefore, in which, as a fact within the knowledge of the creditor, the persons bound to him *singuli in solidum* stand to one another in the relation of principal debtor and cautioner, have now a better claim than such obligations once had to be viewed as improper cautionary obligations, and to be treated of under that name. But even if guaranty be allowed as a synonym for cautionary obligation in the wider or improper, as well as in the narrower or proper, sense of the latter term, guaranty is never a word of accurate use as applied to any obligation which is not really of a cautionary character. A substantive engagement to pay on demand and in the first instance, or otherwise than on failure of another obligant, the sum due by that other, is incorrectly described as a guaranty (*Wilson*, 1840, 1 Rob. Ap. 137). Among the contracts which are apt to be confounded with cautionry, the one which is perhaps most apt to be misnamed guaranty is the contract of indemnity,—in cases, for example, where an enterprise, accounted of advantage to the public, depends for its being undertaken on the subscribing of a fund to secure those engaging in the enterprise against risk of loss.

A mercantile guaranty owes its specific name, not to any material difference between such a guaranty and other cautionary obligations, but to the fact of its being often used in trade, and consequently, out of favour to trade, privileged in certain respects. Like other writings *in re mercatoria*, it is held valid and binding notwithstanding the absence of those statutory solemnities which are required in the case of ordinary deeds. There is sometimes room for doubt whether a guaranty is a mercantile guaranty or not: because the transactions which are deemed *res mercatoriæ* are not commercial transactions, simply as such, but commercial transactions involving expeditious performance, together, it may be, with a confidential relation of parties, and often also a relation of persons who are subject to different systems of positive law. With reference to these conditions, and especially the condition of prompt activity, which is imperative in many kinds of business, a guaranty is in general determined as mercantile where the parties are so situated that they either cannot give heed to the forms of probative documents, or cannot be presumed familiar with those forms. Where, on the other hand, the transaction is one of a class which usually admits of due compliance with the rules laid down as necessary to the authentication of ordinary deeds, a guaranty wanting in the requisites of formal execution is not entitled to the privileges of a mercantile writ. Thus, a guaranty for an overdraft on a bank account is not a document *in re mercatoria*, though such a document, if it be improbative, is capable of being validated *rei interventu* (*Johnston*, 1844, 6 D. 875).

In an ordinary mercantile guaranty the liability undertaken by the guarantor has reference, as a rule, either to some definite transaction not yet entered into between the persons afterwards related to each other through the transaction as creditor and primary debtor, or to a course of dealing not yet begun between such persons. But where the liability undertaken by the guarantor has reference to a course of dealing, furnishings or advances already made, as well as subsequent furnishings or advances, may be brought within the scope of the obligation; for

although, standing by itself, a guaranty for a debt incurred previously to the date of the guaranty would seem not to be *res mercatoria* (*Paterson*, 31 Jan. 1810, F. C.; affd. 1814, 6 Pat. 38; *sed quære*: Dickson, *Evidence*, 604), a guaranty for past and future furnishings or advances is, in a question as to its being mercantile or not, treated as a whole, and as if it were only for future transactions, because the undertaking as to the past is really a condition precedent of the credit as to the future (*Paterson, supra*).

Mercantile guaranties, like other cautionary obligations, must be in writing (Mercantile Law Amendment Act, 1856, s. 6). By reason, however, of the offhand preparation which such guaranties generally imply, the writing in their case is not only held effectual though it be neither tested nor holograph, but is construed in a different way from cautionary contracts which have been executed in regular form. A cautionary contract authenticated in the manner prescribed by Statute is *strictissimæ interpretationis* in favour of the cautioner. If the terms of the document be free from ambiguity, they fix the furthest limit of the cautioner's liability; if they be of doubtful import, they are read in the sense least burdensome to him (*Baird*, 1835, 14 S. 41; *Napier*, 1840, 2 D. 556; affd. 1842, 1 Bell's App. 78). A mercantile guaranty, on the other hand, is construed on the supposition of its being the hastily expressed mind of persons who, for the most part, are too busy at the time to weigh every word with care, or are ill-qualified to do so. The meaning put on the writing, therefore, when there is any dispute as to the meaning, is that which appears to be borne out by a consideration of the terms of the document, under reference to what were the circumstances in which the writing was made (*Caledonian Banking Co.*, 1870, 8 M. 862). There is no presumption, favourable to the guarantor or otherwise, with respect to the measure of his liability. The position of parties has to be ascertained, as far as possible, from the evidence afforded by the document itself. Where the position cannot thus be made clear, parole proof is competent in aid of the evidence derived from the writing, but never in derogation from that evidence, both as to how the parties stood related to one another at the time when the guaranty was given, and as to any custom of trade in view of which the engagement was undertaken. For a statement of the law regarding the conditions under which proof of trade usage is admitted to supplement or explain a written document, and, in particular, a document *in re mercatoria*, see CUSTOM OF TRADE. Even where parole evidence of circumstances or of usage is competent in reference to a mercantile guaranty, the construction of the writing is not a question on which the opinion of witnesses will be received, but is a matter for the Court alone (*Calder*, 1831, 5 W. & S. 410: *Kirkland*, 1859, 3 Macq. 766).

There is a broad distinction, on the ground of legal effect, between a letter of guaranty and a letter of recommendation, but there is often much difficulty in determining whether a particular writing is in fact a guaranty or a mere recommendation. A letter of guaranty renders the writer of it liable *ex contractu* to the person to whom it is addressed for the credit given by him on the faith of it to the person in whose favour it has been written. A letter of recommendation, on the other hand, purely such, subjects the writer of it to no responsibility in respect of any credit afterwards given by his correspondent to the person commended, except in the case of wilful misrepresentation or concealment on the part of the writer (*Park*, 1851, 13 D. 1049), and then, it is obvious, the liability incurred is not of contractual origin. See REPRESENTATION. The question whether such or such a writing is simply a recommendation, or amounts to a guaranty,

must always turn chiefly on the specialties of each case. But one or two general considerations which hardly pretend to the definiteness of rules, have been set forth as relevant (Bell, *Com.* i. 389), and are here in place. Where the letter is written in answer to inquiries, what it states in praise of the character, and in support of the credit, of the person inquired about is to be construed as expressive of the writer's desire to be of service to his correspondent, rather than as indicative of his interest in the other person, and is thus presumably intended to be, not a guaranty, but only a testimony according to knowledge. In a number of English cases such a letter has been treated as practically an offer of guaranty, which, as only an offer, must be accepted before it can become binding (*M'Iver*, 1833, 1 M. & S. 557; *Simmons*, 1818, 2 Stark. 371; *Mozley*, 1835, 5 Tyrw. 416: *Newport*, 1862, 7 L. T. (N. S.) 328), though, unless the offer clearly point to or require express acceptance (*Mozley, supra*; *Morten*, 1863, 2 H. & C. 305), the acceptance may be implied (per Parke, B., in *Kennaway*, 1839, 5 M. & W. 498; cf. *Offord*, 1862, 12 C. B. (N. S.) 748). Where, again, the letter is written, not in answer to inquiries on the part of the person to whom it is addressed, but spontaneously on the part of the writer, or, it may be, at the instance of the person in whose favour it is conceived, it is not a guaranty, even though it certify the last mentioned of these persons to be respectable and of good credit: provided that it so certify him without reference to any particular transaction or course of dealing into which he and the person addressed may enter. On this condition the letter carries to the person addressed no assurance of safety in the event of his opening business relations with the person whom it serves to introduce, and therefore the writer lays himself under no responsibility (*Taylor*, 15 Feb. 1804, Hume, 93; see opinions in *Rankine*, 15 May 1812, F. C.). But where, even if only by plain inference, the letter contains such an assurance, the writer incurs the liability of a guarantor (*Rankine, supra*; *Johnston*, 1845, 7 D. 1046), or, at all events, is held to have made an offer of guaranty, and to be bound by acceptance of the offer (see the English cases cited *supra*, and cf. *Wallace*, 1895, 22 R. H. L. 56).

The duration of a mercantile guaranty is either determinate or indeterminate. It is determinate when the guaranty is granted either for a specified time or with reference to some particular transaction or set of transactions. It is indeterminate when the guaranty, without expressing or implying any limit to the time within which it will hold good, is granted with reference to a course of dealings that may last long or end soon. Limited and continuing, the terms in common use to mark the distinction between guaranties of determinate and of indeterminate duration, are ill chosen; because all guaranties, whatever their duration, are limited in some respects, and those of determinate duration subsist in some cases for a considerable time. Every guaranty is limited to a particular person as creditor, and to a particular person as principal debtor, neither assignation nor delegation being competent. In one case, indeed, where a bill had been fortified by a separate letter of guaranty, and where, on the bill's being endorsed, the guaranty was handed over to the endorsee, the guarantor was held liable to the endorsee (*Sir W. Forbes & Co.*, 29 May 1816, F. C.); but the decision was pronounced on grounds which have been cut away by subsequent criticism (More, *Notes*, 107; Bell, *Com.* i. 393), and has never been followed. Most guaranties are further limited with regard to the amount of liability undertaken. Unless they be so expressed as clearly to cover debts which already exist, they create liability only in respect of debts which subsequently accrue (*Dykes*, 1825, 4 S. 69; *Houston's Exrs.*, 1826, 4

S. 566; *Downie*, 1840, 3 D. 59), and, where an outside margin of liability has been fixed, they are construed, not so as to lay restraint on the dealings between the creditor and the principal debtor, but so as to render the guarantor responsible, up to the full measure of his engagement, for the balance arising from those dealings (*Kinross*, 1687, 3 Bro. Supp. 212; *Tennant*, 1859, 21 D. 631). Subject to the proviso that account is always to be taken of peculiarities in the matter to which a guaranty relates and of the evident understanding among the parties, the terms of the obligation are to be strictly read, especially where they tend to any limiting effect. In the usual contrast of limited and continuing, the question whether a guaranty falls under the one head or the other depends so much for its answer in any particular case on the words used, and on the circumstances, that no rules of practical service can be deduced from the decisions. The same experience is acknowleged in England (cf. De Colyar on *Guaranties*, 3rd ed., 243). The Scots cases show that a continuing guaranty may be one that bears to be for a fixed sum (*Kemble*, 1831, 9 S. 648: *Veitch*, 1864, 2 M. 1098), and that a guaranty given in respect of "any" dealings is not necessarily a continuing one (*Wilson*, 1797, Hume, 85: *Slade*, 1808, Hume, 95; *Baird*, *supra*; *Scott*, 1866, 4 M. 551), though it carries a presumption of its being so (*Downie*, *supra*; *Tennant*, *supra*; *Veitch*, *supra*; *Caledonian Banking Co.*, *supra*; *Stewart*, 1871, 9 M. 763). Under a guaranty which is not a continuing one the guarantor's liability is *pro tanto* lessened by any payments made to the creditor by the principal debtor after the limit of duration set to the guaranty has been passed. Under a continuing guaranty, on the other hand, the guarantor remains answerable for successive balances due by the principal debtor to the creditor, till the guaranty be recalled or till circumstances change.

A mercantile guaranty does not come under the septennial limitation established by the Act 1695, c. 5 (Bell, *Com.* i. 375; cf. *Alexander*, 1843, 6 D. 322).

Guardianship of Infants Act, 1886.—The provisions of this Act (49 & 50 Vict. c. 27), so far as they relate to Scotland, are as follows:—

"II. *On death of father, mother to be guardian alone or jointly with others.*—On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act, the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead, or refuses or refuse to act, the Court may, if it shall think fit, from time to time appoint a guardian or guardians to act jointly with the mother."

A father having died without nominating tutors for his pupil children, a petition by the widow to be appointed factor *loco tutoris* was held incompetent, as she was already tutor by operation of secs. 2 and 8 of the Act (*Willison*, 1890, 18 R. 228).

A father died possessed of heritable and moveable property, and without appointing tutors to his children. The next of kin on his side petitioned to have one of their number appointed to act with the mother, on the ground that she was ignorant of business. The Court appointed a person nominated by the mother to act jointly with her (*Martin*, 1886, 16 R. 185).

The fact that a mother has entered into a second marriage does not affect her right under the Statute to be guardian to her children by a former marriage (*Campbell*, 1888, 15 R. 784).

It was held that under this section a mother could grant a valid discharge for a sum of damages found due to pupil children for the death of their father (*Jack*, 1886, 14 R. 263).

"III. *Mother may appoint guardian in certain cases.*—(1) The mother of any infant may by deed or will appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they shall act jointly."

The Act does not apply to bastards, and a mother cannot, under its provisions, appoint a guardian to her illegitimate child (*Brand*, 1888, 16 R. 315, and 15 R. 449).

A widow on her deathbed appointed a Canadian lady to be guardian to her pupil son, who was domiciled in Scotland. A petition by the guardian for the custody of the pupil was opposed by the father's trustees, and was refused *in hoc statu* on the ground that what the Court had to consider was not the petitioner's abstract right, but the well-being of the child, and that the petitioner had not made a sufficient disclosure of her circumstances. "I would only add," said Ld. M'Laren, "that I am not quite clear that the petitioner's appointment as tutor is a valid one, because it was made on deathbed. A father can make such an appointment *in legitima potestate* only, and it is not likely that the Legislature intended to give the mother a higher or more unrestricted power of appointment" (*Fenwick*, 1893, 20 R. 848; see *Morrison*, 1894, 21 R. 1071; *Reilly*, 1895, 22 R. 879; *Kincaid*, 1896, 23 R. 677).

"(2) The mother of any infant may by deed or will provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father of such infant, and the Court, after her death, if it be shown to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be authorised and empowered so to act as aforesaid, or make such other order in respect of the guardianship as the Court shall think right.

"(3) In the event of guardians being unable to agree upon a question affecting the welfare of an infant, any of them may apply to the Court for its direction, and the Court may make such order or orders regarding the matters in difference as it shall think proper."

"V. *Court may make orders as to custody.*—The Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under this Act, and in every case may make such order respecting the costs of the mother and the liability of the father for the same or otherwise as to costs as it may think just."

In an undefended action of separation and aliment the custody of a pupil child was given to the mother. A petition by the father under this section was held to be competent so far as it related to the custody of the child; and it was observed that under the section the Court could give

effect to considerations which could not be regarded in determining an action of separation and aliment (*Beedie*, 1889, 16 R. 648).

A widow who had married again, and resided in Florence, petitioned for the custody of two pupil daughters, and was opposed by their uncle, who was tutor nominate under their father's will. The petition was granted (*Maquay*, 1888, 15 R. 606; and see *Campbell, supra*, 15 R. 784; see *Stevenson*, 1894, 21 R. (H. L.) 96).

"VI. *Power to Court to remove guardian.*—In England and Ireland the High Court of Justice, in any Division thereof, and in Scotland either Division of the Court of Session, may, in their discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act, and may also, if they shall deem it to be for the welfare of the infant, appoint another guardian in place of the guardian so removed.

"VII. *Guardianship in case of divorce or judicial separation.*—In any case where a decree for judicial separation, or a decree either nisi or absolute for divorce, shall be pronounced, the Court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage; and, in such case, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children.

"VIII. *Application of Act to Scotland.*—In the application of this Act to Scotland the word guardian shall mean tutor, and the word infant shall mean pupil.

"IX. *Interpretation of terms.*—In the construction of this Act the expression "the Court" shall mean—

. . . . . .

"In Scotland, the Court of Session or the Sheriff Court within whose jurisdiction the respondent or respondents or any of them may reside.

"Any application under this Act to the High Court of Justice in England or to the High Court of Justice in Ireland shall be made to the Chancery Division of the said Courts respectively in such manner as may be prescribed by Rules of Court.

"In Scotland, the expression 'the Court of Session' shall mean either Division of the said Court, and in vacation the Lord Ordinary on the Bills.

"X. *As to removing proceedings and appeals.*—

. . . . . .

"In Scotland, any application made under this Act to a Sheriff Court may be removed to the Court of Session, at the instance of any party, in the manner provided by and subject to the conditions prescribed by the ninth section of the Sheriff Courts (Scotland) Act, 1877 (40 & 41 Vict. c. 50).

"In Scotland, an appeal shall lie to either Division of the Court of Session from any order made by the Lord Ordinary on the Bills or a Sheriff Court under this Act.

"XI. *Rules as to procedure.*—Rules for regulating the practice and procedure in any proceedings under this Act, and the forms in such proceedings, may from time to time be made—

. . . . . .

"(*b*) So far as respects the Court of Session in Scotland by Act of Sederunt; and

"(*c*) So far as respects any County Court in England or Ireland

and the Sheriff Court in Scotland in like manner as rules and orders respecting those Courts can respectively for the time being be made.

"XII. *Tutors.*—In Scotland, tutors being administrators-in-law, tutors-nominate, and guardians appointed or acting in terms of this Act, who shall, by virtue of their office, administer the estate of any pupil, shall be deemed to be tutors within the meaning of an Act passed in the twelfth and thirteenth years of the reign of Her Majesty, intituled "An Act for the better Protection of the Property of Pupils, Absent Persons, and Persons under mental incapacity in Scotland," and shall be subject to the provisions thereof: Provided always, that such tutors being administrators-in-law, tutors-nominate, and guardians aforesaid shall not be bound to find caution in terms of the twenty-sixth and twenty-seventh sections of the last-recited Act, unless the Court, upon the application of any party having interest, shall so direct.

"XIII. *Saving clause.*—Nothing in this Act contained shall restrict or affect the jurisdiction of the High Court of Justice in England, and of the High Court of Justice in Ireland, or of any Division of the said Courts, and of the Court of Session in Scotland, to appoint or remove guardians, or (in the case of Scotland) tutors or factors *loco tutoris*, or otherwise in respect of infants."

See Custody of Children; Pupil; Minor: Curator; Tutor.

Guild.—The guilds were societies, fraternities, or companies, associated for some particular purpose, most commonly for carrying on commerce. These merchant-guilds corresponded to modern corporations or incorporations. They were licensed by the sovereign (by royal charter, burghal grants, etc.), and were governed by rules and laws of their own, questions arising out of which have frequently come before the Courts for decision (see Shaw, *Digest*, *voce* "Corporation"). The name is supposed to be derived from *geldan*, *gildan*, to pay, because each member was required to pay something towards the support of the body.

See Incorporation; Exclusive Privilege; Dean of Guild.

Gun Licence.—By the Gun Licence Act, 1870 (33 & 34 Vict. c. 57), it is provided (s. 3) that there shall be paid 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 10s. Gun includes (s. 2) 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. It has been held in England that a pocket pistol comes under this definition (*Campbell*, 1876, 40 J. P. 756).

The duty and licence is declared (s. 4) to be an excise duty and licence, and probably therefore a private person has no right to prosecute for penalties under the Act.

A penalty of £10 is imposed (s. 7) upon any person who shall use or carry a gun, elsewhere than in a dwelling-house or the curtilage (purlieus) thereof, without having in force a licence under the Act. Being an excise penalty, this fine may be modified like other excise penalties.

Certain exemptions are recognised.—

(1) A person carrying firearms in the performance of naval, military, or police duty.

(2) A person having a game licence.
(3) A servant carrying a gun by his master's order, for his master.
(4) The occupier of any lands using a gun to scare birds or to destroy vermin, or any servant of the occupier using a gun for the like purpose, but in this latter case the occupier must himself have a licence. Under this exemption it has been held in Scotland (*Goling*, 1878, 5 R. 755) that rabbits are vermin, but the decision though binding in Scotland has been doubted (see Warry on the *Game Laws*, 184), and is ignored by the Excise. Rooks are certainly vermin (Warry, 185), and so probably are wood pigeons (Irvine, 246).
(5) Gunsmith in his trade.
(6) Carrier in his trade.

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 (s. 7).

Provision is made (s. 9) for the summary apprehension and punishment of any person who, being found by an Inland Revenue officer or a constable carrying a gun, fails to produce a licence and refuses to give his name and address.

Conviction of an offence under the Day Trespass Act (2 & 3 Will. IV. c. 68) infers forfeiture of the licence.

The licence, no matter whensoever taken out, expires upon 31 July (Customs Act, 1883, 46 Vict. c. 10, s. 6).

[See Irvine on *Game Laws*; Oke on *Game Laws*; Warry, *Game Laws of England*.]

Gypsies.—See EGYPTIANS.

Habeas Corpus Act.—This is the name given to the English Act 31 Car. II. c. 2 (amended by 56 Geo. III. c. 100) which was passed to provide a remedy in the case of illegal prosecution. The name has sometimes been applied to a Scottish Statute having a similar object, the Act 1701, c. 6.

See CRIMINAL PROSECUTION; WRONGFUL IMPRISONMENT.

Habit and Repute.—It is an aggravation of the crime of theft that the offender is "habite and repute" a thief. Even a single act of theft, if combined with this aggravation, was formerly capital. Hume, i. 92, in describing this rule as "reasonable" as well as "useful," states the principle thus: "In such a case when the man's general character and way of life have been duly established, the particular act comes to be considered as a confirmation only, and a detected instance of his daily course of evil-doing."

This affords the key to what is necessary to establish the aggravation. That the panel is of doubtful fame or the subject of evil rumours is insufficient—"the reputation requisite to be established must amount to something like making a *trade* of theft" (Hume, i. 92, case of *Thomas Stewart*). The aggravation is limited to theft, and has been held not to

apply to other crimes inferring dishonesty, even although of a similar nature (*Buckley*, 1822, Hume, i. 94, note, Shaw, 73; *Cathie*, 1823, Shaw, 93; *Falconer*, 1852, J. Shaw, 546; cases of *Dawson* and *Scott*, Bell, *Notes*, 31 and 32).

Proof of Habit and Repute.—Previous convictions of theft are not essential, although they may form important adminicles of proof. The essential point to be established is that the accused has "been marked as a known thief by the common *bruit* and report of the neighbourhood, and have had a character affixed to him as a brother of the trade" (Hume, i. 93). Active participation in theft is not requisite, if accused is the associate of thieves, and living by theft. In *M'Ghee*, 1861, it was held that the aggravation might apply to a person who was bedridden (Macdonald, 47). The minimum period during which the reputation must have existed does not appear to be absolutely decided. It must certainly not be less than twelve months, although in some of the earlier decisions shorter periods appear to have been held sufficient. In the most recent case, *Dempster*, 1862, 4 Irv. 143, it appears to be doubted whether a bare twelve months is enough, but the case is not very clearly reported. The twelve months must be immediately prior to the commission of the crime to which the aggravation applies, and must have continued down to the date of apprehension. See case of *Heron*, 1838, 2 Swin. 104, where accused having absconded, and an interval of over six years occurring between the crime and the trial,—no proof of character during that period being available,—held that evidence of habit and repute at time of offence insufficient. The aggravation in this case was libelled "you *are* habit and repute a thief"; but opinion expressed by Ld. Moncreiff that even if "*were*" had been substituted for "*are*," the facts would not have constituted a relevant aggravation. Macdonald, however (p. 47), expresses the opinion that the aggravation might, where otherwise applicable, be relevantly laid in the past tense. The repute for the requisite period must apparently exist in Scotland (see *Todd*, Bell, *Notes*, 31, where proof of habit and repute rested on evidence of that character possessed in England). In estimating the twelve months, periods of imprisonment either prior or subsequent to trial cannot be reckoned, but periods of repute prior and subsequent to imprisonment may be combined so as to make up the full period (Macdonald, 48). It is not essential that accused should have abstained from all honest employment, provided that such employment has not been sufficient to remove his general evil reputation. The question is one for the jury.

The provisions of sec. 67 of the Criminal Procedure (Scotland) Act, 1887, as to previous convictions not being referred to in the presence of the jury until after a verdict of guilty, do not apply to proof of habit and repute (*H.M. Advocate* v. *James Hunter*, Aberdeen, 26 June 1890, 2 White, 501). In this case Ld. Shand says: "I cannot but think that the recent legislation requires that this matter of habit and repute should be put on the same footing as that of previous convictions . . . I am bound to say, however, that, so far as my opinion is concerned, I should be very much satisfied to see the whole matter of habit and repute swept away."

Verdict of Jury.—The jury require to find whether or not the aggravation is proven—not whether there was foundation for the belief of the neighbourhood, but "was he, or was he not, so reputed in the country? Did his neighbours, or did they not, come to that conclusion about him?" (Hume, i. 93, 94). In recent years police evidence of repute has in practice generally been held sufficient.

The habit and repute is merely an aggravation of the particular crime

of theft charged. If the panel is acquitted of that crime, even although the jury hold the aggravation established, no punishment can follow. (In an early case quoted by Hume, *Macgregor*, the accused, on such a finding by the jury, was ordained to find caution for good behaviour.) An acquittal, however, in the above circumstances will not prevent the aggravation being libelled and proved in a subsequent trial on a new charge of theft. The aggravaion of habit and repute is now seldom libelled.

[Hume, i. 92; Bell, *Notes*, 28–31; Alison, i. 296; Macdonald, 46.]

Habit and Repute as Proof of Marriage.—Marriage may be proved in Scotland by evidence that the man and woman, being free to marry each other, lived together as man and wife, and were believed by their friends and neighbours to be married to each other. This is called proof of marriage by cohabitation and habite and repute. The words "habite and repute" are past participles, equivalent to "held and reputed," and correspond to "haldin and repute," as in the case of *Dury* (1570), cited by Fraser, *H. & W.* i. 392, and to "habiti et reputati," as in *Johnstone*, 1522, Liber Officialis S. Andree, No. 33. The presumption of marriage may be rebutted (*Cuningham*, 1814, 2 Dow, 482: *Dysart Peer. Ca.*, 1881, 6 App. Ca. 489).

Habite and repute are of no value except coupled with cohabitation (*Lowrie*, 1840, 2 D. 961).

It is not correct to say that marriage is constituted by cohabitation and habite and repute. It is constituted by the consent of the parties. But as the law of Scotland requires no marriage ceremony, their consent may be proved in this way, and it is not necessary for the pursuer of the declarator to fix upon any *punctum temporis* as that at which the marriage was constituted (Fraser, *H. & W.* i. 396). For a fuller account of the law, see MARRIAGE.

Habitatio, in Roman law, is a personal servitude. It is the right to live in another person's house. The owner of the house has the right to determine in what manner and in what part of the house the *habitator* shall live. *Habitatio* differs from *usus* in that the *habitator* is entitled to let out his right to others (*Inst.* ii. 5. 5). It differs from both *usus* and *usus fructus* in its not being extinguished by the *capitis diminutio* of the *habitator*, or by non-user (*Dig.* 7. 8. 10. pr.).—[Stair, ii. 6. 1: Bankt. i. 657.]

Habitual Drunkards.—See DRUNKARDS (HABITUAL).

Hackney Coachmen do not fall under the edict *nautæ, cauponcs, stabularii*, unless they are employed as carriers of goods and paid for carriage (Bell, *Prin.* 236). But if a hackney coachman undertakes to carry goods even without reward, he is liable for negligence at common law (*Coggs*, Ld. Raym. 909, 1 Smith, *Lead. Cases*), and he is liable in the same way for luggage which he has undertaken to convey (*Ross*, 2 C. B. 877; 15 L. J. C. P. 182), and the liability for such negligence extends to the owner of the hackney coach (*Powles*, 25 L. J. Q. B. 331). Hackney coachmen are in the same position as other carriers of passengers. They are not responsible for mere accidents happening to the persons of passengers without any default

on their part: but they are bound to carry passengers upon their tendering their fare, provided they have no reasonable excuse, and they are bound to provide for their safety and conveyance, so far as human care and foresight can go.

The Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), by sec. 271 and Sched. V., lays down regulations (which may be altered by the magistrates, with the approval of the Sheriff) for hackney carriages plying for passengers in burghs. These regulations define conveyances so styled, provide for licensing them and their drivers, and for the control, suspension, and revocation of said licences. They prescribe penalties for breaches of duty, and they regulate fares. Sec. 273 provides for the erection and control of cabmen's shelters. Five of the largest towns, viz., Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock, are not controlled by the provisions of this Act, but they have in the Police Acts applicable to them respectively somewhat similar provisions (*e.g.* Glasgow Police Act, 1866, ss. 72, 170, 172, 184, 186, 218, 220–243).

Half-Blood.—The half-blood relationships are two—consanguinean and uterine. Consanguinean relations are those born of or descended from the same father, but not from the same mother; uterine relations, those born by or descended from the same mother, but not from the same father; relations of the full-blood are termed relations german. According to the law of Scotland, the rules relating to the degrees of kinship within which marriage is forbidden are the same whether the parties be related of the whole or of the half blood.

Half-blood relations are called in intestate succession amongst the collaterals of the deceased (see Collateral Succession) according to the following rules:—

(1) *Relations Consanguinean.*—Failing brothers and sisters german of the deceased, or their descendants, the succession opens to half brothers and sisters consanguinean, *e.g.* if a man dies leaving a son and daughter by his first marriage, and a son by a second marriage, his heir in heritage would be the son by the first marriage. The heir of the latter would be his sister german, to the exclusion of the half-brother consanguinean. Had the son of the first marriage, however, predeceased his father, the son of the second marriage would have been his father's heir, to the exclusion of the sister. In moveable succession the three children would succeed as next of kin to their father, but the daughter of the first marriage would succeed to her full brother, to the exclusion of the half-brother consanguinean, who would only succeed to his half-brother (the son of first marriage) in the case of the half-sister's predecease.

(2) *Relations Uterine.*—From the nature of the relationship it follows that a uterine brother cannot succeed in heritage to his stepfather or to his half-brother, as there is no succession in heritage through the mother. By the older law, there was no succession either in heritage or in moveables to the uterine relations (Stair, iii. 8. 43; Bankt. ii. 296; Ersk. *Inst.* iii. 8. 8; Bell, *Prin.* ss. 1654, 1665, 1861; M'Laren on *Wills*, ss. 123, 236; *Alexander*, 1696, Mor. 14873). "This doctrine, at least as to succession in heritage, may be deduced from the choice or delectus of a special family made by the superior in his feudal grant, which would be elided if the fee were descendible to the kinsmen of the mother, whom the law considers of a different family from the father" (Erskine, *supra*). The law in this respect was altered by the Moveable Succession Act of 1855 (18 Vict. c. 23), by which it is

enacted (s. 5), that if an intestate die without issue, and leaving no surviving parent, brother or sister, german or consanguinean, nor any descendant of them, his brothers and sisters uterine, if any, or their descendants, shall have right to one-half of his moveable estate.

According to the law of England, the half-blood was formerly excluded from succession to land. By 3 & 4 Will. IV. c. 106, a relation of the half-blood succeeds next after a relation german of the same degree. In moveable succession there is no distinction between the whole and the half blood.

See COLLATERAL SUCCESSION; CONSANGUINEAN; UTERINE.

Hamesucken (Germ. *Heim*, home; *suchen*, to seek).—"Haymsucken is when ane man searches and seeks ane other man at his house, or assailzies his house to slay him, *or to do him any injury*, whilk crime is punished be death and confiscation of his moveable gudes" (Skene, *Treatise of Crimes*; Hume, i. 321).

The Place where—the Person on whom—and *the Manner in which, the Offence must be committed.*

Place where.—The hame or home," his domicile, or settled place of dwelling, *ubi calumnians est manens, surgens et cubitans, die ac nocte*" (Hume, 313). This definition excludes all places of merely temporary residence, or of business,—even although the house may be under the same roof (Hume, 312, 313): but it is immaterial whether the occupier be proprietor or tenant (Hume, 314). While the offence cannot be committed on a mere lodger in an inn, the landlord appears entitled to the same protection under his own roof as another man, provided the offence is committed under circumstances amounting to hamesucken (Hume, 315). The invasion must be of the *house*. The precincts of the house, such as the courtyard, are not comprehended in the term "home" (Hume, 315). Does a *ship* come within the definition home as regards this crime? Point undecided. Macdonald (p. 163) expresses opinion in the negative, unless where ship converted into a sailors' home or similar institution.

Person on whom.—"It is settled, likewise, that the house affords this high protection, not only to the master of the family, but his wife, children, and servants, and in general all the members of his household who are there at bed and board, so that under his roof they have their home and biding-place, and deem themselves secure from harm." A lodger held entitled to the protection where he formed an inmate of the house, in opposition to a merely temporary residenter (Hume, 314).

The Manner in which Offence must be committed.—There must be the *preconceived intention* to commit the assault. "It is in the premeditated seeking of the person at his home to assault him that the aggravated and distinctive character of hamesucken lies" (Hume, 319). This excludes assaults committed under the following circumstances: (*a*) arising out of a sudden quarrel *after* entry to a house: (*b*) violence commencing outside, and immediately after continued in house, to which sufferer flies for protection; (*c*) where the entry to the house is for another purpose, although felonious, *e.g.* theft (Hume, 319), provided that in the execution of such purpose violence was not necessarily contemplated (Hume, 321): (*d*) violence committed in error by an officer of the law in execution of a warrant, either on the wrong person, or under a defective warrant, or by irregular proceedings (Hume, 319).

As regards *the mode of entry*, "it is sufficient that there be an entry against the king's peace." Entry may be obtained by terrifying those

within, or by artifice, or by secretly entering and lying in wait for opportunity of assault (Hume, 318). Actual entry is unnecessary where the security of the house to its master is destroyed, as where he is attacked and wounded within the house, although this is done from the outside (Hume, 316). The attack may be outside where a person has been forced by violence to leave the house; but, contrary to opinion of Mackenzie, it does not appear hamesucken where the owner has been induced by artifice to leave the house, and is then attacked outside (Hume, 317).

The *injury inflicted or contemplated must be serious*, and not such "as savours more of insult and contempt than of enmity or resolution to do him harm"; but actual physical injury is not necessary. There may be cases where the injury "is not to be measured by the mere bodily suffering, but by the alarm and terror attending the assault in the whole circumstances of the case, and especially the colour of the ultimate and meditated wrong" (Hume, 320).

Modus in Libel.—"You did go to the dwelling-house of A. B. for the purpose of assaulting him there, and did, within said dwelling-house, assault said A. B. [*state the mode and injures.*]" (Macdonald, 382.)

Punishment.—Hamesucken was, until the passing of the Criminal Procedure Act, 1887, capital. The opinion has been expressed that no less punishment than penal servitude would now be inflicted (Macdonald, 165).

[Hume, i. 312; Bell, *Notes*, 86, 87; Alison, i. 201; Macdonald, 162.]

Handwriting.—See Comparatio literarum; Forgery; Opinion Evidence.

Harbours.—See Ports and Harbours.

Hares.—Various statutory provisions were made in early times for the protection of this the most popular of all of the beasts of sport in Great Britain. These provisions had reference to the season and the mode of taking the game, and the places where it might lawfully be done. As regards season: whilst there was no close time, by a series of Statutes the taking of hares in time of cover was prohibited under penalties of extraordinary severity. This provision is now in desuetude (*Donald*, 1828, Syme, 303). As regards the mode of capture, the destruction of hares by firearms was not only prohibited, but was at one time declared to be a capital offence. So late as 1707 (c. 13) the shooting of hares was declared an offence. This Statute was repealed by 48 Geo. III. c. 94, notwithstanding the opposition of the Lord Advocate (Boyle), who regarded the shooting of hares as unsportsmanlike, and desired to reserve them for hunting and coursing. Statutes were passed at different times prohibiting the capture of hares in parks or other enclosures. These provisions are now merged either in the modern game laws or in the common law of theft.

Hares are game within the meaning of the Night Poaching Act (9 Geo. IV. c. 69), the Day Trespass (2 & 3 Will. IV. c. 68), and the Poaching Prevention Act (25 & 26 Vict. c. 114), and the Game Licence Act (23 & 24 Vict. c. 90).

In regard to licences, there are two special exemptions: (1) Under the Act 11 & 12 Vict. c. 30, any person (s. 1) having a right to kill hares in Scotland may do so himself or by any person permitted, directed, or commanded by him by any writing under his hand, without being obliged to

take out a game certificate, provided always that the hares are found and killed upon his own land. Any person (s. 3) may pursue and kill or join in the pursuit or killing of hares by coursing with greyhounds or by hunting with beagles or other hounds without having obtained a game certificate. (2) By the Game Laws Amendment (Scotland) Act, 1877 (40 & 41 Vict. c. 28), the lessee in occupation of lands, and one person authorised by him in writing, is exempted from the obligation to take out a game licence in respect of the capture of hares on such lands. This provision, however, is virtually superseded by the more comprehensive provision of the Ground Game Act, 1880 (43 & 44 Vict. c. 47), which (s. 4) exempts the occupier of lands, and any person authorised by him under the Act, from the necessity of taking out a game licence.

Close Time.—In the case of moorlands and unenclosed lands, there is a close time, so far as regards the exercise of the privileges conferred by the Ground Game Act from 15th April to 10th December inclusive. Under the Hares Preservation Act, 1892, 55 Vict. c. 8, the sale of hares is prohibited during the months from March to July inclusive, under a penalty not exceeding twenty shillings for each hare. Hares imported from abroad are excepted.

[Irvine on the *Game Laws*; Oke on the *Game Laws*.]

Hasp and Staple.—See Burgage (vol. ii. p. 253).

Hat-money, or primage, is a payment in the nature of a gratuity made by the freighter to the master of a ship upon delivery of the cargo.

The leading case on the subject is *Howitt* (1877, 5 R. 321). Two questions were raised in this case: *First*, whether the master of a ship is entitled to primage under a charter party which makes express mention of a gratuity to the captain "on good delivery of the cargo," and a subsequent bill of lading which was to the effect that the goods were to be delivered, "assigns paying freight for said goods as per charter party"; and, *Second*, whether the claim, supposing it to be good, is forfeited in respect that the goods were not safely carried. Both questions were answered by the Court in the affirmative, the latter on the ground that where freight has been earned by the owner, primage has been earned by the master (Bell, *Com.* i. 614: Bell, *Prin.* s. 420; Brodie, *Supp. to Stair*, 1001).

Havers.—See Commission (Proof by) (2); Admissions (*b*): Best Evidence; Citation; Oath on Reference; Witness.

Hawker.—See Pedlar.

Health, Bill of.—See Bill of Health.

Hearsay Evidence.—See Best Evidence; Evidence.

Heath.—See Muirburn.

Heir.—This term is used, in its widest sense, to denote one who takes by succession, as contrasted with a "singular successor" being one who takes in virtue of a direct conveyance, whether *inter vivos* or *mortis causa*. In this sense it includes the successor in moveables as well as the successor in heritage. Its precise significance thus depends on the quality of the succession as heritable or moveable. Thus a destination of mixed estate to heirs will, in the absence of anything to show that another meaning is intended, carry heritage to heirs proper, and moveables to executors (*Blair*, 1849, 12 D. 97: *Mitchell's Trustees*, 1872, 11 M. 206; see also *Grant's Trustees*, 1862, 24 D. 1211). In a narrower sense, "heir" is used to denote the person entitled to succeed to the deceased's heritage, as distinguished from his executors or heirs in moveables. In this narrower sense it includes both the heir-at-law who succeeds *provisione legis*, or, simply, by force of law, and the heir of provision who succeeds *provisione hominis*, in virtue of a special destination in the titles.

Intestate Succession.

The "heir-at-law" is the person entitled to succeed *ab intestato* to heritage held by the deceased under a conveyance or destination to himself, or to himself and his heirs. Other terms practically synonymous are "heir of line," "heir general," "heir whomsoever." He succeeds to all heritable estate belonging to the deceased at his death, except such as (*a*) he held under titles containing a special destination, or (*b*) he may have disposed of *mortis causa*. The main features of intestate succession to heritable estate are: (1) primogeniture among males, (2) the succession of males in preference to females, and (3) the right of representation in virtue of which a descendant, however distant, takes the estate to which his ancestor would have succeeded had he survived the deceased. All through the order of succession legitimate relationship is alone regarded.

Subject to these rules, the succession opens first to descendants. If a father dies survived by children, but by no more remote descendants, the succession opens to his eldest surviving son, or if there be no son, to all the daughters equally as "heirs-portioners." But the descendants, in their order, of an elder son predeceasing are preferred to younger children, sons or daughters, surviving. Each *stirps* must be exhausted before the succession opens to the next. In the event of the succession opening to heirs-portioners, the descendants, in their order, of a daughter predeceasing take the share to which she would have succeeded had she survived. It is immaterial whether the deceased's children are of one or several marriages. All heirs who are descendants are known as "heirs of the body."

In the event of there being no descendant, the succession opens to collaterals—brothers and sisters—of the deceased. The heir in this case is the immediate younger brother, or, if he have predeceased, the heir of his body. Failing such younger brother and his descendants, the succession opens to the next younger brother, and so on. If there be no younger brothers or descendants of younger brothers, the succession opens to the immediate elder brother of the deceased; failing him and his descendants, to the next elder brother, and so on. Failing brothers or their descendants, the succession opens to the sisters equally as heirs-portioners, the heir of the body of any predeceasing sister taking in her room. If, however, the brothers and sisters of the deceased be of different marriages, those of the full blood, brothers and sisters german, succeed before those born of a different mother from the deceased, brothers and sisters consanguinean.

Brothers and sisters by the same mother but by a different father, known as brothers and sisters uterine, have no right of succession.

In the case of collateral succession there was formerly a different order of succession with regard to heritable estate which the deceased had acquired by purchase or other singular title, known as "conquest," as distinguished from that to which he had or might have succeeded as heir, known as "heritage." The rules above given applied to heritage. The difference was that whereas heritage descended, conquest ascended, or, in other words, instead of going to younger brothers first, went to elder brothers in their order, beginning with the deceased's immediate elder brother. Failing elder brothers and their descendants, it went to younger brothers in their order in the same way as heritage. It was thus only where the deceased was a middle brother that the order of succession in conquest differed from that in heritage. In all other respects the rules regulating succession were the same. Where one took a conveyance of lands in favour of himself and his heirs, this meant heirs of conquest, not heirs-at-law. Conquest, however, did not include all heritable property acquired by the deceased by singular title, but only such as required sasine to complete the right. Thus it did not include leases or personal bonds excluding executors, nor teinds, unless purchased along with the lands (Bell, *Prin*, s. 1672). Moreover, conquest, after it had once been taken by succession, became heritage. Thus, assume the third of four brothers to have purchased an estate, and to have died childless and intestate. The second brother, therefore, succeeded as heir of conquest. On his death, childless and intestate, the estate would, if he had made up his title to it, pass to the youngest brother, as his heir-at-law, not to the eldest, as his heir of conquest. If, however, the second brother had failed to make up a title, the eldest would on his death have been entitled to serve as heir of conquest to the third, and take up the estate as being still in his *hereditas jacens*. The distinction between heritage and conquest is now abolished (37 & 38 Vict. c. 94, s. 37) as to all successions opening after 1 October 1874, the rules applicable to heritage obtaining in all cases of succession to persons dying on or after that day.

Failing descendants, and brothers and sisters german or consanguinean and their issue, the heir is the deceased's father; failing him, his collateral heirs in the order above explained. Failing all these, the succession opens to the deceased's paternal grandfather, and so on. Among ascendants there was the same distinction between heirs of line and heirs of conquest as in the case of collateral succession. The succession of ascendants was not at first admitted, and only came to be recognised after the institution of the Court of Session (per Ld. Currichill in *Grant*, 1859, 22 D. 70). The mother of the deceased, or relations through her, can in no case succeed as heirs-at-law.

A rule applicable to all the foregoing cases is that the character of heir is to be ascertained as at the date of the service to the deceased, subject only to this qualification, that a nearer heir then *in utero* is considered as already born, and thus excludes from service the person for the time being holding the character of heir. If service be delayed until after the birth of a nearer heir, there is no doubt (at least as the law stood prior to 1 October 1874) that the nearer heir will be preferred. But the mere possibility of a nearer heir not then *in utero* being afterwards born is no bar to service by the person for the time possessing the character of heir. It was, however, at one time doubtful whether the heir thus serving, at least if an ascendant, was not bound to denude on the birth of a nearer heir. Stair (iii. 5. 50) and Bankton (iii. 5. 56) indeed laid it down that

he was not bound to denude, but some later writers maintained that he was. The question was therefore an open one until the ascendant's indefeasible right was affirmed by the Court (*Grant*, 1859, 22 D. 53). The principle of the decision is perhaps not very clear, but it is thought that, in spite of Ld. Curriehill's very powerful dissent in that case, the question can no longer be regarded as open. As will be seen, a different principle applies in tailzied succession. Even although there be a nearer heir *in utero* at the date of service, it is not void, but only voidable (*Wat*, 1706, Mor. 14901). Prior to 1 October 1874 a right of succession did not vest by mere survivance; and if the person possessing the character of heir failed during his lifetime to take the necessary steps, by making up his title, to vest the right, it fell on his death. But since 1 October 1874 rights of succession vest without service (37 & 38 Vict. c. 94, s. 37). It is thought, therefore, that the person possessing the character of heir at the date when the succession opened, could not now, although he had failed to serve, be deprived of the succession by the birth of a nearer heir not then *in utero*.

Failing all heirs, the estate falls to the Crown. But the Crown, although described as *ultimus hæres*, does not, it is thought, take as heir, but in respect of the estate being caduciary. Thus it has been decided that the Crown cannot take under a destination to "heirs" of the deceased (*Torrie*, 1832, 10 S. 597). So the Crown never was liable for the deceased's debts *ultra valorem* of the estate (Ersk. iii. 10. 4).

It remains to add, under this head, that the heir-at-law can only be excluded from the succession by a conveyance or destination to someone else. Apart from such conveyance or destination, the declaration by the deceased that his heir is disinherited is quite ineffectual (*Ross*, 1770, Mor. 5019; *Blackwood*, 1833, 11 S. 443). It must, however, be kept in view, that while a simple conveyance to A. entitles his heir to succeed on his death, yet (except in the case of a conveyance by a parent to a child, when the grandchild is entitled to serve under the presumption *Si sine liberis*) where the conveyance is to A., whom failing, to B., A.'s heir-at-law is excluded by B., who is entitled to serve as heir of provision to A., if he has not altered the destination either *inter vivos* or *mortis causa*.

Tailzied Succession—Heirs of Provision.

Where the heir does not take simply by operation of the law, but in virtue of a destination contained in the titles, he is known as an heir of tailzie or provision. In the language of our institutional writers, every deed which has the effect of diverting the succession from the legal order is called a tailzie or entail. Of these there were three kinds (Ersk. iii. 8. 22): *first*, simple destinations, *i.e.* such as a conveyance to A., whom failing, to B., whom failing, to C.; *second*, entails with prohibitory clauses; and, *third*, strict entails, where the prohibitory clauses were guarded by irritant and resolutive clauses. These three classes of entails were of course very different in the restraints which they put upon the heir in possession. Under the first class he might (subject to the right of challenge which the heir formerly had on the ground of deathbed) freely alter the destination by conveying the lands either *inter vivos* or *mortis causa* to another series of heirs. But if he did not alter the destination, it would, on his death, entitle the next substitute heir of provision to take the estate in preference to his heir-at-law. Under the second class the heir was put under greater or less restraint, according to the rigour of the prohibitory clauses. They might strike against altering the order of succession, or against contracting debt, or against alienating the lands, or against all of these. So far as the

prohibition did not in terms apply, the heir was left quite unfettered, "for restraints are not to be multiplied by implication." But a substitute heir was entitled to prevent or to reduce gratuitous alterations of the succession, or other infringements of express prohibitions (*E. Culhander*, 1686, Mor. 15476). These unfenced prohibitions were, however, unavailing against the onerous dispositions or obligations of the heir in possession (*Young*, 1705, Mor. 15482; *Bryson*, 1760, Mor. 15511; *Ankerville*, 1787, Mor. 7010). Entails of this class were therefore effectual only *inter hæredes*. Now, however, they are ineffectual even *inter hæredes* (11 & 12 Vict. c. 36, s. 43: *Cunyngham*, 1852, 14 D. 636; *Dewar*, 1852, 14 D. 1062; *Ferguson*, 1852, 15 D. 19). They are thus merely in the position of simple destinations. In the case of a simple destination, a testament or any other form of will habile to regulate the testator's moveable succession is now sufficient, provided it purports to do so, to carry his landed estate, and thus alter the succession to it (31 & 32 Vict. c. 101, s. 20). As regards the effect of strict entails, see ENTAIL.

In destinations it is usual to call classes of substitute heirs by their relation to individuals called *nominatim* as the head of a stirps under the description of heirs-male, heirs-male of the body, etc., of such individuals.

Heir-male means that heir ascertained according to the usual rules of intestate succession who, being himself a male, is connected with the deceased exclusively through males.

Heir of the body means the heir being a lineal descendant of the ancestor.

Heir of a marriage means the heir descended of the marriage in question.

Heir-male of the body means an heir-male lineally descended from the ancestor.

Heir-male of line meant the heir-male excluding the heir of conquest (*Sinclair*, 1766, Mor. 14944).

Heir-female means the heir of line after exhaustion of heirs-male. This may either be a female or a male succeeding through a female. Where females only remain to take under a destination to "heirs-female," those descended from the sons must succeed in their order. Thus a daughter of the eldest son will succeed to a grandson by a younger son in preference to his sister (*Dalrymple*, 1739, 1 Pat. 237, generally referred to as the *Bargany* case). So, on the succession opening to heirs-female, a descendant of the only daughter of the eldest son is preferred to the descendant of a granddaughter of a younger son, although more closely related to the last heir-male (*Johnstone*, 1839, 2 D. 73). It has been decided that in a tailzied destination to "the eldest dochter of A. without division and their heirs-male" the term "eldest dochter" is not synonymous with "heir-female being a female" (*Ker*, 13 Nov. 1810, F. C.; affd. 5 Pat. 579).

If the settlor desires to ensure the estate remaining in his own family, that can only be done by destining it to such a series of heirs as will exclude unrestricted succession through females; for if a female succeed under a destination to heirs, and have children who succeed and die childless, their heir will be some relative on their father's side. Thus the father will be preferred even to a son of the mother by another marriage (*Lenox*, 1663, Mor. 14867).

In complicated destinations questions of extreme difficulty often arise as to who is the heir called under the destination. The real question always is, What did the settlor mean? and in determining this, the deed will be construed as a whole. There are some general rules of construction.

(1) Where a substitute heir is described by his position in the family of the settlor, his character will, as a rule, be determined as at the date when

the succession opens, not the date when the deed was made. Thus in the *Roxburghe Succession* case (*Ker*, 1810, 5 Pat. 320), where the destination was "to the eldest daughter of the said Umquhil Hary Lord Ker without division and their heirs-male," and Lord Hary Ker had four daughters, it was held that the expression "eldest daughter" was not, according to the construction of the deed, to be confined to the eldest born daughter, but was to be considered as applicable to whichever of the four daughters might be eldest when the succession opened, the whole four being by the conception of the deed called *seriatim*. So in a later case Ld. Chan. Cottenham said: "It appears to me that there is no doubt that the Court is to look, not to those who answered the description of first, second, and so on at the time of the entailer's death, but to those who answered the description at the time the succession opened" (*Shepherd*, 1838, 3 S. & M'L. 255, at 281). The words quoted were used with reference to the particular destination there in question, but the reasoning is, it is thought, general. Of course a contrary intention, if clearly indicated, would receive effect.

(2) While flexible terms may be construed by reference to other parts of the deed, yet technical words will not be lightly understood to have another than their well-accepted meaning. This rule depends on the principle that the will of the settlor governs the succession. But *primâ facie* the words used must receive their natural meaning. The settlor will not be lightly presumed to have used them in a different sense. "In construing a deed in which there is a question as to the true intent of the author of that deed, you are to adhere to that as the intent which is the *primâ facie* obvious meaning of those words, unless you are by fair reasoning, by strong argument, by that which amounts to necessary implication or declaration plain driven out of the obvious meaning, and unless you can satisfy yourself that the author of the deed did not intend that such should be taken to be the meaning of the words he has used, and unless you collect (I think I may safely add that, and I abstain from going further) that that is not the meaning of the language of the author of the deed from what the author of that deed has himself by the deed told you is the meaning of his language" (per Ld. Chan. Eldon in *Ker*, 1810, 5 Pat. 320, at 444). But in considering the settlor's intention it is legitimate to regard the circumstances of the family history as conditioning the words employed (*Ker, supra, passim*). In accordance with the ordinary rule, the dispositive clause is the controlling one (*Shanks*, 1797, Mor. 4295; *Grahame*, 20 June 1816, F. C.; affd. 1825, 1 W. & S. 353; *Forrester*, 1826, 4 S. 824). And its terms cannot be affected by inferences drawn from the narrative, or by collateral writings (*Campbell*, 1770, Mor. 14949; *Hay*, 1778, Mor. 2315; affd. 1789, 3 Pat. 142, where the Court refused to read "heirs-male" as meaning "heirs-male of the body": *Earl of Selkirk*, 1740, Mor. 5615, and 5 Bro. Supp. 684; affd. 1740, 1 Pat. 271, where, in dealing with conquest, the Court refused to infer from a collateral deed that heir meant heir of line instead of heir of conquest). But an omission in the dispositive clause may be supplied by reference to the procuratory or precept (*Sutherland*, 1801, Mor. App. "Tailzie," No. 8; *Halliday*, 1802, 4 Pat. 346; *Maclauchlan*, 1757, Mor. 2312). In accordance with the rule, a destination to "heirs-general" will not be interpreted by mere implication to mean "heirs of the body" (*Baillie*, 1770, 2 Pat. 243; reversing Court of Session, 1766, Mor. 14941; *Murray*, 1774, Mor. 14952; *Suttie*, 19 January 1809, F. C.; *Richardson*, 5 July 1821, F. C., and 1 S. 105; affd. 1824, 2 Sh. App. 149; *Duff*, 1824, 3 S. 11; *Gordon*, 1866, 4 M. 501). On the other hand, it has been held

that although there was a destination to the institute and his heirs whomsoever, yet when this was followed by a destination over to take effect on the death of the institute without issue, his heirs whomsoever could not serve to him under the destination, on his death without issue, but the substitute must take, as there was no doubt that that was the settlor's intention (*Tinnoch*, 26 November 1817, F. C.; *Moodie*, 1829, 7 S. 743; *Hunter*, 1839, 2 D. 16; *M'Ewan*, 1865, 3 M. 779; *Pattison*, 1866, 4 M. 555; affd. 1868, 6 M. H. L. 147). The principle of these decisions has been stated alternatively, that the latter part of the clause, if conflicting with the former, must prevail, and that the latter clause is "a mere specification and more precise announcement of what was truly meant by the former" (per Ld. Jeffrey in *Campbell's Trustees*, 1838, 16 S. 1004, at 1006). The case of *Ker* v. *Innes*, from which Ld. Chan. Eldon's opinion above quoted as to the rigour of the rule is taken, is itself a good illustration of the length the Court will go in arriving by implication at a meaning different from the natural sense of the words. There "heir-male" was held to mean "heir-male of the body" largely because giving the term its ordinary meaning would have had the effect of greatly postponing the substitutes called to the succession: but there were other *indicia* pointing to the same conclusion. The same interpretation was given to "heirs-male" in the case of *Braid* (1860, 22 D. 433); while "heirs-female" has been construed as meaning "heirs-female of the body" (*Connell*, 1867, 5 M. 379); and "heirs whatsoever" as meaning "heirs whatsoever of the body" (*Earl of Northesk*, 1882, 10 R. 77).

The following rules have been given (Sandford, *Entails*, 91) as to the circumstances in which technical words admit of construction:—

"(*a*) When the words as they stand, taken in their natural sense, render the whole deed unintelligible or inextricable.

"(*b*) Where the meaning of the words as they stand is doubtful from the nature of the words themselves.

"(*c*) When the natural and legal meaning of the terms is controlled and explained by what appears from the parts of the same deed to be the meaning which the maker of the deed attached to the terms used by him."

These rules are illustrated by the cases above cited.

(3) It has been stated (Ersk. iii. 8. 47): "In every case where there has been an antecedent destination of a subject limiting the succession to a particular order of heirs, the general word "heir," or "heir whatsoever," in all posterior settlements of the subject must be understood, not of the heir-at-law, but of the heir of the former investiture (*Hay*, 1698, Mor. 14899; *M. Clydesdale*, 1726, Mor. 1275; 14930?), unless it shall appear from pregnant circumstances that that term was understood to be used in its proper sense." This rule was supposed to be established by the two old cases cited in support of it, but these, as has been pointed out (Sandford, *Entails*, p. 80, note), were misunderstood by the learned author. It is now settled that the word "heir" cannot be construed by reference to the former investiture, but, subject to the exceptions above and after explained, must receive its proper legal meaning (*Brodie*, 1749, 5 Bro. Supp. 466; *Rose*, 1784, Mor. 14955; *Molle*, 13 December 1811, F. C.: affd. 1816, 6 Pat. 168). Reference must be made, however, to another case where, under somewhat special circumstances, a disposition by a father to his eldest son and his heirs of part of a family estate destined to heirs-male, was held to carry the estate to the heirs-male succeeding under the old investiture (*Burnet*, 1765, Mor. 14939; affd. House of Lords, 1766, Mor. 14941).

(4) But where the subject purchased is an accessory to subjects already held by the purchaser under a destination,—as, for instance, teinds, or the *dominium utile* where the superior is the purchaser,—the word "heirs" occurring in the disposition of the accessory subject will be construed as meaning the heirs pointed out in the destination of the principal subject, because of the strong presumption that the purchaser intended the accessory subject to go along with the principal (Stair, iii. 5. 12: Ersk. iii. 8. 47: Bankt. iii. 5. 27: *Hay*, 1698, Mor. 14899; *Greenock*, 1736, Mor. 5612; *Duke of Hamilton*, 1740, Mor. 14935: *Burnet*, 1766, 2 Pat. 122; *Duke of Roxburghe*, 1823, 2 S. 141). The principle underlying this rule is curiously illustrated by the case of *Hay* above cited. There one who held a tack of teinds destined to heirs-male granted a sub-tack taking the rent payable to himself and his heirs whatsoever. On his death the heir-male was preferred to the tack duties.

The case hitherto considered has been that of proper succession in the character of heir. But the case frequently occurs of a testator bequeathing certain lands, or appointing his trustees to convey them, to a person described as the heir-male, heir-male of the body, etc., of some person named. In such a case the beneficiary will be determined according to the meaning of the words by which he is described as above explained. But he completes his title, not in the character of heir, but as disponee. Consequently service was not, even prior to 1874, required to vest the right in him. So, too, he did not incur the passive title of heir with its attending liabilities.

It may also be noticed under this head that a person called as a substitute under a destination may, by the predecease of the institute before any right vested in him, acquire the character of conditional institute. There was formerly much difficulty and some apparent fluctuation of opinion as to how such a person made up titles (*Creditors of Carleton*, 1748, Mor. 14366; *Campbell*, 1770, Mor. 14949; *Peacock*, 1826, 4 S. 742; *Murray*, 1833, 11 S. 629). Now, however, it is quite settled that the person so succeeding takes in the character of institute without any need for service or declarator to vest or establish his right (*Colquhoun*, 1828, 7 S. 200; remitted for consideration, 1831, 5 W. & S. 32; decided, 1831, 9 S. 911; *Fogo*, 1840, 2 D. 651: remitted for consideration, 1841, 2 Rob. 440; decided, 1842, 4 D. 1063; *Grant's Trs.*, 1862, 24 D. 1211; *Hutchison*, 1872, 11 M. 230). The cases last cited conclusively establish the rule that a substitution implies a conditional institution in the event of the institute predeceasing the granter.

As has been seen, in the case of intestate succession, if the person possessing the character of nearest heir at the time complete his title to the estate, the title so made up is indefeasible although a nearer heir should be afterwards born. In testate succession the rule is different. The principle is that the will of the testator must prevail, and that the order of succession which he has prescribed must receive effect. The Court, indeed, in the earliest reported case decided that the person then possessing the character of heir could not serve, as there was hope of a nearer heir (*Bruce*, 1677, Mor. 14880). But in a later case the remoter heir was allowed to serve: but on a nearer heir being afterwards born, the Court decided that he only held in trust, and was bound to denude in favour of the nearer heir (*Mount Stewart*, 1707, Mor. 14903). The question came up again (*Mackinnon*, 1756, Mor. 14938), when the Court found that upon the birth of the nearer heir the defender's right to the estate resolved and became void, and that the nearer heir had right to the estate from the

time of his birth, and might make up titles to the estate as if the defender had never entered. The question was further complicated by the fact that, the estate being much burdened with debt, the heir compelled to denude had sold part of it. The nearer heir endeavoured to reduce the purchaser's title, but the Court granted absolvitor, apparently on the ground that the sale was a necessary act of administration (*Mackinnon*, 1765, Mor. 5279). The Court further sustained the validity of a jointure provided by the interim heir during his possession (*Macdonald*, 1765, Mor. 5290); but Ld. Kames, in his report of the decision (Mor. 5285), significantly remarks: "It appeared to me the judges were swayed more by compassion than by law." The jointure may, however, have been supported on the ground that it flowed from a proprietor duly infeft, and could not be affected by the subsequent reduction of his title. Both decisions were affirmed in the House of Lords (*Macdonald*, 1771, Mor. 5290). In a modern case (*Stewart*, 1859, 22 D. 72) the Court held that the remoter heir had only a qualified interest in the estate, and that a sale made by him before the birth of the nearer heir was ineffectual in respect that, as the investiture disclosed the peculiarity of his possession, the purchaser could not plead *bona fides*. It must always be kept in view, however, that the ruling principle is to carry out the intention of the settlor, and that it may be so expressed as to render the remoter heir's title indefeasible even by the birth of a nearer heir. See the *Eglinton Succession* case (*Lord Eglinton*, 1847, 6 Bell's App. 136).

Title of Heir.

At common law no right in proper feudal estate vested in the heir, whether at law or of provision, by survivance alone. It was necessary for the vesting of any right that the character of heir should be established, and the estate transferred from the deceased to him. Until this had been done the estate remained *in hæreditate jacente* of the deceased. If the apparent heir died without thus vesting the estate in himself, all his right to it lapsed, and the person who on his death possessed the character of heir of the deceased was entitled to take up the succession (see Apparent Heir). As to what was necessary to take the estate out of the *hæreditas jacens* of the deceased, and to vest it in the heir, regard must be had to (*a*) the character of the estate or right, and (*b*) the state of the deceased's title. Thus if the estate was a lease, the heir's right became complete by the mere fact of his survivance (Ersk. iii. 8. 77). Originally, indeed, the heir required to serve before he could assign the lease (*Rattray*, 1623, Mor. 10366); but it was afterwards decided that the mere fact of survivance vested the heir with a title to assign the lease (*Campbell*, 1739, Mor. 14375). Udal lands, too, in Orkney and Shetland vested without service, even although the deceased was infeft, if his titles could not be connected with a charter from the Crown (*Beatton*, 1832, 10 S. 286). So corporeal moveables, made heritable by destination, vested without service (Bell, *Prin.* s. 1825), and the right to heirship moveables, provided there had been possession (Ersk. iii. 8. 77). Heritable bonds, too, where the deceased was not infeft, vested in the substitute first named without service (*Wilson*, 1757, Mor. 14368); but a substitute called in the second place, even *nominatim*, required to serve (Stair, iii. 5. 6), a general service being sufficient (Ersk. iii. 8. 63). Neither was service required to vest the *jus crediti* of heirs under a marriage contract to their provisions, but for the reason that they took as creditors, not as heirs (Ersk. iii. 8. 73; *Ogilvy*, 16 Dec. 1817, F. C.). Lastly, titles of honour and hereditary offices required no service to vest them in the heir (Ersk. iii. 8. 77).

But with regard to proper feudal estate, service (or the less formal completion of title by *clare constat* or cognition and sasine) was always necessary to vest the right. If the deceased had only a personal title, a general service without any further completion of title sufficed to transfer the estate from his *hæreditas jacens* to the heir (Bell, *Prin.* s. 782). If, however, the deceased's title was complete, it was formerly necessary not only that the heir's character be established, but that his title be completed by infeftment. This might be done in several ways. The most formal method consisted in the heir obtaining himself served as heir in special (see SERVICE). After obtaining a decree of special service, he was in a position to force an entry from the superior. If the heir, although served, died before taking infeftment, his right lapsed. But by 31 & 32 Vict. c. 101, s. 46, it was provided that a decree of special service should be equivalent to a disposition by the deceased to the heir, at once vesting in him a personal but transmissible right to the lands. The second and most usual method was for the heir without service to obtain from the superior a precept (now a writ) of *clare constat*, infeftment on which completed his title. This precept formerly fell by the death of either granter or grantee; but it is now (10 & 11 Vict. c. 48, s. 15; re-enacted 31 & 32 Vict. c. 101, s. 103) effectual during the life of the grantee notwithstanding the death of the granter (see CLARE CONSTAT). The heir might also complete his title by ADJUDICATION ON A TRUST BOND (which see). In the case of burgage property, the heir might be entered by one of the bailies by cognition and sasine (see BURGAGE). For further particulars as to these various modes of completing an heir's title, see also Bell, *Conveyancing*, pp. 1082 *et seq.* Now a personal right to every estate in land descendible to heirs vests without service or other procedure in the heir entitled to succeed by survivance of the person to whom he is entitled to succeed, whenever he died (37 & 38 Vict. c. 94, s. 9), provided the heir did not die before the commencement of that Act, 1 Oct. 1874; and this personal right may be transferred, like an unfeudalised conveyance. A feudal title in the heir's person can still, however, be completed only by infeftment following on one or other of the preliminary processes before mentioned. It is thought that this statutory provision, vesting a right of succession in an heir without service, would not entitle the superior to insist against an heir who had not intromitted with an estate for the feu-duties payable from it.

RIGHTS OF HEIRS.

Before completing his title, an heir is entitled to possession of the estate, and to many other rights. See APPARENT HEIR. After completing his title, he is fully vested in all the rights belonging to the deceased descendible to him, and may exercise them as fully as the deceased could have done. He is, as the legal brocard expresses it, "eadem persona cum defuncto." The congeries of rights thus vested in the heir is known as his "active title." Where the heir is excluded from possession by a liferenter, and has no other means of support, he is entitled to aliment from the liferenter, if he have more than is required for his own subsistence (Ersk. ii. 9. 62 and 63, and cases there cited). The heir is also entitled to the moveable succession, if there be no one else as nearly related to the deceased. If there are others as nearly related, he cannot take the heritable succession and at the same time claim a share of the moveables; but he is always entitled to participate in the moveable succession on collating the heritage. See COLLATION. His right to participate in the moveable succession extends, if the heir is a child of the deceased, to the

legitim as well as to the deads-part. If the right of the younger children to legitim be discharged or excluded, while the right of the heir is not, he is entitled to the whole legitim fund (*Earl of Kintore*, 1884, 11 R. 1013; affd. 1886, 13 R. H. L. 93). The heir had formerly the right to reduce *ex capiti lecti* deeds granted by his ancestor when on deathbed to his prejudice. See DEATHBED. He had also in certain circumstances a certain claim to part of the deceased's corporeal moveables. See HEIRSHIP MOVEABLES. These last two rights are now abolished.

LIABILITIES OF HEIRS.

At common law the heir, being "eadem persona cum defuncto," was liable to fulfil all his ancestor's obligations. This liability was known as his "passive title," and was unlimited in its extent. It did not, however, extend to all heirs alike, and the Legislature early provided means whereby it might be limited to the value of the estate inherited. See BENEFICIUM INVENTARII. If the heir, without a title, proceeded to intromit with the deceased's estate, he at once, *ipso facto*, incurred the fullest liability. See PASSIVE TITLE. If he wished to avoid this, his duty was to abstain from intromission. The law allowed him a year, afterwards reduced to six months, to make up his mind whether he should assume the rights and responsibilities of heir. See ANNUS DELIBERANDI. Meantime he was entitled, in order to ascertain the value and liabilities of the succession, to compel the exhibition of all writings granted to or by the deceased. This was done by an action of exhibition *ad deliberandum*. See EXHIBITION, ACTION OF. While the *annus deliberandi* ran, the heir could not have diligence done against him for the deceased's debts. If he desired to avoid liability, he might do so by renouncing the succession. If, however, the heir-at-law or of conquest expede a general or special service, his liability was at once fixed for the full amount of the deceased's debts (Ersk. iii. 8. 50), if anything was carried by the service (Bell, *Prin.* s. 1916: *Earl of Fife*, 1828, 6 S. 698; *Mackay*, 1835, 13 S. 246). Such heirs also incurred universal responsibility if, being duly charged to enter, they compeared and failed within a reasonable time to renounce (*Smith*, 1807, Hume, 439). It has been said that the same liability resulted from service as heir-male in general, *i.e.* without reference to any particular estate, because that carried to the heir every right in the ancestor which by former investitures was descendible to heirs-male (Ersk. iii. 8. 50; Bell, *Prin.* s. 1916).

But it was not every heir who incurred universal liability, and at common law there was limited responsibility in the following cases:—

(*a*) An heir of provision taking a particular estate in virtue of a special destination was only liable *in valorem*. A contrary view was at one time entertained (Stair, iii. 5. 13; Ersk. iii. 8. 51). But it was afterwards settled that the liability was only *in valorem* (Bankt. iii. 5. 62 and 63: Bell, *Prin.* s. 1922; *Baird*, 1766, Mor. 14019, and 5 Bro. Supp. 927). Where an estate is held under strict entail, the heir succeeding to the estate is not, save for provisions to wives and younger children, in so far as authorised by Statute, liable to any extent for the obligations of a preceding heir incurred in contravention of the entail (*Stormonth*, 1662, Mor. 13994: *Riddoch*, 1682, Mor. 14000; Ersk. iii. 8. 51). So far was this principle formerly carried, that the succeeding heir of entail was not even liable to fulfil obligations, unless arising purely from custom (*Lcarmonth*, 1878, 5 R. 548), undertaken by a former heir in leases, to pay tenants the value of meliorations at the end of their leases, or himself to execute improvements on their farms. These obligations, so far as unimplemented during the life

of the granter, could only be insisted in against his executor (*Dillon*, 1780, Mor. 15432; *Webster*, 1791, M. 15439, Bell's *Oct. Cas.*, 207; *Todd*, 1823, 2 S. 113; affd. 1825, 1 W. & S. 217; *Fraser*, 1825, 4 S. 73, 5 S. 722, 8 S. 409; affd. 1831, 5 W. & S. 69; *Mackenzie*, 1849, 11 D. 596). Now, however, unless the heir in possession coming under the obligation has otherwise declared, the succeeding heirs of entail are bound to relieve the executor to the extent to which the heir in possession, had he implemented his obligations to his tenants, might have charged the sums so paid by him on the estate, and also to relieve the executor to the same extent of obligations undertaken by the heir in possession in connection with improvements on the mansion-house and offices, or any parts of the estate not under lease (41 & 42 Vict. c. 28, ss. 1 and 2). But if an heir of entail served not only as heir of tailzie and provision, but as heir of line, or even heir-male, of the preceding heir of entail, he was barred from challenging deeds granted by him in contravention of the entail because by his service he had rendered himself liable to warrant all his obligations (*Home*, 1708, Mor. 14010; *Ayton*, 1710, Mor. 14010).

(*b*) An heir entering by precept of *clare constat* was thought to be universally liable for his ancestor's debts (Ersk. iii. 8. 71). But the contrary has been decided where, after his entry, the ancestor's title was reduced (Bell, *Prin.* s. 1922; *Farmer*, 1683, Mor. 14003). It is thought that the liability was in all cases limited to the value of the particular estate, on the principle of the cases of *Baird*, 1766, Mor. 14019, and *Blount*, 1783, Mor. 9731.

(*c*) An heir entering *more burgi*—that is, without service by cognition and sasine—was liable only *in valorem* (*Blount*, 1783, Mor. 9731).

(*d*) An heir taking up a lease of ordinary length destined to heirs, but excluding assignees and sub-tenants, is not liable at all for the ancestor's debts (*Bain*, 1896, 23 R. 528), because the father's right terminated with his life, and the lease could not be attached by the creditors. If the lease were of extraordinary duration, the heir would probably be liable *in valorem*, on the ground that the exclusion was ineffectual against creditors.

The heir's common-law liability for his ancestor's debts, as above explained, has been progressively modified by Statute. See under BENEFICIUM INVENTARII. Now it is limited to the value of the estate to which he succeeds (37 & 38 Vict. c. 94, s. 12).

In addition to his liability for his father's debts, the heir succeeding to his fee-simple estate, or otherwise representing him, is bound to maintain the younger children, if otherwise unprovided for: sons, until majority; daughters, if in the higher ranks of life, beyond that age until marriage (Ersk. i. 6. 58). The heir is not thus liable if he succeed to his father under an entail (*Malcolms*, 1756, Mor. 439; *Jackson*, 1836, 15 S. 313); nor when he has succeeded to only a trifling estate, and the succession taken by the younger children is fairly equivalent (*Mackintosh*, 1868, 7 M. 67). See Fraser, *Parent & Child*, 107.

ORDER OF LIABILITY OF HEIRS.

In a question with creditors, and apart from any specialty in the obligation, while the different classes of heirs are all liable, at least to the value of the estate inherited by them, yet they can only be sued in a particular order (Stair, iii. 5. 17; Ersk. iii. 8. 52; Bankt. iii. 5. 69; Bell, *Prin.* ss. 1935, 1936).

(*a*) The heir primarily liable is the heir of line, or heir-general, as being the general representative of the deceased. While the distinction between

heritage and conquest existed, the heir of line was liable before the heir of conquest (*Creditors of Fairly*, 1630, Mor. 3559; *Brown*, 1782, Mor. 5228). Where more than one heir of line succeeded, as where the first heir died without having made up a title to the whole estate, the obligation divided *pro rata* of the value of the succession taken by them respectively (*White*, 1673, Mor. 5207; *Ker*, 1736, Mor. 5211).

(*b*) The heir of conquest, as general successor in all lands acquired by the deceased by singular title, came next.

(*c*) Next came heirs of provision, who were only liable after the heirs of line and conquest had been discussed (*Forrester*, 1649, 1 Bro. Supp. 429; *Walls*, 1700, Mor. 3561; *Vint*, 1712, Mor. 3562; *Park's Curator*, 1871, 9 M. 1078). But while the liability of the heir of provision was undoubtedly postponed to that of the heirs of line and conquest where there was any estate for them to succeed to, there is some conflict in the decisions as to whether it was necessary to call such heirs where there was no visible estate for them to succeed to, before suing the heir of provision (cf. *Luss*, 1672, Mor. 3565, and *Allan*, 1715, Mor. 3566). Of the heirs of provision *inter se*, the heir-male, being of the deceased's blood, is liable before the heir of tailzie, where there is estate for him to succeed to (*Dunbar*, 1621, Mor. 3559). But where two sons of the deceased succeeded,—the eldest to his entailed estate under an entail which contained no prohibition against contracting debt, the second to a fee-simple estate in virtue of a special destination,—it was decided that, being both heirs of provision, they must pay their father's personal debt rateably, according to the value of the estates taken by them, disregarding the arguments, on the one side, that the eldest son, being heir of line, was primarily liable, and, on the other side, that the second son was primarily liable, as taking by provision of the father, while the eldest son did not (*Mackenzie*, 1847, 9 D. 836). It was maintained by Stair (iii. 5. 17) that heirs by marriage contract, being heirs by blood, were liable before other heirs of tailzie and provision. This, however, is disputed by other institutional writers, who point out that the heir by marriage contract, being in some degree creditor to the deceased, should come last (Bankt. iii. 5. 69; Ersk. iii. 8. 52; Bell, *Prin.* s. 1935). As to this, it must be kept in view, on the one hand, that heirs under a strict entail are not liable at all for the debts of a preceding heir; and, on the other hand, that where a father binds himself by marriage contract to make pecuniary provisions or to destine certain estates to the heir or children of the marriage, they take not in the character of heirs at all, and do not represent the deceased. As between an heir under an entail which does not effectually preclude the contraction of debt and other heirs of provision, there is, as has already been seen, no priority (*Mackenzie*, 1847, 9 D. 836). Where the heir of the marriage takes not as heir, but as creditor, the provision payable to him is a good charge against lands held by his father under an imperfect entail.

But the foregoing order of liability among heirs only applies with regard to personal debts or heritable debts unconnected with special subjects, *e.g.* annuities, due by the ancestor dying intestate. Where the ancestor has died testate, his will is the rule: and where the debt is charged on a particular estate, the heir taking it, of whatever class he may be, is primarily liable to the extent of the value of that estate, in virtue of the ancestor's implied will. Thus where the testator has bound himself and his heirs-male, they are liable before the heir of line (Ersk. iii. 8, 52: Bell, *Prin.* s. 1935; *Blair*, 1663, Mor. 3571). So where the debt is charged on a particular estate, the heir taking that estate is primarily liable to the extent

of the value of the estate, not only in a question with heirs of the same class (*Robertson's Creditors*, 1803, Mor. App. "Competition," No. 2), but even in a question with heirs whose liability for general debt is prior to his own (*Fairlie*, 1611, Mor. 3575; *Gordon*, 1615, Mor. 3575; *Ogilvie*, 1826, 2 W. & S. 214; *Carrick's Trustees*, 1840, 2 D. 1068). But if the estate on which the debt is charged be insufficient to meet it, the heir of line is primarily liable for the balance (*Kinghorn*, 1607, Mor. 3574). On the same principle, where the debt is charged on several estates, the heirs taking them, although of different classes, are liable *pari passu* in proportion to the value of the estates to which they succeed to the extent of their value (*Rose*, 1787, 3 Pat. 66, reversing judgment of the Court of Session to the effect that the heir-male was entitled to relief from the heir of line—1786, Mor. 5229; *Sinclair's Exrs.*, 1798, Hume, 176; *Moncreiff*, 1825, 1 W. & S. 672). The question, however, always is what did the ancestor mean. His intention, if clearly expressed, will receive effect (*Breadalbane's Trs.*, 1842, 4 D. 1259; *Mackintosh*, 1873, 11 M. H. L. 28).

Relief between Heir and Executor.

In a question between heirs and executors the rule is firmly fixed that, unless the deceased has otherwise directed, the heir is primarily liable for heritable debts, and the executor for moveable debts (*Carnousie*, 1630, Mor. 5204; *Drummond*, 1799, 4 Pat. 66; *Wallace*, 1846, 8 D. 1038; *Breadalbane's Trs.*, 1873, 11 M. 912; *Duncan*, 1883, 10 R. 1042). The question turns entirely on what was the character of the debt as affecting the ancestor—whether personal or heritable.

Thus if the debt be personal, the executor is primarily liable although it arise out of the deceased's obligation to lay out money on land (*Mullo*, 1758, Mor. 5221), or have been incurred by the deceased in improving a landed estate (*Hyslop*, 18 Jan. 1811, F. C.), or be payable after the ancestor's death to tenants for meliorations effected by them (*Todd*, 1823, 2 S. 113; affd. 1825, 1 W. & S. 217), or represent the price of an estate purchased by the ancestor, but retained by him until the seller should clear off burdens affecting it (*Macnicol*, 16 June 1814, F. C.; *Ramsay*, 1887, 15 R. 25), or be due under a personal bond as the price of lands purchased by the ancestor at a judicial sale (*Arbuthnot*, 1773, Mor. 5225). The same principle applies, and the executor is primarily liable, where the ancestor has purchased lands and has retained part of the price in order that he may pay debts incurred by the seller and charged on the estate; for although the creditor holds heritable security, the purchaser's obligation is purely personal (*Lowthian*, 1797, 3 Pat. 621; *Macnicol*, 16 June 1814, F. C.). So where the ancestor has granted absolute warrandice in a conveyance of lands, his executor is primarily liable to clear the estate of debt, even although the executor is the grantee of the conveyance (*Duchess of Montrose*, 1886, 14 R. 131; affd. 1887, 15 R. H. L. 19).

But where the debt is in the position of a real burden on the ancestor's estate, liability for it falls primarily on the heir. Thus where, in the disposition to the ancestor, the price was declared a real burden, the primary liability fell on the heir, although infeftment had not been taken (*Macnicol*, 31 Jan. 1816, F. C.). The result was the same where the ancestor had purchased an estate charged with debt, retaining its amount from the price and granting a bond of corroboration to the creditor (*Ross*, 1824, 3 S. 271; affd. 1826, 2 W. & S. 40); and also where the purchaser was infeft in the property under an absolute disposition, but had granted a back letter to the ancestor, declaring that he had made the purchase for him, and was bound

to convey to him on payment of the price (*Murray*, 1837, 16 S. 283). It does not affect the heir's liability that the security may be bad in a question with creditors, the ancestor's intention to grant security over the lands being clear; and if the lands burdened be insufficient to pay the debt, the balance will still be regarded as a heritable debt primarily payable by the heir (*Bell's Trustees*, 1884, 12 R. 85). "The question between heir and executor does not depend upon the bond being found to create an effectual preference in a competition, but, according to all the authorities, upon the intention of the ancestor to create a heritable debt or a moveable debt. There can be no question that the bond was intended to create a heritable debt; and under the Act of 1868 such a debt remains heritable in so far as regards the liability of the debtor and his successors, although it is now moveable *quoad* the succession of the creditor. It appears to me, therefore, that the unpaid balance of the accounts secured or intended to be secured by the bond in question forms a proper charge upon the heritable succession" (per Ld. Kinnear in *Bell's Trustees*, *supra*, at 90). An interesting illustration of the rule is afforded by a modern case, where the testator, being liable under his marriage contract to provide his widow in an annuity, and having executed on deathbed a settlement of his whole estate, directing his trustees to pay *inter alia* the annuity out of the proceeds, and the heir having reduced the settlement *quoad* the heritage *ex capite lecti* and served heir, it was held that he must relieve the moveable estate of the annuity, as being in its nature heritable from bearing a tract of future time, to the extent of the value of the heritable property to which he had succeeded, or might yet succeed, as heir in heritage of the deceased (*Crawford's Trustees*, 1867, 5 M. 275). It has been decided that the liability, as between heir and executor, for debt charged on a Scotch estate falls, in accordance with the law of Scotland, on the heir, although by the law of the deceased's domicile the executor was primarily liable (*Drummond*, 1799, 4 Pat. 66).

The rule set forth in the three preceding paragraphs is firmly fixed; and while it will of course yield to the expression of a contrary intention by the ancestor, it will not be displaced by mere implication. "Unless there be—I do not say express words of direction—but unless there be what is called in the House of Lords implication as clear as to amount to declaration plain—so clear implication that there can be no doubt about it—we cannot transpose the burdens upon the two successions" (per Ld. Ardmillan in *Macleod's Trs.*, 1871, 9 M. 903, at 911). Thus, on the one hand, the executor is not bound to pay in relief of the heir heritable debt merely because of a general direction by the testator to pay his debts (*Sinclair's Exrs.*, 1798, Hume, 176; *Fraser*, 1804, Mor. App. "Heir and Executor," No. 3; affd. 1812, 5 Pat. 642; *Campbell*, 1817, Hume, 180; *Henderson*, 1858, 20 D. 473; *Bain*, 1861, 23 D. 416; *Douglas' Trs.*, 1868, 6 M. 223; *Macleod's Trs.*, 1871, 9 M. 903). *Fraser's* case is a good illustration of the rule, for there the testator directed that "all my just and lawful debts be paid by my executors," and he left large moveable estate, while his only debt was the heritable debt of which the heir unsuccessfully sought to be relieved. Conversely, the disposition of lands under burden of debts, but where the clause is not so conceived as to make the debts a burden on the lands, does not preclude the person taking them from being relieved of moveable debt by the executor (*Russels*, 1745, Mor. 5211; *Campbells*, 1747, Mor. 5213; affd. H. L.; *Forbes*, 1766, 1 Hailes, 138).

Where an heir has had to pay moveable debts, there being at the time supposed to be no moveable estate, he is, should such estate subsequently emerge, entitled to repetition from the executor (*Stainton's Trs.*, 1868, 6 M.

240). So where an heir of line, who had paid debts on the faith that he was heir to an estate, was subsequently evicted by the heir-male, it was decided by the House of Lords, reversing the judgment of the Court of Session, that the heir of line, having succeeded to no estate, was entitled to relief from the heir-male (*Maxwell*, 1717, Mor. 5210).

But a creditor does not require to consider whether the debt due him is heritable or moveable. Both heir and executor are liable to him, and he may sue either at pleasure (*Trail*, 1611, Mor. 3563; *Adam*, 1612, Mor. 3564: *Carnegie*, 1627, Mor. 3564; *Kirkpatrick*, 1838, 16 S. 608; affd. 1841, 2 Rob. 475: *British Linen Co.*, 1850, 12 D. 949). It makes no difference that the heir's liability only arises under the Act 1695, c. 24. He cannot on that ground insist on the executor being first discussed (*Morris*, 1867, 6 M. 60). But the executor is not liable for rents falling due after the ancestor's death, and after the heir has been recognised as tenant (*Gordon*, 1791, Mor. 5444). Nor is he liable for feu-duties becoming due after the ancestor's death, even although the ancestor has by feu-contract bound "himself and his heirs, executors, and successors whomsoever," nor for damages because the heir has failed to take up the feu (*Aiton*, 1889, 16 R. 625; *Macrae*, 1891, 19 R. 138). But the executor is liable for such rents or feu-duties where the ancestor has bound himself and his heirs, executors, and successors conjunctly and severally (*Police Commissioners of Dundee*, 1884, 11 R. 586; *Burns*, 1887, 14 R. H. L. 20).

[Stair, iii. 4 and 5; Ersk. iii. 8. 1–100; Bankt. iii. 4 and 5; Bell, *Prin.* ss. 1637 *et seq.*; More, *Notes on Stair*, ccexix *et seq.*; Sandford on *Succession*; Sandford, *Entails*; M'Laren, *Wills and Succession.*]

Heirs and Bairns, or its equivalent, "heirs and children," is a destination sometimes introduced into marriage contracts or other family settlements. Under such a destination the general rule is that heritage goes to the eldest son, not to the children generally, the word "heir" being regarded as the ruling term (*Fairservice*, 1789, Mor. 2317; *Dollar*, 1792, Mor. 13008; *Bowie*, 23 Feb. 1809, F. C.; *Duncan*, 9 Feb. 1813, F. C.). But it is always a question of intention, and the above rule may be displaced by indications in the settlement of a desire that the whole children should come in (*Wilsons*, 1769, Mor. 12845). In the case of burgage property (*Fairservice*, 1789, Mor. 2317), or conquest (*Ponton*, 1832, 4 Jur. 401), the presumption in favour of the heir seems to be weaker. In the case of moveables so destined, the children take equally. Where the succession under this destination is mixed, the heir takes the heritage, the younger children the moveables.

Where the destination of lands is to the children of a marriage, they take equally (*Waddell*, 1828, 6 S. 999).

[Bell, *Prin.* s. 1964; Sandford on *Heritable Succession*, i. 172–79; Bell, *Convey.* 1081; M'Laren, *Wills*, s. 1399.]

Heir-Apparent is the person who, if he survive the ancestor, must necessarily succeed him, since he cannot be ousted by the birth of a nearer heir; for instance, the eldest son with regard to intestate succession. The term is used in contradistinction to "presumptive heir," being the person who would be heir if the ancestor then died, but whose right of succession may be displaced by the birth of a nearer heir; for instance, the immediate younger brother. The term in this sense is not known to the common law of Scotland.

It was introduced by the Rutherfurd Act (11 & 12 Vict. c. 36), by which it is defined (s. 52) as meaning "the heir who is next in succession to the heir in possession, and whose right of succession, if he survive, must take effect." By that Act and the subsequent Entail Acts the heir-apparent is given important rights with reference to an entailed estate. See ENTAIL. The term is frequently used in old reports in the sense of the "apparent heir." The two are, however, quite distinct.

Heirship Moveables.—Heirship moveables were abolished by the Conveyancing Act of 1868 (31 & 32 Vict. c. 101, s. 160), and the interest in the subject can now seldom be more than antiquarian. They consisted of certain articles of a moveable nature to which the heir of line of a person deceased was entitled to succeed in addition to the heritage, and to the exclusion of the executors. The right was established by the Act 1474, c. 54, and was founded upon the presumed intention of the deceased that his heir should not succeed to the bare walls only of his house, or to his farm, dismantled of all its plenishing. The right pertained only to "the heirs of prelates, under whom are comprehended all beneficed persons (*Rigg*, 1623, Mor. 5391); the heirs of barons, under whom are comprehended all who are infeft in lands (see *Irvine*, 1744, Mor. 2304, 5400) or annualrents (*Jameson*, 1678, Mor. 5398), though not erected in a barony; and the heirs of burgesses, by whom are meant actual trading, but not honorary, burgesses" (see *Dunbar*, 1628, Mor. 5392; *Cumming*, *infra*) (Hope, *Minor Practicks*, App. II.). A heritable bond, without infeftment thereon, did not give the right to heirship moveables (*Montgomery*, 1666, Mor. 5396; *Cochran*, 1695, Mor. 5398; *Cumming*, 1698, Mor. 5399); nor did the possession by the deceased of a liferent (*Scot*, 1668, Mor. 5396), or a conjunct fee (*Monro*, 1730, Mor. 5400). Where the deceased had been divested before death, no heirship moveables could be claimed (*A.* v. *B.*, 1629, Mor. 5394; *Straton*, 1636, Mor. 5395). The heir of line alone could claim heirship moveables, and he could do this though he actually succeeded to no heritable property (*Crawford*, 1543, Mor. 5389). In the case of heirs-portioners of line, the eldest succeeded to the heirship moveables (*Garnkirk*, 1725, Mor. 5366). Where the heir renounced the succession, the heirship moveables went to the executors (*Pollock*, 1667, Mor. 5402). Heirship moveables vested by possession without service; but if the heir died without obtaining possession, they went to the heir of the first deceased (Ersk. iii. 8. 77). The Act of 1474 provided that, "anent the airschip of mooveable gudes," the heirs shall have "the best of ilk a thing, and after the Statute of the Burrow Lawes, and as is conteined in the Samin." The "Burrow Lawes" here referred to give a list of articles which might be claimed as heirship moveables (*L. Burg.* c. 125), and lists are also given in Hope's *Minor Practicks*, App. II., and Balfour's *Practicks*, p. 234. These lists, however, can scarcely be taken as exhaustive. The heir was entitled to take "the best buird and buird claith, ane hand towel," and so on, through all the articles of household furniture, silver-plate, linen, etc. Where the articles were such as went in pairs or dozens, he might take the best pair or dozen. "Aif thair be twelf spoonis, or ma, the air sall have twelf: bot gif thair be fewar nor twelf, the air sall have bot ane" (Balfour, *ut supra*). Of "divers and sindrie tapestries" or "pavilions," he might only take the best (*Drummond*, 1575, Mor. 5386). But by ancient custom he was entitled to the whole furniture of the hall (*Knollis*, 1489, Mor. 5385), and also to such articles as the family seal of arms, and the cushion and carpet of the seat in

church. In a modern case it was held that a silver cup presented to the deceased by a regiment of foot was an heirship moveable, but that a cabinet of coins and the books relating thereto could not be claimed as heirship (*Leith*, 1863, 1 M. 949). He was not entitled to draw heirship from articles of a fungible nature, or such as were estimated by quantity, *e.g.* money, wine, or corn. From the outside plenishing he might take the best horse, yoke of oxen, cow, cart, plough, etc. Where an heir claimed a bull in addition to a yoke of oxen and a cow, his claim was disallowed. In the same case, he was refused more than one horse (*Hepburn*, 1793, Mor. 5387). No ship or boat could be claimed as heirship (*Brown*, 1527, Mor. 5386). The heirship was drawn from the whole moveables of the deceased before any division by law or fraction took place (*Stevensons*, 1680, Mor. 5405). The heir could not be deprived of his right to heirship goods by any deed of the ancestor, either testamentary or on deathbed, but heirship goods might be disponed *in liege poustie* (*Leith, ut supra*).

[Stair, iii. 5. 9; Ersk. iii. 8. 17, 18; Hope, *Minor Practicks*, App. II.; Balfour, *Practicks*, 234.]

Heirs-Portioners.—Although in early times females were entirely excluded from succession to land, probably because they were unable to render military service, it has long been the law that they succeed, failing males equally near the deceased, according to the usual order of heritable succession, and their descendants. But in the succession of females there is this peculiarity, that in place of the whole estate going to one, the whole females equally near in the order of succession inherit in equal portions. Hence the designation "heirs-portioners." Conquest divided equally as well as heritage (*Carse*, 1717, Mor. 14873). Thus if a father die, leaving no sons or their descendants, his daughters, although of different marriages, inherit equally. If any of the daughters have predeceased their father, leaving issue, the issue inherit the share to which their mother would have succeeded had she survived, the sons taking in their order of seniority; and failing them, the daughters equally. In the case of collateral succession the rule is the same. But while females thus succeed equally, they do not hold as joint proprietors. They indeed "hold *pro indiviso* until the subject is divided. But each has a title in herself to her own part or share, which she may alienate or burden by her own separate act" (per Ld. Moncreiff in *Cargill*, 1837, 15 S. 408).

But while division is the leading rule in the succession of females, the right of primogeniture to some extent prevails. Thus (1) where part of the inheritance is *sua natura* indivisible, it goes to the eldest daughter, *e.g.* a title of dignity, or a right of superiority. The vassal could not have superiors multiplied upon him, and he was entitled to take an entry from the eldest daughter alone (*Fenton*, 1523, Mor. 5357). If the superiority be blench, the eldest daughter takes it with its casualties, without recompense to the others (*M'Neight*, 1843, 6 D. 128). But if it yield substantial feu-duties, they must be equally divided (*Rae*, 1809, Hume, 764). If there be more than one such superiority, the sisters are entitled to choose them in their order of seniority, recompensing any one who does not receive a superiority (*Houston*, 1744, Mor. 5369). The eldest sister is also entitled to the custody of the title deeds (*Cunningham*, 1680, Mor. 2449; *Rae*, 1809, Hume, 764). Again, on the same principle, because it is indivisible, the eldest daughter is entitled (2) to the principal mansion-house as a *præcipuum*.

In early times the younger daughters had to be recompensed out of the deceased's estate for the value of the mansion-house. But it is now settled that the eldest daughter takes without recompense (*Cowie*, 1707, Mor. 5362; *Peadie*, 1743, Mor. 5367; *Ireland*, 1765, Mor. 5373; *Forbes*, 1774, Mor. 5378). It is laid down by Stair (iii. 5. 11) that this rule only applies where the mansion-house is a tower, fortalice, etc., but not where it is within burgh, or an ordinary country house. In accordance with this opinion, it has been decided that a house within burgh does not fall to the eldest daughter as a *præcipuum* (*Wallace*, 1758, Mor. 5371; *Smith*, 1792, Mor. 5381); nor does a villa on feuing ground (*Smith, supra*; *Rae*, 1809, Hume, 764). But it is sufficient that the house, although not a fortalice or tower, be treated as a mansion-house (*Cowie*, 1707, Mor. 5362; *Ireland*, 1765, Mor. 5373—although, here the estate was very small and the house ruinous). Where, however, the house was the only one on the estate, and had always been let as a farmhouse, the claim to it as a *præcipuum* was repelled (*Halbert*, 1857, 19 D. 762). It is immaterial that the house is in point of fact divisible, and has actually been inhabited by two families (*Forbes*, 1774, Mor. 5378). Along with the mansion-house is included an orchard or garden if unlet, or let with the mansion-house (*Cowie*, 1707, Mor. 5362; *Forbes, supra*; *Dinniston*, 1830, 8 S. 935). But where the daughters take in virtue of a destination to them *nominatim*, the eldest has no right to a *præcipuum* (*Cathcart*, 1773, Mor. 5375), her right being in truth only that of a joint-disponee. Where, however, the succession opens to the daughters under a destination to "heirs whatsoever," the eldest is entitled to a *præcipuum*, because "it is left solely to the law to find out who these are" (*Wight*, 1798, Mor. App. "Heir-Portioner," No. 1; *Maclauchlane*, 1807, Mor. App. "Heir-Portioner," No. 3). It does not affect the eldest daughter's right to a *præcipuum* that the heirs-portioners take under an entail which has not been feudalised (*Dinniston*, 1830, 8 S. 935). In the division of an estate, the eldest daughter is entitled to the portion lying contiguous to the mansion-house: the others cast lots (*Inglis*, 1781, Hume, 762).

The opinion has been expressed that a lease to a tenant and the heirs of his body, "secluding heirs-portioners," descends to the eldest daughter (*Pratt*, 1858, 21 D. 19).

The eldest heir-portioner had no right to heirship moveables (*Cruickshanks*, 1801, Mor. App. "Heir-Portioner," No. 2; *Rae*, 1809, Hume, 764).

Where an entail fails to exclude heirs-portioners, they take in fee-simple on the succession opening to them. See ENTAIL.

Each heir-portioner is primarily liable only for her proportion of the ancestor's debts, although her share of his estate should exceeed the whole debt (Stair, iii. 5. 14; Ersk. iii. 8. 50; *Home*, 1632, Mor. 14678). But if the others prove insolvent, she may, as *lucrata*, be found liable to the full extent of the estate to which she has succeeded (*Burnet*, 1665, Mor. 5863), but no further (Stair, iii. 5. 14; Ersk. iii. 8. 53; *White*, 1698, Mor. 14683). Under sec. 12 of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), the liability of an heir-portioner for her ancestor's debts is now limited to the value of the share of his estate to which she has succeeded.

[Stair, iii. 5. 11, 14; Ersk. iii. 8. 5, 13, 50, 53; Bell, *Prin.* 859, 1083–1085, 1219, 1659; Bankt. iii. 5. 71–84.]

Herald.—See LYON KING OF ARMS.

Hereditas jacens. — See Apparent Heir; Adjudication contra hereditatem jacentem; Constitution (Decree of); Passive Title; Heir.

Herezeld.—Herezeld, or heriot, was a casualty formerly exigible on the death of a tenant. It consisted of a contribution by the heirs of the deceased tenant of the best moveable, or, more properly, the best thing capable of moving, *e.g.* ox, cow, horse, etc., of which the tenant died possessed. It was payable to the landlord, and was a casualty exigible only in baronies where the custom was established by previous practice. Herezeld was due only by a tenant-at-will dying in possession of a farm, and by acceptance of it a landlord was bound to continue the widow and children of the tenant deceased in possession of the farm for another year on the same terms (*Bell*, 1763, 5 Supp. 470). Herezeld was not exigible from feuars.

In England, the heriot was in many cases payable on the death of a tenant who was possessed of a copyhold estate. Herezeld is now altogether obsolete.

Heritable and Moveable.—The distinction between immoveable and moveable, as applied to things and rights, is fundamental, and would subsist as practically important, even if the parallel distinction between heritage and executry were swept away, as is sometimes proposed. It is unfortunate that the two distinctions have been jumbled together, through the caprice of our writers, or the special prominence in early times of one example of the importance attached to the physical division of things; that thus "heritable"—that which, as a rule, goes undivided to a single heir—is opposed to "moveable," a term which has in essence no relation to succession; and that these two terms are used as including between them all things and rights. It is true that the distinction is all-important in cases between the heir of a deceased person and his executors—or next-of-kin in the wider sense of the term. But it also appears in questions (in the old law) between wife and husband; in questions, as to legal family rights, between the heir on the one hand, and the widow, husband, and younger children of a deceased person on the other: between the purchaser and seller of immoveable property with its plenishing; between heritable creditors and the ordinary creditors of a debtor, or his trustee in bankruptcy; between the users of heritable and the users of moveable diligence; between the heir of immoveable property and the liferenter's representatives; between landlord and tenant; and between territorial rules of law and rules which follow the person. In all these cases the persons or Courts concerned in the first-mentioned side of each group desire that the thing or right should be held to be immoveable, and the others have an opposing interest. Except in questions between landlord and tenant, the criteria for discriminating between the two are substantially the same; and, seeing that even this divergence arises only in regard to fixtures, it will be possible in the present article to proceed as if there were no divergence at all. See Fixtures.

The point of time which has to be looked to in the above questions is that of the death, marriage, sale, diligence, and ish of lease. Nothing that occurs after that date avails to alter the complexion of the right or thing (Ersk. ii. 2. 20), except in certain cases of constructive conversion, of which *infra*.

It is a convenient division of the subject to view the rules of law as applied to things tangible (*res corporales*), and as applied to rights (*res incorporales*).

I. *Things.*—Lands, buildings, minerals, and soil *in situ*, trees attached to the soil (see *Ainslie*, 30 Ch. D. 485), natural crops unsevered, such as grass, are heritable. On the other hand, ships, industrial fruits, such as growing crops, including, it is thought, hay both of the first and second crop (see *Lyall*, 11 S. 96), and trees in a nursery garden (see *Beybie*, 16 S. 232), and all things that move or are displaceable *in specie*, are moveable. Cases involving questions of great delicacy arise when what is in its nature moveable has come to be attached physically to what is heritable; but these are treated more appropriately elsewhere. See Fixtures; Heirship Moveables; Heirlooms.

II. *Rights.*—These are heritable or moveable according as they do or do not relate directly to what is corporeally heritable. Thus rights in and to lands, in the widest sense of the word, whether absolute or (with certain exceptions) redeemable, in fee-simple or limited, including superiorities, teinds, casualties, feu-duties, ground-annuals, servitudes, real burdens, and leases, are heritable: and it is immaterial whether title has been completed or not. On the other hand, right of action (other than real action), a *jus crediti*, a right to a share of the proceeds of heritage, patents (*Advocate-General*, 10 D. 969), and copyrights (5 & 6 Vict. c. 45, s. 25) are moveable. "Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators as personal or moveable, and not real or heritable estate" (53 & 54 Vict. c. 39, s. 22); but the title to it "shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable in trust so far as necessary for the persons beneficially interested" (*ib.* s. 20 (2)). Similarly, shares in a company are moveable, though the whole or part of its property be heritable (8 & 9 Vict. c. 17, s. 7; 25 & 26 Vict. c. 89, s. 22). Right to trade marks and to trade names appears to be purely moveable; while goodwill may savour of heritage to a greater or less extent according to circumstances (see *Hughes*, 19 R. 840). Rights having a tract of future time, *i.e.* such as give a claim to payment periodically (like an annuity) without having relation to a principal sum (like interest), are heritable (*Hill*, 11 M. 247; *Reid*, 5 R. 630). The reasons given for this rule are that these rights, yielding annual profits, are *quasi feuda*, and that they are unsuitable for being treated as executry, which ought to be capable of being ingathered and distributed soon after the death of the donor (Ersk. ii. 2. 6).

The specialties in regard to bonds, and the history thereof, are set out in other articles. [Bond; Bond and Disposition in Security.]

Constructive Conversion.—There are many cases in which things or rights, heritable or moveable according to the rules above briefly indicated, are for certain purposes *converted* from that character into the opposite character by something done by their deceased owner either *inter vivos* or *mortis causâ*.

I. *Unfulfilled Contracts.*—The most familiar instance of moveable property coming to be treated as heritable in succession through *inter vivos* acts, occurs where money is at the date of the party's death required to complete a building or other enterprise according to a plan, contracted for at that date and not fully or at all paid for. The money comes out of the move-

able succession and goes to the benefit of the heir, seeing that the deceased had intended to benefit the heritage at the expense of the personal estate (*Malloch*, 5 M. 335). Another case is where the deceased has contracted to buy heritage, and his executor has to pay for it, and thus benefit the heir (*Ramsay*, 1887, 15 R. 25). The converse case is of greater importance. A bargain for the sale of the deceased's estate has been completed before his death; but the disposition has not been executed and the price has not been paid. The heir-at-law or other person entitled to the heritage is bound to grant the disposition; but the price goes to swell the executry (*Chiesley*, Mor. 5531). The same rule applies where the transfer of the heritage is by compulsory surrender under the Lands Clauses Acts, and the price is really compensation. The money falls to executry, not to the heir (*Heron*, 1856, 18 D. 197). This form of conversion affects the whole estate of the deceased, and is not trammelled by the legal rights of widow, widower, or children.

II. *Conversion, mortis causâ.*—The operation of a settlement cannot (in contrast to the foregoing) interfere with these legal rights; cannot trench on the terce, courtesy, *jus relicti, jus relictæ*, or legitim; and cannot affect the sources from which these rights are respectively drawn (*Lashley*, 1804, 4 Pat. 581). The cases are divisible into two categories.

(1) *The Effect on the Deceased's own Succession.*—Assume that there is a direction in the will to sell or buy heritage, and that the persons entitled to succeed (either *de plano* or failing others) are described in words—such as his "heirs," "heirs and assignees," "heirs and successors"—which are flexible in the sense of being applicable either to heirs in heritage or heirs *in mobilibus*. It seems the better opinion—though there are *dicta* to the contrary—that a direction to sell sends the subject or its price to the latter heirs, and that a direction to buy sends the price or the heritage bought to the former (see M'Laren, *Wills*, i. 234). But if realisation of heritage—which is the ordinary case—is directed in the settlement for certain purposes which do not exhaust the estate, and a balance is left in intestacy, there is no conversion of that balance; and heir and executor share it in proportion to the original value of the heritable and moveable estate respectively (*Cowan*, 1887, 14 R. 670). The same is true where certain of the purposes for which realisation was ordered lapse; *pro tanto* the direction lapses with them (*Thomas*, 1868, 7 M. 114).

(2) *The Effect on a Beneficiary's Succession.*—This is the case of constructive conversion which most frequently occurs; and it cannot be said that the current of decision has always flowed smoothly. No difficulty has arisen in practice, where money or other moveable property is left by the deceased with a power conferred or a duty imposed in the will on his trustees to turn it into land; for this is usually done for the benefit of a single person with a prescribed—usually an entailed—destination (see *Dick*, 1828, 6 Sh. 1065). Nor is any difficulty found in the converse case of heritage being left by a testator, which he destines either directly or with the intervention of a trust to a legatee and his heirs. If the legatee dies intestate and without having altered the nature of the estate, his heir-at-law takes to the exclusion of his heirs *in mobilibus*. The real difficulty arises from the fact that many settlements contain a *direction* to the trustees to sell heritage, and most settlements contain a *power* to sell; and the question then is, which of a beneficiary's representatives—his heir-at-law or his executors—shall benefit on the beneficiary's death where he has not disposed of his vested interest in the trust estate. See, as an excellent illustration of the difficulties which may arise, the case of *Strachan*, 1843, 5 D. 687.

(*a*) *Direction to Sell.*—If the direction comes into force, or would do so if the trust were allowed without interference by the beneficiaries to run its prescribed course, there is no doubt that conversion is effected (*M'Gilchrist's Trs.*, 1870, 8 M. 689). The result of a failure, total or partial, of the purposes in pursuance of which sale was ordered has been already referred to (see also *Dick, supra*; *Grindlay*, 1853, 16 D. 27).

(*b*) *Power by Implication equivalent to Direction to Sell; and not so.*—It is unnecessary that the word "direct" or an express equivalent should occur in the settlement. "It is sufficient that the just construction of the whole instrument, taken together shows that nothing but sale was contemplated, and that the testator's views could not be carried into execution without a sale; that, in fact, it was the plain duty, under the instrument of the trustees to effect the sale" (per Ld. Jeffrey in *Advocate-General* v. *Williamson*, 13 D. 436; affd. 2 Bell, 89). In this case the terms of the instructions to the trustees, taken in their general collocation, were largely relied on. But in the majority of cases there is only implication, either from the purposes of the trust or from these in conjunction with the circumstances of the estate. So it was in *Boag*, 1872, 10 Macp. 872, where there was not even power to sell, but by inference from the purposes sale was considered necessary, and therefore power implied, and as a consequence conversion. But there is a presumption unfavourable to conversion, the rule being that neither trustees nor guardians can in their discretion alter the succession of beneficiaries or wards, and that reasonable, though not perhaps strict, necessity must dictate their acts, if these are to have the force of conversion. The rule which is followed in practice was adopted by Lord Westbury in *Buchanan*, 1862, 4 Macq. 374, from the *dicta* of Lord Fullerton in *Advocate-General* v. *Blackburn's Trs.*, 1847, 10 D. 166. "If instead of an absolute and unqualified trust or direction for sale the right to sell was made to depend on the direction or will of the trustees, or was to arise only in case of necessity, or was limited to particular purposes, as, for example, to pay debt, or was not *indispensable to the execution of the trust*, then in any of these cases, until the discretion was exercised, or the necessity arose or was acted on, or after the particular purpose was answered, there was no change in the quality of the property, and the heritable estate must continue to be held and transmitted as heritable." It may be laid down that hitherto the only circumstance which has told decisively in favour of conversion is, that the trustees are directed to divide, and in the event have to divide, the estate from time to time among the beneficiaries, when, for example, they respectively reach majority, or, being females, are married: seeing that it would be unreasonable to expect the trustees to hold the heritage in *pro indiviso* shares with the beneficiaries earliest in right of possession (*Playfair's Trs.*, 21 R. 836). If, on the other hand, the division is in the event, not gradual but *uno flatu*, the beneficiaries being reduced to one in number or being all major or married at the date of distribution, this rule does not apply (*Anderson's Exr.*, 1895, 22 R. 254). Other circumstances are merely make-weights for or against conversion. Thus, while it may be true that (*Brown's Trs.*, 1890, 18 R. 185) till recently "there had been no case, in which a testator used the words 'pay' and 'payment' or 'sums' and no other words, where the decision has been against conversion," and that in cases where conversion has been negatived these words have been associated with others such as "convey" or "dispone," nevertheless the case of *Anderson's Exr.* shows that it would be unsafe to treat a bald direction or power, pointing *primâ facie* to delivery in cash, as an infallible guide towards a direction to convert. Again, the number of the bene-

ficiaries among whom the estate has to be distributed is, no doubt, not to be ignored as an element of construction; yet it achieved nothing in favour of conversion where the trust had subsisted for fifty years and the beneficiaries ultimately entitled were fifty-two in number; for it is as easy to convey *uno ictu* to many persons heritage in equal shares as to divide the proceeds of it in money (*Duncan's Trs.*, 1882, 9 R. 731). In the case of *Sheppard's Trs.*, 1885, 12 R. 1193, the same reluctance to admit conversion without proved necessity for it was shown by five judges out of the seven who heard the argument. There was a power of sale, but no direction to sell. The trustees were directed, on the death of the truster's widow, or on the majority of his youngest child, to divide the residue and to dispone, convey, and make over and deliver it to the children and to the issue of predeceasers. The estate consisted of five heritable subjects, and there were five children. Prior to the date of distribution the trustees had not found it necessary to sell. The question was whether the shares of certain children who had predeceased the widow went to their heirs or to their executors; and the decision was that there had been no constructive conversion, and that the former claimants fell to be preferred. Again, it would probably be unsafe to rely implicitly on the distinction between heritage held as a family or residential estate, and therefore to be spared from division if possible, and heritage held merely as an investment, like stocks or shares and to be treated like them in distributing the fee (see *Baird*, 1880, 8 R. 233).

If there be an express direction to sell, the conversion takes place as soon as the direction becomes binding on the trustees (*M'Gilchrist's Trs.*, 1870, 8 M. 689, *supra*). If there be only a power, it does not appear to be settled whether the conversion dates *a morte*, or from the time when sale is first seen to be necessary or from the date of actual sale.

It is, of course, competent for a beneficiary who is *capax* to reconvert the estate so as to regulate his own succession by taking *in formâ specificâ* from the trustees heritage which had not been sold, and would, but for the reconversion, have had to be treated as moveable (see *Grindlay*, 1853, 16 D. 27).

See also Legacy and Succession Duty.

Heritable Jurisdiction.—Although originally all jurisdiction was, as it is now, personal, *i.e.* granted in consideration of the fitness of the grantee, and so dying with him, under the feudal system there existed a scheme whereby certain jurisdictions were annexed to certain lands, these jurisdictions being patrimonial, and descendible to heirs along with the lands to which they were annexed.

By the Jurisdiction Act, however, passed in 1746–47, all heritable jurisdiction was abolished, with the exception of some petty powers reserved in Admiralty and to barons (powers which have now been abrogated or have fallen into disuse). By the Act of 1746 the powers formerly vested in regalities, baillieries, and other heritable sheriffships were vested in those Courts of the king which would have had these powers had the jurisdictions abolished never been granted.

The Act ordered that one Sheriff or Stewart-depute was to be appointed in every shire, who must be an advocate of three years' standing. The jurisdiction of a baron was not, as has been said, absolutely abolished by the Act of 1746, but his civil jurisdiction was limited to cases where the debt and damage did not exceed forty shillings sterling. His criminal

jurisdiction was limited to assaults and other small offences punishable by a fine not exceeding twenty shillings sterling, or by setting the offender in the stocks for a period of three hours in the daytime. Barons also retained the power, after the passing of the Act, to recover from their vassals and tenants rents of land. The whole jurisdiction of barons, however, has now fallen into desuetude.—[20 Geo. II. c. 43; 28 Geo. II. c. 7; Ersk. *Prin.* I. iv. 6, 13, 14, 15.]

Heritable Securities.—*Definitions.*—The phrase "heritable security" is defined in the Titles to Land Consolidation Act, 1868, for the purposes of that Act, as including (s. 3) "all heritable bonds, bonds and dispositions in security, bonds of annualrent, bonds of annuity, and all securities authorised to be granted by section 7 of 19 & 20 Vict. cap. 91, and all deeds and conveyances whatsoever, legal as well as voluntary, which are or may be used for the purpose of constituting or completing or transmitting a security over lands or over the rents and profits thereof, as well as such lands themselves and the rents and profits thereof, and the sums, principal, interest, and penalties secured by such securities, but shall not include securities by way of ground annual, whether redeemable or irredeemable, or absolute dispositions qualified by back bonds or letters." The Conveyancing Act, 1874 (s. 3), followed in this respect by the Heritable Securities Act, 1894, adopts this definition, with the addition of real burdens and securities by way of ground annual. It has been held that a security over a registered lease fell within the definition in the Consolidation Act, 1868 (*Stroyan*, 1890, 17 R. 1170), even although constituted by an absolute assignation with a back bond, on the ground that the exclusion of absolute dispositions did not apply to other forms of *ex facie* absolute transfers (*Stroyan, ut supra*, per Lord Lee). A more general definition of the phrase "heritable security" may be taken from the opinion of Ld. Rutherfurd Clark in the same case, to the effect that any security over a heritable subject is a heritable security. This must be qualified to the extent that a security which contains a formal conveyance of a heritable subject, but gives the creditor no right over that subject, and no means of acquiring any right over it by diligence, is not a heritable security. Thus Harbour Trustees borrowed money on mortgages expressed in a particular form, whereby the harbour and works were assigned to the creditor. It was held that, as the harbour and works were vested by the Legislature in a statutory body for public purposes, a private creditor could not attach them by diligence, and therefore that the mortgages in question were only personal obligations of the Trust, and not real or heritable securities (*Greenock Harbour Trs.*, 1888, 15 R. 343; *Bringloe*, 1897, 34 S. L. R. 449). A railway mortgage or debenture, however, issued under the Railway Companies (Scotland) Act, 1867, has been held to be a heritable security, in respect that although the railway could not be attached by ordinary diligence, it was open to the mortgagees or debenture holders to obtain the appointment of a judicial factor, whereby they entered into possession of the subjects, and might ultimately expose them to sale (*Breadalbane*, 1887, 14 R. 307).

Earlier Forms.—The earlier forms of heritable security in Scotland were devised to evade the rule of the canon law, which forbade the taking of interest as usury. Thus the direct disposition in security of a sum lent, with a fixed rate of interest, being impossible, the alternative forms of an annualrent secured upon land, and a wadset, were adopted. A very brief sketch of these conveyances may be given. The bond of annualrent was

originally a purchase of a rent or annuity secured upon land. It was secured by infeftment, but not by any conveyance of the lands, and was thus of the nature of a real burden (Menzies, *Conveyancing*, p. 845). The creditor was in the position of the holder of a *debitum fundi*, and was therefore entitled to poind the ground (Stair, ii. v. 8), but as the bond contained no disposition of the lands, it could not form a title for adjudication in implement (*Strachan*, 1776, M. App. *voce* "Adjudication," No. 7, explained in *Watson*, 1868, 6 Macp. 258). In its original form the bond of annual rent contained an obligation for payment of the rent, but no obligation to repay the principal sum, and no right to insist on redemption, and was thus an absolute purchase of an annuity, and not a security. In process of time, however, a clause, known as a clause of requisition, giving the granter of the bond the right to redeem, was added, and the addition of a personal obligation for the principal sum advanced converted the bond of annualrent into the modern heritable bond. It is still, however, used in its original form under the Entail Acts (38 & 39 Vict. c. 61, s. 8: 41 & 42 Vict. c. 28, s. 3).

Wadset.—The form of security known as a wadset was either proper or improper. "A proper wadset is, where the fruits and profits of the thing wadset are simply given for the annualrent of the sum, and the hazard or benefit thereof, whether it rise or fall, is the wadsetter's" (Stair, ii. x. 9). The addition of a back tack, securing the granter in the possession of the subjects, or of an obligation to account for the profits of the subject, converted the security into an improper wadset, as the essential feature of the proper wadset was, that the creditor looked to obtain interest for his advance solely to the fruits or profits of the subject, and not to the personal obligation of the debtor. In a wadset, the creditor was known as the wadsetter—the debtor, in respect of his right of reversion, as the reverser. The security was constituted by an ordinary disposition of the lands to the wadsetter, usually with a holding *de me*, and was completed by infeftment. The right of reversion was usually provided for in a separate deed, and the contract was thus a mutual one, in which the reverser conveyed the lands, and the wadsetter undertook to grant a right of reversion (Dallas, *Styles*, p. 709). A reversion was not binding on singular successors of the wadsetter until the Act 1469, c. 27, and its registration in the register of sasines and reversions was first enacted by the Act 1617, c. 16. The wadset was declared redeemable by payment of the capital sum, at a time and place fixed in the reversion; if payment was refused, the lands might be recovered by a declarator of redemption (Menzies, *Conveyancing*, p. 848). Such a declarator has been sustained at the instance of parties holding real burdens on the reversion, who alleged that the wadset had been extinguished by the wadsetter's intromissions with the rents (*Wright*, 1855, 17 D. 629). It is a point never definitely settled, whether the record could be cleared, on the redemption of a wadset, by a simple renunciation; or whether formal resignation was necessary (*Duke of Roxburgh*, 1825, 1 W. & S. 41).

Modern Forms.—The forms of heritable security in use in modern practice are the bond and disposition in security, the absolute disposition with back bond, and the real or reserved burden. The first two forms are constituted by direct conveyance of the lands, redeemably in the one case, absolutely in the other; the last contains no disposition of the lands, but is constituted as a burden on the right of a party to whom they are conveyed. The form of security known in England as an equitable mortgage, by which the pledge of the title-deeds of an estate confers on the pledgee the rights of a security-holder over that estate, is not

recognised in Scotland, and, if adopted, would not confer upon the pledgee any right which would be available against the singular successors of the pledgor, or against his general creditors (*Christie*, 1862, 24 D. 1182). It is not proposed here to enter into a discussion of the details of the various forms of security, which are dealt with under their respective heads.

Capacity to Grant.—As a general rule, any person who is in possession of heritable property, and is capable of contracting, may grant a heritable security. A pupil cannot himself burden his lands, and his tutor can only do so by obtaining the authority of the Court (*Scott's Trs.*, 1887, 14 R. 1043). A minor, with curators, requires their consent (Bell, *Prin.* 2096), and it is doubtful whether a security by a minor without curators would be valid (per Ld. Pres. Inglis in *Hill*, 1879, 7 R. 68). A trustee requires either express powers in the trust-deed, the authority of the Court, or the consent of all the beneficiaries, if they are alive and capable of acting (30 & 31 Vict. c. 97, s. 3). A married woman requires the consent of her husband, unless his *jus administrationis* has been excluded (Fraser, *H. & W.* i. 814; More, *Notes to Stair*, p. xvii; *Boyle*, 1822, 1 S. 372). A husband may grant a security over his own liferent of the wife's estate, but cannot affect it further (Fraser, *H. & W.* i. 811). The power of a corporation holding heritable property to grant a heritable security would seem to depend on whether it has power to borrow, and whether the heritable property in question is or is not dedicated to public uses. A trading company has the power to borrow, if such an act is within the ordinary scope of its business, and not forbidden in the memorandum or articles of association (*Blackburn Society*, 1885, 29 Ch. D. 902, and see *Bateman*, 1876, L. R. 1 C. P. 499). The borrowing powers of companies under particular Statutes, or under the Companies Clauses Acts, depend on, and are limited by, the Statute by which the company is incorporated, and any borrowing beyond those limits is *ultra vires*, and will not form a binding debt (*Wenlock*, 1885, 10 App. Cas. 354; *Blackburn Society*, 1885, 29 Ch. D. 902). A royal burgh has the power to borrow and to alienate its heritable property, and therefore has probably the power to grant heritable securities (*Royal Burgh of Renfrew*, 1892, 19 R. 822). Much of the heritable property of a burgh, however, is of a kind destined to public uses, such as parks and public buildings, and a security purporting to convey such subjects would be ineffectual, inasmuch as they are not open to the diligence of private creditors (*Sanderson*, 1859, 22 D. 24; *Greenock Harbour Trs.*, 1888, 15 R. 343). Even over subjects which are not public, but which form a source of revenue to the burgh, a security would be reducible, as contrary to the fundamental principles of burgh administration, if it were granted for an inadequate consideration (per Boyle, L. J. C., in *Magistrates of Selkirk*, 1828, 6 S. 955). Local authorities, such as a county council or parish council, are usually authorised to borrow money on the security of the rates (52 & 53 Vict. c. 30, s. 57; 57 & 58 Vict. c. 58, s. 28): and it would seem very doubtful whether they have any implied power to grant a heritable security in the event of their possessing heritable property.

Title to Grant.—Any interest in heritable property may be made the subject of a security. Thus a bond may be granted by a superior over the *dominium directum* (*Campbell*, 1865, 4 M. 23), by the creditor in an existing heritable security (*Stein's Creditors*, 1793, Mor. 14127), or by a leaseholder. Where, however, the title of the granter is either limited, as in the case of an heir of entail, or incomplete, as in the case of land held on a personal title, special forms of security, or special procedure on completing the security, have to be adopted.

Securities under Entail.—Apart from the relaxations in the fetters of a strict entail contained in the entail Statutes, an heir in possession could grant a security over his own liferent interest (*Nairne*, 15 Feb. 1810, F. C.), but was unable to affect the fee, except under a special provision in the particular entail (*Duchess of Richmond*, 1837, 16 S. 172). By the Aberdeen Act (5 Geo. IV. c. 87) and subsequent Statutes (31 & 32 Vict. c. 84, s. 6; 38 & 39 Vict. c. 61, s. 10; 11 & 12 Vict. c. 36, ss. 21, 23, 33; 16 & 17 Vict. c. 94, s. 23) an heir of entail is entitled to burden the fee by granting, under the authority of the Court, an ordinary bond and disposition in security, in order to secure provisions for his wife and children. Under 31 & 32 Vict. c. 84, s. 11, entailer's debts, *i.e.* debts for which the estate is liable to be adjudged, may be charged in the same way as children's provisions. Under the Montgomery Act (10 Geo. III. c. 51) and 38 & 39 Vict. c. 61, s. 7, 8; 41 & 42 Vict. c. 28, s. 3; 45 & 46 Vict. c. 53, ss. 5, 6, an heir of entail in possession, who has expended money in certain improvements on the estate, may obtain the authority of the Court to execute either (*a*) a bond of annualrent at the rate of £7, 2s. for each £100 expended for twenty-five years, or (*b*) a bond and disposition in security for three-fourths of the sum expended. Under the Rutherfurd Act (11 & 12 Vict. c. 36, s. 4) and the Entail Act, 1882 (45 & 46 Vict. c. 53, s. 4), power is given to every heir of entail to burden his estate on obtaining the same consents, if any, which would entitle him to disentail. These depend on whether the heir was born before or after the date of the entail, and will be found under the heading ENTAIL. In every case in which a security affecting the fee of the estate is granted by an heir of entail, the authority of the Court must be obtained by petition. Any judgment of the Court authorising any instrument of disentail, disposition, or bond and disposition in security, if not brought under review by appeal to the House of Lords, and if no action of reduction has been brought during the two years during which such an appeal is competent, is no longer, as regards third parties dealing *bonâ fide* on the faith thereof, reducible on the ground of any irregularity or non-compliance with the provisions of the entail Statutes (16 & 17 Vict. c. 94, s. 24; 45 & 46 Vict. c. 53, s. 29; *Viscount Fincastle*, 1876, 3 R. 345).

Securities granted on Incomplete Title.—The granter of a heritable security may be a person who holds lands on a *jus crediti*, without any formal or valid title. This may occur if the security is granted while the granter's title rests merely on missives of sale, or is merely a right to demand a conveyance from trustees, or is open to some objection which is fatal to his feudal title without interfering with his personal right to the lands (*Struchan*, 1776, M. App. *voce* "Adjudication," No. 7; *Edmond*, 1855, 18 D. 47; affd. 1858, 3 Macq. 116; *Paul*, 1835, 13 S. 818). The effect of a security granted in any of these circumstances is to place the creditor in the position of an assignee of a *jus crediti*, or personal obligation, but not to give him a real right over the lands. His security may be completed, in a question with the granter, his creditors or anyone deriving right from him, either by registration of the bond in the Register of Sasines, or by intimation to the party or parties who are debtors in the *jus crediti* (*Edmond, cit.*). He then is placed in the position of the holder of an intimated assignation. He is, however, exposed to the danger that his right may be excluded by a subsequent disposition granted by the person infeft in the lands, which, if duly made real by infeftment, would be preferable to the right of the granter of the security, and therefore to that of the security holder (*Calder*, 1806, Hume, 440). In such cases the security may be completed either by

the completion of the title of the granter, which will accresce to the title of the grantee (*Swan*, 1866, 4 M. 663; *Smith*, 1869, 8 M. 204), or by an action of adjudication in implement, directed against the person last infeft in the lands (*M'Gregor*, 1843, 5 D. 888; *Watson*, 1868, 6 M. 258).

Again, the granter of a heritable security may be the holder of a personal right to lands, *i.e.* he may have a right to take infeftment, but not have done so. The distinction between this case and the one above considered is that the holder of a personal right can take infeftment without the intervention of any third party, while the holder of a *jus crediti* requires a conveyance, voluntary or judicial, from the person who is debtor therein. The ordinary cases of securities granted on a personal right arise when the granter has a disposition in his favour, on which he has not taken infeftment, or where he is an heir who has not made up a title, but possesses on the personal right conferred by sec. 9 of the Conveyancing Act, 1874. In such cases the security holder is exposed to a double risk. His right may be excluded by a disposition granted by the party infeft in the lands (*Calder*, 1806, Hume, 440; Bell, *Prin.* 772), or by a conveyance subsequently granted by the granter of the security, but made real before it (*Auchincloss*, 1894, 21 R. 1091; see *Bell*, 1737, M. 2848; 2 Ross, L. C. 410 (Adjudger)). The defect in the title of the security holder may be cured either by accretion, if the title of the granter of the security is completed (*Glassford's Exrs.*, 1850, 12 D. 893; *Smith*, 1869, 8 M. 204), or by the methods provided by the Consolidation Act, 1868. Under that Act, if the granter of the security is the disponee in a general disposition, the grantee may complete his title by expeding and recording a notarial instrument in the form of Sched. L, setting forth the title of the granter, and the title, or series of titles, by which his own right was acquired (Consolidation Act, 1868, s. 19). If the granter was in right of a specific disposition of the lands, the grantee may either record that disposition, together with a notarial instrument in the form of Sched. N, or expede and record a notarial instrument in the form of Sched. J (s. 23). It would seem somewhat doubtful whether the creditor in a security granted by an heir holding a personal right can complete his title without an action of adjudication in implement. A method for the completion of the title of a disponee from an heir is provided by the Conveyancing Act, 1874 (s. 10, Sched. E), but it seems doubtful whether its use is competent to a security holder, at least if the security is *ex facie* redeemable.

Reduction of Title of Granter.—The reduction of the title of the granter of a heritable security does not necessarily avoid the right of the creditor. If a party holds land on a title which is good on the face of the records, it would appear that a heritable security granted by him for onerous causes, and duly made real, would form a valid burden on the lands, even although the title of the granter were ultimately reduced on some latent ground (*Heron*, 1749, 3 Ross, L. C. 243; *Calder*, 1806, Hume, 440). The principle of these cases would not hold if the title of the granter were actually under challenge at the date of the granting of the security (*Wauchope*, 1817, 3 Ross, L. C. 259), or, probably, if the title of the granter were an absolute nullity, if, for instance, it were founded on a forged deed (see Lord Kilkerran's note to Heron, *cit.* in 3 Ross, L. C., at p. 248). And if the title of the granter was subject to an objection which a proper search would have disclosed, the security will be avoided on that title being reduced. Thus, in a recent case, a testator disponed lands to A., subject to the provision that "in the event of A. dying without leaving any male heir of his body" the lands should revert back to B. A. never made up any title

under the disposition, but, during his lifetime, B. expede and recorded a notarial instrument thereon, which was registered on his behalf "in eventual fee." This title was reduced at the instance of the testamentary trustees of A., and, in a question as to the position of a lessee under a lease granted by B., it was pointed out by Lord Trayner, that as B.'s title was defective on the face of it, no real right granted by him could affect the lands after his title was reduced (*Reid's Tr.*, 1896, 23 R. 636).

International Law of Heritable Securities.—The question as to the international law of heritable securities is not directly settled by any Scotch decision. But there can be no doubt that the effect of a security, as a real right in land, must be determined by the *lex loci rei sitæ*, and therefore that a question as to a heritable security over heritage in Scotland would be decided by Scotch law, even although the granter or grantee, or both of them, were domiciled abroad (cf. *Mackintosh*, 1895, 22 R. 345 (Lease)). In England it has been held that the question as to what terms were sufficient to carry Scotch heritage must be determined by Scotch law, in the construction of an English will (*Johnstone*, 1817, 4 Madd. 474, note). Similarly, where an English company issued obligations purporting to charge heritable property situated in Florence, it was held that the validity of these charges must be determined by Italian law (*Norton*, 1877, 7 Ch. Div. 332).

Heritable Securities in competition with other Rights.—In a question between two securities over the same subject, the criterion of preference is not the date of granting, or the form of the security, but the date at which infeftment is taken, or, in modern practice, the date at which the disposition constituting the security, or a notarial instrument upon it, is recorded in the Register of Sasines (Stair, iii. 1. 21; Ersk. ii. 3. 48; Act 1617, c. 16; 31 & 32 Vict. c. 101, s. 120). The special rules in the case where the subject of the security is a lease will be found under the heading Lease. The fact that a security may be granted in the form of an absolute disposition is immaterial in a question with other heritable creditors, as, in a question with such creditors, the rights and liabilities of such a disponee are those of a creditor (*Liqrs. of City of Glasgow Bank*, 1882, 9 R. 689). Among other rights over land with which a heritable security may be brought into competition, those of importance are—(1) public burdens; (2) feu-duty; (3) terce; (4) rights acquired by diligence.

Public Burdens.—All ordinary public burdens are a first charge on the property on which they are laid, and are therefore preferable to the right of a heritable creditor, whether in possession or not (Poor-Law Act, 1845, s. 88; Taxes Management Act, 1880, s. 4; Preferential Payments in Bankruptcy Act, 1888; *North British Property Invest. Co.*, 1888, 15 R. 885). It may be more doubtful whether a special local rate is preferable. The question will depend on the terms of the Act under which it is levied, but there is a strong presumption, which will only yield to very unequivocal terms, that such a rate is to be preferable to all private interests (*Greenock Board of Police*, 1885, 12 R. 832).

Rights of Superior.—Feu-duty and the casualty of relief are burdens on land preferable to any heritable security (Ersk. ii. 5. 50). The casualty of composition, if taxed and expressly stipulated, is a *debitum fundi*, and thus preferable to all real rights subsequently granted; but it is still doubtful whether an untaxed composition can be regarded as more than a personal obligation of the vassal (*Stewart*, 1880, 8 R. 270). A stipulation for an increase of the feu-duty at certain fixed periods, under sec. 23 of the

Conveyancing Act, 1874, doubtless creates a *debitum fundi*, and is preferable.

Widow's Terce.—The real right of a heritable creditor cannot be brought *in computo* with terce, that is, the creditor cannot uplift the rents of the subjects affected by the terce and apply them in reduction of his debt or interest, except to the extent of one-third of the interest, for which the widow is liable (*Belschier*, 1780, M. 15863; *Whisr*, 1895, 3 S. L. T. No. 11).

Adjudger.—An adjudger ranks with a heritable creditor according to the date of their respective infeftments (Stair, iv. 35. 8). At common law, however, it was held that the raising of an action of adjudication rendered the subjects litigious, with the effect that no infeftment taken after the raising of the action could rank before the adjudger's right, provided that there was no undue delay in the completion of the diligence (Stair, iv. 35. 17: *Wallace*, 1736, 1 Ross, L. C. 228; *Duchess of Douglas*, 1764, 1 Ross, L. C. 233). For this rule the Consolidation Act, 1868 (s. 159), has substituted a provision whereby an adjudger can render the subjects litigious by recording in the Register of Sasines a notice of the signeted summons of adjudication, without which the action has now no effect in rendering the subject litigious. A more complicated question of preference arises when two or more adjudications are led, and a heritable security is completed after the first but before the others. By the Act 1661, c. 62, all adjudications led before that first made effectual, and all led within a year and a day thereafter, rank *pari passu*. (See ADJUDICATION.) The difficulty which arises in ranking a heritable creditor and two adjudgers, who *inter se* rank *pari passu*, but of whom one is preferable, and the other postponed, to the heritable security, has been solved as follows:—The prior adjudger is ranked for his whole debt in preference to the heritable creditor, who is then ranked on the balance in preference to the second adjudger. The second adjudger is then entitled to draw from the ranking of the first adjudger the amount by which that ranking exceeds what it would have been had the heritable security never existed, and the question been one with adjudgers alone (Bell, *Com.* ii. 404; *Binning*, 1747, 1 Ross, L. C. 248; *Chalmers*, 1737, 1 Ross, L. C. 253).

Inhibition.—An inhibition strikes at all heritable securities afterwards granted by the party against whom it is used, unless the subject of the security is acquired after the inhibition is used (Consolidation Act, 1868, s. 137). The date of an inhibition is the date at which it is registered in the General Register of Inhibitions, unless, before or after its execution, a notice is registered in that Register, when, if the inhibition and the execution thereof are duly registered within twenty-one days from the date of the registration of the notice, that date is held to be the date of the inhibition (Consolidation Act, 1868, s. 155, Sched. PP). The inhibition strikes at all voluntary real rights granted after its date to the effect of entitling the inhibitor to reduce the real right in question, so far as he is prejudiced thereby, *ex capite inhibitionis* (Stair, iv. 50; Bell, *Prin.* 2310). It does not, however, strike at a security granted before its date but completed after it, or, probably, at a security granted after the inhibition in pursuance of a prior obligation to grant it (*Livingston*, 1842, 5 D. 1). When there are several heritable securities affected by a prior inhibition, the burden of the inhibitor's right falls entirely on the security which is lowest in the ranking (*Creditors of Langton*, 1760, M. 6995). Questions of some complication have arisen in cases where the rights of inhibitors, adjudgers, and heritable creditors over the estate of the common debtor have come into conflict. The canons of ranking in such circumstances

will be found drawn out in Bell's *Com.* (ii. 413), in terms which have received the approval of the Court (*Baird and Brown*, 1872, 10 M. 414).

Heritable Securities in Debtor's Succession.—On the death of the debtor in a heritable security, his whole estate, heritable and moveable, is liable to the creditor, who is not bound to discuss the heir before proceeding against the executor (*M'Gillivray's Exrs.*, 1857, 19 D. 1099). The liability of an executor is limited by the value of the estate to which he confirms (*Renton*, 1851, 14 D. 35); of an heir, by the value of the estate to which he succeeds (Conveyancing Act, 1874, s. 12); of a disponee or legatee, by the value of the estate disponed or left to him (*Bruce*, 1826, 5 S. 119; *Welch's Exrs.*, 1896, 23 R. 772). The personal obligation in any heritable security (not including a security by *ex facie* absolute disposition) transmits against any person taking the estate by succession, gift, or bequest, and forms a burden on his title in the same way as it did on that of his ancestor or author (Conveyancing Act, 1874, s. 47: or see *Lamb*, 1889, 27 S. L. R. 242; *Welch's Exrs., supra*). If, however, a creditor elects to proceed against heirs, he must discuss them in a certain order. The heir who succeeds to the particular subject, or is burdened with the obligation, must be discussed before calling on the heir-at-law, and, under a settlement in favour of heirs-male, the heir of line must be discussed before the heir-male (Ersk. iii. 8. 52). In a question between the representatives of the debtor, on intestacy, the burden of the heritable security must be borne by the heir, and the executor, on payment, is entitled to relief (Ersk. iii. 9. 48; *Duncan*, 1883, 10 R. 1042). Premonition of payment given before the death, however, probably makes the burden fall on the executor (*Earl of Minto*, 1825, 1 W. & S. 678). The mere fact that the subjects of the security are insufficient to meet the debt, or that the security would, in a question with other creditors, be reducible, does not relieve the heir (*Bell's Tr.*, 1884, 12 R. 85); but the question may still be open, whether the granting of a heritable security as an additional safeguard to a large debt primarily secured over moveable property will render the whole debt heritable and a burden on the heir. In testate succession, a direction, or a distinct evidence of intention, as to the estate from which a heritable debt should be paid, will render it a burden on that estate (*Macleod's Tr.*, 1871, 9 M. 903), but the general rule is that the disponee of the estate subject to the burden is liable for it, even if there is a general direction to executors to pay all debts (*Fraser*, 1804, M. App. "Heir and Executor," No. 3; affd. 3 Pat. 642; *Douglas's Tr.*, 1868, 6 M. 223). When two estates are burdened with a bond, and are left to different disponees, the burden of the bond must be borne rateably, according to the value of the estates, under deduction of any charge preferable to the bond which may happen to affect either estate (*Ferrier*, 1896, 23 R. 703).

Succession to Creditor.—In the succession of the creditor, heritable securities, including real burdens (Conveyancing Act, 1874, s. 30), and securities over leases (*Stroyan*, 1890, 17 R. 1170), but not including an absolute disposition with a back bond (Consolidation Act, 1868, s. 3), are now moveable (Consolidation Act, 1868, s. 117). They are still, however, heritable in successions opening before 31 December 1868 (*Brown*, 1870, 8 M. 439); where the security is expressly taken in favour of executors; and in regard to questions of *legitim*, taxation, rights of courtesy and terce, *jus mariti* and *jus relictæ* (Consolidation Act, 1868, s. 117; see *Hare*, 1889, 17 R. 105). It has been held that heritable securities fell under a *mortis causa* disposition of moveable estate (*Guthrie*, 1880, 8 R. 34), but that a heritable security to which a wife succeeded as next of kin of the creditor

did not fall under the *jus mariti* of her husband (*Hodge*, 1879, 7 R. 259). A security in which executors are not excluded may be rendered heritable, (*a*) where the bond or a notarial instrument thereon is recorded in the Register of Sasines, by recording a minute in the form of Schedule DD of the Consolidation Act; and (*b*) where neither the bond nor a notarial instrument thereon is recorded, by endorsing a minute in the form of Schedule DD on the bond, and recording it with that endorsation in the Register of Sasines (Consolidation Act, 1868, s. 117). The exclusion of executors, whether effected in the bond or by minute, may be removed either by the creditor recording a minute in the form of Schedule EE of the 1868 Act in the Register of Sasines, or by his assigning, conveying, or bequeathing the bond to himself or any other person, without repeating the exclusion of executors, when the bond becomes moveable on such assignation, etc., taking effect (Consolidation Act, s. 117).

Position of Creditor in Contracts made by Debtor.—The rights and remedies of the creditor in a heritable security depend largely upon the form of security adopted, and are treated of under the headings Absolute Disposition, Bond and Disposition in Security, and Burden. The more general question as to the position of the creditor in regard to contracts entered into by the debtor with relation to the subjects may be discussed here. The general principle would seem to be, that the debtor, so long as he is allowed to remain in possession, is entitled to carry on the ordinary management of the subjects, and that his acts of ordinary management, such as the granting of leases, will be binding on the creditor. But the creditor is not bound by, nor entitled to enforce, contracts relating to the subjects which fall outside the ordinary powers of management, and to which he was not a party. Thus a debtor, in feuing part of lands which were subject to a security, undertook certain personal obligations in the nature of building restrictions with regard to the part still unfeued. It was held that these were not binding on a purchaser from the heritable creditor, and the opinion was indicated that it was more than doubtful whether they would have been binding even if they had been expressed as conditions of the feu rights (*Morier*, 1895, 23 R. 67). Conversely, the opinion has been expressed, that if the debtor enters into a contract of sale of the subjects and allows the purchaser to resile, the creditor has no title to insist on the fulfilment of the contract of sale (*Smith*, 1895, 23 R. 60). And where the proprietor of bonded subjects entered into a contract with a neighbouring proprietor, whereby each undertook certain obligations with a view to making a private access to the subjects, and failed to perform his part of these obligations, it was held that the creditor had no title to oppose an action of reduction of the contract at the instance of the neighbouring proprietor (*Heron*, 1893, 20 R. 1001). These principles make it important, in arranging a bond or other security over property which it is proposed to feu, to reserve power to the debtor to feu, and to take the creditor bound to restrict his security to the feu-duty, and also to consent to an allocation thereof (Bell, *Convey.* 1177: *Jurid. Styles*, 5th ed., i. 415). On the part of the creditor, care should be taken that the debtor is precluded from entering into any contract with the feuars which would give the latter the right to retain the feu-duty in case of non-fulfilment, as such a right of retention would be as effectual in a question with the creditor as with the debtor. Thus, a bond was granted under reservation of power to feu, and the creditor was taken bound to restrict his security to the feu-duty. In granting the feus, the debtor undertook to lay out certain streets and drains, but became bankrupt without fulfilling these obligations. It was held that

the feuars were entitled to retain the feu-duty until these obligations were fulfilled, in a question with the creditor in the bond (*Arnott's Trs.*, 1881, 9 R. 89).

Extinction of Heritable Security.—A heritable security should be extinguished by formal redemption, the exact manner depending on the form of security. But as the security is a mere accessory to a debt (*M'Cutcheon*, 1876, 3 R. 565), it may also be extinguished by that debt ceasing to exist. Payment of the debt for which the security is granted will extinguish it in a question with the granter, his representatives, or his trustee in bankruptcy (Stair, ii. 3. 48; *Wylie*, 1803, 3 Ross, L. C. 136, per Ld. Pres. Campbell). In a question with an assignee of the bond, payment to the original creditor will be good if made before intimation of the assignation was received, and before the original creditor was divested by the completion of the right of the assignee (*Macdowal*, 1714, M. 576; *Woodmass*, 1825, 3 S. 476). Again, if the creditor enters into possession and uplifts the rents of the subjects, he is bound to account for his intromissions, and if he retains from the rents a sum more than sufficient to pay interest, his debt and security will be *pro tanto* diminished, and a defence founded on the creditor's intromissions is good in a question with an assignee from him (*Baillie*, 1711, 3 Ross, L. C. 713). A heritable security may be extinguished by compensation, if the bondholder is otherwise indebted to the debtor in an equal or greater amount. Compensation may take place, even although one debt is unsecured and the other secured (*Hay*, 1712, M. 2571), but it does not take effect unless pleaded (Bell, *Prin.* s. 575). When pleaded, the effect is that the two debts are held to be extinguished from the date at which the *concursus crediti et debiti* took place, and the assignee of a heritable security is therefore exposed to the risk of finding his debt and security extinguished by compensation with a debt due by his cedent to the debtor in the security, provided that the *concursus* took place before the assignation (*Rankin*, 1680, 2 Ross, L. C. 707; *Shiells*, 1876, 4 R. 250). Again, a heritable security may be extinguished by confusion, when the capacities of debtor and creditor are united in the same person. This may occur by the granter acquiring the bond, or by the grantee acquiring the subjects over which the bond is granted. In either case the bond is extinguished *confusione*, and cannot be kept up as a separate and independent right (*Love*, 1863, 2 M. 22; *Murray*, 1890, 18 R. 287; cf. *Mackenzie*, 1838, 16 S. 311; affd. M'L. & R. 117). Confusion, however, does not take place when a person obtains right to the bond in a different capacity from that in which he holds the subjects (*Fleming*, 1868, 6 M. 363), or when his right to the bond is absolute, and his right to the subjects limited or postponed. Thus, a fiar may take an assignation to a bond affecting the estate, and keep it up as a subsisting obligation against the liferenter (*Fraser*, 1875, 2 R. 595). And an heir of entail may acquire securities affecting the estate, and maintain them as burdens, or assign them to a third party (*Welsh*, 1837, 15 S. 537; *Macalister*, 1865, 4 M. 245). On paying off such a burden he should be careful to take an assignation to it, as it is doubtful whether, if a mere discharge were taken, the security would not be held to be extinguished *confusione* (*Duke of Roxburgh*, 1825, 1 W. & S. 41).

[See Absolute Disposition with Back Bond; Bond and Disposition in Security; Burden; Lease; Stair, ii. v. and ii. x.; Ersk. ii. viii.; Ross, *Lectures*, ii. 320; Menzies, *Conveyancing*, 842; Montgomery Bell, *Conveyancing*, 3rd ed., ii. 1151.]

Heritage, Proof of Obligations regarding.—So long as matters are entire, heritable rights can be constituted and transmitted by probative writings only. Till the writing is completed there is *locus pœnitentiæ* (Stair, i. 10. 9; Ersk. iii. 2. 2; iv. 2. 20; 1 Bell, *Com.* 328; *Gowans' Trs.*, 1862, 24 D. 1382; *Walker*, 1863, 1 M. 417). As instances of the application of the rule may be taken, the case of the constitution of a negative servitude (*Gray*, 1792, Mor. 14513; *Cowan*, 1872, 10 M. 735; see also *Dundas*, 1886, 13 R. 759. *Mutrie*, 26 June 1810, F. C., and *Johnstone*, 1829, 7 S. 732, are not to be followed), of a positive servitude resting on express grant (*Kincaid*, 1750, M. 8403; see SERVITUDE), of a lease of heritable subjects for a period longer than a year (Stair, ii. 9. 4; Ersk. iii. 2. 2), and of a contract of submission or decree-arbitral regarding heritage (*Otto*, 1871, 9 M. 660; *Robertson*, 1885, 12 R. 419). So, too, effect has been given to the principle where an offerer claimed that he, and not the bidder preferred by the judge of the roup, was entitled to the subjects (*Aberdein*, 1867, 5 M. 726; *Shiell*, 1874, 1 R. 1083); and it has been held that a contract resting upon an offer signed by, not holograph of, the offerer, and a letter of acceptance holograph of, and signed by, the acceptor, might be resiled from (*Goldston*, 1868, 7 M. 188; *Scottish Lands & Building Co.*, 1880, 7 R. 756; *Malcolm*, 1891, 19 R. 278. As to the effect of an unilateral promise to convey lands, see *Goldston* and *Malcolm*, *ut supra*. As to holograph missives passing between the agents of the parties, see HOLOGRAPH WRITINGS). Further, the rule has been applied in an action of damages for non-implement (*Allan*, 1875, 2 R. 587). But the case is different where the question is not as to the constitution or implement of a contract, but as to a claim for reimbursement of outlays made on the faith of an arrangement between the parties (*Walker*, 1823, 2 S. 379; *Bell*, 1841, 3 D. 1201; *Heddle*, 1846, 8 D. 376; *Dobbie*, 1873, 11 M. 749; *Allan*, *ut supra*). An agreement by A. to relieve B. of the rent of certain heritable subjects until the expiry of the lease was held not to be a contract relating to heritage, although it was part of the bargain that the subjects should be transferred to A., on the landlord's consent being obtained (*Kinninmont*, 1892, 20 R. 133).

While a probative writing is essential when the case is *in nudis finibus contractus*, an improbative writing or a verbal agreement may be perfected *rei interventu*. The *rei interventus* may be proved by parole: but the verbal agreement can be proved only by writing (see *Bryan*, 1892, 19 R. 490), or by the oath of party (*Gowans' Trs.* and *Walker*, *ut supra*).

[Dickson, *Evidence*, ss. 549–556.] See LEASE; REI INTERVENTUS; STAMPS.

Heritors.—The term *heritor* anciently meant an owner in fee of the *dominium utile*, in other words, it indicated all the landowners in a parish, but in modern times the use of the term is restricted to indicate that class in reference to its liability for the building and repairing of church and manse in the parish. Neither superiors, titulars, liferenters, nor tenants, even though holders of long leases, are heritors. A body such as a railway company may be a heritor. Female proprietors are heritors, and may attend and vote, or may grant a proxy. The constituent members of the body of heritors of a parish varies according as the basis of assessment is the valued rent of the seventeenth century or the real rent. In the former case the Cess Roll, in the latter the current Valuation Roll, is *primâ facie*, but not conclusive, evidence of a person being a heritor.

Heritors' assessments are personal claims, and not *debita fundi*. There are several modes of calling a meeting of heritors, but where the number is considerable it is desirable to adopt the procedure of the Ecclesiastical Buildings Act, 1868, by which, when the heritors exceed forty in number, it is optional to dispense with individual citation, and to substitute newspaper advertisement. But if this mode be adopted, there is this difficulty, that as under the Act notice of twenty-one days is necessary, every adjournment of a meeting would require the same notice. One heritor can constitute a meeting—indeed, in some parishes there is only one heritor altogether. There is no permanent chairman, but each meeting elects one for the occasion. He has no casting vote, as at common law no chairman possesses such a power. The principal obligations of heritors are "the building, rebuilding, or repairing of churches or manses, or the designing or excambing of sites therefor, or the designing or excambing of glebes, or additions to glebes, or the designing or excambing of sites for additions to churchyards, and the suitable maintenance thereof (including the building, rebuilding, or repairing of churchyard walls)." It seems doubtful if there is any obligation on heritors to fence a glebe.

The rules which determine whether an assessment is to be imposed on the real-rent heritors or the valued-rent heritors depend on the following points: (1) whether the parish is landward, burghal, or burghal-landward; (2) whether the present circumstances of the parish make it now inequitable that the valued rent should be taken; (3) whether the proviso of the Ecclesiastical Buildings Act, 1868, applies as to the obligation when the seats have been allocated by the valued rent; and (4) whether it is a case of building or of repairs only. The following cases lay down the principles: *Nesting*, 1873, 11 M. 755; *Kinclaven*, 1870, 8 M. 858: *Peterhead*, 4 Pat. 356: *Mauchline*, 1837, 15 So. 1148; *Duddingston*, 1870, 8 M. 733; *Annan*, 1883, 11 R. 47; *Govan*, 1887, 14 R. 910.

An important point as yet undecided is whether, when the rule that the valued-rent basis of assessment is compulsory as to the church owing to the provision of the Ecclesiastical Buildings Act, 1868, in the case of the seats having been allocated by the valued rent, this extends to the manse, a term not used in the Act. In other words, the question is, Can there be two sets of heritors, one for the church assessments and another for the manse,—where it is equitable that the real rent should be taken in the latter case? It is thought that there should be two such modes of assessment. For instance, if it were found necessary to bring in an expensive water supply to a manse, if the incidence of the assessment by the valued rent would be on a fraction of the value of the parish, it would be unreasonable to prevent effect being given to the equity of assessing by the real rent, by straining the term "ecclesiastical building" to the manse.—[See Duncan, *Parochial Ecclesiastical Law*, and Black, *Parochial Ecclesiastical Law*.]

Hermogenian Code.—See CODEX.

Hership.—*Hership* or *depredation* was "the driving away of numbers of cattle, or other bestial, by the masterful force of armed people" (Hume, i. 110). Hume (*ib.*) mentions two cases where the cattle were driven off in presence of the owners or their people. "But even when the cattle are taken in the absence of the owners or their servants, who fly

perhaps on the approach of such a crew, it is still a case of violent and masterful taking, or *brigancy* (as it is sometimes called), and stouthrief, and not of simple theft; on account of the circumstances of open force and alarm to the neighbourhood with which the spoil is committed" (*ib.*).

Highways.—A highway is simply a public right of passage (see Rankine, *Landownership*, 3rd ed., p. 290, and cases there cited). The land on which the highway runs remains fully vested *a celo usque ad centrum* in the feudal proprietor, whose use of it is limited only so far as is necessary for the enjoyment of the right of passage by the public. This was declared to be the law of Scotland by the House of Lords in *Galbreath*, 1845, 4 Bell's App. 374.

It thus appears that the phraseology of some of the institutional writers and of many judges is at fault in ascribing to the Crown a right of property in the *solum* of highways (*e.g.* Craig, i. 16. 10; Ersk. ii. 1. 5; Bankt. i. 3. 4). That there was among feudal lawyers a tendency to take this view sufficiently appears from the section of the Regiam Majestatem (ii. 68, *Thomson's Acts*, i. 622), which declares the obstructing of public roads to be purpresture. The tendency was probably due to the neglect to distinguish between different kinds of *regalia*, viz. those which are patrimonial rights of the Crown, and those (*res publicæ*) in which the Crown is merely trustee for the public *fictione juris*. There is a failure to elucidate the character and the extent of the Crown's right of property in *regalia* of the latter class, and, indeed, there are passages which are in no way inconsistent with the view (now settled to be the sound view) that these are incorporeal rights (Stair, ii. 1. 5, and ii. 7. 10; Ersk. ii. 6. 17; Bell, *Prin.* s. 638). The chief Scotch decisions are *Galbreath, supra*; *Waddell*, 1868, 6 M. 690: *Sutherland*, 1876, 3 R. 485. These settle the law that the right of highway confers on the public "a right to use the surface of the ground for the purposes of locomotion, but no right to use the *solum* except in so far as is necessary to ensure the safety of the public" (per Ld. Curriehill in *Waddell, supra*). So—apart from Statute—grass and trees above, and minerals below, the road, are the property of the owner of the *solum* (per Ld. Campbell in *Marquis of Breadalbane*, 1848, 7 Bell's App. 43: contrast Stair, ii. 1. 7). The law is similar as to the *solum* of harbours (*Scrabster Harbour Trustees*, 1864, 2 M. 884; *Milne Home*, 1868, 6 M. 189). It is of course competent for road authorities to acquire the *solum*, but this must be done expressly. Where they take land for road purposes under statutory authority, it is assumed that they take only the right of passage (*Waddell, supra*).

The right is one of passage to the public at large. The highway cannot be encroached upon or obstructed (*Forbes*, 1783, Mor. 13185), even by the local authorities charged with their maintenance, except with the authority of the Legislature (*Magistrates of Montrose*, 1762, Mor. 13175; *Oyston*, 1896, 24 S. L. R. 169, per Ld. Watson).

In the matter of the maintenance of highways there is a fundamental difference between Scots law and English law. In England, there is a common-law obligation on the parish to maintain its highways. In Scotland, there is no such obligation. No one is under any duty to repair highways unless the obligation has been imposed by Statute (see Report of Royal Commission on Roads in Scotland, 1859).

Accordingly, as Professor Rankine points out, there is in Scots law, apart from Statute, no distinction between highways publicly maintained and public rights of way, except that the former are under public manage-

ment, and the latter are not. Both fall under the description of "highways."

History of Legislation.—The earliest Scots Statutes on the subject provide that all common "hie gaittis" for passage from or to free burghs, and specially all "hie gaittis fra free dry Burrowes to the Portis and havinnis next adjacent, be kept without impediment by any one" (1555, c. 53; 1592, c. 78). The Act 1617, c. 8 (re-enacted by 1661, c. 38), empowered the justices of the peace to mend highways and passages to or from market towns and seaports, and also roads to the parish church. It declared that highways to market towns shall have a minimum width of twenty feet, and gave the justices power to punish those who refused to mend highways and passages. But the Act did not provide any efficient method of securing the necessary labour.

The result of the more effective legislation which followed was to create three classes of roads.

1. *Statute-labour Roads*, called also *Commutation* or *Parish Roads*, were formed and maintained under the following general Statutes, viz. 1669, c. 37 (the leading Statute), amended by 1670, c. 13; 1686, c. 13; 5 Geo. I. c. 30; 11 Geo. III. c. 53; 8 & 9 Vict. c. 41. All of these are repealed either expressly or by implication by the Acts of 1878 and 1889, afterwards referred to. Their policy was to intrust the supervision of highways, bridges, and ferries to the justices of the peace of each county, with whom were associated, in 1686, the Commissioners of Supply. The highways were to be maintained by requiring so many days' labour (not more than six) from all tenants, cottars, and servants; hence the name *Statute-labour* roads. In certain cases the labour might be commuted for a money payment; hence the name *Commutation* roads. The parishes were to be apportioned to the highways, so as to put the burden equally on them; hence the name *Parish* roads. Any expense not thus defrayed was levied by stenting the heritors at a rate not exceeding 10s. Scots per £100 of valued rent. However, in the course of time local Acts were obtained to regulate the management and maintenance of these roads, so that the general Statute-Labour Acts were practically superseded.

2. *Turnpike Roads.*—By 1669, c. 37, the Privy Council was empowered to sanction the levying of customs at "bridges, calseys, or ferries," for repairing them, where the stent is insufficient; and the levying of such customs is referred to in 1686, c. 13. The power was rescinded by 5 Geo. I. c. 30; but it had been exercised in not a few cases, and the demand for better roads led to Parliament sanctioning many local Turnpike Acts, authorising the levying of specified tolls on those who used the improved roads sanctioned by the Acts. The earliest Scotch Turnpike Road Act was passed in 1713, and more than three hundred and fifty such Acts were passed between 1750 and 1844 (Report of Royal Commission on Roads, *supra*). The first general Turnpike Act for Scotland was 4 Geo. IV. c. 49, repealed and in the main re-enacted by 1 & 2 Will. IV. c. 43, which in its turn was repealed by the Statute Law Revision Act of 1890, except in so far as it is embodied in the Roads and Bridges Act, 1878, Sched. C.

3. *Military and Parliamentary Roads.*—These were situated almost entirely in the Highlands. The Military roads (General Wade's) were formed after the rebellion of 1745. The Parliamentary roads were constructed under 43 Geo. III. c. 80, Parliament providing half the cost. Parliamentary assistance was, for a time, given to the upkeep of these roads, and power was given to levy tolls (4 Geo. IV. c. 56), in addition to the powers of assessment previously conferred. These roads were finally

transferred to the management of the county road authorities by the Highlands Roads and Bridges Act, 1862 (25 & 26 Vict. c. 105).

The management of highways is now regulated by the Roads and Bridges Act, 1878 (41 & 42 Vict. c. 51), as modified by the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50); and as regards streets in burghs, by the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55).

See Roads and Bridges; Right of Way.

Hinc inde—On either side—On this side and the other.—These words are used in connection with any process, account, or transaction. Thus the "claims of parties *hinc inde*" is a phrase constantly employed, signifying the claims of parties against each other.

Hiring.—This contract has many of the same qualities as the contract of sale, to which it has been compared by several writers (Stair, i. 15. 1; Ersk. iii. 3. 14; 1 Bell, *Com.* 481). But as the property of the subject is not transferred, as in the case of sale, the contract of hiring differs from it in many of its incidents. In the Roman law the contract of hiring was known as *locatio-conductio*. The lessor was the locator, and the hirer the conductor. By this contract the lessor contracts to give for a period of time the use of a certain thing or of personal services and labour, or of both combined. It may refer to lands, houses, and real estate or moveables, or service or of work to be performed. The essentials of the contract are that there should be a thing or service hired for a period which can be readily determined, and for a hire either expressed or to be fixed by reference to some standard.

The contract is completed by consent alone, and may be proved by parole evidence, except in the cases of leases of heritable subjects, or contracts of service for more than a year. If the contract is in writing, then parole evidence is not competent to alter or vary the written contract.

The obligations on the lessor are, to deliver the thing or perform the service stipulated for, and to maintain the hirer in the occupation of the thing hired against all third parties. The obligations on the hirer are, to use the thing hired according to the contract, to restore it at the end of the period fixed by the contract in the same condition, ordinary tear and wear excepted, as he received it, and to pay the stipulated hire.

The varieties of this contract may be considered under the divisions of *locatio rei* and *locatio operis*, the former comprehending the hiring of lands, houses, and moveables, including horses, cattle, ships, machinery, etc.; the latter including the hire of workmen and labourers and all the varieties of contracts for the carriage of goods (1 Bell, 452). The leasing of heritable subjects is considered in another place (see Lease); and so also are the hiring of ships (see Charter Party; Freight; Ship) and the carriage of goods (see Carrier).

Locatio rei.

The hiring of moveables is an agreement whereby the lessor binds himself to procure and to continue the free use and enjoyment of the subject to the hirer, in consideration of a hire which the latter engages to pay. It differs from the contract of sale in respect that it does not transfer the property to the hirer, who has merely the bare use of the subject let, and must

restore it at the conclusion of the contract to the lessor (Ersk. *Inst.* ii. p. 734).

(1) *The subject* must be one capable of being used and returned. According to the strict meaning of the contract, therefore, fungibles are not the proper subject of this contract, because they are consumed by the use. At the same time, the contract may be effectually constituted although specific subjects are not fixed upon, as a horse-hirer may engage to furnish horses for a carriage although the parties have not fixed on any particular horses of which the use is to be given (1 Bell, *Com.* 481). If the subject is hired for a specific use, then the lessor warrants it as being fit for the use specified. But if there is no particular use specified or implied by the circumstances in which the contract was entered into, then the lessor does not come under any guarantee that the subject is fit for any particular use by the hirer.

(2) The price for the hire must be certain or ascertainable by reference to some standard. It ought, according to the civil law, to be in money; but the best authorities in the Scottish law hold that as all the effects and conditions competent where the hire is money are competent where it is any other fungible, as oil, wheat, etc., that such are proper locations (Stair, i. 15. 1). The hire may be fixed at the time, or may be such as shall be fixed by some person agreed upon, or may be fixed according to the custom of the trade, or the Court may fix a fair price for the use or enjoyment received.

(3) The use may either be stipulated for at the time of entering into the contract, or be determined by the implied use of the subject. Thus if the thing hired be a horse with saddle and bridle, and the use specified is that the hirer may ride to a certain town or in a certain direction, then it will not be competent for him to ride in another direction. If, however, no stipulation is made as to the place to which he is to go, he may ride it in any direction he pleases, so long as he does not go beyond a fair distance: but he may not put the horse to any other purpose than that of riding.

(4) There must be contract having a legal obligation on the parties. If that is not the case, then neither party is bound. Thus the use must not be one in aid of any act prohibited by law, as the hiring of articles for use in smuggling or for immoral purposes (*Pearce* v. *Brooks*, L. R. 1 Ex. 213). The contract must be between persons competent to contract according to the ordinary rules of law of contract. Lastly, there must be free and voluntary consent between the parties, otherwise the contract may be annulled (Story on *Bailments*, 372).

1. *Obligations on the Lessor*—

(1) To deliver the subject to the hirer. The lessor is bound to procure and deliver to the hirer the subject in such condition that it may serve for the purpose for which it was let. If the thing is not in his possession at the time when the contract is entered into, he is bound to use every effort to procure it, so that he may put the hirer in possession of it. If the subject has been destroyed by accident and without any fault on his part, then the contract is at an end, and neither party has any claim against the other. But refusal to deliver on the ground of insolvency will expose the lessor's estate to a claim of damages (1 Bell, *Com.* 482). If the subject of the contract is indefinite, the destruction of any one article will not free the lessor from the obligation in the contract.

(2) To do no act which shall deprive the hirer of the thing, or the use and enjoyment of it. Once the subject is delivered, the hirer is entitled to remain in possession against the lessor and his creditors; and the lessor

is bound to maintain the hirer in the possession of it. Hence if he sell the subject, and the hirer is deprived of the possession of it by the purchaser, the lessor will be liable in damages for any loss which the hirer may suffer thereby. He is also bound not to obstruct the hirer in the use of the subject.

(3) To warrant the title and right of possession to the hirer, in order to enable him to use the thing. If anyone challenge the hirer in the use of the thing on the ground of want of title, the lessor is bound to defend the hirer's title. Should the hirer be evicted on the ground of the lessor's want of title, he will be entitled to damages. This warrandice only applies to the legal claims of third parties, and not to their wrongful acts. The hirer would have an action at his own instance against them for such illegal dispossession.

(4) To keep the thing in suitable order and repair, so that the use stipulated for may be got. The lessor must repair any defects which render the subject useless for the purpose for which it was hired. Although this is the general rule of law, it may be modified by local usage or the custom of trade. Thus the hirer of a horse is usually bound for all the ordinary expenses of its upkeep while in his possession, as food, shoeing, etc.; but if he incur extraordinary expenses, as, in the case of illness, for special veterinary attendance, etc., he will be entitled to recover them from the lessor. To ground such a claim it will be necessary to show (*a*) that the occasion of the expense was not to be ascribed to the hirer or lessee; (*b*) that the expense was indispensably necessary: (*c*) that the lessor had notice of it as soon as circumstances permitted (1 Bell, *Com.* 482).

(5) To warrant the thing free from any fault inconsistent with the proper use or enjoyment of it. This applies to all defects which go to prevent the use, whether they are known or unknown to the lessor. Otherwise the hirer would, through no fault of his own, be deprived of the use for which he contracted. The lessor would not be liable for all defects, but only for those graver ones that interfere with the use. Thus the lessor of a horse would not be responsible for a horse which was only a little restive: but if it is so restive as to interfere with the riding of it, or make it dangerous to ride, then, as the proper use of it is gone, he is liable under his warranty. The lessor is bound to disclose all the faults in the subject of the contract at the time of the hiring.

2. *The Hirer's Obligations are*—

(1) To put the thing to no other use than that for which it is hired. If he put it to any other use, he will be liable in damages. Thus if the hirer cause a horse, which he has hired for riding, to jump a fence, and it is injured, he will be liable in damages (*Barnard*, 13 C. B. (N. S.) 45). Again, it has been decided in Scotland that to take a horse, which has been hired for a ride along a road, into a grass field and gallop it there, is to go beyond the implied conditions of the contract on which the horse was hired: and the hirer was held liable in damages for the loss of the horse (*Seton*, 8 R. 236).

(2) To use the thing well and to take care of it. At one time there was much discussion as to the degree of diligence which he must display in caring for the subject, but recent authorities, both in England and Scotland, are agreed that he must exercise such care as a prudent man would show to his own property (1 Sm. L. C. 228). The question of negligence is one to be determined upon the facts of each case, and no general rule can be laid down. For example, where the hirer of a horse, which fell ill on his hands, prescribed for it himself instead of calling in a veterinary surgeon, and the horse died, he was held liable (*Dean*, 3 Camp. 4, and notes). So also

for overriding a horse, and not taking proper care of it when heated (*Campbell*, 6 S. 806). It has been decided in Scotland, that "where a man hires a horse and it falls sick or 'crooked' by the way, though he can prove that he rode it *more debito* and no farther than the place agreed on, yet the rider must further prove the *casus fortuitus quem nulla præcessit illius culpa*, nor negligence, and the defect or latent disease it had before he hired it" (*Binny*, 16 July 1669, Mor. 10079); and the same view was taken in *Pyper*, 5 D. 498. If the lessor sends his own servants with a carriage and horses which he has hired to another, then the hirer is discharged from all attention to the horses and risks of the road, and is bound only to take ordinary care of the glasses and inside of carriage, unless he officiously interferes and gives orders, and takes the management and direction of the vehicle into his own hands (Jones on *Bailments*, 88). The hirer of a horse is not liable if he has given it into the custody of a stabler, and it is stolen (*Trotter*, Mor. 10080). He is liable for the negligence of his wife and family in the use of the article hired, and also of his servants acting within the scope of their employment (1 Bell, *Com.* 485).

(3) To restore it at the time appointed. He is bound to restore it in as good a condition as he received it, ordinary tear and wear excepted, unless it has been injured by internal decay or inevitable accident (*Schroder*, 32 L. J. C. P. 150). The time, place, and manner in which the article is to be restored must be determined by the circumstances, if not fixed by the parties on entering into the contract.

(4) To pay the price or hire. If the subject has been destroyed or rendered unfit for the purpose for which it was hired by inevitable accident during the period of the contract, the hirer will be entitled to a corresponding deduction from the hire. He will also be entitled to deduct those expenses which he is entitled to recover from the lessor.

The hirer will also be bound to observe all those obligations which are prescribed by contract, or by law, or by custom.

The contract may be terminated by the mere efflux of time or the accomplishment of the object for which the thing is hired; by the loss or destruction of the thing hired by any inevitable casualty; by a voluntary dissolution of the contract by the parties; and by the operation of law, as when the hirer becomes proprietor of the thing hired (Story on *Bailments*, 417). The death of one of the parties to the contract would also seem to dissolve it, unless when a term is fixed in the contract, when it subsists till the period has expired.

Hire-purchase.—Goods are sometimes hired with the condition that if the hire of the goods is paid for a certain number of terms, then the goods become the property of the hirer. This contract is usually in writing. The hirer may at once terminate the contract by returning the goods to the lessor. The lessor remains the proprietor of the goods, and may reclaim them from any third party to whom the hirer has sold or pledged them (*Helby*, 1895, App. Ca. 471; *Murdoch & Co. Limited*, 16 R. 396). If default is made in punctual payment, as time is of the essence of the bargain, the lessor can recover the subject, and all previous payments of hire are forfeited (*Cramer*, 1883, Cab. & El. 151, per Lopes, J.; affd. on appeal, Sol. J., 1889, 780; 1889, 87 L. T. 421).

Reputed Ownership.—Sometimes difficult questions are raised by the possession of moveables by a former owner on a lower title. Possession of moveables presumes property, and the true owner must know that the power of disposing of the goods in another must give an appearance of good credit. Accordingly, where property has been sold privately, and has

afterwards been let by the purchaser to the former owner, the question as to the right to the property has often been raised between the purchaser and the creditors of the lessee. The solution of this question depends mainly on the *bona fides* of the transaction, and on the presumptions raised by the custom of trade. In the case of goods sold remaining in the custody of the seller, there is presumption of simulation raised against any inferior title flowing from the buyer which he may pretend. But this presumption will be stronger or weaker according to circumstances, and, if the good faith of the transaction is clearly proved, will altogether disappear (*Orr's Tr.*, 8 M. 936). So, again, it has been held that there is no presumption that the furniture in an hotel belongs to the hotel-keeper (*Duncunson*, 8 R. 563). As to the possession of household furniture on a lower title by a former owner, see *Pattison's Tr.*, 20 R. 806, and *Liddell's Tr.*, 20 R. 989.

Locatio operis.

This branch of the contract of hiring was divided into two heads under the civil law: (1) *Locatio conductio operarum*, when one person let his services and another hired them; (2) *Locatio conductio operis faciendi*, when one person contracted that a particular piece of work should be done, and another contracted to do it. The distinction between those two kinds of hiring is not of great importance in the law of Scotland. There is often a great resemblance between the latter—*locatio operis*—and the contract of sale. The criterion seems to be, that when the materials are supplied by the employer, and the person employed gives nothing but his skill and labour, then the contract is one of location. But if the materials as well as the labour are supplied by the workman, then the contract is one of sale. If, however, the principal material is supplied by the customer, and the workman supplies only the accessories, then the contract is still one of location (1 Bell's *Com.* 275).

Again, the contract of service may often be closely related to one of partnership. The question has often arisen where a part of the agent's or servant's remuneration was a portion of the profits of the business. It has, however, been settled by Statute that "no contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner" (28 & 29 Vict. c. 86, s. 2). Therefore, although a circumstance to be considered in each case, it is not conclusive of the agent's position as a partner.

In order to constitute the legal relation of master and servant, there must be a contract legally binding on the parties. This contract may be considered under the heads of: (1) the parties to the contract: (2) the constitution of the contract; (3) its duration; (4) the obligations on the several parties to the contract.

I. *Parties to the Contract.*—(1) Pupils cannot bind themselves, and so cannot enter into contract of service. Their tutors may, however, on their behalf: but the contract is reducible on the ground of lesion. Although the pupil is free, the other party may be bound if the contract is judged beneficial to the pupil (Ersk. *Inst.* i. 7. 33).

(2) Minors are capable of giving consent, although they usually have curators. Deeds of a minor with curators, without their consent, are null, without proof of lesion. It would therefore appear that a minor, in these circumstances, cannot enter into a contract of service, although this has been doubted (*Stevenson*, 10 M. 919). On the other hand, deeds of a

minor who has no curators, or of a minor who has curators, with their consent, are valid unless they are reduced, on proof of minority and lesion, within four years of the minor reaching majority. This contract also, although null against a minor, may be valid against the other party to it. It would appear that if a minor is engaged in trade, and hires servants, he will be bound as if he were of full age, although the contract was entered into without consent of curators; and he will not be restored on the ground of lesion (Stair, i. 6. 44; Ersk. *Inst.* 7. 44; *Heddel*, 5 June 1810, F. C.).

(3) Married Women. According to the common law of Scotland, a married woman cannot enter into a contract of service so as to bind herself. But there are several exceptions to this rule, as when a wife represents herself as unmarried (Elch. Ann. 26); or her husband is abroad, and she is engaged in business on her own account (*Churnside*, Mor. 6082; *Orme*, 12 S. 149); or he is in prison, and she has to provide for her own support. In virtue of her *prepositura*, she can hire servants suitable to her husband's position, in which case the husband alone is liable.

In each of these cases (pupil, minor, and married woman), the persons who are not *sui juris* are liable to pay a fair value for all services which are in *rem versum* to them. This includes all necessary attendance suitable to the degree in life of the employer, and all services beneficial to their estate.

II. *Constitution of the Contract.*—In order that there may be a valid contract of service, there must be final and complete consent to its terms. Until the contract is settled in its final shape, either party may resile. There must be complete agreement as to the various terms of the contract, although they may not be enumerated. Thus if no period or remuneration be mentioned, the law will presume that the customary period and rate of wages of that kind of service were intended. If an offer of service be made, the offer must be accepted within a reasonable time, otherwise it falls. There is, however, *locus pœnitentiæ* until it is accepted (Bell, *Prin.* s. 79; *Dunmore*, 9 S. 190). The acceptance must meet the offer, otherwise they do not of themselves constitute a valid contract. Like other contracts, a contract of service must not be vitiated by error, force, or fraud. In England, it has been held that where there was no fraud, mere non-disclosure of a material fact did not invalidate the contract (*Fletcher*, 42 L. J. Q. B. 55). The service contracted for must not be opposed to the ordinary rules of morality, or the policy of the common law, or the provisions of a Statute (Addison on *Contracts*, bk. i. c. 3, s. 1). Thus a printer cannot recover wages for printing an indecent book (*Poplett*, 2 C. & P. 198). So, also, all contracts or agreements to recommend parties for employment in positions of trust, in consideration of payment of money, entered into without the knowledge of the employer are null (*Waddo*, 4 B. & C. 319). If a Statute imposes a penalty on any act, a contract to perform such an act is null and void, even though there is no provision in the Statute declaring it to be so (Addison on *Contracts*, p. 83).

Form of the Contract.—According to the civil law, the contract of *locatio operis* might be verbal and proved by parole evidence. Our law has so far followed it, that contracts of service for less than a year need not be authenticated by writing. It was from the analogy of tacks of heritable subjects that the rule was introduced that contracts of service for more than a year must be in writing (*Caddel*, Mor. 12416). The contract is complete as soon as one party agrees to retain or hire, and another agrees to serve, for a certain term at a specified salary, and it may be proved by parole evidence where the period of service is less than a year. It lies with the

party founding on the contract to prove its terms, even when there is an allegation by the other party that the contract was conditional, and that the condition had not been purified (*Forbes*, 6 S. 75; *Thomson*, 9 S. 598). If there has been a verbal contract for more than one year, and there has been no *rei interventus*, it is very doubtful if the contract is valid even for one year (Bell, *Prin.* s. 173; *Paterson*, 8 S. 931). But if the servant have entered upon the service, then the contract is valid for one year, but not more (*Caddel*, *supra*). If it is stipulated that the contract should be reduced to writing, then there is *locus pœnitentiæ* till that is done, and the writing is formally executed. In order that a written contract may be valid of itself, it must be either probative or constituted by missives holograph of the parties. The rule as to writings *in re mercatoria* does not apply to contracts of service (*Stewart & M'Donald*, 7 M. 544). By 33 & 34 Vict. c. 97 (Schedule), "An agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant," is exempt from stamp duty; but this does not apply to contracts of apprenticeship, nor to an agreement for the hire of a clerk. When an agreement to serve is contained in an improbative writing, or is otherwise incomplete, it may be validated by *rei interventus* (Dickson on *Evidence*, s. 815). The doctrine "is grounded on the fact of the person, otherwise imperfectly bound, having permitted another to proceed on his obligation or agreement as if it were complete, and to perform on the faith of it acts unequivocally referable to, or resulting from, the agreement, and which, by the refusal to execute the agreement, would prove detrimental to the person so misled or encouraged to proceed" (1 Bell, *Com.* 346). Accordingly, the terms of the contract must be discovered from the informal writing, or by the oath of party; and then the *rei interventus* may be proved by parole, so as to validate the contract (*Gibson*, 3 R. 144). In a contract averred to be for more than one year, it is sometimes difficult to discover whether the acts constituting the *rei interventus* are referable to a contract for a year, or a longer period (Dickson on *Evid.* s. 834; *Napier*, Hume, *Dec.* 388). With regard to indentures of apprenticeship, it has been held that an apprentice, having entered on his service, and continued there for three years, was held to be barred from objecting to the want of legal solemnities made to the deed (*Rymer*, Mor. 5726).

Earnest, or arles, is often given in entering into contracts of service. It is a small sum of money given by one of the parties to the other to make it more evident and certain that a bargain has been completed. The giving of arles does not, like *rei interventus*, validate a contract otherwise incomplete. They do not bar *locus pœnitentiæ* where that is otherwise competent; but, on the other hand, the giving of them back will not entitle either party to resile (*Wallace*, 1800, Hume, *Dec.* 383). Where there is an established and notorious local custom that no contract of service is complete till arles are given, then there is *locus pœnitentiæ* till that is done. Arles of small amount were formerly called dead earnest, and are not to be computed part of wages.

Implied Contracts of Service.—The rule of law in England is that unless there is an express contract of hiring, there can be no claim for wages (Addison on *Contracts*, 9th ed., p. 843). So also, in Scotland, the same seems to be the ordinary rule of law (*Ritchie*, 12 D. 119; *Master of Saltoun*, 3 Bro. Supp. 337). But an exception to the general rule seems to have been allowed in cases where services, which in the ordinary case would be remunerated by wages, are rendered by persons living in the house with the employer. These persons, often relatives, may have been taken into the

house out of charity, but have remained performing various household duties. It has been held in several cases that, although there was no express contract of service and no stipulation for wages, yet for the services rendered wages may still be due (*Shepherd*, 1812, Hume, *Decisions*, 394, and other cases quoted in Fraser, *M. & S.* 40 *et seq.*; *Thomson*, 1889, 16 R. 333).

In the event of a servant claiming remuneration for services rendered beyond the ordinary scope of his duty, Ld. Deas laid down that there would require to be specification of three things: (1) of the duties of the office for which the servant was originally engaged, (2) of the extra duties performed by him, (3) of the agreement to give remuneration for the extra duties (*Latham*, 4 M. 1084).

III. *Duration of the Contract.*—The question has been raised whether a contract of service for life, or a long term of years, is void according to Scotch law, as being against good manners and Christian liberty (*Caprington*, Mor. 9454). The latest authorities seem to hold that there is no restriction by law in the period to which a contract of service may extend (Ersk. i. 7. 62; Fraser, *M. & S.* 4). The rule of the English law is that a contract of service for life is valid if contained in a duly executed deed (Chitty on *Contracts*, 13th ed., p. 524).

Whenever the period of service is fixed by the contract, the parties will be bound by its terms. The contract may be for any period, long or short, or only during pleasure, or that each party may terminate the contract by giving certain notice or paying a fixed penalty.

But it sometimes happens that no period has been fixed by the parties, when the law will presume the period from the relations of the parties, the circumstances of the case, and the custom of the district as applied to that kind of service. In England, a contract of "general hiring," as it is called, when no period is fixed, lasts for a year. In hiring menial or domestic servants, the period, if it is not fixed by the parties, is determined by law to be a year, with the right to each party to end the contract on a month's notice. In Scotland, no general rule of law has been fixed, and it depends on the circumstances and customs in each case what term will be presumed by law, if no period has been fixed by the parties. Although it is arranged that the servant shall be paid so much per week, month, or year, that does not decide the period of engagement, but it will depend on the custom as to that particular service what the law will presume to be the period of service (*Baird*, 5 Bro. Supp. 514; *Groom*, 1859, 21 D. 831; *Forsyth*, 1880, 7 R. 887).

Menial or domestic servants, especially in towns, are usually presumed to be hired for six months (Bell, *Prin.* 174). Farm-servants are presumed to be hired for a year. Gardeners are usually presumed to be hired for a year, although there is no direct decision to that effect (*Groom*, *supra*). Coachmen are in the same position as other domestic servants, and are not presumed to be hired for a year (*Scott*, 6 S. L. R. 301). Gamekeepers who are provided with a house are presumed to be engaged for a year (*Armstrong*, 9 D. 29 and 1198; *Cameron*, 10 M. 301). Farm grieves are presumed to be hired for a year (*Muir*, 7 S. 717). Tutors and governesses are usually presumed to be hired during pleasure, and the contract may be terminated on reasonable notice. But special circumstances may be proved to show that the contract was for a longer term (Bell, *Prin.* 174; *Moffat*, 1 D. 468). By the Education Act of 1872, School Boards may dismiss masters appointed by them since that date at pleasure, on reasonable notice, or money compensation in lieu thereof (35 & 36 Vict. c. 62, s. 55; *Morrison*,

3 R. 945). Private schoolmasters, in the absence of any stipulation to the contrary, hold their offices at the pleasure of the managers (Bell, *Prin.* s. 2189). Clerks, commercial agents, and managers of banks, etc., are presumed to hold their situations at the pleasure of their employers, and may be dismissed on reasonable notice being given.

Tacit Relocation.—Where due interruption or warning that the engagement is to terminate is not given by either party, the engagement is held to be renewed in all its parts from term to term by tacit relocation (Bell, *Prin.* s. 173; *Baird*, Mor. 9182, 5 Bro. Supp. 514; *Tait*, 26 Feb. 1841, 16 F. C. 658). But where the terms of the contract of service are altogether different from those usually found in contracts in that particular trade, the rule as to tacit relocation will not apply (*Lennox*, 8 R. 38). The renewal cannot be for more than a year, or such shorter period as is customary in the particular kind of service, even where the original agreement was for a longer period, because no verbal contract can be valid for more than a year (Dickson, *Master and Servant*, 58).

Warning.—There is no formal style of warning of termination of a contract of service. It is enough that notice be given at the proper period. The parties may, by their actings and communings, intimate their intention to terminate the contract without formal notice, as when a gentleman tells his coachman that he intends to give up his carriage at Whitsunday (Fraser, *Master and Servant*, 59; *Macdonell*, M. App. "Mutual Contracts," 3; *Maclean*, 4 Feb. 1813, F. C.). In the case of agricultural and domestic servants it is usual to give forty days' warning, and they would accordingly be held entitled to it. A warning of less time would be held no warning at all. The forty days' warning only operates to prevent tacit relocation, and does not free parties from original agreement (*Wallace*, Hume, *Dec.* 383). As to other classes of servants, it is not necessary to give forty days' notice, but reasonable notice must be given (*Morrison*, 3 R. 945). A sewing mistress was held entitled to three months' notice (*Robson*, 6 R. 213), and a manager of a colliery was held entitled to three months' (*Forsyth*, 7 R. 887). As to manufacturers, mechanics, and artisans, the length of notice depends on the agreement between the parties, the custom of the trade, and the relations of the parties. In the absence of any proof as to custom, the Court will grant reasonable notice. Sometimes the service is ended without any notice, as when the servant is hired for a special purpose and the purpose is fulfilled, or when the occasion for the services is ended (*London, etc., Shipping Co.*, 13 D. 51). If either party plead a special custom, he must prove it to be "uniform and notorious" in order to have effect given to it (*Morrison*, 2 S. 434).

IV. *Obligations of the Parties to the Contract.*—1. *The Servant's Duties.*—(1) The servant is bound to enter on the service contracted for at the period agreed, otherwise he will be liable in damages. He cannot offer a substitute, as the contract implies a *delectus personæ* (*Campbell*, 9 S. 264). He must remain in his situation continuously until the contract is terminated without fault on his part. If he fails, the master may refuse to take him back, his wages may be forfeited, and he would be liable in an action for damages.

(2) The servant must know his work and do it carefully. Where a servant of any sort is engaged on the footing that he has the skill and ability to perform certain duties then the servant guarantees himself competent for the service he has undertaken. His obligation is to do the work at the time agreed on, to do it well, to employ the materials furnished by the employer in a proper manner, and, lastly, to exercise all proper care

and diligence about the work (Story on *Bailments*, 430). Where skill as well as care is required in performing the undertaking, then, if the party purports to have skill in the business, and he undertakes to serve for hire, he is bound not only to ordinary care and diligence in securing and preserving the thing, but also to the exercise of due and ordinary skill in the employment of his art or business about it, or, in other words, he undertakes to perform it in a workmanlike manner (Story on *Bailments*, s. 431; 1 Bell, *Com.* 459). *Spondet peritiam artis.* It is the party's own fault if he undertakes without having sufficient skill, or if he applies less than the occasion requires (*Peddie*, Hume, *Dec.* 304). The degree of skill and diligence which is required rises also in proportion to the value, the delicacy, and the difficulty of the operation. Goods were sent to a finisher to be finished by a process admittedly delicate, and it was held that the finisher, by accepting the employment, undertook to perform the work without injury to the goods, and that, when they were returned injured, he could only exonerate himself by proving that the injury was due to some defect in the goods, or incapacity to undergo the process (*Hinshaw & Co.*, 8 M. 933). Persons employed as domestic servants are under the same obligations as to the duties of their several employments; but if they give notice, at the time of their engagement, of their want of knowledge of the duties of the employment, the ordinary skill will not be required of them (*Gunn*, Hume, *Dec.* 384). The servant must take care of the property of the master; and if he is guilty of gross negligence, whereby the property of his master is injured, he will be liable in an action of damages. But he is not liable for *damnum fatale* or misadventure (Fraser, *M. & S.* 68).

(3) The servant is bound to be respectful to the master, and obedient to his orders. As in this contract the condition of the master is more advantageous than that of the servant, the servant ought to respect the master according to his condition in the world (*Puffendorf*, quoted by Fraser, *M. & S.* 70). A workman ought to show deference to the tradesman that employs him, otherwise discipline could not be maintained; but a higher degree of respect will be demanded from a menial servant towards a master whose station in life is much higher than his own. A servant is also bound to obey all lawful orders of the master. The orders must be as to things that were agreed on, or were implied, at the time of entering into the contract. After a refusal on the part of the servant to perform his work, the master is not bound to keep him on as a burthensome and useless servant to the end of the year (Ld. Ellenborough in *Spain*, 2 Stark. 256; see *A.* v. *B.*, 16 D. 269). So a servant refusing to obey orders, and speaking insolently to his master, was held to have been rightly dismissed, and forfeited all claim to wages for the time he had served (*Silvie*, 8 S. 1010). The master of a vessel was dismissed when in a foreign port for drunkenness, but reinstated on condition that no spirits were allowed on board. Notwithstanding this, he took spirits on board, and was drunk during the voyage home. On the safe arrival of the ship he was dismissed, and the Court held that he had forfeited his wages for the home voyage by his misconduct (*M'Kellar*, 15 D. 246). The orders of the master must be as to matters within the scope of the servant's duty, not dangerous to the servant, nor of a lower grade than those he contracted for (Bell, *Prin.* s. 176). If the deviation be great, or, though small, often repeated, the Court will protect the servant. A cook and housekeeper cannot be reduced to the position of maid, to do merely marketing duties (*Gunn*, Hume, *Dec.* 384); nor a head gamekeeper to that of under gamekeeper (*Ross*, 1 R. 352). A farmer was held entitled to dismiss a labouring hind who refused to

obey orders to attend to the cattle on a Sunday, so as to permit his fellow-servants to go to church, although he was not employed to perform such services (*Wilson*, 6 D. 1256). A servant must attend to his work on all lawful days, and during the hours either fixed by agreement or by the common custom of that kind of service. Holidays are usually a matter of arrangement, or are determined by the custom of the locality. A workman need not work on Sunday (*Phillips*, 13 S. 778; rev. 2 S. & M'L. 465). But domestic servants and farm-servants do not come within this rule (*Wilson*, *supra*).

A domestic servant is bound to accompany his master to any part of the country. But he is not bound to go furth of Britain, so as to be beyond the protection of British laws, nor is he bound to go to a distant part of the country without an engagement for his return, and an indemnification for time and expense (Bell, *Prin.* s. 180). Where a servant's work has reference to a place rather than a person, the master cannot remove the servant to a distant place, inconvenient to the servant. A spinner or carder who was employed at one mill on a yearly contract of service could not be removed to another mill half a mile distant from her home, belonging to the same master (*Anderson*, 16 S. 412).

(4) The servant must act morally. The master is entitled to demand that all within his household shall act decently, so that the feelings of other members of his household may not be scandalised. All classes of domestic servants, and tutors, governesses, secretaries, and even commercial employés, who live with the master, come under this rule. It does not matter whether the immorality take place within or outside the house of the employer, so long as his interests, reputation, or feelings are injured thereby (*Mathieson*, 10 S. 825; *Greig*, 2 M. 1278). The misconduct must take place during the term of service, and a servant is not bound to disclose at the time of entering into the contract any facts in his previous history affecting his character (*Fletcher*, 42 L. J. Q. B. 55). Dishonesty on the part of the servant is a good ground for a master dismissing him (Bell, *Prin.* s. 178). Drunkenness, if frequently repeated, and even one very glaring case, will justify the master in dismissing a servant (*Edwards*, 11 D. 67; *M'Kellar*, 15 D. 246).

(5) The servant must do nothing to injure his master's business. If a servant wilfully act in such a way that the master is liable to lose the custom of those who employ him, the servant may be dismissed (*Read*, 9 C. & P. 588). Again, if a servant insists that he is a partner, and acts accordingly, the master would have a good ground for dismissing him (*Amor*, 9 A. & E. 548).

(6) Remedies of the master for the servant's misconduct. At one time it was held competent by the common law of Scotland to imprison a servant, in the event of his deserting his service, until he found caution to return to the service and continue in the same. But as this remedy has for a long time fallen into disuse, and, although there has been much legislation on the relations of master and servant, no statutory authority has been given to the practice, it is thought that it would not be now competent (Ersk. *Inst.* iii. 3. 16, note 736; Fraser, *M. & S.* 101 and 382). In the case of certain special employments, *e.g.* actor, public singer, etc., it seems probable that the Court would grant interdict against the artiste giving his services to anyone else than the person who employed him during the term of his engagement. For any of the ordinary employments, the master's remedies for the servant's misconduct are dismissal, forfeiture of wages, and damages. If the servant fails to

enter, or deserts from, his service, the master is entitled to declare that all current wages are forfeited (Ersk. iii. 3. 16).

What is desertion depends on the circumstances, and the Court will not enforce a harsh rule against the servant. Absence for a day will not entitle the master to dismiss the servant. But continued absence (although involuntary, if it arises from the servant's fault), if it injures the master's interests and interferes with the due conduct of his affairs, will be sufficient (*Gibson*, 23 D. 358). In regard to other cases of misconduct, the master must not be too prompt to take advantage of any slight fault to dismiss a servant. It is his duty to admonish him and give him an opportunity to amend his ways (*Thomson*, Hume, *Dec.* 392). If the fault is not a very grave one, the Court, while holding the master entitled to dismiss the servant, may find the wages due for the period that has been actually served.

It is sufficient that a master has a good ground for dismissing a servant, although he does not actually state it at the time (Ersk. *Prin.* s. 182, note). But it would seem that if a servant is dismissed for immorality, he is entitled to know the cause of his dismissal (Ld. Deas in *Watson*, 24 D. 494).

2. *The Master's Obligation to the Servant.*—(1) The master is bound to receive his servant into his employment and continue him therein. But whatever would justify the master in dismissing the servant would be a good reason for the master refusing to admit him. The master cannot transfer the services of his servant, as there is a *delectus personæ* on the servant's part as well as on the master's. It depends on the nature of the employment, the circumstances in which it was entered into, and the terms of the agreement, whether the assumption of partners by the master will put an end to the agreement (see *Campbell*, 5 S. 335). But where the firm is dissolved, the service is ended, and it depends on the circumstances in which the dissolution took place whether the servant will recover damages or not.

(2) The master must treat the servant properly, and with due forbearance and moderation. This is the obvious duty of all towards those who are placed under their protection. At the same time, the servant would not be justified in leaving on account of slight exhibitions of bad temper or disagreeable character on the part of the employer. Each case depends on the special circumstances, and is a question for the jury. At one time it was thought that masters had the right of moderate personal chastisement (Ersk. i. 7. 62). But lawyers are now agreed that there is no such right in the case of grown-up servants; and if it exists at all, it is only in the case of apprentices and young persons, to whom masters come in the place of parents. If a servant remains in the employment after harsh or cruel treatment by the master, he will be held to have condoned his master's conduct. "Under ordinary circumstances, a domestic servant is not entitled to remain in service for the full period of service, and, at the expiry, to bring up a catalogue of grievances as a ground of damages against her master" (Ld. Pres. Inglis in *Fraser*, 5 R. 596).

A master is bound to provide suitable board and lodging for domestic servants during the period of service. He is not entitled to compel a female servant to reside out of the family while the service continues, the engagement of a female servant being on the faith of the protection of her master's house (Bell, *Prin.* s. 183). If the master call in a medical man to attend on the servant when he is ailing, the master will be liable for the bill, and will not be entitled to deduct it from the wages of the servant. But in the ordinary case, where there is no special agreement, a

master is not bound to provide medical attendance for his servants: nor will he be liable for the bill if the servant call in a medical man without his knowledge. There may be criminal responsibility incurred by a master in failing to provide suitable food, lodging, and medical attendance for his servants. By 38 & 39 Vict. c. 86, s. 6, it is provided: "Where a master, being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, whereby the health of the servant is, or is likely to be, seriously or permanently injured, he shall, on summary conviction, be liable either to pay a penalty not exceeding £20, or to be imprisoned for a term not exceeding six months, with or without hard labour."

(3) The master is bound to be careful not to injure the servant's character. If the master accuse the servant of a grave offence which he cannot prove, the servant may quit the service, and may demand wages, board-wages, and damages, according to the circumstances of the case (*Langmuir*, 11 S. 571). But a master's position is privileged, and he is entitled to state the reason when he dismisses the servant for immorality, which he believes has been committed. The statement is held not to be actionable unless malice is proved (*Watson*, 24 D. 494).

The master ought to give the servant a character at the end of the service, but this is merely a moral obligation which the law will not compel him to fulfil (*Fell*, 12 December 1809, F. C.). But if the master give a character, it must be true to the best of his knowledge; and if that be so, he will be protected, even if the character be prejudicial to the servant (Bell, *Prin.* s. 188, and cases there cited). A material element in judging of the master's conduct in such a case is the occasion on which the master acted. If he were asked for the character, his position will be very much stronger than if he ultroneusly volunteer to give it. But even in the latter case it would seem that the special circumstances of the case may be so strong as to justify the master's action. Masters should be protected as much as possible if they honestly discharge their duty in speaking of the characters of those servants who have quitted their service (Ld. Alvanley in *Rogers*, 3 B. & P. 592).

It has not been decided in Scotland whether a master would be liable in damages for giving a false character in the servant's favour, although there does not seem to be any reason for holding that he would not. A Statute has been passed inflicting penalties on all those who give or use a false character, or alter a true character which has already been given (32 Geo. III. c. 56). Mr. Tait says that the Act "appears, and is understood, not to extend to this country," but to England only. Ld. Fraser says: "This doubt does not seem to be well founded. The Act is quite absolute and general, and there is nothing in it to indicate that it was to be restricted in its operation to England" (Fraser, *M. & S.* 133).

(4) The master must pay the servant his wages. Wages are the price which the employer has undertaken to pay for the services which the servant has given. Board-wages are not of the nature of hire, and are not implied in the term "wages" (*Cooper*, 1825, 3 S. 435).

The master is bound to pay the wages at the term stipulated. The servant may have been hired by an overseer, but if the master has received the benefit of his services, he will be bound to pay the hire (*Nabonic*, Hume, *Dec.* 353).

In most trades there is a customary rate of wages, which will regulate the amount in the absence of any agreement. But if the parties have

entered on a course of dealing by which the rate of remuneration has been fixed, this standard will be maintained by the Court, and will overcome the usage of trade (*Stewart*, 9 S. 382, and 11 S. 725; affd. 2 S. & M'L. 45. See also *Mansfield*, 9 S. 780; affd. 6 W. & S. 277). If there is no agreement and no custom, the Court will give the servant the value of his services or *quantum meruit* (*Wallace*, 1 Sh. App. 42). In one case the Court allowed a clerk to a writer a salary at the rate of £50 a year (*Sinclair*, 9 S. 487). If the question is left to the master as to whether *any* wages are to be paid or not, no action will lie against him if he refuses to pay any (Smith, *Master and Servant*, 4th ed., 201). But if it is agreed that there shall be wages, but the amount is left to the discretion of the master, the servant will have an action for the fair value of the services rendered (*Bryant*, 5 M. & W. 114). On the other hand, if the rate of wages is left in the servant's discretion, he will not be justified in demanding an exorbitant amount. If the wages are to be paid in victual, and there is an extraordinary rise in price, due to exceptional and unprecedented causes, the master is not bound to give specific implement or compensation at current market price of the district (*Wilkie*, 11 D. 132).

Mr. Bell says that the master is bound to give the workman a full supply of work (if his wages depend on the price) during the term agreed on (Bell, *Prin.* 192). Ld. Fraser says that "this depends on the implied as well as the express terms of the contract," and the master is not bound to provide work unless the agreement is imperative (*M. & S.* 137). Domestic servants, although engaged for a year, should be paid half-yearly (Bell, *Prin.* s. 184). With regard to other servants, in the absence of express stipulation the terms of payment depend on the custom of those engaged in that kind of service. Should the master fall into arrear with the wages the servant is entitled to interest on the amount so long as it remains unpaid (*Mansfield*, 6 W. & S. 277).

In Scotland, if the servant die during the term of service, the servant's representatives are entitled to wages *pro rata* for the time he has served (Bell, *Prin.* s. 179). With regard to a servant who has been disabled by injuries received in the course of his duty Mr. Bell thinks that the servant would not forfeit his wages; but Lord Fraser says: "It is thought that the better rule is, that a servant disabled without fault on his part, and without fault on the part of the master, has no claim for wages during disablement, though this may have been caused by injury sustained when in the performance of his work." In the case of the servant's absence from service through sickness, if it be only for a short time, then no deduction will be allowed; but if it be long-continued, then he will lose the right to wages for the period when he is absent, especially if the master has to employ another servant in his place (Fraser, *M. & S.* 142; see *M'Ewan*, 1867, 5 S. L. R. 62).

On the master's death the contract of service is ended, although it may be for a term of years in the agreement. The usual rule is to give the servant wages and (where these are due) board-wages till the next term only; but that only if he gets no other employment (Bell, *Prin.* s. 186). If the master dies after the expiry of the time for giving warning, wages are due for another term after the one current, but only under the limitations above stated (Fraser, *M. & S.* 144).

In the event of the master's bankruptcy, domestic and farm servants have, by common law, in Scotland a preference for wages for the current term over the other creditors. The privilege is strictly construed to apply to those two classes only, and it was doubted if it extended to gardeners (*M'Lean*, 10 S. 217). Farm-servants included reapers, and even all those

employed only for short periods for agricultural purposes (Bell, *Prin.* 1404). It did not extend to artisans, clerks, brewers, and overseers, who were compelled to rank as common creditors (Bell, *Prin.* 1404).

The privilege, however, has been extended to other classes by statute —38 & 39 Vict. c. 26, repealing 19 & 20 Vict. c. 79, s. 122. It is enacted that "the wages of clerks and shopmen and servants employed by the bankrupt shall be entitled to the same privilege as the wages of domestic servants, to an extent not exceeding four months' wages prior to the date of sequestration being awarded, or, where sequestration is not awarded, prior to the concourse of diligence for the distribution of the estate of a party being notour bankrupt, and not exceeding the sum of £50; and the wages of workmen employed by the bankrupt shall be similarly entitled, to an extent not exceeding two months' wages prior to the same respective dates."

Farm-servants have a preference for their wages over the landlord's hypothec (*M'Glashan*, 29 June 1819, F. C.). The reason is that "the crop is created by the labour of the servants, and if they had left the farm there would have been nothing for the landlord; the fund being constituted by their skill and exertions, they are entitled to a preference for their wages" (Ld. Hermand's opinion, given in Bell on *Leases*, i. 415, note). It is doubtful whether domestic servants have the same privilege, but it is thought most probable that they have (Fraser, *M. & S.* 149).

(5) A workman has a lien for his wages. Where a workman is employed to perform a piece of work in his own premises on materials supplied by his master, he has a right to retain them till he has been paid the stipulated hire for his services. The foundation of the claim is the possession of the subjects; and if he lose possession, as by delivery to his employer, his right of retention is gone (Bell, *Prin.* ss. 1419 and 1430). If the subject remain in the premises of the employer, and the workman come there to perform the work, then there is no lien for wages.

(6) Counter-claims and answers to demand for wages. A master has no right to impute sums of money or clothes given to the servant to wages, unless these are obviously part of them, and intended by the parties to be so considered (Dickson on *Master and Servant*, 152).

A master has no right to retain a servant in his employment, and afterwards refuse to pay the wages on the ground of the servant's misconduct in the service. The master's duty is either to dismiss him, or to admonish him and pass from the fault (*Tait*, 26 February 1841, F. C.: *Fraser*, 9 S. 418). Where a servant, by his misconduct, causes loss to his master, and the master intimates his intention to deduct it from the wages, it would appear that the Court would permit this by way of compensation (Ld. Justice-Clerk Inglis in *Scottish North-Eastern Railway Co.*, 21 D. 700). But the loss must arise strictly from the same contract as the demand for wages, and a master will not be entitled to set off an illiquid claim of damages, not arising from the service, against the servant's liquid claim for wages (*Leyler*, 4 R. 435; *Logan*, 13 D. 262).

(7) Prescription of wages. By the Act 1579, c. 83, it was enacted "that all actions of debt for house maills, men's ordinaries, servants' fees, merchants' accounts, and others the like debts that are not founded upon written obligations, be pursued within three years, otherways the creditor shall have no action, except he either prove by writ or by oath of his party." This Act applies to wages of all kinds of servants, both superior and inferior. Each term's wages runs a separate course, the *terminus a quo* being the date of payment (Bell, *Prin.* ss. 628 and 629). For specimens of cases to

which the Act has been applied, see Bell, *Prin. supra*, and Dickson on *Master and Servant*, 156. To raise the plea of prescription, all that is necessary is that the claim should be denied and the plea of prescription taken, and the other party will then be compelled to prove by writ or oath the constitution and resting-owing of the debt.

(8) Arrestment of wages. At common law a servant's wages, being alimentary, could not be arrested by his creditors, except as to the superplus more than what is necessary for his maintenance (*Bogg*, Mor. 10380; Stair, iii. 1. 37: Ersk. iii. 6. 7). What is necessary depends on the varying conditions and circumstances of each case (*Shanks*, 16 S. 1353). It is not competent to arrest wages upon the dependence of any action raised under the Small Debt Acts (8 & 9 Vict. c. 39). By the Act 33 & 34 Vict. c. 63, it is enacted that "the wages of all labourers, farm-servants, manufacturers, artificers, and workpeople shall cease to be liable to arrestment for debts contracted subsequent to the passing of this Act, save as hereinafter excepted" (s. 1). "If the amount of wages earned exceeds twenty shillings per week, any surplus above that amount shall still be liable to arrestment as before the passing of this Act, but the expense or cost of any such arrestment shall not be chargeable against the debtor, unless in virtue of such arrestment the arresting creditor shall recover a sum larger than the amount of such expense or cost" (s. 2). ". . . This Act shall in no way affect arrestments in virtue of decrees for alimentary allowances or payments, or for rates and taxes imposed by law; but every arrestment used after the 1st day of January 1871 for such alimentary allowances or payments, or for rates and taxes imposed by law, shall set forth the nature of the debt for which it has been used, otherwise the same shall not be effectual" (s. 4). According to the ordinary rule of construction, the general expression "workpeople" will apply to persons *ejusdem generis* with the classes mentioned in the Act. Hence it will not include shopmen, clerks, domestic servants, etc., who will remain under the rule of the common law. There is no reason why the Act should not apply to persons employed by the piece or job.

Servant's Remedies on the Master's Breach of Contract.—If the master commits any of the breaches of contract which have already been referred to, then the servant may leave the master's service and raise an action for damages. If the master wrongfully dismisses the servant or refuses to receive him, the proper remedy is an action for damages, and not for the wages which the servant was prevented from earning (*Cameron*, 10 M. 301). The servant is not bound to return to the service if he has been improperly dismissed, and therefore it is no answer to his claim that the master is willing to receive him back. The contract of service will not be specifically enforced against the master, but the servant may have a claim for wages, board-wages, and damages (*Mason*, 14 S. 343). Where a person is the holder of a public office, he may claim to be restored, if he be improperly ejected from it. As a general rule the Court will tax the amount due in reparation of a wrong done through the breach of contract by the master at the wages and board-wages which the servant can claim under the contract. But this is not necessarily the case, and in slighter cases of injury the Court will give less, while in graver they may give more. The master "will be subjected in such damages as, in the whole circumstances of the case, appear reasonable" (*Tait's Justice* v. *Servant*, Fraser, *M. & S.* 163). The damages which a servant recovers must be for loss which is directly the consequence of the master's act. The authorities differ on the question whether a servant is bound to look for other employment, so as to lessen the claim for damages by mitigating the injury which he has

sustained. Recent cases seem to lay down that he is bound to work if he can obtain employment (*Ross*, 1 R. 352). The master's bankruptcy is a breach of the contract of service, and the servant is entitled to damages (*M'Ewan*, 5 M. 814, Ld. Pres. Inglis, at 817). But in this case a servant is bound to look out for other employment, and can only recover the difference between his wages under the contract and what he has earned elsewhere (Bell, *Prin.* s. 185).

Master's Liability for the Servant's Contracts.—A master may be liable for the servant's contracts entered into with third parties on his behalf. This liability depends on the question whether the master has in express terms, or by implication, given to the servant a mandate to act on his behalf, and the principle on which it rests is *qui facit per alium facit per se*. Where the master has given an express mandate, there can be no doubt about his liability for the servant's contracts. But even where there is no express mandate, one may be implied by his conduct and course of dealing. Thus where a master ran weekly accounts for bread, and the servant extended the accounts to a longer period, the master was held liable, although he had given the servant money to pay the weekly account (*Oliver*, Hume, *Dec.* 319). But where a bachelor gave his servant £1 weekly to provide meat and vegetables, and the servant, after some ready-money purchases, opened an account which ran on for sixteen months, the master was held not liable in payment of the butcher's account (*Mortimer*, 7 M. 158). The same doctrine has been laid down in England (*Stubbing*, Peak. N. P. C. 47). Again, unless the master had been in the habit of employing the tradesman in the way of his trade, it should not be in the power of a servant to bind him to contracts of which he had no knowledge and to which he gave no assent (Ld. Ellenborough in *Hiscox*, 1802, 4 Esp. 174). If a master has ordered goods on credit from a tradesman, and the servant has ordered further goods, the master will be held liable, although the goods were ordered without his assent, or even against his orders, privately given to the servant (Ersk. iii. 3. 33). The master must give due warning to the tradesman not to supply the servant. A master may be held liable if he use the article ordered by the servant, and if it lay within the scope of the servant's authority to enter into such contracts (Fraser, *M. & S.* 256).

It was held in one case that a stationmaster had no authority to bind a railway company to pay for medical attendance upon a guard injured on the railway beyond the first visit, for which he had express authority from the company (*Montgomery*, 5 R. 796). The master's death operates as a revocation of the servant's mandate, but the representatives will be held bound by contracts entered into by the servant, in ignorance of his master's death (Ersk. iii. 3. 41; 1 Bell, *Com.* 525).

Servant's Liability for his Contracts.—So long as a servant keeps within the limits of his mandate, he is not liable (unless he is the master of a ship, for furnishings supplied to it) for contracts entered into by him on his master's behalf. But if he treats with the other party as principal, and does not disclose that he is only a servant, he will be liable personally. So also if he, in contracting in his master's name, goes beyond the master's commission, he will be liable personally to anyone dealing with him in the *bonâ fide* belief that he is acting within his master's authority (1 Bell, *Com.* 540).

Termination of the Contract.—(1) The contract may be ended in the normal way, by the expiration of the period of service, accompanied by due warning by one of the parties that he does not intend to renew it (see *ante*).

(2) *By Consent express or implied.*—This may be inferred by the conduct of the parties (*Ferguson*, Hume, *Dec.* 21, and *Robinson*, Hume, *Dec.* 20). If a servant resigns a situation and the master accepts the resignation, the servant cannot withdraw the resignation, even if it be done within a few minutes after offering it (*Peter* v. *Glasgow Millboard Co.*, 13 S. L. R. 127).

(3) *Death or prolonged Sickness of Servant.*—The death of the servant will relieve his representatives from damages for breach of the contract. Both parties must have contemplated the servant's life and health as a condition of the contract. Mr. Bell says sickness or inevitable accident "will excuse non-performance for a short time, but if the inability should continue long, and a substitute should be required, the master will be discharged from his counter-obligation to pay wages" (Bell, *Prin.* s. 179). Everything depends on the circumstances of each case. The master cannot seize on every illness,—for example, one for a few days,—as an excuse for rescinding the contract: but where it is long continued and interferes with the conduct of the master's affairs, it will be held sufficient. A shopman was taken ill on 1st December, and his illness proving to be scarlet fever, sent his master notice that he would be absent for at least six weeks. His master on 9th December wrote to him that the exigences of his business obliged him to engage another man to fill his place, which he accordingly did. The servant returned on 28th January following, and tendered himself to resume his duties, but his master refused to receive him back in the same capacity. In an action of damages for wrongous dismissal, held on the assumption that the pursuer was a yearly servant, that the contract of service was resolved by the prolonged inability of the pursuer to render the stipulated service, and that the defender was entitled to treat it as at an end (*Manson*, 12 R. 1103). The servant's sickness is a good defence to an action of damages at the instance of the master for failure to implement the contract (*Robinson*, L. R. 6 Ex. 269). If the sickness be due to servant's misconduct during employment, he cannot exact more wages than for the time he has served, and cannot demand that the master should keep him in his employment (*McEwen*, 5 S. L. R. 62).

(4) *Imprisonment of the Servant.*—If the servant is imprisoned, even without fault of his own, then the master may, as in the case of sickness, be liberated from the contract. If the servant is found guilty of crime, and imprisonment follows, he will be liable in damages to the master, as it was through his fault that the contract of service was broken. If, however, he is imprisoned through no fault of his own, for a crime of which he is ultimately acquitted, he will not be liable in damages (Fraser, *M. & S.* 322).

(5) *Servant's Marriage.*—A servant cannot be dismissed because of her marriage. If she is willing to fulfil her contract, it will remain in the same position as before. But the master cannot claim specific performance of the contract of service, and if she does not, on account of the marriage, fulfil her contract, the master will be entitled to claim damages from her and her husband.

(6) *Enlistment.*—The Statute 44 & 45 Vict. c. 58, s. 144, deals with civil process which is competent against a soldier. It would seem from it that a master cannot reclaim a servant who has enlisted, but the servant may be liable in damages or at least in forfeiture of wages.

(7) *Death of the master* terminates the contract of service, even though by the agreement it was to last for a term of years. In Scotland the servant is entitled to remain till the next term, and till then the executors are entitled to his services (*Hoey*, 5 M. 818).

(8) *Dissolution of a Firm.*—The servant of a firm which is dissolved by the death of one of the partners is not bound to remain in the employment of the surviving partners, nor are they bound to employ him (*Hoey, supra*). If the firm come to an end through bankruptcy or by voluntary dissolution, the contract is at an end, but the company may be liable in damages.

(9) *Contract Terminated by the Course of Events.*—It may happen in certain contracts that the occasion for the service having disappeared, the contract may be brought to an end. A tutor hired to teach a child, though his contract may be for a term certain, would have no right to damages should the child die, and his service be thus terminated. So also where the contract becomes illegal or impossible by operation of law, the contract may be terminated.

(10) *Breach of Contract.*—The contract may be terminated by the breach of either party in the ways already mentioned.

(11) *Consequences of Termination of Contract.*—When a servant is discharged he is bound to leave the service quietly (*Ross*, 1 R. 352). When a servant has been provided with clothes these remain the property of the master, whether they be plain clothes or livery (*Shiells*, 4 S. 134). The servant is bound to leave the premises, and if he does not, the master may turn him out and remove his effects without process of law (*Scott*, 6 S. L. R. 301).

The following subjects will be found treated under separate headings. For the contract of apprenticeship, see APPRENTICE. For the law as to hiring of seamen, see SEAMEN. There are many Statutes dealing with the regulations as to the relations of master and workmen; for these see WORKMEN. The law of damages arising from the fault of masters or workmen or third parties will be found under the heading of REPARATION.

Hiring of Custody.—By this contract one party undertakes for hire to receive the property of another into his custody, and to bestow upon it due care and attention, so that it may remain in safety. The custodian is bound in ordinary diligence, and is liable for any negligence which results in damage to or the loss of the property committed to him (Story on *Bailments*, 449). The subject may be considered under the following heads: wharfingers, warehousemen, livery stablers, and persons who keep fields for depasturing cattle.

Wharfingers are, like other custodians for hire, liable in ordinary diligence. Sometimes it has been said that their liability was the same as common carriers, but this is not so; they are liable only to the same extent as warehousemen (1 Bell, *Com.* 497; Story on *Bailments*, p. 457). If the wharfinger employ his own men to unload the vessel, he will be liable for any loss caused by their negligence (1 Bell, *Com.* 606). A wharfinger who keeps goods for a long period of time without charge will not be held to be acting gratuitously, as his profit will come from the freight when the goods are ultimately placed on board ship for transit (*White*, 11 Q. B. 43). A wharfinger who undertakes to see that a ship is safely berthed in a harbour will be liable for any damage to the ship, owing to its not being securely placed (Chitty on *Contracts*, 13th ed., 397). Delivery to a wharfinger who usually has charge of the buyer's stock, and whose acts in accepting delivery have frequently been acknowledged by the buyer, is held to be equivalent to delivery into the buyer's warehouse (1 Bell, *Com.* 216). The wharfinger's responsibility begins as soon as the goods are landed on the wharf, or put out of the hands of the

carrier or porter for embarkation (Bell, *Prin.* 156). But there must be some act or assent on his part, or on that of his servants or agents to the custody thereof, before he will be deemed to have assumed the character of custodian (Story on *Bailments*, 460). He is liable for any loss due to want of care on his part (*Cailiff*, Peak. 114). His store and wharf must be free from all things likely to hurt property (1 Bell, *Com.* 488). It is said that in the event of any loss, it lies on him to acquit himself by showing he was not in fault (Chitty on *Contracts*, 13th ed., 397; 1 Bell, *Com.* 488). If a wharfinger with whom goods have been lodged carelessly makes a representation that the goods are in his warehouse, whereas as matter of fact they have been lost, he will be liable in an action of damages for the value of the goods to any person who has bought the title to the non-existent property (*Seton*, 19 Q. B. D. 68 C. A.). If the wharfinger has merely the possession of the goods for safe custody, and he receives directions to ship them on board a certain ship, he must place them in charge of the proper officers of the vessel (*Leigh*, 1 Car. & P. 638, 641; 2 Esp. 695).

If he is clothed merely with the custody of the goods, and the duty of shipping them devolves by custom on the master of the ship to which they are to be sent, the wharfinger is discharged from responsibility as soon as he has placed them at the disposal and under the care of the master and officers of such vessel, although they are not actually removed from the wharf (*Cobban*, 5 Esp. 41; Addison on *Contracts*, 825).

Warehousemen have much the same responsibility for goods placed in their charge for safe custody as wharfingers, and are bound to take common and reasonable care of the commodity intrusted to their charge. But they are not liable for loss by mere accident not attributable to their own negligence (*Garside*, 4 T. R. 581; *re Webb*, 8 Taun. 443). His warehouse must be safe, free from danger of fire, vermin, or any other risk which would endanger the goods placed in it (*White*, 11 Q. B. 44; Bell, *Prin.* 155). But if he have taken all reasonable precautions, he will not be responsible for the loss of the goods, as he does not, like a carrier, insure the safety of the goods (*Cailiff*, Peak. 114; Story on *Bailments*, 451). The liability of the warehouseman begins as soon as the goods arrive, and the crane of the warehouse is applied to raise them into the warehouse; and it is no defence that they are afterwards injured by falling into the street, through breaking of the tackle, even if the carman who brought them refused the offer of slings for further security (*Thomas*, 4 Esp. 262).

Warehousemen are responsible for the innocent mistakes of themselves or their servants in making a delivery of goods to persons not entitled to them (*Lubbock*, 1 Stark. R. 104). If the goods are injured while in the possession of a warehouseman through his fault, he will be liable in damages, even although subsequently the goods are completely destroyed without his fault, as by fire, flooding, or other inevitable accident (Story on *Bailments*, 456). A railway company are only liable as ordinary warehousemen for luggage left at a "cloak-room" or "left luggage office." They may modify the terms on which they shall receive articles by conditions printed on the ticket. There is, however, no rule or presumption of law that a person is bound by the conditions in the document handed to him; but it is a question of fact in each case whether they have been brought to his notice (*Henderson*, 1 R. 215; affd. 2 R. H. of L. 71). If he did not see there was writing on the ticket, he is not bound by the conditions, but if he knew there was writing and knew or believed that it contained conditions, or if the ticket is delivered to him in such a manner that he can see that there is writing upon it, and so in the opinion of a jury

has reasonable notice that the writing contained conditions, then he will be bound by the conditions (*Parker*, 2 C. P. D. 416; *Harris*, L. R. 1 Q. B. D. 515). A passenger on his arrival at a railway station in the evening left a large and heavy trunk with the porter at the left luggage office, and in return got a receipt, bearing on the face—"the company only receive the within-mentioned articles upon the conditions expressed on the back of this ticket." The third condition upon the back was that when any "article deposited in the company's cloak-room or warehouse" exceeding the value of £5 was lost, the company would not be liable unless at the time when the package was delivered its true value was declared, and a corresponding additional charge paid. A notice to the same effect was likewise posted inside the office. No verbal reference was made to the terms of the conditions. Owing to press of traffic the trunk was left by the company's officials upon the station platform, immediately outside the left luggage office, and had disappeared next day. The value exceeded £5, and had not been declared. It was held that the railway company were liable for the loss, as they were not in a position to enforce the condition above specified, the article not having been "deposited in the company's cloak-room or warehouse" (*Handon*, 7 R. 966).

With regard to both wharfingers and warehousemen a difficulty arises when they act also as common carriers, to settle the degree of their liability. The responsibility of a common carrier for goods intrusted to him is much higher than that of either of the others. If the carrier receives the goods into his own warehouse, for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and the goods are lost or injured, such person's responsibility as carrier begins with the receipt of the goods (*Hyde*, 5 T. R. 389). But if he receives goods into his warehouse to be forwarded according to the future orders of the owners, and the goods are lost or injured before these orders are received, he is not liable as a common carrier, but only as a warehouseman. If the duty as carrier is not ended, and there is loss or damage to the goods, he will be responsible therefor as a common carrier, notwithstanding he acts as a warehouseman in the same transaction. Thus if the deposit in the warehouse be in some intermediate place in his route (*Forward*, 1 T. R. 27), or if after arriving at the destination he places the goods in his warehouse till, in accordance with his duty as carrier, he can deliver them to the owner, he will be liable for loss as carrier (*Hyde*, 5 T. R. 389). But when the goods have arrived at their fixed destination, and are placed in the carrier's warehouse to await the owner's convenience in sending for them, or for the purpose of being forwarded by another carrier to some other place, then his duty as carrier ceases and his duty as warehouseman begins (*Rowe*, 8 Taun. 83; *in re Webb*, 8 Taun. 343).

Stablers.—If an innkeeper receive the horses of travellers into his stables, he is liable for any loss or damage to the horse, or its furniture, or goods on its back, proceeding from any cause except inevitable accident. This responsibility arises from the edict *nautæ, caupones, stabularii*, which has been imported into our law (*Chisholm*, 1714, Mor. 9241; *Hay*, 1801, Mor. *Nautæ*, etc., App. 1; see 1 Bell, *Com.* 498; Stair, i. 13. 3.; More's *Notes*, lvii.). But it seems doubtful whether this strict rule would apply to livery stablers who receive horses for the purpose of training or to be kept for a considerable period of time (*Trotter*, Mor. 10080). It was held that a stabler who had, for the purpose of training it, received a young horse into a stable, under which he was aware that a railway company were forming a tunnel by blasting rock, and who had not communicated that circumstance

to the owner of the horse, was liable for injury done it, in consequence of a fright occasioned by an explosion in the tunnel (*Laing*, 12 D. 1279; see also *Hagart*, 10 S. 506).

Pasturage of Cattle.—Those who keep fields for depasturing cattle are not liable under the edict *nautæ caupones*, but only for such ordinary diligences as a man adhibits in his own affairs. This contract in England is called a contract of agistment. He who lets out fields for pasture must show ordinary skill in managing cattle, and also that he has exhibited due care in the safe keeping of cattle intrusted to him (Mor. 10081; 1 Bell, *Com.* 488, 489). The grazing field must be properly secured against the escape of the cattle, and free from pitfalls and dangers which may lame or injure them (1 Bell, *Com.* 488). A horse which had been sent to be grazed for hire upon a farm was killed by falling into a hole in the field in which it was placed, which was situated over old mineral workings. The hole was proved to have been noticed for some time before the accident by several persons resident in the neighbourhood; it was held that the farmer was liable in damages for the loss, as he had failed to take that reasonable care of property placed in his custody which a prudent man would have taken of his own (*M'Lean*, 10 R. 1052). If he leave the gate open, or the fences are defective and the cattle are lost, he will be liable to make good the loss (*Broadwater*, Holt's N. P. C. 547, 17 R. R. 677). If he place the cattle in a field where they are exposed to infection from diseased cattle, or to the attack of a mischievous animal, he will be liable for the loss (*Robertson*, 13 D. 779, 14 D. 315; Chitty on *Contracts*, 398).

Lien of Custodian for Hire.—The general rule of the Scottish law is that in all contracts "there results to the possessor of the goods a right to retain them for the price of his labour, and the expense advanced upon them while in his keeping, and in the fair line of his employment or trust" (2 Bell, *Com.* 93). Accordingly it would seem that each of the custodians for hire who have been referred to has a right of retention for the agreed on price of the care and custody bestowed upon the specific articles or cattle. In order to justify a claim for a general right of retention, the custodian must prove a special agreement or usage and custom of trade which is public and notorious (2 Bell, *Com.*—Special Lien to Innkeepers for Stabling, 99; Stablers and Grassmail, 100: General Lien to Wharfingers in England, 103). There is no general lien to storekeepers (*Laurie & Co.*, 15 D. 404), nor to scourers (*Smith*, 22 D. 344). A consignee having deposited for custody with the proprietors of a warehouse certain goods consigned to him, but without intimating that they were not his property, and the owners of the warehouse having subsequently made advances to him, but not specially on the faith of the goods, or with relation to them, and the consignee having become bankrupt, it was held that the proprietors of the warehouse were not entitled to retention against the true owners till satisfied of their advances to the consignee (*Stuarts & Fletcher*, 7 S. & D. 622).

High Court of Justiciary. — See JUSTICIARY (HIGH COURT OF).

Holdings. — See TENURES; AGRICULTURAL HOLDINGS ACTS; CROFTERS HOLDINGS ACTS.

Holidays.—*Banks.*—The Bank Holidays Act, 1871 (34 & 35 Vict. c. 17), provides (s. 1) that the following days shall be kept as close holidays in all banks in Scotland, viz. (Schedule):—

New Year's Day.
Christmas Day.
(If either of the above falls on a Sunday, the next following Monday shall be a bank holiday.)
Good Friday.
The first Monday of May.
The first Monday of August.

The corresponding bank holidays in England and Ireland are (*ib.*):—

Easter Monday.
The Monday in Whitsun Week.
The first Monday in August.
The Twenty-sixth day of December, if a week-day.

All bills of exchange or promissory notes which are due and payable on any such bank holiday are payable, and in case of non-payment may be noted and protested, on the next following day, and not on such bank holiday. Any such noting or protest is as valid as if made on the day on which the bill or note was made due and payable (s. 1). Similar provisions are made with regard to notice of dishonour and presentation for honour (s. 2), and as to payments (s. 3).

Her Majesty may, by proclamation, appoint a special day to be observed as a bank holiday throughout the United Kingdom, or in any part thereof, and such day shall be deemed a bank holiday as regards bills of exchange, etc. (s. 4). By Order in Council Her Majesty may from time to time alter a day appointed for a bank holiday, when it is made to appear in any special case that in any year it is inexpedient that the appointed day should be so observed (s. 5).

Customs and Inland Revenue Offices.—The Revenue Offices (Scotland) Act, 1880 (43 & 44 Vict. c. 17), provides (s. 1) that the following days shall, subject to the provisions of secs. 4 and 5 of the Bank Holidays Act, 1871, be kept as public holidays in the Customs and Inland Revenue offices in Scotland, viz.—

New Year's Day.
Christmas Day.
(If either of the above falls on a Sunday, the following Monday shall be a holiday.)
Good Friday.
Her Majesty's Birthday.
The first Monday in May.
The first Monday in August. (Schedule.)

The anniversary of the coronation of Her Majesty and her successors, and the birthday of the Prince of Wales, are no longer to be kept as holidays in these departments in Scotland.

Factories.—See FACTORIES AND WORKSHOPS.

Holograph Writings.—1. *What are Holograph Writings?* They are deeds written with the granter's own hand. When subscribed they "are unquestionably the strongest probation by writ, and least imitable" (Stair, iv. 42. 6); for it is obvious that it is much easier to forge the signatures to a deed than to counterfeit the handwriting from beginning to end of it (Ersk. iii. 2. 22; 1 Bell, *Com.* 324). Such writings, accordingly, are

as effectual to bind the granter as deeds executed with the statutory solemnities (Bell, *ut supra*). Observe, however, that they subsist only for twenty years, unless validated as the Act 1669, c. 9, directs (Vicennial Prescription). "There are two exceptions to the general rule that a holograph writing must be entirely in the handwriting of the granter. First, where the essential parts of the document are in the handwriting of the granter, and merely formal words are in the handwriting of another person; second, where there are in the handwriting of the granter words which clearly express an adoption of what is not in his handwriting" (*Maitland's Trs.*, 1871, 10 M. 79, per Ld. Pres. Inglis. See also the cases there cited, and *Panton*, 1824, 2 S. 632; *Christie's Trs.*, 1870, 8 M. 461; *Garine's Tr.*, 1883, 10 R. 448, and the cases there cited; *Macdonald*, 1890, 18 R. 101. Ld. M'Laren dissented from the judgment in that case; see his work on *Wills*, s. 514). It is immaterial whether the non-holograph parts of the document are written or printed (*Macdonald*, *ut supra*, per Ld. Adam). Adoption is not to be inferred from a mere signature (*ib.*, per Ld. Pres. Inglis). A mutual contract *inter vivos*, holograph of one of the parties and signed by all, will not receive effect as the holograph deed even of the writer, unless the obligation binding him be independent of the obligations constituted against the others (*Sproul*, 1809, Hume, 920; *Miller*, 1835, 13 S. 838). It is otherwise, however, in the case of a mutual will, holograph of one of the parties and signed by all. It will be effectual as the writer's testament (*M'Millan*, 1850, 13 D. 187). Whenever it is proved that an agent, in granting a holograph writing, acted with the authority of his principal, such writing passing between the agents of the parties or between one of the parties and the agent of the other, is as binding as a writing holograph of the parties themselves (*Whyte*, 1879, 6 R. 699, per Ld. Gifford; *Woodrow*, 1861, 24 D. 31; *Scottish Lands and Building Co.*, 1880, 7 R. 756; *Caithness Flagstone Quarrying Co.*, 1880, 7 R. 1117; 1881, 8 R. (H. L.) 78). So, too, a letter, bearing to be the letter of a firm, and holograph of one of the partners, was held to be holograph of the firm, the hand of a partner being, in matters within the *prepositura*, the hand of the firm (*Buchanan*, 1831, 9 S. 557; 1835, 13 S. 841; *Nisbet*, 1869, 7 M. 1097; *M'Laren*, 1871, 44 Sc. Jur. 17).

It may be noted that "effect has been given to a writing, not holograph or tested, in respect of a reserved power contained in a previous settlement to make bequests by any writing under the hand of the testator. In such cases the writing, though informal, is made effectual by adoption and recognition in the prior deed" (*Maitland's Trs.*, 1871, 10 M. 79, per Ld. Ardmillan; see *Crichton*, 1802, Mor. 15952; *Dundas*, 1807, Hume, D. 917; *Inglis*, 1831, 5 W. & S. 785; *Rankine*, 1849, 11 D. 543; *Sprot*, 1855, 17 D. 840; *Baird*, 1856, 18 D. 1246; *Young's Trs.*, 1864, 3 M. 10; *Wilsone's Trs.*, 1861, 24 D. 163). So, too, an improbative writing may be operative if expressly adopted and sufficiently identified in a subsequent probative deed (*Callander*, 1863, 2 M. 291, and cases there cited; *Glen*, 1881, 9 R. 317).

2. *Presumption in the Case of Holograph Writings.*—"Holograph writings ought regularly to mention that they are written by the granter, in which case they are presumed holograph unless the contrary be proved" (Ersk. iii. 2. 22). Where the document does not contain such a statement, it is necessary for him who founds upon it to prove that it is holograph of the granter (*Anderson*, 1850, 20 D. 1326; 1858, 3 Macq. 180; *Cranston*, 1890, 17 R. 410), either *comparatione literarum* or otherwise (1 Bell, *Com.* 324. See 4., below).

3. *Erasures, Deletions, etc., in the Case of Holograph Writings.*—In

Robertson, 1844, 7 D. 236, 242, Ld. Mackenzie observed (see *Mags. of Dundee*, 1858, 1 Macq. 134) that "a holograph deed depends mainly on the handwriting of the granter, in which it is proved or admitted to be. Then the ordinary doctrine of erasure and superinduction cannot apply, for there is no room to say that the alteration or change was not made by the granter; on the contrary, being in his handwriting proves that it was made by him: so that it stands in the same situation as an ordinary deed, when it has an express clause mentioning that the alteration was made by the granter." Accordingly, if a holograph writing contain words written on erasure, it will be none the less effectual, even if the words be *in substantialibus*, on proof that they, too, are holograph of the granter (*Robertson, ut supra*; *Grant*, 1849, 11 D. 860; 1852, 1 Macq. 163). It is sometimes matter of difficulty to determine whether holograph alterations made, it may be, in pencil or in red ink by a granter upon his deed are intended to be operative, or are merely deliberative (*Nasmyth*, 1821, 1 Sh. App. 65; *Muir's Trs.*, 1869, 8 M. 53; *Hamilton*, 1882, 9 R. (H. L.) 53; *Lamont*, 1887, 14 R. 603; *Munro's Exors.*, 1890, 18 R. 122. See CANCELLATION). Further, the observation has been made that there is "an obvious distinction between what is written and what is obliterated: that the former must have been an intended act, the latter may have been accidental" (*Mags. of Dundee*, 1858, 3 Macq. 134, per Ld. Chan. Chelmsford); and that, while the deleted part of a holograph testamentary writing cannot have any testamentary operation, it may be used to show what the testator knew when he wrote it, and also what he had at one time intended (*ib.*). Accordingly, it is competent, in order to complete the sense of a holograph deed, to read the obliterated part as if it were not obliterated (*Chapman*, 1860, 22 D. 745).

4. *Subscription of Holograph Deeds.*—If holograph deeds "be not subscribed, they are understood to be incomplete acts, from which the party hath resiled; yet if they be written in count books or upon authentic writs, they are probative, and resiling is not presumed" (Stair, iv. 42. 6). Stair refers in this passage "to entries in regular books, which never are subscribed or require subscription, to markings by the creditor on the back of a bond or other security of payments to account, and the like, entries which most commonly have no subscription, and not to testamentary documents, which have always been held to require subscription" (*Goldie*, 1885, 13 R. 138, per Ld. Shand). Thus, an unsigned holograph will, although commencing with the testator's name, is ineffectual (*Dunlop*, 1839, 1 D. 912; *Skinner*, 1883, 11 R. 88; *Goldie, ut supra*; see *Russell's Trs.*, 1883, 11 R. 283, and the comments upon that case in *Goldie, ut supra*). In *Burnie's Tr.*, 1894, 21 R. 1015, an unsubscribed holograph writing, occurring below the subscription to a holograph trust settlement, and containing bequests of specific articles, was held by Ld. Justice-Clerk Macdonald and Ld. Young, *dubitante* Ld. Rutherfurd Clark, to be effectual. Ld. Young was of opinion that the rule laid down by Stair did not apply to an explanatory note prefixed, or subjoined to, or on the margin of, or endorsed upon, a holograph will, which is itself duly subscribed; that the writing in question was explanatory as to one legacy; and that as it was good as to that legacy, it was good as to the other gifts, as to which it was not an explanatory, but the only operative, instrument. So far as these views relate to unauthenticated holograph marginal additions, see *Horsburgh*, 1848, 10 D. 824; *Brown*, 1884, 11 R. 821; and *Pettiecrew's Trs.*, 1884, 12 R. 245. Such an addition is, when its date is material, not probative thereof (*Durie*, 1667, M. 16927; *Johnston*, 1688, M. 17063; see M'Laren, *Wills*, s. 530). Where two documents, both holograph, contained in an envelope found after the writer's death in

a locked desk, gave a complete sense only when read together, it was held that they formed the writer's final will, although the first was not signed but superscribed, while the second was initialed, in accordance with her usual practice as established by proof (*Speirs*, 1879, 6 R. 1359). Effect has been given to an unsigned holograph postscript to a letter holograph and subscribed (*Wauchope*, 1662, M. 16965; *Dunlop*, *ut supra*; *Robertson*, 1845, 7 D. 236). It is to be observed that obligatory instruments are, if acted on, binding although unsigned (*Weir*, 1872 10 M. 438; see *Skinner*, *ut supra*); and that the unsubscribed holograph doquet of a notary, authenticating the deed of a person who cannot write, is effectual, if it contain the notary's name *in gremio* (*Cullen*, 1731, M. 16842; *Gordon*, 1765, M. 16818).

5. *Does a Holograph Writing prove its Date?*—"It is a rule that no holograph writing without witnesses can prove its own date" (Ersk. iii. 2. 22; Dickson, ss. 770, 771. As to the date of marginal additions, see 4., above), except against the granter (*E. of Dunfermline*, 1674, 1 Bro. Supp. 703; *Purris*, 1869, 7 M. 764, per Ld. Neaves. See also *Scott*, 1737, M. 12616). But "every holograph writing of a testamentary character shall, in the absence of evidence to the contrary, be deemed to have been executed or made of the date it bears" (37 & 38 Vict. c. 94, s. 40). Observe that the debtor's holograph acknowledgment of intimation of an assignation proves its own date in the absence of disproof (*Newton & Co.*, 1785, M. 850; Dickson, s. 775). Though the deed does not, by itself, prove the date, the rule is that it is not to be taken as if there were no date expressed in it, but only that in cases of any doubt the date must be supported or adminiculated *aliunde* (*Waddel*, 1845, 7 D. 605, per Ld. Moncreiff. See, however, *Suttie*, 1838, 16 S. 429, per Ld. Pres. Hope, and *Purris*, *ut supra*, per Ld. Neaves). A deed challenged on this ground will be, nevertheless, effectual as to matters which do not depend on its date (*Gordon*, 1702, M. 5050, 12614: Dickson, s. 773).

[Dickson, *Evidence*, ss. 754, 775; M. Bell, *Conveyancing*, i. 78–82.] See also Deeds, Execution of; Heritage, Proof of Obligations regarding; I. O. U.; Proving the Tenor.

Homicide.—The destruction of the life of a human being. It is committed only where a self-existent human creature is destroyed. The destruction of an unborn child may be criminal, but does not constitute homicide in the legal sense of the term. If, however, a child has breathed, that is enough, and the act is homicide if its life be destroyed even before it is fully out of the body of the mother (Hume, i. 186; Alison, i. 71, 72; Macdonald, 120; *Macallum*, 1858, 3 Irv. 187; *Scott*, 1892, 3 W. 240, 19 R. (J. C.) 63). Homicide is either criminal or justifiable. Criminal homicide may be either Murder (*q.v.*) or Culpable Homicide (*q.v.*).

See also Justifiable Homicide.

Homologation has been defined as "that assent or approbation of a deed, conveyance, settlement, or contract, which is inferred from circumstances: supplying, in the case of the obliger or granter, the want of legal evidence of consent, and establishing as a recognised engagement a contract defectively entered into, or giving sanction and effect to a conveyance or settlement against which exception might be taken" (1 Bell, *Com.* 144). If this definition be accurate, it would appear that the doctrine rests upon the principle that when a man gives out and acts

upon his deed as regular and binding, he is barred from taking exception to it on the ground of latent nullities for which he is responsible (*Smith*, 1824, 2 Sh. App. 265, 282; *E. of Fife*, 1825, 4 S. 335; *M'Dougall's Exor.*, 1830, 9 S. 12; ADMISSIONS AND CONFESSIONS (*h*); BAR, PERSONAL). Bell goes on to observe (*ib.* 145; *Prin.* s. 27; see Ersk. *Inst.* iii. 3. 47; *Prin.* iii. 3. 15; *Callender*, 1863, 2 M. 291) that "homologation may be either by the subsequent approbation of the granter or maker of the obligation, deed, or settlement; or by the acquiescence of one who, having an interest adverse to it, confirms what has been done. Homologation of the former kind bars *locus pœnitentiæ*; homologation of the latter bars all exception otherwise competent. When the original party homologates, he either ratifies a deed or obligation already executed, but imperfectly, or he adopts and gives effect to what would otherwise be null" (see *Gall*, 1855, 17 D. 1027; as to the difference in effect between ratification of a voidable deed and adoption of a deed which is null, see below).

It is to be observed that Erskine limits the application of the principle to obligations arising *ex naturâ* or *ex contractu* (Ersk. iii. 3. 47; see *Callender, ut supra*).

A deed may be homologated not only by the granter, but by his agent (*Mitchell*, 1874, 2 R. 162; see also *Grant*, 1830, 8 S. 606; and cf. *Telfer*, 1735, M. 5657), or executor (*M'Calman*, 1864, 2 M. 678). Deeds granted by a minor, without consent of his curators (*Hume*, 1671, M. 5688; *Forrest*, 1853, 16 D. 16; see *Harkness*, 1833, 11 S. 760), or by a married woman (*Mitchell*, 1672, M. 5711), may be homologated by the granter on attaining full legal capacity (see *Brodie*, 1827, 5 S. 900). Further, the principle has been applied to deeds open to exception on the ground of fraud (*Dunbar*, 1672, 1 Bro. Supp. 649; *Rigg*, 1776, M. 5672, M. App. "Fraud," No. 2; *M'Michan*, 1839, 1 D. 1085), or impetration *vi et metu* (*Grant*, 1706, M. 16509). While a deed intrinsically null, *e.g.* if forged (see *Mackenzie*, 1880, 7 R. 836; 1881, 8 R. (H. L.) 8 and the cases there cited), or vitiated *in substantialibus* (*Robertson*, 1844, 7 D. 244; *Grants*, 1847, 6 Bell's App. 153; *Boswell*, 1852, 14 D. 378; see Dickson, ss. 856–859), or signed by an idiot or lunatic, cannot be homologated, it may be adopted (Ersk. iii. 3. 47; 1 Bell, *Com.* 145; *Gall*, 1855, 17 D. 1027; Dickson s. 854). So, too, an improbative testamentary writing may be adopted by the granter by reference to it in a probative deed (see *Callender, ut supra*; HOLOGRAPH WRITINGS, 1.).

It has been observed that "there are few, if any, defects in the formal procedure under a submission which may not be cured by homologation. Defects in the deed of submission, in the arbiter's omission to execute his acceptance of office, in the prorogation of the submission, in the omission of the interlocutor interponing the authority of the Court to a judicial reference, in the mode of conducting a proof, and, finally, in the award itself, have severally furnished instances in which acts of homologation have validated irregular procedure, or barred the parties personally from bringing it under challenge" (Bell, *Arbitration*, 315; see More, *Notes*, 67. 68; *Fleming*, 1827, 5 S. 906; *Dundee, Perth, and Aberdeen Railway Co.*, 1851, 13 D. 552; *Paul*, 1867, 5 M. 613; *Elgin Lunacy Board*, 1874, 1 R. 1155; *Robertson*, 1885, 12 R. 419).

The same principle has been applied in the case of an heir of entail challenging the deeds under which he had possessed and claimed enrolment (*Cunninghame*, 1825, 1 W. & S. 103; cf. *Pollock*, 1849, 12 D. 143); of a person taking exception to his sister's marriage contract, which he had attested (*Davidson*, 1714, M. 5652; *Johnstone*, 1725, M. 5657; see below as

to the effect of attestation by one who has no concern with the deed); of a principal who had recognised the settlement made by an unauthorised agent (*Stein's Assignees*, 1827, 6 S. 1; cf. *Smith*, 1879, 6 R. 1017); and of beneficiaries in questions as to the validity of a purchase by a trustee (*Fraser*, 1847, 9 D. 415; cf. *Thorburn*, 1853, 15 D. 845), or the acceptance or rejection of provisions in their favour (*Johnstone*, 1825, 4 S. 234; *Selkirk*, 1854, 16 D. 715; *Keith's Trs*, 1857, 19 D. 1040; *Douglas*, 1859, 21 D. 1066; *Paterson*, 1866, 4 M. 706; *Donaldson*, 1886, 13 R. 967; *Inglis' Trs.*, 1887, 14 R. 740).

Assent is of the essence of homologation; and, consequently, he only who is capable of legal obligation, can homologate (*Morton*, 11 Feb. 1813, F. C.; *Rose*, 1821, 1 S. 154; *Brodie*, 1827, 5 S. 900; *Stein's Assignees*, 1831, 5 W. & S. 47; *Harkness*, 1833, 11 S. 760; *M'Gibbon*, 1852, 14 D. 605; *Sanders*, 1879, 7 R. 157). Further, it is essential that the person from whose actings homologation is inferred know of the existence of the deed, together with the state of matters as affected by it (Ersk. iii. 3. 48; 1 Bell, *Com.* 145; *Johnstone*, 1825, 4 S. 234; *Murray*, 1826, 4 S. 374; *Lindsay's Curator*, 1879, 6 R. 671; *Roberts*, *ib.* 805; *Gillespie*, *ib.* 813; *Wemyss's Trs.*, 1896, 24 R. 216; and the cases of *Selkirk*, *Keith's Trs.*, *Douglas*, *Paterson*, *Donaldson*, and *Inglis' Trs.*, *ut supra*; see also IGNORANTIA JURIS). Thus homologation is not inferred from subscription as a witness, unless the circumstances of the case give rise to a presumption of knowledge (Ersk. *ut supra*; see *Davidson*, 1714, M. 5652; *Johnstone*, 1725, M. 5657). In the opinion of Lord Justice-Clerk Hope, knowledge in minority is not to be held as sufficient to instruct knowledge after the minor has attained majority (*M'Gibbon*, *ut supra*).

Homologation may be express or implied (Stair, i. 10. 11; Erskine, Bell, *ut supra*). Thus, the acknowledgment by the granter of a trust deed of the actings of the trustee thereunder, has been held to remove objections to it on the ground of ineffective delivery and *ultra vires* (*Forbes*, 1840, 3 D. 149). So, too, effect has been given to an improbative receipt, treated by the granter's executor as a valid document of debt (*M'Calman*, 1864, 2 M. 678); and to a marriage contract imperfectly executed, upon which marriage had followed (cf. with *Falconer*, 1830, 8 S. 312; *Wemyss's*, 1768, M. 9174; and *Campbells*, 5 June 1812, F. C.). In regard to the class of instruments last mentioned, Ld. Gillies observed that "when a marriage has been solemnised on the faith of an antenuptial contract . . . there must be actual forgery of the deed libelled to make the ground of reduction relevant" (*Falconer*, *ut supra*). As to the validation of submissions irregularly conducted, see above.

It is to be observed that "the approbatory acts must be so strong and express that no reasonable construction can be put on them other than that they were performed by the party from his approbation of the deed homologated; for no man is *in dubio* presumed to have an intention of obliging himself" (Ersk. iii. 3. 48; 1 Bell, *Com.* 145). Thus, the principle has no application where the deed alleged to operate homologation was attributable to an influence which the granter was not in a condition to resist (*Dallas*, 1704, M. 5677), or was one which the granter was under legal obligation to grant (*Dunbar*, 1662, M. 6715. See also *Innes*, 1821, 1 Sh. App. 169). Further, "a protest against the inference which might otherwise collaterally arise from the act to be done will exclude homologation" (1 Bell, 146; *Malcolm*, 1823, 2 S. 410; *Crichton*, 1826, 4 S. 553; 1828, 3 W. & S. 329; *Adam*, 1832, 5 D. 391).

If the contract or obligation be one and indivisible, a partial approbatory

act will set up the whole (*Steel*, 1774, M. 5669; cf. *Erskine*, 1682, M. 5703). And the same result follows even if it be divisible, unless the person concerned protest that his act is to be taken as limited in application (*Murray*, 1671, M. 5689; see *Muir*, 1663, M. 6107; *Hume*, 1671, M. 5688; *Carmichael*, 1823, 2 S. 198; cf. *Dow*, 1856, 18 D. 820). Homologation has a retroactive effect, making the deed to which it applies good *ab initio* (1 Bell, *Com.* 145). It cuts "off the person homologating from all objections otherwise competent to him against the original deed; and consequently" gives "the same effect against him and his heirs as if it had been valid from the beginning. But in relation to third parties, who are not bound to acknowledge the deeds of him who homologates, homologation can have no effect" (Ersk. iii. 3. 49. See *Liddle*, 1744, M. 5721; Elch. "Homologation"; 1 Bell, *Com.* 146, note). "Where the deed or obligation is null, homologation acts only as the adoption of what is reduced to an intelligible and precise shape, but is in no degree binding; and the binding effect has in this case no retrospect" (1 Bell, *Com.* 145).

[Dickson, *Evidence*, ss. 850–866; Kirkpatrick, *Digest*, s. 111; More, *Notes*, 67 *et seq.*; M. Bell, *Conveyancing*, i. 189–194; Menzies, *Conveyancing*, 183 *et seq.*]

Honorarium.—In Roman law this term denoted a fee paid to a person as an acknowledgment for trouble gratuitously undertaken, in contradistinction to such remuneration as could be exacted as a recompense. These honoraria could not be made the subject of an action; but the prætor, or *præses provinciæ*, pronounced *extra ordinem* whether they were due, and what was the proper amount (*Dig.* l. 13. 1; cf. *Dig.* ii. 6. 1; *Cod.* iii. 1. 13, s. 9). The term has been used in a similar sense in Scotland. An advocate's fees are regarded as honoraria. Consequently an action by an advocate against a client for fees is incompetent. "An advocate in undertaking the conduct of a cause in this Court enters into no contract with his client, but takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the Court, to the members of his own profession, and to the public. . . . It follows, also, that he cannot demand or recover by action any remuneration for his services, though in practice he receives *honoraria* in consideration of these services" (*Batchelor*, 1876, 3 R. 914, per Ld. Pres. Inglis, at p. 918). According to custom, a counsel's fees are paid when he is instructed for the various stages of a case; and they are presumed to have been so paid. An action by an advocate against an agent who received fees from a client for counsel, and retained them to his own use, would be competent (*Cullen*, 1862, 24 D. 1132). Where a counsel has acted in a case gratuitously for a friend, a poor person, or a professional brother, and his client is found entitled to expenses, the appropriate fees can be recovered from the losing party (*Batchelor*, *ut supra*). Action has been held competent for the annual salary of an advocate as standing counsel (*Mackenzie*, 1728, Mor. 11421). As to whether an advocate is entitled to retain fees for services which he does not render, Sheriff Mackay says (*Manual*, 28) that the general opinion is that he may do so, "the ground being either that the fee is an *honorarium*, or that some services are presumed to have been rendered, although they may not have been those for which the fee was sent. Counsel may therefore, according to existing practice, retain the full fee, though he does not attend the hearing of the cause owing to another engagement, unless, as is now common, it is expressly stipulated that

he attend. When he has no other engagement, he is bound to attend."

Honours.—See DIGNITIES.

Horning, Letters of.—A debtor or obligant cannot be imprisoned, nor can his goods be poinded, until he has been duly charged to pay or perform. Prior to the passing of the Personal Diligence Act, 1838, when personal execution was resorted to the charge required by law was contained in letters of horning. Where the obligation was to pay money, the writ (after the passing of the Act 1584, c. 139) might also contain warrant to poind and arrest, in which case the letters were called letters of horning and poinding. This came to be the form almost universally adopted, except where the obligation was *ad factum præstandum*, when letters of horning alone were used, imprisonment, in that case, being the only compulsitor in the event of failure to obey the charge. Originally, however, this form of diligence was used solely with a view to imprisonment, and indeed the remedy of poinding was quite inconsistent with the old legal consequences of rebellion, which was the result of failure to obey, because rebellion involved the forfeiture of the rebel's goods to the Crown. See ESCHEAT.

Letters of horning were a development from LETTERS OF FOUR FORMS (*q.v.*). The change consisted in (1) substituting one charge of (originally) fifteen days for the four charges of three days each formerly required, and (2) in making denunciation of rebellion the immediate result of the obligant's failure to obey the charge, whereas, according to the older style, the alternative was first given of voluntary surrender.

To warrant the issue of letters of horning, there must be either (1) a decree obtained in an action against the obligant, or (2) a decree of registration upon a protested bill of exchange, or upon a deed duly registered for execution. See REGISTRATION. There are also a few exceptional cases provided for by special Statutes which warrant hornings, which seem to be still competent (*Jurid. Styles*, 3rd ed., iii. 369). Formerly, if the decree were that of an inferior Court, it was necessary to obtain a DECREET CONFORM (*q.v.*) from the Court of Session by raising there a new action, as the writ can issue only on a warrant from the Supreme Court. Procedure by bill was, however, substituted by the Acts 1592, c. 181, 1606, c. 10, 1609, c. 15, and 1612, c. 7.

The writ, which runs in the name of the sovereign and passes the Signet, is addressed to messengers-at-arms. It sets forth the ground of debt, and the decree upon which the diligence proceeds. In narrating this, strict accuracy must be observed: any partial payments that may have been made must be specified (*Brown*, 1849, 11 D. 474; *M'Martin*, 1824, 3 S. 275). Then follows the "will." "Our will is herefore and we charge you that on sight hereof ye pass and in our name and authority command and charge . . . to make payment" within a specified number of days, under pain of rebellion or being put to the horn. Then follows an order to the messenger to denounce the obligant rebel on the lapse of the days of charge if payment has not been made. In the case of letters of horning and poinding, warrant to poind and arrest is incorporated.

The *inducie*, or days of charge, vary. Where the writ is issued (*a*) upon a decree of registration on a deed wherein the obligant consents

to execution within an expressed number of days, the *inducie* will be the number so specified. Consent to a shorter period than six days is unknown in practice, and would probably be ineffectual (*Forrester*, 25 June 1815, F. C., *per* Ld. Meadowbank); (*b*) where issued upon a registered deed in which the registration clause specifies no time, but is in the statutory form provided by the Titles to Land Consolidation (Scotland) Act, 1868, s. 138, the *inducie* are six days; (*c*) on registered protests, six days (1681, c. 86); (*d*) on all other decrees, where the parties charged are within Scotland, seven days; where in Orkney or Shetland, or furth of Scotland, fourteen days (Court of Session Act, 1868, s. 14). It will thus be observed that the *inducie* on letters of horning (being letters passing the Signet) are in some instances shorter than where the corresponding new forms of diligence introduced by the Personal Diligence Act are used; *e.g.* in the case of decrees of the Court of Session the *inducie* on warrants annexed to extracts are fifteen days where the parties are in Scotland, and forty days where they are in Orkney or Shetland; and in the case of registered protests where the parties are in Orkney or Shetland, the *inducie* upon extracts are forty days (*Jurid. Styles*, iii. pp. 337 and 369).

The messenger having duly served the writ upon the debtor personally, or at his dwelling-house, or edictally, as the case requires (see CHARGE), he next proceeds to certify, by writing on the back of the letters, that he has given the charge. This attestation, which is known as the messenger's *execution* or *indorsation*, must specify all the steps taken; and, so far as these are solemnities required by law, they must be fully and accurately set forth (*Hay*, 1680, Mor. 3790). If the obligant failed to fulfil his obligation within the days of charge, the messenger in former days denounced him rebel, by reading the letters at the Market Cross of Edinburgh, or that of the head burgh of the shire in which the obligant had his domicile, and blowing three blasts of a horn. See DENUNCIATION. This ceremony, however (from which the writ received its name), fell into disuse long prior to the passing of the Personal Diligence Act, though the execution of denunciation continued to recite the procedure as if it had actually been gone through. The denunciation along with the letters of horning and the execution thereof are then within fifteen days registered in the General or Particular Register of Hornings, and the creditor may obtain letters of caption, which warrant the obligant's imprisonment. When letters of horning and poinding are used, poinding may proceed whenever the days of charge have expired. The proceedings are the same as in the case of a charge in virtue of the Personal Diligence Act, and according to the rules of that Act; the only distinction being that there is no power of opening shut and lockfast places, and a special warrant must be applied for when such power is found necessary (*Jurid. Styles*, 3rd ed., iii. 370).

Although the provisions of the Personal Diligence Act, authorising the insertion of warrants to charge in extract decrees, have in ordinary practice superseded entirely the use of letters of horning, these are still in all cases competent (*Pollok*, 1865, 3 M. 968); but where the creditor resorts to them unnecessarily, he cannot recover the extra expense from the debtor (s. 8). Letters of horning may still have to be resorted to in certain cases where the newer form of diligence is not applicable. Such cases arise when the warrant to charge on extract would not of itself afford sufficient evidence of the charger's right, and supplementary evidence requires to be produced, as where diligence proceeds upon a registered bond at the instance of a creditor who has acquired right by assignation, before the bond has been registered.

For examples, see *Jurid. Styles*, 3rd ed., iii. 345 *et seq.* See also Mackay, *Prac.* i. 65.

[Ross, *Lect.* i. 280 *et seq.*; Menzies, *Lect.* 287 *et seq.*; Bell, *Lect.* 520 *et seq.*; Stair, ii. 3. 22, ii. 4. 60, and iv. 47. 7; Ersk. ii. 5. 55; Bell, *Com.* ii. 7, 159, 435; *Jurid. Styles*, 2nd ed., iii. 567, 734, 985: Bell, *Prin.* s. 2311.]

See Diligence; Imprisonment.

Horses.—Contracts relative to the sale, hiring, custody, and carriage of horses are subject to precisely the same rules of law as are applicable to other classes of moveable property. The provisions of the Sale of Goods Act, 1893, with respect to the sale of horses in open market (s. 22) are not applicable to Scotland, because with us there is no law of market overt, such as exists in England and Ireland. Accordingly, the *vitium reale* attaching to a horse stolen in Scotland is indelible till its return to the original owner, and it is recoverable from a *bonâ fide* purchaser (*Todd*, 1882, 9 R. 301). Horses were held to be "goods" under sec. 5 of the Mercantile Law Amendment Act (*Young*, 1858, 21 D. 87), and have so been considered under sec. 14 of the Sale of Goods Act, 1893 (*Wilson*, 1896, 23 R. 714). Should a horse die or become injured while in the hands of an intending purchaser, the burden lies on him of proving that he was not to blame for the death or injury; and he is liable in the same degree of diligence as the hirer of a horse (*Pullar*,1858, 20 D. 1238). In the case of the sale of a specific horse without a warranty, the rule *caveat emptor* applies if the purchaser has had opportunity of examining the animal, and he takes it with all its faults, unless there be fraud on the part of the seller. A seller is not bound to disclose discoverable defects unless this duty is laid on him by the purchasers (*Yeats*, 1884, 21 S. L. R. 698).

Soundness means fitness for immediate use. A sound horse is one free from any disease or structural alteration which does, or may, diminish its natural usefulness (*Kiddel*, 1842, 9 M. & W. 668; *Dundas*, 1797, Hume, 677; *Ralston*, 1808, M. *voce* "Sale," App. 6). If a horse suffers to this extent from a curable disease, it is unsound till fit for work. Broken wind, being incurable, constitutes unsoundness. Cough, cold, and sore throat may or may not amount to unsoundness (*Dykes*, 1860, 22 D. 1523; *Newlands*, 1885, 12 R. 820; *Gardener*, 1880, 7 R. 612). Roaring is not unsoundness unless symptomatic of disease. Similarly, spavin, thrush, navicular joint disease (*Robeson*, 1874, 2 R. 63), sand-crack, and the like, are indications of unsoundness (*Pollock*, 1840, 2 D. 1026: *Hendrie*, 1842, 4 D. 1417; *Brand*, 1813, Hume, 697 (string-halt)): but mere thinness of sole does not render a horse unsound; nor do corns or splint, unless of such a character as to impair usefulness (*Hamilton*, 1791, Hume, 667; *Ewart*, 1791, Hume, 667; *Ralston, ut surpa*; see also *Fisher*, 1846, 9 D. 17; *Jardine*, 1806, 14 F. C. 253). The same principles are applicable in the case of a horse suffering from blindness (*Martin*, 1791, Hume, 703; *Scott*, 1815, Hume, 702; *Russell*, 1792, Hume, 675), or other ailments. Crib-biting and wind-sucking, if sufficiently injurious to health, may amount to unsoundness (*Deuchars*, 1833, 11 S. 612; *Vaucamps*, 1889, 5 S. L. R. 353). The legal meaning of vice in a horse is, a bad habit, either manifested in temper, so as to render it dangerous or diminish its usefulness, or a habit injurious to health (*Geddes*, 1814, 17 F. C. 606, 6 Pat. App. 312; *Fisher*, 1846, 9 D. 17 (insufficient gelding): see Ld. Wood in *Scott*, 1857, 20 D. 253, 257). Backing, jibbing, biting, kicking, rearing, bolting, if persistent, are vicious habits. Shying (*Begbie*, 1828, 6 S. 1014; *Rose*, 1878, 5 R. 600), if inveterate, or habitual restless-

ness in harnessing (*Scott, ut supra*) or mounting (*Fraser*, 1886, 2 S. L. R. 292), so as to render these operations dangerous, constitute vice.

Wilful misrepresentation of material facts as to a horse's condition of health or habit is a good ground for annulling a contract of sale (*Brown*, 1791, Hume, 671; *Beddie*, 1812, *ib.* 695), or for claiming damages (Sale of Goods Act, s. 53); but not unless the misrepresentation is material (*Geddes, ut supra*). Concealment amounts to fraud, provided there be a duty to disclose material facts. Devices to conceal defects, such as filling up a sand-crack or thrush, and such practices as gingering, are fraudulent (*Cossar*, 1826, 4 S. 685): and when a horse is sold "with all faults," the seller is not protected against faults he has been at pains to disguise.

A horse warranty is an essential condition forming part of the contract of sale; hence, on breach of warranty the sale is reducible. All statements made as grounds of reliance are warranties. It is not necessary that they be in writing (*Scott*, 1857, 20 D. 253), nor that they be made simultaneously with the sale. Honest belief by a seller giving a warranty that a horse possesses certain qualities does not free him if the horse *de facto* does not possess them. All warranties apply to the state of the horse at the time of sale (*Ewart*, 1791, Hume, 161; *Gilmer*, 1830, 8 S. 420; *M'Bey*, 1842, 4 D. 349; *Hendrie*, 1842, 4 D. 1417; *Pollock*, 1840, 2 D. 1026; *Brown*, 1848, 10 D. 1460). Should disease show itself soon after sale, it is a question of evidence whether or not it amounts to a breach of warranty, and it lies on the purchaser to show that the disease existed at the date of sale (*Wight*, 1833, 11 S. 722; *Dykes*, 1860, 22 D. 1523; *Begbie*, 1828, 6 S. 1014). Representations by horse-dealers, or affirmations in praise of a horse, are mere *verba volantia*, and not warranties, unless on the faith of them a sale takes place. The border-line between recommendation and warranty is a very hazy one (*Rough*, 1875, 2 R. 529; *Wilson*, 1896, 23 R. 714). It is a jury question whether a representation comes up to a warranty. A general warranty such as is inferred from the word "warranted" means that a horse is fit for immediate work (*Ralston*, 1808, M. *voce* "Sale," App. 6). Such a warranty does not cover patent defects. An express warranty, whether of fitness or for specific purpose, is confined to what is expressed in it. "Believed sound" is limited to the seller's belief. "Warranted sound," or "this horse is sound," renders the seller liable if the horse be unsound. If any peculiarity, such, *e.g.*, as age, is to be guarded, it must be inserted in the warranty (*Scott, ut supra*: *Thomson*, 1859, 21 D. 726). "Free from fault" covers unsoundness, vice, and blemish (*Deuchars*, 1833, 11 S. 612). "Quiet in harness and saddle and sound *to the best of my knowledge*" means that the words in italics apply both to quietness and soundness (*Campbell*, 1886, 23 S. L. R. 712). Where the warranty is verbal, the exact words used must be proved (*Mackie*, 1874, 2 R. 115; *Robeson, ut supra*; *Rose, ut supra*).

The position of auctioneer is that of custodier and factor for the seller till purchase, and then custodier for the buyer; but if a horse is put up and not sold, and the auctioneer request the owner to take it away, the custody reverts to the owner. An auctioneer giving a warranty without authority does so at his own risk. Conditions of sale are sufficiently notified by being printed with the catalogue, or posted up in the auction-mart. They are to be fairly construed, and are not altered by verbal declarations by the auctioneer (*Laing*, 1832, 10 S. 777; *Hain*, 1853, 15 D. 667: *Yeats, ut supra*).

When a horse is sold expressly for a particular purpose it must be fit for that purpose, whether the seller is aware of its defect or not (*Rough, ut*

supra). A horse "fit to be ridden by a gentleman advanced in life" must not be vicious and sulky (*Campbell, ut supra*); and if a pair is bought to work together, though each goes well by itself, they must be capable of working together, or they may be rejected (*Dundas*, 1797, Hume, 677; *Wemyss*, 1802, *ib.* 682). If the warranty of fitness for a particular purpose be implied, the purpose must be different from the ordinary purpose (*Hamilton*, 1878, 5 R. 839—a case under the Mercantile Amendment Law Act; see also *Rough, ut supra*). Trial before rejection must be fair and reasonable, and such as to test the animal (*M'Bey*, 1842, 4 D. 349); but it must not be put to excessive work, nor subjected to more severe work than a prudent man would put his own horses to (*Pullars, ut supra*). If a purchaser use a horse on trial as his own, he is barred from rejecting it. Notice of refusal to accept being equivalent to return under the old law (Sale of Goods Act, 1893, s. 36), the obligation of a buyer to immediately place a horse he intends to reject in neutral custody no longer prevails (*M'Bey, ut supra*; *Cal. Rwy., ut supra*).

When a particular horse accidentally dies while on hire, the lessor is discharged; and if it become temporarily useless through no fault of his own, the lessee can either abandon the contract or claim abatement of the hire. But if it be an indefinite animal, as in the case of "jobbing out" horses, accidental death does not free the lessor. If a hired horse take ill, the risk is with the lessor, unless the illness be temporary or there be fault on the lessee's part (*Fowler*, 1872, L. R. 7 C. P. 272). A hired horse must only be put to such use as is implied in the contract (*Straiton*, 1610, Mor. 3148; *Moffat*, 1624, Mor. 10073; *Shaw*, 1792, Hume, 297; *Gardeners*, 1792, Hume, 299); and a lessee is liable for a horse injured by being galloped in a field when it was hired to be ridden along a road (*Seton*, 1880, 8 R. 236; see *Bain*, 1888, 16 R. 186, for a case of loan). If a horse fall lame, the lessor should put it up at the most convenient place, and notify to the owner (*Bray*, 1818, 1 Gow, 1). He should provide veterinary treatment, and not treat it himself (*Dean*, 1811, 3 Camp. 4.; *Campbell*, 1828, 6 S. 806). When a horse is accidentally killed while on hire, or at wintering or grazing, the risk of accident is with the owner, unless there be fault on the custodier's part. The onus of proof of injury is on the custodier (*Binny*, 1679, Mor. 10079; *Robertson*, 1809, 15 F. C. 348; *Pyper*, 1843, 5 D. 498; *Pullars, ut supra*; *Wilson*, 1879, 7 R. 266); but in the recent case of *Sutherland*, 1896, 23 R. 718 (Second Division), this doctrine has been overruled. Livery-stable keepers must provide secure stables (*Searle*, 1874, 43 L. J. Q. B. 43), and proper labour in dressing and feeding. Graziers' parks must be free from pitfalls (*Davidson*, 1749, Mor. 10081; *M'Lean*, 1883, 10 R. 1052; *Mack*, 1832, 10 S. 349; but see *Sutherland, ut supra*) and diseased animals (*Robertson*, 1851, 13 D. 779, 14 *ib.* 315). Breakers and trainers must preserve horses intrusted to them from dangers (*Laing*, 1850, 12 D. 1279).

Railway companies who carry live-stock must receive a horse if offered to them at a reasonable time; but their duty in this respect is limited to the convenience at their disposal (*M'Manus*, 1859, 4 H. & N. 327). They must provide a reasonably sufficient vehicle for its transit (*Blower*, 1872, L. R. 7 C. P. 655; *M'Manus, ut supra*), and tie it up in the van (*Paxton*, 1870, 9 M. 50; *Rain*, 1869, 7 M. 439), unless this has been undertaken by the consigner (*Richardson*, 1872, L. R. 7 C. P. 75). If accident happen to the horse in transit, the presumption is against the carrier, but he is not liable if he can prove that the accident was due to the inherent vice of the horse (*Paxton, Ralston*, and *Blower, ut supra*; *Kendall*, 1872, L. R. 7 Ex. 373,

377), unless brought out by the company's negligence (*Gill*, 1873, L. R. 8 Q. B. 186).

House of Commons.—See COMMONS, HOUSE OF.

House of Lords.—See LORDS, HOUSE OF.

House of Lords, Appeal to.—See APPEAL TO HOUSE OF LORDS.

Housebreaking is not in itself a point of dittay. In practice it is nearly always associated with the crime of theft, either as an aggravation of that crime or with intent to commit it. Stouthrief and robbery may be aggravated by being committed by means of housebreaking (Macdonald, 55–56). Breaking into a house with intent to assault, and assaulting the occupier, is an aggravated form of assault, known as hamesucken, and, even where the circumstances did not amount to hamesucken, would doubtless be considered a serious aggravation. See HAMESUCKEN. Housebreaking has been held an aggravation of malicious mischief (Bell, *Notes*, 35; case of *Munro*, 1831, Macdonald, 117). By Act 29 Geo. III. c. 46, it is made an offence to break into buildings with intent to destroy woollen and other goods in the loom, or apparatus for manufactures. *Shipbreaking* is an aggravation of theft, to which the principles applicable to housebreaking apply generally (Macdonald, 35). It has not been decided whether "shipbreaking with intent to steal" is a relevant charge, but there seems no reason why it should not be so held (Macdonald, 68). *Prisonbreaking*, either breaking out of, or breaking into with a view to rescue prisoners, is a crime (Hume, i. 401–404; Macdonald, 224, 225).

Hume, i. 98, defines housebreaking as "*the forcible entry of a house.*"

What does the term *house* include? "Any roofed building" (even although unfinished) "so fastened as to indicate that the owner relies on its strength to protect property" (Macdonald, 28; Hume, i. 103). Where a house is divided into several apartments, each let to a separate tenant, each apartment so occupied will form a "house" (Macdonald, 29); but it seems questionable if this applies to a room occupied by a mere lodger in an inn being broken into by another lodger under the same roof (Hume, i. 101).

What constitutes "forcible entry"? Forcible entry implies the existence of a security to be overcome. "The law always understands it to be housebreaking when the thief opens a way into the house for himself, and overcomes the ordinary obstacles provided against entry, and for the safe keeping of the effects within; though this be done without the piercing or effraction of any part of the building, or of what is attached thereto: since it is nevertheless true, that the defence and safeguard of the house are broken" (Hume, i. 98). It is the "*security*," not the "*sanctity*," of the house which must be violated (*Peter Alston* and *Alexander Forrest*, H. C., 13 March 1837, 1 Swin. 433, Ld. Mackenzie, p. 468. See this case for exhaustive examination of principles). Applying the above principles, entry may be effected by (*a*) Actual breaking of some portion of the building. (*b*) Adopting some unusual mode of entry, as by a window,

provided the window, if "near the ground," is not open, and the thief requires to raise the sash either wholly or partially to effect entry; although not expressly decided, entry by an open window in an upper storey would apparently be "forcible entry"; an open window merely protected by unfastened folding blinds, or a broken pane protected by a moveable board, would not be considered secured (Hume, i. 98, 99, 100; cases in Bell, *Notes*, 37, 38, 39. See cases of *Martin* and *Davidson*, p. 38, as to entry by window, when this a usual mode of entry); entry by the chimney or by a sewer—"for neither of these is a place of entry, or necessary to be any further guarded than it is by its own nature,"—or by a water wheel (case of *Hunter*, 1801, Hume, i. 99, Bell, *Notes*, 37). (*c*) Opening the door by forcing or otherwise removing an inside bar or bolt, or by breaking or picking the lock or opening the lock with false keys, or the true key feloniously obtained or illegally retained (Hume, i. 98, 99, 100; Macdonald, 30). See case of *Farquharson*, 1854, 1 Irv. 512,—key given for specific temporary purpose, and used to obtain entry,—and *Jardine*, 1858, 3 Irv. 173, as to illegal retention of key. See also *Sutherland*, 1874, 3 Coup. 74, where held housebreaking to raise heavy trap-door in pavement forming entry to a cellar. The effect of pushing open a door, merely secured on the inside by some heavy article resting against it, has not been decided, but would doubtless depend on the nature and amount of resistance thus offered (Macdonald, 29). It is not housebreaking to raise a latch or remove an outside hook-and-eye check, or to turn key left outside in lock (*Alston* and *Forrest, supra*). Prior to this case the decisions appear conflicting (Alison, i. 286; Bell, *Notes*, 36, 37; Macdonald, 31). Effect of opening with key hanging on a nail within sight and reach of thief not decided. Conflicting opinions expressed in *Alston* and *Forrest, supra*. In *Jardine, supra*, Ld. Deas says that this has been held to be housebreaking, but no reference is given. (*d*) Entry by holes or apertures, to which the same principles as those referred to in the case of doors and windows appear applicable (Macdonald, 33, 34; cases in Bell, *Notes*, 35 and 199, case of *Anderson*). (*e*) Entry by artifice, as by getting door opened on false pretences and then rushing or forcing a way in. "Because the owner is here simply an instrument in their hands, and serves, in a manner, as a key to the house, of which they have falsely and feloniously got possession" (Hume, i. 100). (*f*) By collusion with an inmate of house, or, being lawfully within the house, unfastening any secured means of entry, and afterwards returning and thus obtaining entry (Hume, i. 99, 101).

The security being violated, entry may be made by the insertion of the hand or an instrument to remove property, as well as complete physical entry (Hume, i. 101, 102). The above principles apply equally to all acts of housebreaking, viewed either as an aggravation of theft or with intent to steal. In the latter case entry is not essential, provided the security has been destroyed. Where the security was not completely overcome, a charge of breaking the door of a house with intent to enter and steal held relevant (*Monteith*, 1840, 2 Swin. 483; Macdonald, 67). This might now be charged as attempted housebreaking.

Breaking out of house after theft or attempted theft. It has not been decided whether this amounts to housebreaking. The weight of opinion seems against it being so considered (Hume, i. 101; Macdonald, 34).

Modus in Libel.—The Criminal Procedure (Scotland) Act, 1887, Schedule A, contains the following form applicable to theft by housebreaking:—

". . . You did break into the house occupied by Andrew Howe, banker's clerk, and did there steal twelve spoons, a ladle, and a candlestick. . ."

This form is apparently intended to be applicable in all cases, and to supersede the previous practice of describing the particular manner by which entry is obtained. Housebreaking with intent to steal would apparently be sufficiently libelled as follows:—". . . You did break into the house occupied by A. B., with intent to steal therefrom. . ." (Macdonald, 362).

Punishment of Housebreaking.—Theft by housebreaking was formerly capital, and Hume quotes numerous instances of this sentence being pronounced. The punishment has for many years been limited to penal servitude or imprisonment, and a capital sentence is now no longer competent (s. 56 of Criminal Procedure (Scotland) Act, 1887). Minor cases are sometimes tried by the Sheriff summarily. In exceptional circumstances the option of a fine has even been given, and the Probation of First Offenders Act, 1887, may, in suitable cases, be taken advantage of. Where the party whose house is entered has reason to believe that there is imminent danger to the lives or persons of the inmates, he may be justified in killing the housebreaker. The danger is presumed to be imminent at night (Macdonald, 143).

Housebreaking Implements: Possession of.—Under sec. 409 of the Burgh Police (Scotland) Act, 1892, every known or reputed thief, or associate of known or reputed thieves, in whose possession are found picklocks or other implements usually employed in housebreaking, is liable to be apprehended, and, on conviction, sentenced to imprisonment not exceeding sixty days. The section appears to contemplate that the mere possession of such implements by a party of the character in question is sufficient for conviction; but it would be reasonable that the magistrate should be satisfied that the circumstances point—as they will no doubt as a rule do—to the possession being felonious. On English law, see 24 & 25 Vict. c. 96, ss. 58 and 59, *infra*.

[Hume, i. 98; Bell, *Notes*, 35–41; Alison, i. 282; Macdonald, 28, 67.]

Notes on Law of England.—The English law seems to rest on much the same principles as our own. A distinction is there drawn between *burglary* and *housebreaking*, the former being limited to the breaking and entering of a dwelling-house by night with intent to commit felony therein. Night extends from 9 p.m. of one day to 6 a.m. of the following day. *Breaking out* is also treated on the same footing as breaking in (Stephen, *Digest*, pp. 258, 261; 24 & 25 Vict. c. 96, ss. 50–59).

House-rents.—See RENTS; PRESCRIPTION.

Housing of the Working Classes.—The law on this subject is entirely statutory, and is contained in the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), as amended in certain unimportant particulars by two short Statutes, 57 & 58 Vict. c. 55, and 59 & 60 Vict. c. 31 (which repeals a prior amending Statute, 55 & 56 Vict. c. 22), and by an enabling subsection in the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58, s. 24, subs. 6).

History.—The Act of 1890 is entitled "An Act to consolidate and amend the Acts relating to Artizans and Labourers Dwellings and the Housing of the Working Classes." It repeals all prior Statutes on the subject, and Schedule 7 gives a list of the repealed enactments, which shows the

history of previous legislation. The following are the repealed Statutes which applied to Scotland:—

(*a*) The Dwelling Houses (Scotland) Act, 1855 (18 & 19 Vict. c. 88), had for its object the encouragement of the formation of voluntary associations for the erection or improvement of dwelling-houses for the working classes. Such associations were also given certain powers "to acquire dilapidated or noisome buildings in towns." The Act contains most careful provisions regarding the formation, registration, working, management, and powers of these associations.

(*b*) The Labouring Classes Dwelling Houses Act, 1866 (29 & 30 Vict. c. 44), enabled the Public Works Loan Commissioners to make advances towards the erection of dwellings for the labouring classes, and at the same time empowered railway and other trading and manufacturing companies to provide dwellings for those in their employment. This Act is declared to apply to Scotland by sec. 4 of 30 & 31 Vict. c. 28.

(*c*) The Artizans and Labourers Dwellings Act, 1868 (31 & 32 Vict. c. 130), applied only to burghs and police burghs. It laid on local authorities the duty of causing any house, which was unfit for human habitation, to be either effectively repaired or demolished. It was amended by 42 & 43 Vict. c. 64.

(*d*) The Artizans and Labourers Dwellings Improvement (Scotland) Act, 1875 (38 & 39 Vict. c. 49), went a step further, by enabling a local authority to deal with an unhealthy area by an improvement scheme. It applied only to burghs with a population of or above 25,000. It was amended by 43 Vict. c. 2.

(*e*) The Public Works Loans Act, 1879 (42 & 43 Vict. c. 77).

(*f*) The Artizans Dwellings Act, 1882 (45 & 46 Vict. c. 54). Part I. amends only the English Acts of 1875 and 1879. Part II., however, which amended the Act of 1868, applied to Scotland. It provided *inter alia* for the removal of obstructive buildings.

(*g*) The Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), extended the application of existing Statutes and introduced important amendments. Its provisions are embodied in the Statute of 1890.

The Statute now in force is the Consolidation Act of 1890, which supersedes all prior Statutes. The amending Act of 1894 (57 & 58 Vict. c. 55) extends to sec. 39 of the Act of 1890 the borrowing powers given by sec. 43 thereof. The Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58, s. 24, subs. 6), extends to parish councils certain powers of making complaints or representations which the Act of 1890 confers on inhabitant householders. The amending Act of 1896 (59 & 60 Vict. c. 31), taking the place of a prior amending Statute of 1892, which it repeals, provides (1) that lands vested in local authorities under the Acts of 1875 and 1880 shall continue to be vested in them under the Act of 1890 without further instruments, and (2) amends sec. 96, subs. 2, of the Act of 1890 by the insertion of qualifying words. With these trifling amendments the Act of 1890 contains the whole law on this subject.

In construing the Statute, the Scots lawyer must always keep before him Part V. (ss. 94–97), which provides for the application of the Act to Scotland.

The execution of the Act is devolved on the local authorities under the Public Health (Scotland) Acts, viz., in burghs and police burghs, town councils and police commissioners; and in rural districts, district committees or county councils, sitting as such. Certain powers of supervision and

review are exercised by the Secretary for Scotland, who has in Scotland all the powers which the Local Government Board has in England (s. 96, subs. 1). Again, powers of supervision as to the providing of lodging-houses in rural districts, which in England are exercised by county councils, are in Scotland intrusted to the Local Government Board for Scotland, coming in place of the Board of Supervision (s. 96, subs. 1).

The expenses of executing the Act fall on the public health rate.

The general provisions of the Act are grouped under four heads: Part I. Unhealthy areas (ss. 1–28); Part II. Unhealthy dwelling-houses (ss. 29–52): Part III. Working-class lodging-houses (ss. 53–71): Part IV. Supplemental (ss. 72–93). The remainder of the Act contains special provisions: Part V. Application of Act to Scotland (ss. 94–97); Part VI. Application of Act to Ireland (ss. 98–101); Part VII. Repeal and temporary provisions (ss. 102, 103).

Part I. Unhealthy Areas.

This part of the Act applies only to burghs and police burghs (ss. 3, 96). On receiving an "official representation" that within a specified area (*a*) any houses, courts, or alleys are unfit for human habitation, or (*b*) sanitary defects injurious or dangerous to health exist, and that there is no remedy but rearrangement and reconstruction, the local authority must consider the advisability of entering on an improvement scheme (s. 4). The "official representation" comes from the medical officer, acting either on his own motion or on a complaint made to him by two resident justices or twelve ratepayers (s. 5). Sec. 6 specifies the requisites of any improvement scheme. Such a scheme requires the approval of the Secretary for Scotland, which is given, by provisional order, only after the procedure specified in secs. 7 and 8. The provisional order must be confirmed by Act of Parliament (ss. 8 and 9), all the procedure being at the expense of the local authority. The Secretary for Scotland may require the scheme to provide for the accommodation elsewhere of working people to be displaced by it (s. 11). If a local authority refuses to make an improvement scheme, it must send a copy of the official representation, with the reasons for not acting on it, to the Secretary for Scotland, who may thereupon order a local inquiry (s. 10). The execution of the scheme devolves on the local authority, subject to the provisions of secs. 12–15. The Secretary for Scotland may sanction modifications on the scheme, and may provide for its completion on the local authority failing to do so.

If the medical officer fails to act on the representation of twelve ratepayers as to an unhealthy area, they may appeal to the Secretary for Scotland, and he may order a local inquiry (s. 16). Secs. 17–19 and 94 (3) (*b*) deal with the proceedings on local inquiries. Secs. 20–23 and 94, and the Second Schedule (note articles 33 and 34), deal in great detail with the acquisition of land under an improvement scheme. It is to be noted that under sec. 21 compensation for property constituting an unhealthy area is not to include any allowance in respect of compulsory sale, or the value of any addition or improvement made after the publication of the scheme, unless such were necessary. If the property was let for illegal purposes, or overcrowded, or a nuisance, or in defective sanitary condition, or in bad repair, it is to be valued only at the rent obtainable if it was let legally, for a proper number of occupants, and in good sanitary condition and good repair. If it is unfit for occupation, only the value of ground and materials can be allowed.

Secs. 24 and 25 deal with expenses and borrowing. Sec. 26 makes

provision for the case of absence of the medical officer. Secs. 27 and 28 confer powers on the Secretary for Scotland as to notices.

PART II. UNHEALTHY DWELLING-HOUSES.

(1) *Buildings Unfit for Human Habitation.*—It is the duty of the medical officer to report to the local authority any dwelling-house so dangerous or injurious to health as to be unfit for human habitation (s. 30). He must inspect and report on such a house if required by four or more householders of the vicinity (s. 31), or by the parish council (57 & 58 Vict. c. 58, s. 24 (6). Urban local authorities may be forced to act by the Secretary for Scotland (s. 31 (2)). It is the duty of every local authority to ascertain, by causing periodical inspection, whether any dwelling-house in the district is unfit for human habitation, and to take proceedings, under the Public Health Acts, for closing any such house (s. 32, which prescribes also the method of obtaining and enforcing a closing order). If, after a closing order, no steps are taken to render the house sanitary, the local authority may, in the manner set forth in sec. 33, order its demolition. Sec. 34 provides for the execution of a demolition order, and sec. 35 provides for an appeal to the Sheriff (s. 95 (3)) against such an order. An owner who executes works required by an order of the local authority may obtain an order charging the expenditure on the property (ss. 36, 37, 95 (1)).

(2) *Obstructive Buildings.*—A medical officer, finding a building which stops ventilation, or otherwise makes other buildings dangerous or injurious to health, or which prevents the remedy of any nuisance in respect of other buildings, is required to represent the matter to the local authority, with the recommendation that the obstructive building should be pulled down. Any four or more resident householders, or the parish council, may make a like representation. The local authority proceeds, in the manner prescribed (s. 38), to consider the matter; and if it resolves on demolition, there is an appeal, as in the case of a demolition order under sec. 35. Sec. 38 provides fully for purchase, compensation, etc.; but it will be noted that in Scotland sec. 94, subs. 3 (3)), takes the place of sec. 38, subs. 8.

Where the area is too small to be dealt with under Part I. as an unhealthy area, it may be dealt with by a scheme for reconstruction under secs. 39, 40 (also 57 & 58 Vict. c. 55, as to borrowing). The details as to notices, approval by the Secretary for Scotland, taking of land, etc., are similar to those contained in Part I. of the Act.

Questions of compensation under Part II. of the Act are to be settled by an arbiter appointed by the Secretary for Scotland; and the same considerations are to be kept in view as under Part I., with the addition that the arbiter may allow for any increase of value which the improvement makes on other property of the same owner (s. 41).

Secs. 42–44 deal with expenses and borrowing. In rural districts all expenses, except those of a closing order, must be charged on the parish (s. 96, subs. 9) for which they are incurred. An annual account is to be presented to the Secretary for Scotland.

Sec. 45 does not apply to Scotland (s. 96, subs. 16). Possibly the powers of appeal under the Local Government (Scotland) Act, 1889, s. 17, may apply to the cases dealt with in this section.

Secs. 47 and 97 provide for the interests of the fiar and the superior of property dealt with. Sec. 48 saves contract rights, sec. 49 deals with the service of notices, and sec. 50 with the description of "owner" in any proceedings. Sec. 51 provides penalties for preventing the execu-

tion of the Act. Sec. 52 does not seem to apply to Scotland (s. 96, subs. 16).

PART III. WORKING-CLASS LODGING-HOUSES.

Lodging-houses include separate houses or cottages for the working classes, whether in one or in several tenements (s. 53). This part of the Act may be adopted by any public health local authority (s. 54), but a district committee may do so only on receiving the necessary certificate from the Local Government Board for Scotland (ss. 55, 96, subs. 1, 95, subs. 3 (*b*)). Secs. 56–60 confer powers on the local authority for the execution of this part of the Act, including powers to acquire land (s. 94, subs. 3 (*a*)), to build, to purchase existing lodging-houses, to sell and exchange lands, etc. In Scotland, the consenting authority under sec. 60 is, in urban districts, the Secretary for Scotland; and in rural districts, the Local Government Board for Scotland (s. 96, subs. 1).

The management of lodging-houses thus established is vested in the local authority (s. 61). Bye-laws for their regulation may be made, which, except for lodging-houses occupied as separate dwellings, must provide for the matters enumerated in the Sixth Schedule to the Act. The provisions of the Public Health (Scotland) Act as to rules for common lodging-houses apply, with the necessary variations (s. 96, subs. 14). Tenants of lodging-houses on receiving parochial relief are disqualified from continuing as tenants (s. 63). Sec. 64 provides for sale of lodging-houses, with the same consents as under sec. 60. As to expenses and borrowing, see secs. 65 and 96, subs. 2, the latter as amended by 59 & 60 Vict. c. 31. Secs. 67–70 deal with the power of companies, societies, and individuals to erect houses for their working-class servants, and empower the Public Works Loan Commissioners to make them advances on loan. Sec. 71 deals with the application of penalties.

PART IV. SUPPLEMENTAL.

For the most part the supplemental provisions deal with local matters and with minor questions of detail. But sec. 75 is of great importance. It declares that, in any contract after 14 August 1885 for letting for "habitation" a house or part thereof at a rent not exceeding £4, it is an implied condition that, at the commencement of the letting, the house is reasonably fit for human habitation. Sec. 80 provides for accounts and audit. Under sec. 82 the Secretary for Scotland is the approving authority. Sec. 86 is qualified, as regards Scotland, by s. 96, subs. 15.

[For details, the Statutes must be consulted.]

Husband.—1. *Personal Rights and Duties.*—The husband is the *dignior persona* and head of the household, and it is the wife's duty in things lawful to obey him. In the words of Stair, "The husband is lord, head, and ruler of the wife by the express ordinance of God" (Stair, i. 4. 9). So inherent in the nature of marriage is the husband's right to be the head of the house, that a renunciation of it by him is void as *contra bonos mores* (*Colquhoun*, 1804, Mor. App. "Husband and Wife," No. 5; Bell, *Prin.* s. 1562). He is entitled to choose where the matrimonial home shall be; and it is the wife's duty to live with him in any place, either at home or abroad, as he shall determine (see ADHERENCE). Whatever a woman's domicile may be before marriage, it then becomes that of her husband; and if he changes his domicile during the marriage, hers is changed also (Stair,

i. 4. 9; *Carswell*, 1881, 8 R. 901: see other authorities in Walton, *H. & W.* 343). It is also for him to decide upon what scale the domestic establishment is to be kept up (see ALIMENT). The husband is not entitled to beat his wife, or to imprison her in his house (see Fraser, *H. & W.* i. 511, ii. 897: *Jackson*, [1891] 1 Q. B. 671: *Mackenzie*, 1895, 22 R. H. L. 32). Nor can he compel her to live with him. If she obstinately refuses to do so, without reasonable cause, his remedy is to decline to aliment her (see ALIMENT), and at the end of four years to raise a divorce for desertion (see ADHERENCE; DIVORCE). Conversely, if the husband turns the wife out of doors, she cannot compel him to take her back. Her remedy is to claim aliment, and after four years to get a divorce for desertion. Or, unless the circumstances are very exceptional, she will be entitled to a judicial separation on the ground of cruelty (*Colquhoun, ut supra*; Fraser, *H. & W.* i. 511, ii. 896: Ersk. i. 6. 19). In two Sheriff Court cases it has been held that a husband can obtain an order to have his wife removed from his house, and to interdict her return, he finding caution to pay her reasonable aliment (*Hislop*, Guthrie, *Select S. C. Cases*, 2nd ser., 205; *Sutherland*, 1897, 5 S. L. T. No. 63; see *Ringer*, 1840, 2 D. 307).

The husband may prohibit any person, even his wife's relations, from visiting her in his house (*Cadboll*, 1758, 5 Bro. Supp. 475; *Waring*, 2 Hag. Con. at 159; Fraser, *H. & W.* ii. 897. See a case in Sheriff Court, *Sharp*, 7 S. C. R. 10).

A husband may sue for damages for the death of his wife by the fault of the defender (*Dow*, 1844, 6 D. 534). In a recent case it was strongly urged by Ld. Young that he is also entitled to sue for damages for personal injury to his wife, although, since the Married Women's Property Act, 1881 (44 & 45 Vict. c. 21), the wife is herself entitled to sue; and if she recovered damages, they would not fall under the *jus mariti* (*Bern's Exor.*, 1893, 20 R. 859).

He is entitled to sue an action of damages against a paramour of his wife, even although he have forgiven the wife herself (*Macdonald*, 1885, 12 R. 1327; see SEDUCTION). As to the necessity of the husband's consent to his wife's deeds, or his concurrence in actions at her instance, see ADMINISTRATION, HUSBAND'S RIGHT OF.

2. *Patrimonial Rights and Liabilities.*—A husband is bound to supply his wife with necessaries (see ALIMENT). Where the marriage was on or after 18 July 1881, the wife's moveable estate does not, as formerly, vest in the husband in virtue of his JUS MARITI (*q.v.*). The wife cannot, however, dispose of the capital of her moveable estate, or of her heritage, without the husband's consent (see ADMINISTRATION, HUSBAND'S RIGHT OF). The husband's liability for his wife's antenuptial debts is discussed under ANTENUPTIAL DEBTS OF A MARRIED WOMAN.

He is not liable for his wife's delicts or quasi-delicts, unless they were committed by his authority, or with his consent, and when he might have prevented them (Fraser, *H. & W.* i. 558; *Milne*, 1892, 20 R. 95; *Barr*, 1868, 6 M. 651; *Mullen*, 1881, 18 S. L. R. 493: *Hastie*, 1897, 4 S. L. T. No. 411; reversed in Inner House, but not yet reported). He is in general liable for her contracts made as *præposita rebus domesticis* (see WIFE). It is thought that he cannot claim aliment from his wife though she has separate estate (see ALIMENT). His rights of succession to her estate are those of JUS RELICTI (*q.v.*), and, subject to certain conditions, COURTESY (*q.v.*).

For the husband's rights and duties in relation to children, see PARENT AND CHILD; ALIMENT; CUSTODY OF CHILDREN.

See Conjugal Rights Act; Married Women's Property Acts, 1877 and 1881; Married Women's Policies of Assurance Act.

Hypothec.—*Definition.*—A hypothec is a real right in security over a particular subject, or class of subjects, allowed to remain in the possession of the debtor. In this respect it is distinguished from a right of pledge or lien, to the completion of which it is essential that the subject be transferred to the possession of the creditor. It is distinguished from a preferable debt in respect that it confers a right over a particular subject, and not a general preference in the distribution of the debtor's estate. A hypothec may be legal, *i.e.* implied by law in certain relations of parties, or conventional, *i.e.* established by contract, but the only hypothecs of the latter class which are recognised in the law of Scotland are bonds of bottomry and respondentia (see BOTTOMRY). With these exceptions, a mere agreement that a particular subject should be hypothecated to a creditor is ineffectual, that is to say, it confers no preference over the subject in a question with the general creditors of the debtor (Stair, i. 13. 14; Ersk. iii. 1. 34; *M'Gavin*, 1891, 18 R. 576). Legal hypothecs are recognised in favour of (1) a law agent; (2) a landlord; (3) a superior; and (4) certain creditors in maritime cases.

Hypothec of Law Agent.—A law agent who has been employed to conduct an action in which his client has obtained a decree for expenses, has a right of hypothec over the expenses found due, in security of his account for conducting the action. In the Court of Session this is recognised as a common-law right (Bell, *Prin.* s. 1396); in the Sheriff Court it is provided by A. S., 10 July 1839 (s. 106), that the Sheriff, on application, may, if he thinks fit, allow decree to go out in the name of the agent. The agent has no hypothec at common law over the subject recovered or vindicated by his client in the litigation, but by statute it is declared to be within the discretion of the judge before whom any proceeding is taken, to declare the law agent employed therein to be entitled to "a charge upon and against, and a right to payment out of, the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved on behalf of his client by such law agent in such action." All acts done or deeds granted by the client (except acts or deeds in favour of a *bonâ fide* purchaser) are declared to be null and void in competition with the law agent's right under this charge (54 & 55 Vict. c. 30, s. 6). It is doubtful whether this section covers a sum of money found due to the pursuer in an action, or whether its operation is confined to the case where the result of the action is the vindication of the client's right to some corporeal subject (*Tait & Co.*, 1894, 2 S. L. T. No. 252).

Nature of Right.—The right of a law agent over the expenses is of the nature of an implied assignation, which he may put in force by taking decree in his own name. He is held to have a *jus quæsitum* in the expenses, on a finding for them being pronounced, which his client is not entitled to disappoint by compromising the claim, and which is not affected by the diligence of the other creditors of the client, or by his sequestration (*Barr*, 1850, 13 D. 305; *Hunter*, 1835, 13 S. 495; *Pollard*, 1881, 9 R. 21). And the fact that the client is solvent and able to pay his agent is not a good objection to an application by the agent for decree in his own name (*Russel*, 1826, 4 S. 403).

Enforcement of Hypothec.—The agent may render his hypothec over expenses effectual by moving for decree in his own name, which, subject

to the control of the Court in exceptional cases (*Bloe*, 1882, 9 R. 894), will be granted as a matter of course, and whereby he becomes directly the creditor of the party liable in expenses (*Black*, 1825, 4 S. 124; *M'Creadies*, 1882, 10 R. 108). He may also allow decree to go out in the name of the client, and yet preserve his hypothec by giving notice of his claim to the opposite party, provided this is done before any competing right has been completed. Such notice is not excluded by the bankruptcy of the client (*M'Tavish*, 1826, 4 S. 704; and 1828, 6 S. 593), but is excluded by payment to the client (*Fleeming*, 1839, 1 D. 1097, per Ld. Mackenzie), by arrestment by a third party (*Stephen*, 1830, 8 S. 847), or by the establishment and assertion of a right in the opposite party to compensate the expenses by a debt due to him by the client (*Mackenzie*, 1823, 2 S. 401; *Fleeming, supra*).

Compensation by Party Liable in Expenses.—As a general rule, a party who is found liable in expenses cannot plead compensation on a debt due to him by the party to whom these expenses are found due, as a bar to the agent of that party obtaining decree in his own name (Bell, *Prin.* s. 1390: *Miller*, 1848, 10 D. 1384). Even when the result of the action is to establish a debt due by the party to whom expenses are found due, the opposite party cannot set off that debt against the expenses in a question with the agent (*Munro*, 1846, Arkley, 118). And if two independent actions between the same parties result in each obtaining a decree for expenses, these claims cannot be compensated if either agent asserts a right of hypothec. Where, however, the actions in which the decrees of expenses are obtained relate to the same subject-matter, and might have been conjoined, compensation may be pleaded (*Portobello Pier Co.*, 1877, 4 R. 685; but see *Strain*, 1890, 17 R. 566). And where counter decrees for expenses are pronounced in the same action, either party may plead compensation, and the opposite agent is then not entitled to decree in his own name (*Graham*, 1826, 5 S. 49: *Gordon*, 1865, 3 M. 938; *Macgillivray*, 1891, 19 R. 103). This rule has been enforced even where one of the parties was on the poor-roll (*Gordon, supra*).

Right of Agent to proceed with Action.—Questions of some difficulty arise as to the right of a law agent, in virtue of his hypothec, to have himself sisted as a party to the action, and to proceed with it in the event of its being abandoned or settled by the client. His right to do so is not absolute, that is, he is not entitled to proceed with litigation merely on the ground that expenses have been incurred, and there is a probability of success (*Minton*, 1882, 20 S. L. R. 126). The following cases have been laid down as those in which the agent is entitled to proceed with the action: (1) where expenses have been actually found due; (2) where expenses follow as a natural consequence from an interlocutor already pronounced; (3) where the litigants have entered into a compromise for the purpose of defeating the agent's claim (*M'Lean*, 1824, 3 S. 136). The first rule may be illustrated by a case where, on decree for expenses having been pronounced in the Sheriff Court, the agent was held entitled to be sisted as a respondent in an appeal to the Court of Session, which his client did not think fit to oppose (*Ferguson, Halliby, & Co.*, 1826, 4 S. 814; see also *Sloss*, 1823, 2 S. 344; *Barr*, 1850, 13 D. 305). In the application of the second case, the agent has been allowed to proceed wherever an interlocutor has been pronounced which would, in ordinary circumstances, be followed by a decree for expenses. Thus where a bill of suspension and liberation was passed (*M'Lean*, 1824, 3 S. 136); where in an action for aliment interim aliment was awarded (*M'Gregor & Barclay*, 1867, 5 M. 583); and where, in an action by a woman who had divorced her husband, concluding for *jus*

relicta, the pursuer's claim was remitted to an accountant (*Cornwall*, 1871, 8 S. L. R. 442)—the agent has been held entitled to proceed. But where a party sued his father's executors for legitim, and they rested their defence on the ground that he had renounced legitim, and also that he had received payments sufficient to extinguish it, it was held that, when the action was settled after an interlocutor repelling the plea of renunciation and ordering an accounting had been pronounced, the agent was not entitled to proceed, as the interlocutor was not one on which a decree for expenses would naturally follow (*Murray*, 1852, 14 D. 501). To entitle an agent to proceed with an action in which no interlocutor inferring expenses has been pronounced, he must aver that the settlement between the parties was collusive, and entered into for the purpose of defeating his claim. The mere fact of a compromise for a lump sum in name of damages and expenses does not infer collusion (*M'Queen*, 1854, 17 D. 107). But where a creditor brought a reduction of a deed, on the ground that it was a fraudulent preference granted within sixty days of the bankruptcy of the granter, and the action was taken out of Court and referred to arbitration, and the deed was meanwhile reduced on the same ground at the instance of other creditors, it was held that the agent of the original pursuer might proceed with the reduction, in order to obtain a decree for expenses (*Tod & Wright*, 1822, 1 S. 381. See also *Cheyne*, 1832, 10 S. 202; *Murray*, 1852, 14 D. 501; *M'Queen*, 17 D. 107).

[See Begg, *Law Agents*, 2nd ed., p. 190; Monteith Smith, *Expenses*, p. 187.]

Hypothec of Landlord.—The common law of Scotland recognises the right of a landlord to a hypothec for rent whether the subject let was agricultural or urban (Bell, *Com.* ii. 28; Hunter, *Landlord and Tenant*, 4th ed., ii. 360). By the Hypothec Abolition (Scotland) Act, 1880 (43 Vict. c. 12), the hypothec of a landlord for the rent of land, including the rent of any buildings thereon, let for agriculture or pasture, and exceeding two acres in extent, was abolished as from 4 November 1881, with an exception in the case of rent due under any lease, bargain, or writing current at that date. As the result of this Act is that agricultural hypothec can only exist in the very exceptional case of a lease current on 4 November 1881, it is proposed to treat the subject very generally, and mainly with reference to those points which are still of interest as illustrating the operation of urban hypothec.

Parties entitled to Exercise.—Hypothec, so far as still existing, is available to anyone who is in the position of a landlord, and entitled to demand the rent. Thus it may be used by a heritable creditor in possession (*Railton*, 1834, 12 S. 757), by the holder of an *ex facie* absolute disposition, a liferenter (*Zuill*, 1833, 11 S. 682), or a party who has paid the rent and obtained an assignation of the landlord's rights (*Guthrie*, 1880, 8 R. 107). It cannot, however, be used as a means of creating a security over moveables, in cases where there is no real relationship of landlord and tenant between the parties. Thus where a company lent money to a firm of shipbuilders, and took from them an *ex facie* absolute disposition of their yard and the moveables therein, with a personal bond for the sum lent, qualified by a lease to the borrowers at a rent greatly in excess of that in the Valuation Roll, and a back letter declaring that the transaction was only a security, and that all payments made as rent were to be ascribed in payment of interest and principal, it was held that as the parties were only nominally landlord and tenant, the lenders had no right to sequestrate the *invecta et illata* in the shipbuilding yard, in a question with the

trustee in the bankruptcy of the shipbuilders (*Heritable Securities Investment Association*, 1880, 7 R. 1094).

Rent secured by Hypothec.—The landlord's hypothec is available for rent, whether due or only current, but not for arrears (*Thomson*, 1858, 20 D. 1256: *Young*, 1833, 12 S. 233). In agricultural subjects the crop was hypothecated for the rent of the year in which it was produced, at whatever term that rent might be payable (Bell, *Prin.* s. 1239; *Crawford*, 1737, Mor. 6193 and 10531; *Horn*, 1830, 8 S. 454), but not for the rent of any other year (*Earl of Cassilis*, 1816, Hume, 230). By Statute it is declared to fall if proceedings are not taken to make it effectual by sequestration within three months of the date at which the rent, or the last portion thereof, fell due (30 & 31 Vict. c. 42, s. 4). Live stock is hypothecated for the rent of each year successively, and the same period of three months is allowed to the landlord to make it effectual (*Rorison*, 1766, Mor. 6211; *Ross*, 1817, Hume, 232). In the same way hypothec in urban subjects secures each year's rent successively, and must be put in force within three months of the term of payment (Ersk. ii. 6. 64; Bell, *Prin.* s. 1240, 1277).

Hypothec in Agricultural Subjects.—The general subjects over which agricultural hypothec, so far as unaffected by legislation, extends, are the crop and stocking of the farm. Thus, in a dairy farm the cows and cheeses (*Goldie*, 1839, 1 D. 426), in an arable farm the crop and horses (*Henderson*, 1847, 17 Sc. Jur. 271), have been held to be impignorated. When cattle belonging to a third party have been received by the tenant of a farm at a grass maill, conditioned as the fair annual rent of the grazing, they are subject to hypothec to the extent of such grass maill, but no further (30 & 31 Vict. c. 42, s. 5). By the same Statute (Hypothec Amendment (Scotland) Act, 1867) agricultural hypothec is declared not to attach household furniture or agricultural implements, and only to attach imported manure, lime, drain tiles, feeding stuff, etc., if they are brought on to the premises in fulfilment of a specific obligation in the lease.

Agricultural Sub-lease.—The landlord's hypothec is unaffected by a sub-lease, unless he has impliedly or expressly consented to it. In the absence of such assent he is entitled to attach the effects of the sub-tenant for the rent due by the principal tenant, even if the sub-rent has been paid (Ersk. ii. 9. 63: Bell, *Prin*, s. 1237: *Lord Salton*, 1700, Mor. 1821; *Stewart*, 1878, 5 R. 1024). The effect of the consent of the landlord to the sub-lease will be more appropriately dealt with in relation to urban hypothec.

Effect of Hypothec in Questions with Purchasers of Crop.—As the hypothec for rent is a right in security over a specific subject, it follows that the landlord is entitled to vindicate that subject from anyone who has acquired a right to it, such as a purchaser or creditor of the tenant using diligence. Thus it was held that a dealer who had purchased meal made from oats which were subject to hypothec was liable to pay the price over again to the landlord (*Barns*, 1864, 2 M. 1119). By Statute it was afterwards provided that the hypothec should be excluded from agricultural produce which had been *bonâ fide* purchased for its fair market value and removed from the land; and that if such produce has been *bonâ fide* purchased at public auction held after seven days' notice of the intention to sell has been given to the landlord, the hypothec shall cease with regard to such subjects, unless sequestration has been applied for and registered before the lapse of the seven days' notice (30 & 31 Vict. c. 42, s. 3). At common law goods sold by bulk in open market were

exempt from hypothec in the hands of the purchaser (Ersk. ii. 6. 60; Bell, *Prin.* 1242), but the same exemption was not extended to goods sold by sample (*Earl of Dalhousie*, 1828, 6 S. 626; affd. 4 W. & S. 420).

Hypothec in Urban Leases.—In urban leases the landlord's hypothec extends over the *invecta et illata*, *i.e.* moveables brought on to the premises. An urban lease is one where the rent is wholly or mainly paid for the buildings on the land, whether the subjects are situated in town or country (Ersk. ii. 9. 6; Bell, *Prin.* s. 983). Under the phrase *invecta et illata* all ordinary household furniture is included, as well as the goods for sale in a shop, and the moveable machinery and stock in trade in a manufactory. Bills, cash, notes, and ordinary wearing apparel are exempt (Bell, *Prin.* s. 1276). The sale and delivery of any article in a shop or manufactory will exclude the right of the landlord; but the mere fact of sale, without delivery, leaves the article subject to hypothec (*Vaille*, 1823, 2 S. 155; *Wyld*, 1832, 10 S. 538). It is probable that this rule is not affected by the provisions of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), whereby the property in goods sold may pass without delivery, because the hypothec of a landlord is not necessarily excluded by the fact that the article in question does not belong to the tenant.

Furniture belonging to Third Parties.—On the principle that a landlord is entitled to have the subjects plenished with articles which may be subject to his hypothec, furniture hired by the tenant has been decided to fall under hypothec. Thus ordinary household furniture and the table and fittings in a billiard saloon, obtained on hire, have been held to be subject to hypothec (*Wauchope*, 1805, Hume, 227; *Nelmes & Co.*, 1883, 11 R. 193). But the opinion has been expressed that furniture hired for a temporary purpose—for instance, chairs hired for a ball—is not subjected thereby to hypothec (per Ld. Deas in *Adam*, 1863, 2 M. 6). And it is very doubtful whether a single article, obtained on hire, is hypothecated for rent. An early decision in the affirmative has been doubted (see observations on *Penson*, 6 June 1820, F. C., per Ld. Shand in *Bell*, 1885, 12 R. 961), and conflicting decisions have been pronounced in the Sheriff Courts in the cases of pianos, sewing machines, and other articles in the possession of the tenant on contracts of hire (see cases cited in Bell, *Prin.* s. 1276, and *Dickson*, 1886, Guthrie, *Sheriff Court Cases*, 2nd series, 269; *Duncanson & Henderson*, 1894, 2 S. L. T. No. 378, *Middleton*, 1894, 2 S. L. T. No. 135). Articles belonging to a third party, and placed in the possession of the tenant in the course of his trade, are not subject to the hypothec of the landlord. Thus a yachting agent undertook to exhibit pulsometers in his office on commission, and it was held that his landlord could not sequestrate the pulsometers under his hypothec, although there was nothing else in the office except a small quantity of furniture (*Pulsometer Co.*, 1887, 14 R. 316; see also Bell, *Com.* ii. 31). Again, the property of members of the tenant's family, living with him, is not subject to hypothec (*Bell*, 1885, 12 R. 961); nor is the property of a lodger (per Ld. Shand in *Bell*, *cit.*). The case of furniture lent to a tenant gratuitously is more doubtful. The case which has usually arisen is where the tenant is deprived of his property under the Bankruptcy Statutes, and the furniture is purchased by a friend, who allows the bankrupt to retain the use of it. In one case, where the tenant had absconded and his furniture had been openly sold under Crown diligence, it was held that the purchaser did not subject it to the diligence of the landlord by allowing the family of the tenant to make use of it for nine months (*Adam*, 1863, 2 M. 6). But in an earlier case, where creditors allowed a bankrupt to retain the use of his furniture for several weeks, it was held

to be subject to hypothec (*Wilson*, 17 Dec. 1813, F. C.; see *Yuille*, 1823, 2 S. 155).

Hypothec in Mines.—In leases of mines or quarries it is settled that the produce is subject to hypothec as *inveeta et illata* (Ersk. ii. 6. 64, per Ld. Deas in *Weir's Exrs.*, 1870, 8 M. 725, at p. 728); and it is probable, though not definitely decided, that a similar hypothec over the machinery and implements would be recognised (*Tennant*, 11 S. 471; *Weir's Exrs.*, 1870, 8 M. 725; *Lindsay*, 1872, 10 M. 708).

Assignation of Hypothec.—Where a cautioner for the tenant pays the rent, the landlord is bound to assign to him his right of hypothec, and sequestration following on such an assignation is preferable to sequestration by the landlord for the rent of the ensuing term (*Stevenson*, 1821, 1 S. 30). If a third party who is not a cautioner pays the rent, he is only entitled to an assignation of the hypothec if the landlord has no interest to refuse (*Stewart*, 1878, 5 R. 1024; *Guthrie & M'Connachy*, 1880, 8 R. 107). The result is that he can only obtain such an assignation at the end of a lease, as during the currency of the lease the landlord has a continuing interest to have the *inveeta et illata* preserved, to afford security for the rent of the ensuing terms.

Sub-lease in Urban Subjects.—The effect of agricultural hypothec where there is a sub-lease has already been dealt with. Urban leases differ in respect that they are assignable, in the absence of any express provision to the contrary (Bell, *Prin.* s. 1274). The result is that unless sub-letting is forbidden, the hypothec over the effects of the sub-tenant only exists to the extent of the rent due by him to the principal tenant, and can only be exercised if the rent is demanded from him by the landlord before he has paid it to the principal tenant (*Blane*, 1785, Mor. 6232). The principal tenant, where the sub-lease has been granted in pursuance of an express or implied power to sub-let, has a hypothec over the effects of the sub-tenant for the rent due by him, which, however, he cannot make effectual by sequestration in competition with his landlord, unless he has paid or found security for his own rent (*Stevenson*, 1822, 1 S. 312). But where, on the expiry of a sub-lease, the landlord granted a lease of the premises to the sub-tenant, it was held that sequestration brought by the principal tenant for the last term's rent, under the sub-lease, was preferable to sequestration at the instance of the landlord for the first term of the new lease (*Christie*, 14 Dec. 1814, F. C.).

A landlord may render his hypothec effectual by (*a*) retaining the goods on the premises, and (*b*) by attaching them by sequestration.

Retention of Goods under Hypothec.—The former right entitles the landlord to insist on the tenant retaining on the subjects the goods which form the *inveeta et illata* in an urban lease, or the crop and stocking in an agricultural lease. This right he may exercise by obtaining an interdict against the removal of the goods, or a warrant to have them brought back, if already removed. The limits of this right depend upon whether the rent is or is not actually payable. If it is, it is sufficient if enough be left to satisfy the rent (*Rutherford*, 1736, Mor. 6226); if it is not, the whole subjects must be left, even if the tenant is solvent and not in arrears with his rent (Ersk. ii. 6. 59; *Preston*, 1845, 7 D. 942). On the other hand, if the rent is not payable, an offer of caution for rent, interest, and penalties will entitle the tenant or any third party to remove the goods (Hunter, *Landlord and Tenant*, 4th ed., ii. 391); while if the rent is actually due, an offer of caution is not sufficient, and the rent must either be paid or goods sufficient to secure it left (*Crawford*, 1737, Mor. 10531). Third parties remov-

ing subjects under hypothec render themselves liable, as intromitters, to pay the rent, at least to the value of the goods removed (*Barns*, 1864, 2 M. 1119). In a case of very special circumstances, a third party intromitting with the subjects has been held responsible for the whole rent (*Stewart*, 1874, 2 R. 94).

Warrant to bring Goods back.—Further, where goods subject to hypothec are actually removed by the tenant, the landlord may obtain a warrant from the Sheriff to have them brought back. The warrant grants authority to search for and carry back the goods to the house from which they were removed, there to be sequestrated, inventoried, and secured. This warrant should not be granted without the statement of facts showing that the tenant has removed his effects clandestinely; but intimation to the tenant is not necessary or usual (*Johnston*, 1890, 18 R. (J.C.) 6; *Gray*, 1891, 19 R. 25; *M'Laughlan*, 1892, 20 R. 41). The landlord will be liable in damages if he takes out such a warrant without sufficient cause (*Gray, cit.*).

Plenishing Order.—It is a consequence of the right of hypothec that the landlord is entitled to insist on the premises let being suitably plenished, and may enforce this obligation by obtaining a plenishing order in the Sheriff Court (*Robertson*, 1875, 3 R. 21; *Cunningham*, 1883, 10 R. 441). Thus the tenant of a house may be ordained to furnish it, the tenant of a shop to provide a stock in trade (*Whitelaw*, 1871, 10 M. 27). A landlord may enforce the obligation to plenish even if he himself has removed the previous plenishing by diligence for a former term of the rent (*Macdonald*, 1888, 16 R. 168). A plenishing order concludes with a warrant for the summary ejection of the tenant, on failure to pay the rent or find caution for it, and authority to the landlord to re-let the premises, but it does not put an end to the contract of lease; and the tenant is entitled, at least if the subjects remain unlet, to demand possession at any time on paying arrears of rent and plenishing the house (*Wright*, 1875, 3 R. 68).

Sequestration.—Landlord's sequestration is the diligence by which the general security afforded by hypothec is made effectual by attaching specific subjects. It may be used either for rent actually due and payable, or in security of rent not yet due. The latter diligence is a severe measure on the part of the landlord, and will not be granted without cause shown, as, for instance, that the tenant is displenishing the subjects (*Duffy*, 1858, 20 D. 580; *M'Laughlan*, 1892, 20 R. 41). The goods sequestrated in urban subjects cannot be sold until the term of payment has actually arrived (*Duffy, cit.*), and if at that term the rent is paid the landlord must meet the expense of the sequestration (*Gordon*, 1836, 14 S. 954). But sequestration in security of rent to become due is usually combined with sequestration for rent actually due.

Procedure.—A petition for sequestration for rent actually due should be presented in the Sheriff Court of the county in which the subjects are situated. The Small Debt Court is a competent forum if the term's rent which is claimed is under £12, even although the annual rental is above that sum (16 & 17 Vict. c. 80, s. 26). Sequestration is granted as a matter of course, and the effects are inventoried by an officer of Court (A. S., 11 July 1839, s. 150). The inventory is conclusive evidence of what falls under the sequestration, and nothing that is not inventoried is attached (*Horsburgh*, 1825, 3 S. 596). If a third party maintains that articles belonging to him have been inventoried, his proper course is to appear in the sequestration, and not to institute a separate action for their recovery (*M'Kechnie*, 1853, 15 D. 623). Articles which are sequestrated are *in manibus curiæ*, and any unwarrantable intromission with them is a contempt

of Court (Bell, *Prin.* s. 1244). If the tenant removes or sells the subjects sequestrated, he is liable to be imprisoned until he restores them or finds caution for the rent (*Goldie*, 1839, 1 D. 426). Breach of sequestration committed by a third party subjects him to liability in the value of the subjects removed, or, if he acted in knowledge of the sequestration, to liability to pay the whole rent (*Jack*, 1880, 7 R. 465). Where, however, a landlord had sequestrated and then made an arrangement whereby the tenant was to sell the goods and account to him for the proceeds, it was held that he was not entitled, on the failure of the tenant to account for the proceeds of the sale, to revive the sequestration and refuse to allow the articles sold to be delivered to the purchaser (*Mackenzie*, 1883, 20 S. L. R. 694).

Sale.—Sequestration may be followed by sale of the effects, carried out by an officer appointed by the Sheriff. An account must be lodged within fourteen days of the sale, exhibiting the amount received, the expenses of the sale, the rent due, and the difference between that amount and the sum realised by the sale (A. S., 11 July 1839, s. 150). The landlord is entitled to be paid the rent due to him and expenses, and the balance is paid to the tenant, but may be attached by the diligence of any creditor of his, or by the landlord for any debt not covered by the sequestration (*M'Farlane*, 1823, 2 S. 505). Every sequestration must be entered in a register of sequestrations, which is open to inspection on payment of a fee of one shilling (30 & 31 Vict. c. 42, s. 7).

Interdict against Sequestration.—Where sequestration is threatened, the tenant may obtain interdict against it, on finding caution for the rent, or on consignation (*Gray*, 1840, 3 D. 203). Where it is actually granted, it will be recalled on caution being found for the rent, or on an adequate defence being stated by the tenant.

Damages for Improper Sequestration.—An improper or oppressive use of diligence under his hypothec will render the landlord liable in damages. Damages have been awarded both for unnecessary use of diligence, where a warrant to carry goods back was obtained when the tenant had removed them openly and before the rent was payable (*Gray*, 1891, 19 R. 25; cf. *M'Laughlan*, 1892, 20 R. 41), and for oppressive proceedings in carrying out the sequestration, where a grossly unnecessary amount of goods was sequestrated, and the sale was carried out in a manner which precluded a fair price being obtained (*M'Leod*, 1829, 7 S. 396; *Robertson*, 1857, 19 D. 1016). If, however, sequestration is taken out in the Small Debt Court, irregularities before decree will not found an action of damages, because a small debt decree is final, and to allow an action of damages would simply mean instituting an appeal in another form (*Crombie*, 1861, 23 D. 333). But irregularities in carrying out the decree may subject the landlord in damages (*Gray*, 1892, 19 R. 692).

Hypothec in Competition.—In competition with other claims on the tenant's estate, the landlord's hypothec is preferable to any private diligence (*Philips*, 1807, Hume, 228), or to the trustee in the tenant's sequestration (Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 119). It is postponed to diligence at the instance of the Crown (*Ogilvie*, 1791, Mor. 6884; rev. 3 Pat. 273), and to the deathbed and funeral expenses of the tenant (*Rowan*, 1742, Mor. 11852; *Drysdale*, 1835, 14 S. 159). The Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), which has been held to be applicable to Scotland (*Liquidator of "Scottish Poultry Journal" Co.*, 1896, 4 S. L. T. No. 253), specifies certain debts as preferable to the landlord's claim for rent in a bankruptcy or in the liquidation of a company. These

debts are parochial and local rates for the last twelve months before bankruptcy, income tax, not exceeding one year's assessment, the wages of any clerk or servant for services rendered within four months of the bankruptcy, and not exceeding fifty pounds, and the wages of any workman or labourer in respect of services rendered within two months of the bankruptcy, and not exceeding twenty-five pounds. This Statute does not apply to the salary of a person in the position of the secretary of a company (*Liquidator of "Scottish Poultry Journal" Co., supra*).

[See Hunter, *Landlord and Tenant*, 4th ed., ii. 355; Rankine, *Leases*, 2nd ed., 337.]

Hypothec of Superior.—A superior has a right of hypothec for his feu-duties, extending over the crop and stocking in agricultural, and the *invecta et illata* in urban subjects. It is preferable to the hypothec of the landlord (Stair, ii. 4. 7; Ersk. ii. 6. 63; Bell, *Prin.* s. 698; *Yuille*, 1823, 2 S. 155). It is probably not affected by the Hypothec Abolition Act, 1880, which deals only with the hypothec of a landlord. As, however, the superior is entitled to poind the ground, and thus secure a preference over the moveables (Bell, *Prin.* s. 699), this hypothec is rarely if ever put in force, and there is only one instance in which it has been recognised by the Courts (*Yuille, cit.*).

Maritime Hypothecs.—The hypothecs which are recognised as extending over a ship are usually known as maritime liens. They are, however, not liens in the ordinary sense of the word, but hypothecs, inasmuch as the right they confer is a right in security over a ship, without possession (see opinion of Jervis, C. J., in *The Bold Buccleugh*, 1851, 7 Moo. P. C. C. 267, at 284). There are few instances of the exercise of such maritime hypothecs in Scotland: but in a recent case it was laid down by the House of Lords that the maritime law administered by Courts of Admiralty in England and Scotland was the same, and that a maritime lien, if recognised in England, was to be held to be part of the law of Scotland (*M'Knight*, 1896, 34 S. L. R. 93).

Nature of Right.—A maritime lien or hypothec gives a creditor a real right over the ship and freight, but not over the cargo (*The Orpheus*, L. R. 3 A. & E. 363). This right the creditor may render effectual by arresting the ship under the Admiralty jurisdiction of the Court of Session or Sheriff Court, or by claiming a preference in any action or diligence at the instance of other creditors. A maritime hypothec is preferable to a mortgage of the ship (*The Aline*, 1839, 1 Wm. Rob. 111), or to the right of a purchaser without notice of its existence (*The Bold Buccleugh*, 1851, 7 Moo. P. C. C. 267, approved by Ld. Watson in *M'Knight*, 1896, 34 S. L. R. 93; *The Kong Magnus*, [1891] P. 223). In competition with the possessory lien of a ship carpenter, for repairs executed on the ship, it has been held that the carpenter takes the ship into his dock subject to any hypothec by which she may then be burdened, and that he is therefore postponed to a hypothec for salvage services already performed (*The Gustaf*, 1862, Lush. 506; *The Immacolata Concezione*, 9 P. D. 37).

Personal Liability a Condition of Hypothec.—After some doubt, it would seem now to be settled that there cannot be a hypothec over a ship, with the exception of the hypothec of seamen for their wages, unless there is a debt for which the owner of the ship is personally liable. Thus the hypothec of a master for his disbursements will not attach the ship unless the owner is personally liable for the debt (*The Castlegate*, [1893] A. C. 38). And there is no hypothec for a collision which took place when the ship was under the control of a compulsory pilot, or of the harbour

authorities (*Parlement Belge*, 5 P. D. 147; *The Utopia*, [1893] A. C. 492). An exception to this rule has, however, been admitted in the case of a collision while the ship is in the hands of charterers, in which case a hypothec has been allowed although the owner is not personally liable (*The Lemington*, 1874, 2 Asp. M. C. 475; *The Tasmania*, 13 P. D. 110. But see opinion of Ld. Watson in *The Castlegate*, [1893] A. C. 38, at 52).

Hypothecs recognised.—Maritime hypothecs may arise either from delict or from implied contract. The hypothec for collision is the only instance of the former class; in the latter the hypothec of seamen for wages, of the master for wages and disbursements, of a salvor, and a party who has repaired the ship or supplied necessaries in a foreign port, are recognised.

Collision.—The hypothec or maritime lien for collision is available to the owner of a ship which has been injured in a collision by some fault in navigation for which the owner of the colliding ship is responsible. It has recently been held that it is known in the law of Scotland (*M'Knight*, 1896, 34 S. L. R. 93). It is applicable not only in the case of an actual collision between two ships, but also over a ship which, by improper navigation, causes a collision between two other ships (*The Sisters*, 1 P. D. 117; *The Industrie*, L. R. 3 A. & E. 303), or over a wreck which a ship has run into owing to want of proper lighting (*The Utopia*, [1893] A. C. 492). But it will not attach for a wrongful act, not of the nature of a collison, whereby one ship is injured through the agency of the crew of another. Thus where a man, crossing over another ship to reach his own, fell into the hold, and brought an action of damages on the ground that his fall was due to want of proper precautions in the ship in which he fell, it was held that he had no maritime hypothec (*The Theta*, [1895] P. 280). Again, in a recent case, two ships were attached by ropes to the same quay, the ropes of the outer ship passing over the deck of the inner. The master of the inner ship, finding the harbour unsafe, desired to get out to sea; and as the outer ship declined to move, he cut her ropes, with the result that she drifted on shore and was injured. Her owner obtained decree for damages against the owner of the ship which had cut the ropes, and claimed a hypothec over her in a multiplepoinding in which the opposing claimant was a mortgagee. It was held that although the owner of the ship was responsible for the damage done by the master, yet it was not damage in which the ship was a direct agent, and therefore no maritime hypothec arose (*M'Knight*, 1896, 34 S. L. R. 93).

The maritime lien for collision may be enforced even after the ownership of the hypothecated ship has entirely changed (*Bold Buccleugh*, 1851, 7 Moo. P. C. C. 267); but it must be put in force at the first reasonable opportunity, and will be lost by undue delay (*The Kong Magnus*, [1891] P. 223). But an arrestment of a foreign ship eleven years after the collision, during which time she had on forty-seven different occasions been in ports of the United Kingdom, was held, in the circumstances, not to have been attended by unreasonable delay (*Kong Magnus, cit.*).

Hypothec of Seamen.—The cases in Scotland recognise a hypothec in favour of seamen over the freight, but negative any right over the ship not founded on possession (*Seamen of "Golden Star,"* 1682, Mor. 6259; *Sands*, 1708, Mor. 6261). There is, however, no doubt that a hypothec for wages over the ship would be recognised in a modern case, as it is in England (Bell, *Com.* i. 562; *The Louisa Bertha*, 1850, 14 Jur. 1006; *Queen*, 25 Q. B. D. 339). This hypothec cannot be given up by the seamen by contract (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 156), and

attaches if wages are due for service rendered to the ship, whether the owner is personally liable for such wages or not (*The Castlegate*, [1893] A. C. 38).

The master has the same lien for his wages as the seamen, even although he may be a part owner of the ship (*The Feronia*, L. R. 2 A. & E. 65; Merchant Shipping Act, 1894, s. 167). It was held in England that the master has no maritime lien for his disbursements (*The Sara*, 14 App. Ca. 209), with the result that a statutory lien was introduced (52 & 53 Vict. c. 46, s. 1; see *The Orienta*, [1895] P. 49). Hypothec for disbursements can only be exercised for debts for which the owner is responsible, whereas the hypothec of the master for wages, like that of the seamen, can be exercised for services done to the ship, whether the owner is personally liable therefor or not (*The Castlegate*, [1893] A. C. 38).

Hypothec for Salvage, etc.—A maritime hypothec is allowed for salvage (Abbott on *Shipping*, 13th ed., p. 717; 57 & 58 Vict. c. 60, s. 547), but not for towage (*Westrup*, 1889, 43 Ch. D. 241). There is no hypothec for necessaries supplied at a home port, whether to a British or a foreign ship (*Hamilton*, 1788, Mor. 6269; affd. 1780, 3 Pat. 148: *The Henrich Bjorn*, 1886, 11 App. Ca. 270). A hypothec for repairs and necessaries supplied in a foreign port is recognised by the institutional writers (Ersk. iii. 1. 34; Bell, *Prin.* s. 1398), but would appear to be negatived by an English case (*The Rio Tinto*, 1883, 9 App. Ca. 356).

Preference of Maritime Hypothecs Inter se.—In a competition between maritime hypothecs, the lien of seamen for their wages is preferable to a claim for salvage, or to a lender on a bottomry bond (*The W. F. Safford*, 1860, Lush. 69). Claims for salvage rank according to date, the posterior being preferable to the prior claim, in respect that by it the subject of the prior claim is preserved (M'Lachlan on *Shipping*, 4th ed., p. 740). The hypothec for collision is preferable to the hypothec for wages, at least in the case of a foreign ship (*The Elin*, 8 P. D. 129), or where the owner is solvent (see opinion of Dr. Lushington in the *Linda Flor*, 1857, Swa. Ad. 309). It is, however, doubtful whether this rule would apply in the case of a bankrupt owner of a British ship, especially in a question with the wages of seamen who were not responsible for the collision.

[See Abbott on *Shipping*, 13th ed., p. 868; M'Lachlan on *Shipping*, 4th ed., p. 334; Marsden, *Collisions at Sea*, 3rd ed., p. 78; Ashburner, *Mortgages*, p. 121.]

Id certum est quod certum reddi potesti—That is regarded as fixed or ascertained which can be determined. Thus, in the contract of sale it is essential that there shall be a certain price agreed upon by the parties, but it is not essential that the price shall be precisely fixed at the time—it being sufficient that it can be settled by reference to some determinate standard, or by reference to a third party.

Identification; Identity.—Every article which is to be made part of a case must be identified, and its connection with the case must be proved (Dickson, s. 1823). In criminal cases the accused is him-

self a production, and must be identified. Sometimes, owing to lapse of time or failure of memory, a witness is at the trial doubtful of the accused's identity. In such a case it is sufficient to prove that at an earlier period he identified a person in custody, if it be established *aliunde* that the accused is that person (*Wight*, 1836, 1 Swin. 47; Dickson, ss. 263, 1776; Macdonald, *Crimes*, p. 486). In a question as to the identity of an accused, who was absent, with a certain person, it was held to be incompetent to prove a statement made to a third party by the latter, who could not be found (*Monson*, 1893, 1 Adam, 114, where *Burnet*, 1851, J. Shaw, 497, is commented on). The photograph of a defender in an action of divorce who has been cited, and has failed, to appear, may be shown to the witnesses for purposes of identification (*L.* v. *L.*, 1890, 17 R. 754); and where a woman was tried for bigamy, Willes, J., allowed a photograph of her first husband to be shown to witnesses present at the first marriage, in order to establish his identity with the person mentioned in the certificate of that marriage (*Tolson*, 4 F. & F. 103; see *Monson*, *ut supra*). A person who cannot be a witness may be shown to witnesses in order to be identified (*Lary & Mitchell*, 1817, 2 Hume, 349, note; *Bryce*, 1844, 2 Broun, 119; *Yates & Parkes*, 1851, J. Shaw, 528. As to what notice is sufficient, see *M'Lean*, 1836, 1 Swin. 278; Macdonald, *Crimes*, p. 482). Further, a person's statement that he heard words through a telephone, and recognised the voice, has been admitted as competent evidence as to the identity of the person speaking through the telephone (*M'Giveran*, 1894, 21 R. (J. C.) 69).

Productions are generally identified by the labels attached to them (Dickson, s. 1776; Macdonald, *Crimes*, p. 486; see PRODUCTIONS). Where a witness became blind before the trial, he was examined regarding an article which he had identified when in possession of his sight (Taylor, 1838; Bell, *Notes*, 246).

It may be observed that the Criminal Procedure (Scotland) Act, 1887, s. 68, provides that "when in the trial of any indictment the evidence led shall be sufficient to prove the identity of any person, corporation, or company, or of any place, or of any thing, it shall not be a valid objection to the sufficiency of such evidence that any particulars set forth in regard thereto in the indictment have not been proved."

As to the proof of previous convictions, see CONVICTION (PREVIOUS). As to the admissibility of extrinsic evidence for the purpose of identifying a writing referred to in a deed, or the subject of a deed, or the person favoured by it, see PAROLE. As to cases of mistaken identity, see Best, *Evidence*, s. 517; Dickson, s. 79; and the works there cited.

Idiot.—See INSANITY.

Id tantum possumus quod de jure possumus.—This rule ("we can do that only which we may lawfully do") applies to obligations or contracts in themselves unlawful, and to unlawful conditions contained in contracts.—[Stair, i. 3. 7; Trayner, *Latin Maxims.*] See ILLEGAL AND IMMORAL CONTRACTS; CONDITIONAL OBLIGATIONS.

Ignorantia juris neminem excusat—Ignorance of the law excuses no one.—A person may plead ignorance of the fact, but not ignorance of the law. See ERROR; CONDICTIO INDEBITI.

Illegal and Immoral Contracts.—We have seen, under the discussion on contracts in general, that certain restrictions are set upon the absolute freedom of parties to enter into contractual relations. These are classed under the head of illegal and immoral contracts. Contracts may be illegal in three ways: 1, The law may regard them as void; 2, it may refuse to enforce them; 3, it may put a penalty upon them without reducing them. The first two classes are the most important.

1. *Contracts which are Void.*—(*a*) *By Statute.*—When a penalty is imposed by Statute upon the carrying on of trade in a particular way, or the making of a contract by certain persons, it is to be assumed that contracts made in breach are void. The penalty must bear to be imposed for the benefit of the public in general, not for revenue purposes, and the penalty must be recurrent to bring them absolutely under this head (Anson, v. s. 1). To this head belong the sale of offices of public trust in the departments of revenue, administration of justice, or other public departments, at home or abroad, which is prohibited by Statutes based on the policy of the common law (5 & 6 Edw. vi. c. 16; 49 Geo. iii. c. 126, and cases quoted Bell, *Prin.* s. 36 (5) (*a*)). For summary of such contracts, see Pollock, 2nd ed., 682).

(*b*) *At Common Law.*—(1) Contracts *contra bonos mores, e.g.* contracts inciting to crime (*Stewart*, 1752, Mor. 9466; *Grant*, 1786, Mor. 9571), or for the price of prostitution (this does not apply where injury has been sustained, *Durham*, 1622, Mor. 9469, and cases quoted Bell, *Prin.* s. 37 (*d*)); contracts for indecent or mischievous purposes (*Pearce*, 35 L. J. Ex. 134, L. R. 1 Ex. 213—in this case a contract for the hire of a brougham to a harlot for purposes of display was held "null"), or prejudicial or offensive to others, *e.g.* where a creditor, in fraud of agreement to accept a composition, stipulates for a preference to himself (2 Bell's *Com.* (M'Laren's ed.), 370, 395, 399), or where a partner deals on his own account in the matter of his agency; contracts inconsistent with public arrangements (*Blackford*, 8 T. R. 89); or contracts bribing the appointment of a factor or tutor dative to a pupil (*Muschat*, 1639, Mor. 9456; *Scott*, 1736, Mor. 13433).

(2) Contracts inconsistent with public policy. (*a*) Contracts against the policy of the domestic relations, *e.g.* a restraint on marriage, or marriage with a particular person, is void; likewise a contract providing for future separation (Fraser, *H. & W.* 911). Marriage brocage bonds, or contracts for rewarding match-making, fall under this head (*Campbell*, 1678, Mor. 9505).

(*b*) Contracts in restraint of the liberty of the person, if absolute, are void. This does not apply to service (service for life, see Fraser, *M. & S.* 3), nor to restrictions on trading in particular districts; but restraints on trade are bad "unless they are natural and not unreasonable for the protection of the parties in dealing with the particular trade or business" (*Leather Cloth Co.*, L. R. 9 Eq. 345, 39 L. J. Ch. 86).

(*c*) Contracts disturbing public arrangements or impeding justice are void, *e.g.* agreement by a parochial schoolmaster to hold his office at pleasure (*Duff*, 1799, Mor. 9576; *Gardner*, 1835, 13 S. 664); or by a minister not to ask a second augmentation of stipend (*E. of Kelly*, 1803, Mor. 15710); simoniacal pactions (*Maxwell*, 1775, Mor. 9580); contracts for restraining testimony (*Pool*, 1 Camp. 55); for forbearing to expose adultery or sue for divorce (*Gipps*, 2 John. & H. 517; *Brown*, 1 Ex. Div. 5); for compromising felony or procuring pardon (*Stewart*, 1752, Mor. 9465, and

cases quoted Bell, *Prin.* s. 41 (*g*)); for indemnifying a magistrate or jailor for a prisoner's escape (*Shoolbred*, 1789, Mor. 9468; *Lamb*, 1865, 3 M. 1105); for defeating the anti-slavery laws (*Gibson*, 1828, 6 S. 733, and 12 S. 683; affd. 1835, 14 S. 166, and cases quoted Bell, *Prin.* s. 41 (*i*)); for preventing a bankrupt from making a full disclosure (*Nevot*, 3 T. R. 17).

(*d*) Contracts for defeating the revenue laws are void (3 Ersk. 3. 3; Story, *Conflict of Laws*, ss. 246, 259; see Bell, *Prin.* s. 42).

(*e*) Contracts inconsistent with the national war policy are void (1 Bell, *Com.* 303; Reports of Lord Howell's Judgments in Admiralty, by Robinson, 1798, 1808; Edwards, 1808, 1811; Dodson, 1811, 1822; Horne on *Captures, etc.*).

2. *Contracts which the Law refuses to Enforce.*—In this case the contract is not void *ab initio*, as it is in the cases considered above, but as it is voidable by either of the parties the maxim holds "melior est conditio possidentis vel defendentis," and "no Court will lend its aid to a man who founds his cause on an immoral or illegal act" (per Ld. Mansfield in *Holman*, Cowp. 341). Money paid in furtherance of an unlawful contract is irrecoverable (*Tudal*, L. R. 4 Q. B. 309), though it is recoverable until the agreement is performed (*Taylor*, 1 Q. B. D. 291); and a completed transfer of property, though illegal, cannot be reduced (*Ayerst*, 42 L. J. Ch. 690).

(1) An obligation by a client to pay a sum of money to his agent, in addition to his business charges, will not be enforced (*Anstruther*, 1856, 18 D. 405; *Logan's Trs.*, 1885, 12 R. 1094).

(2) Gaming debts are irrecoverable (under this category are included Stock Exchange transactions for differences), but *bonâ fide* holders for value of bills, notes, and mortgages arising therefrom have an effectual right of payment (Prof. Bell in 1 *Ill.* 488). And brokers and turf commission agents can recover money really paid for principals (*Foulds*, 1857, 19 D. 803, and cases quoted Bell, *Prin.* 37 (*n*)).

(3) No one may sue for the price of spirituous liquors to be consumed on the premises (this does not apply to wine, *Alexander*, 1824, 2 S. 788, f. n.), unless the debt has been contracted *bonâ fide* to the extent of twenty shillings at one time, or when delivered elsewhere, in quantities of at least a reputed quart at once (24 Geo. II. c. 40; 25 & 26 Vict. c. 38: *Alexander & Co.*, 1824, 2 S. 788, f. n.). A bill granted for an account, part of which is for tippling, is wholly vitiated (*Maitland*, 1848, 11 D. 71).

(4) A printer cannot sue for an account unless his name appears on the first and last page of every book printed. (It appears not to be always customary to insert the name at the beginning.)

(5) Contracts made according to illegal weights and measures are not enforceable; nor are sales by lottery (10 Will. III. c. 23, and 4 Geo. IV. c. 60: *Christison*, 1881, 9 R. 34); likewise payments of wages in contravention of the Truck Act cannot be enforced (1 & 2 Will. IV. c. 37, and 50 & 51 Vict. c. 46); an unregistered medical practitioner cannot sue for fees (21 & 22 Vict. c. 90, ss. 31 and 32).

3. *Contracts on which a Penalty is imposed which may be Enforced on Payment of the Penalty.*—We have seen, under 1. (*a*), that a penalty, when recurrent, has a prohibitive effect and renders void contracts made in violation of the prohibition. But a Statute may impose a penalty without declaring contracts in violation of its terms to be illegal. The distinction between this and the case discussed lies in the single imposition or recurrence of the penalty; where it is imposed once only it is not presumed to operate as a prohibition the breach of which renders a

contract void. It will thus be seen that contracts falling under this head are not "illegal contracts" at all, and therefore do not fall to be discussed here. They are only made more expensive by the Legislature (*Brown*, 10 B. & C. 93), perhaps merely to protect the revenue, or to render more difficult contracts which for different reasons are undesirable.

Illegal Drilling.—See DRILLING (ILLEGAL).

Illegitimate Children; Illegitimacy.—See BASTARD; GIFT OF BASTARDY; LAST HEIR; SUCCESSION; CUSTODY OF CHILDREN; ALIMENT; LEGITIMACY; LEGITIMATION.

Imbargo.—See EMBARGO.

Imbecile.—See INSANITY; CIRCUMVENTION (FACILITY AND).

Impeachment—The procedure by which a person is accused before the House of Lords by members of the House of Commons. Impeachments are reserved for extraordinary crimes and extraordinary offenders,—for high crimes and misdemeanours beyond the reach of the law,—"but by the law of Parliament all persons, whether peers or commoners, may be impeached for any crimes whatever" (Erskine May, *Parliamentary Practice*, 10th ed., 625). The Commons are the accusers —"as the great representative inquest of the nation," they first find the crime, and then, as prosecutors, support their charge before the Lords, who exercise the functions of both a court and a jury, and give judgment on the charge preferred (*ib.* 50). (For procedure, see Erskine May, 626 *et seq.*)

Impignoration.—See PLEDGE.

Imposition.—See FALSEHOOD, FRAUD, AND WILFUL IMPOSITION; FRAUD.

Impotency as Impediment to Marriage.—See MARRIAGE.

Impressment of Carriages.—The impressment of carriages for military purposes is regulated by the Army Act, 1881 (44 & 45 Vict. c. 58), Part III.

Imprisonment. — See PUNISHMENT; PRISONS; ARBITRARY PUNISHMENT.

Imprisonment for Debt.—The abolition of imprisonment for civil debt in all ordinary cases has made this subject largely one of historical interest to the modern practitioner.

Under the early common law the power of imprisonment was a special remedy confined to merchants and to the case of obligations *ad facta prestanda*. It was first introduced as a general remedy through the influence of the clergy, being established to enforce the decrees of the Ecclesiastical Courts as the punishment of disobedience and of rebellion against God and the Church. After the excommunicating and judicial powers of the Church were extinguished in this country by the Reformation, the remedy of imprisonment for debt was adopted by the Civil Courts: and by successive Statutes it came to be established that decrees, including decrees of registration pronounced by the Court of Session, or decrees of Commissaries, Sheriffs, or Magistrates, provided they were presented to the Court of Session and had the authority of that Court interponed thereto, should be executed by horning and poinding. The warrant of horning was that upon which imprisonment proceeded. It authorised a charge for payment, and, on failure, the denunciation of the debtor as a rebel. All the effects of actual rebellion followed. Not only was the debtor liable to imprisonment on the king's warrant of caption, but his moveable goods were forfeited to the Crown, and were ordered to be thenceforth "inventoried and inbrought to the king's use": and these consequences of insolvency became the common mode of execution for the most trifling debts, the gift of escheat being burdened with payment of the debt for which the denunciation proceeded (Bell, *Com.* ii. 434). The casualty of escheat incurred by horning and denunciation for civil causes continued in force until 1747, when it was abolished by the Act 20 Geo. II. c. 50. Execution by imprisonment, however, continued a competent form of diligence for civil debt until the passing of the Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), which abolished imprisonment for civil debt in all ordinary cases (see *infra*). Imprisonment by caption could originally only proceed on a decree or warrant from the Court of Session, either a decree in action, a decree by registration, or a decree in supplement of the judgment of an inferior Court, or, in revenue cases, on a writ of extent or fiat of Exchequer. By 1 & 2 Vict. c. 114, s. 9, it was made competent to imprison upon an extract decree of a Sheriff. The older procedure was as follows: (1) Upon the warrants above mentioned, letters of horning under the Signet were issued (*Jurid. Styles*, vol. iii. 343 *et seq.*), upon which the debtor was charged to pay. On the expiry of the charge without payment, the debtor was denounced a rebel (or "put to the horn"), this being done within year and day of the charge. The horning with the messenger's execution of the charge and of the denunciation were then registered in the register of hornings, and the horning as returned, with the doquet of registration upon it, was the ground of a new application to the Court of Session for letters of caption. A new and simpler procedure was introduced by the Personal Diligence Act (1 & 2 Vict. c. 114), which was thereafter usually adopted. It was enacted that an extract decree should contain a warrant to charge the debtor to pay under pain *inter alia* of imprisonment, and that it should be lawful by virtue of such extract to charge the debtor, and that, after the expiration of the days of charge, it should be competent within year and day to register the execution of charge in the register of hornings, which registration should have the same effect as if the debtor had been denounced rebel, and the letters of horning, etc., had been registered, conform to the older practice (see *supra*). On the

execution being recorded, the keeper of the register writes on the extract and on the execution (if written on paper apart) a certificate of registration, and a warrant to imprison may then be obtained by a writer to the signet (or, in the case of a Sheriff Court decree, the creditor, or a procurator of Court) endorsing and subscribing on the extract a minute, whereupon the Bill Chamber Clerk (or, in the Sheriff Court, the Sheriff Clerk), being presented with the extract execution, certificate of registration and endorsed minute, writes on the extract a deliverance, "Fiat ut petitur"; and it is lawful, in virtue of said extract and deliverance, to search for, take, apprehend, and imprison the debtor in like manner as if letters of caption had been issued under the Signet (1 & 2 Vict. c. 114, ss. 1, 3, 5, 6, 9, 10, 11).

In order to the legal apprehension of the debtor it is necessary (1) that the messenger have his blazon displayed; (2) that he exhibit to the debtor the warrant of incarceration; and (3) that he touch the debtor with his wand of peace. It is only by the observance of these formalities, or by actual incarceration, that the debtor is legally made prisoner (Bell, *Com.* ii. 436).

Persons imprisoned for debt must, if able, maintain themselves while in custody. By the Act of 1696, c. 32, commonly known as the "Act of Grace," it was provided that an incarcerating creditor should be bound to aliment his debtor if the latter were unable to do so himself, and that, failing his making provision for such aliment as required by the Act within ten days after being ordered to do so, the debtor should be liberated. This Statute was amended and improved by the Act 6 Geo. IV. c. 62. See ACT OF GRACE.

The process of *cessio bonorum* was at an early period introduced into this country to mitigate the severity of the law of imprisonment for debt. Under the law of *cessio* as ultimately developed, a debtor who had been for a month in prison for a civil debt might, under certain conditions, obtain liberation on executing, in favour of his creditors, a disposition *omnium bonorum*, whereby he surrendered to them all his funds and estate in order to payment of their debts. See CESSIO.

Under the privilege of sanctuary, civil debtors (other than Crown debtors) were from a remote period enabled to obtain immunity from personal diligence by retreating to certain privileged precincts, such as the royal palaces and churches. Religious sanctuaries were abolished at the Reformation. The mint, or "cunzie house," was formerly a sanctuary. Edinburgh Castle was at one time thought to be so also, but the contrary was decided in 1714 (*M'Kay*, M. 14305). The only sanctuary which has existed within modern times is the "Abbey of Holyrood House," and it still retains its privileges. The sanctuary affords no protection to criminals, nor to persons under diligence for performance of a fact within their own power, nor to Crown debtors. See ABBEY; SANCTUARY; Bell, *Com.* ii. 461.

Imprisonment for debt was abolished in Scotland by the Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), except in the following cases: (1) Taxes, fines, or penalties due to Her Majesty, and rates or assessments lawfully imposed or to be imposed. (2) Sums decerned for aliment (s. 4). In these excepted cases it was further provided by the Act that no person should be imprisoned for a longer period than twelve months (*ib.*, see *infra*; *Walker*, 1881, 9 R. 249).

The Act is declared not to affect the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugæ*, or under any decree or obligation *ad factum præstandum* (s. 4).

The exemption from ordinary diligence by imprisonment was extended

to alimentary debts by the Civil Imprisonment Act, 1882 (45 & 46 Vict. c. 42); but it was thereby enacted (s. 4) that any Sheriff or Sheriff-Substitute may commit to prison, for a period not exceeding six weeks, or until payment of the sum or sums of aliment and expenses of process decerned for, or such instalment or instalments thereof as he may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which decree has been pronounced against him by any competent Court, provided—

1. That the warrant to commit to prison may be applied for by the creditor without any concurrence.

2. That the application shall be disposed of summarily and without written pleadings.

3. That the failure to pay shall be deemed wilful until the contrary is proved; but a warrant shall not be granted if it is proved to the satisfaction of the Sheriff or Sheriff-Substitute that the debtor has not, since the commencement of the action in which the decree was pronounced, possessed or been able to earn the means of paying the sum or sums in respect of which he has made default, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute shall consider reasonable.

4. That a warrant of imprisonment may be granted of new, subject to the same provisions and conditions, at intervals of not less than six months, against the same person, in respect of failure to pay the same sum or sums of aliment and expenses of process, if or in so far as still remaining due, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute shall consider reasonable, or any sums afterwards accruing due under the decree, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute shall consider reasonable.

5. That the imprisonment shall not to any extent operate as a satisfaction or extinction of the debt, or interfere with the creditor's other rights or remedies for its recovery.

6. That the creditor shall not be liable to aliment or contribute to the aliment of his debtor while incarcerated under the warrant, but that the incarcerated debtor shall be subject to the enactments and rules as to maintenance, work, discipline, and otherwise applicable to the class of prisoners committed for contempt of Court.

The Sheriff's judgment committing a person to prison may be reviewed by the Court of Session (*Tweedale*, 1883, 10 R. 852), although it has been questioned whether a judgment refusing a warrant would be appealable (*ib.*). An appeal from the Sheriff-Substitute to the Sheriff seems to be incompetent (see *Strain*, 1886, 13 R. 1029). Payment of arrears of aliment may be enforced by imprisonment under the Act (*Cain*, 1892, 19 R. 813).

The 1882 Act also modified the liability to imprisonment in the case of rates and assessments (see *supra*), by enacting that no person shall, on account of failure to pay rates and assessments, be imprisoned for a longer period than six weeks in all, at the instance of the rating authority or authorities of any one parish, combination, district, county, or burgh, in respect of his failure to pay the rates and assessments due for any one year, without prejudice to any other rights and remedies competent to the rating authority (45 & 46 Vict. c. 42, s. 5).

By the Debtors Act, 1880, it is provided that at least once in every four weeks it shall be the duty of the governor or principal officer in charge of every prison in Scotland to make a report to the Sheriff of the county within which such prison is situated, setting forth the name and designation

of every civil prisoner detained in such prison, the ground and warrant of his imprisonment, and the period for which he has been so detained; and it shall be lawful for the Sheriff to direct any civil prisoner to be brought before him, and, if he shall think fit, the Sheriff may determine that the assistance of one of the procurators for the poor shall be afforded to such prisoner in raising a process of *cessio bonorum* (43 & 44 Vict. c. 34, s. 10).

For the law applicable to the apprehension and detention of debtors *in meditatione fugæ*, reference may be made to the article MEDITATIO FUGÆ.

[Bell, *Com.* ii. 430 *et seq.*; Bell, *Prin.* s. 2311 *et seq.*; Goudy on *Bankruptcy*, 619.]

Imprisonment (Wrongful).—See MALICIOUS PROSECUTION; WRONGFUL IMPRISONMENT.

Improbation of Deeds *ex facie* Probative.—A deed *ex facie* probative will be reduced on proof that the subscriptions of the party and witnesses are forged, or that the witnesses did not at the time know the party, or did not see him subscribe, or that the party did not at the time of the witnesses' subscribing acknowledge his subscription (see the Act 1681, c. 5; *E. of Fife*, 1825, 4 S. 340; 1826, 2 W. & S. 166).

The evidence of the attesting witnesses is admissible in all such cases (*Frank*, 1795, M. 16824; *Swany*, 1807, M. App. "Writ," No. 7; *Cleland*, 1837, 1 D. 254; *Morrison*, 1862, 24 D. 625; 1863, 1 M. 304); but the weight to be attached to it depends upon the grounds of the reduction and the circumstances of the case. The evidence of witnesses who, while they admit their signatures, affirm that they did not see the granter sign, or hear him acknowledge his subscription, is open to grave suspicion. They might have declined to answer; for, by making such an admission, they render themselves liable, under the Act 1681, c. 5, to the pains of accession to forgery. They are thus ultronous witnesses, and are unworthy of credit, unless they are able to give an explanation so satisfactory, or are corroborated so amply, as to compel conviction (*Smith*, 1824, 2 Sh. App. 265, 287; *Cleland, ut supra*; *Baird's Tr.*, 1883, 11 R. 153; Dickson, s. 906). It is to be observed, however, that the importance to be attached to these considerations depends largely on the character, status, and education of the witnesses (*Cleland, ut supra*, per Ld. Gillies; *Morrison*, 1862, 24 D. 625, per Ld. Justice Clerk Inglis). Where it is not disputed that the granter's subscription is genuine, and made for the purpose of binding him by the deed in question, he is barred from challenging it on such a latent or technical ground (*Baird's Tr., ut supra*). Deeds have been sustained where, while one of the witnesses deponed against his attestation, he was contradicted by other evidence (*Henderson*, 1678, M. 11552, 12669), or his was the only evidence against the deed (see *Cleland*, 1837, 15 S. 1246), or the other witness affirmed his attestation (*ib.*, cf. *Baird's Tr., ut supra*; and see *Commissary of Glasgow*, 1673, M. 12661), or was dead (see Stair, iv. 20. 23; Ersk. iv. 4. 70; *Sibbald*, 1776, M. 16906), or was not adduced (*Stewart*, 1672, M. 12654; cf. *Tennant*, 1675, M. 12667). A deed will be sustained although the witnesses declare that they do not remember subscribing, or seeing the testator subscribe, or hearing him acknowledge his subscription (*Sym*, 1708, M. 16713, 16891; *Young*, 1770, M. 16905; *Frank*, 1795, M. 16824; *Morrison, ut supra*; cf. *Condie*, 1823, 2 S. 432). When the witnesses deny the signatures attributed to them, the question of forgery or of

mistaken identity must be determined upon a consideration of the whole evidence in the case (Dickson, s. 902).

It is thought that it is not obligatory upon the challenger of a deed to adduce the instrumentary witnesses (Dickson, ss. 913, 914. See BEST EVIDENCE).

[Dickson, *Evidence*, ss. 900–915.] See COMPARATIO LITTERARUM; FORGERY; OPINION EVIDENCE.

Improbatory Articles.—See REDUCTION; ABIDING BY.

Improvements.—See LEASES; AGRICULTURAL HOLDINGS ACTS; ENTAIL; MELIORATIONS.

Incendiary.—See FIRE-RAISING.

Incest.—Incest is the crime of carnal intercourse between persons within the degrees of relationship set forth in the eighteenth chapter of Leviticus. This portion of the Mosaic law was embodied in the law of Scotland by the Act 1567, caps. 14, 15. The following are the forbidden degrees enumerated in Leviticus (chap. xviii. 14 *et seq.*):—

Parent and child.

Step-parent and step-child.

Parent-in-law and child-in-law.

Grandparents and grandchildren; and, by construction, ascendants and descendants of remoter degree (Fraser, *H. & W.* i. 70).

Husband and granddaughter of his wife.

Wife and grandson of her husband.

Brother and sister.

Half-brother and half-sister.

Uncle and niece (see *Jean Stewart and John Wallace, jun.*, 1845, 2 Broun, 544).

Aunt and nephew; and, by construction, granduncles and grandnieces, grandaunts and grandnephews (Fraser, *H. & W.* i. 72).

Nephew and uncle's wife.

Niece and aunt's husband.

Man and brother's wife. It is doubtful whether connection between a man and his brother's widow is incestuous (see Deut. xxv. 5; Fraser, *H. & W.* i. 72). Hume mentions a case in which it was held to be so (*Irvine*, Hume, i. 449).

Woman and sister's husband (see *Oman*, 1855, 2 Irv. 146).

Wife and husband's brother's or sister's son.

Husband and wife's brother's or sister's daughter. By construction this is extended to the grandchildren of the spouse's brother or sister (Fraser, *H. & W.* i. 75). Hume refers to a case (*Beatson*, i. 450) where connection between a husband and his wife's niece was held relevant to infer only an arbitrary punishment. Hume mentions the following additional cases which have occurred in practice:

Widower and the daughter of his wife's brother in half blood (*Blair*, Hume, i. 450).

Husband and the sister of his wife's mother (*Gourlay*, Hume, i. 450).

At one time it was held that intercourse between a man and two sisters, or a woman and two brothers, where there was no marriage, was incestuous; but this would not be held now. The only case in which a bastard can have incestuous connection is with his mother; but it has not been expressly decided that this is incest.

There must have been actual connection between the parties to constitute the crime of incest. But attempt to commit incest is a relevant charge, both at common law (*Russell*, 1869, 1 Coup. 441, note; *Simpson*, 1870, 1 Coup. 437; *M'Coll*, 1874, 2 Coup. 538) and by statute (50 & 51 Vict. c. 35, s. 61).

The parties must have known that they were related within the forbidden degrees; but, if the crime is established, the onus of disproving presumed relationship is thrown on the accused.

If both parties are puberes, both are guilty of the crime, and one of the parties, if beyond pupilarity, cannot be adduced as a witness against the other, unless he or she has been charged with the crime, and accepted by the Crown as Queen's evidence.

Punishment.—The punishment of incest under the Act of 1567 is death. The penalty is now imprisonment or penal servitude (50 & 51 Vict. c. 35, s. 56).

[Hume, i. 452; Alison, i. 565; More, ii. 414; Macdonald, 202; Anderson, *Crim. Law*, 92.]

See Marriage; Affinity.

Inciting to Mutiny or Desertion.—See Seducing Royal Forces to Mutiny or Desertion.

Income Tax.—In the present article it has been found impossible to trace the various changes which have been made in the income tax and its incidence. The great number and length of the Acts of Parliament dealing with the subject have made it necessary to omit many details as to the complicated machinery by which the income tax system is worked. The plan adopted in this article has been to give the schedules of charge and the rules for assessing the duties under them practically in full. The effect of later legislation and judicial decisions is noted after the rules to which they apply. The procedure under the schedules and the general provisions for the collection of the tax are noticed in outline. Provisions which apply to England or Ireland, and not to Scotland, have not been noticed. Sections of Acts have been quoted not as they were originally passed, but as amended by later Acts. The subject has been treated under eleven headings, given below. For convenience of reference, subdivisions of the longer headings have been inserted. A list of the Acts of Parliament dealing with the subject has been appended.

I. General Scope of the Tax.
II. Income Tax Officials.
III. On whom the Duties are to be charged.
IV. What Persons are entitled to Exemption or Abatement.
V. Schedules (A) and (B).
VI. Schedule (C).
VII. Schedule (D).

VIII. Schedule (E).
IX. General Provisions for the Execution of the Act.
X. Appeals to Court of Session.
XI. Acts of Parliament dealing with Income Tax.

I. General Scope of the Tax.

Income tax was first imposed in 1798. In that year the amount of taxation levied by what were known as the assessed taxes was regulated by the income of the person taxed. In 1799 a new system was introduced, and everyone was required to make a return of the whole of their income from all sources, and to pay a duty of 10 per cent. thereon, subject to certain exemptions and deductions. In 1803 the system of raising the income tax was changed, and instead of the taxpayer making a return of his whole income, a plan was devised whereby incomes, whether derived from land or investments, or profits or earnings, were taxed at their source. The Act of that year introduced the schedules of charge, much as they are now in use. This new system was less complicated than the old. There was less chance for the taxpayer evading the duties, and there was not so much disclosure of the financial position of the taxpayer. Income tax was levied from 1798 till 1816, when it was abolished. It was again imposed in 1842, and has been levied ever since, at varying rates. In 1853 it was for the first time extended to Ireland.

The general scheme of the income tax, as at present imposed, is to tax all income from all sources in the United Kingdom, and the income of all persons residing in the United Kingdom obtained from sources outwith the kingdom. The various possible sources of income have been subdivided, and are enumerated in five schedules, A, B, C, D, and E. These schedules, as originally framed, are to be found in the Act of 1803 (43 Geo. III. c. 122), and are recited in the Income Tax Act of 1842, "An Act for granting to Her Majesty duties on profits arising from property, professions, trades, and offices" (5 & 6 Vict. c. 35, s. 1). The schedules as now in use are found in 16 & 17 Vict. c. 34, s. 2, and they classify and distinguish the several properties, profits, and gains for or in respect of which income tax duties were granted. Scheds. (A) and (B) deal with income derived from property in and occupation of lands, etc. Sched. (C) deals with income out of public revenues. Sched. (D), with income arising as profits from trades or professions, and with interest on money invested, etc. Sched. (E), with income derived from offices, salaries, pensions, etc.

The principal Acts dealing with the subject are the Acts of 1842 and 1853 above mentioned, together with the Taxes Management Act of 1880. The last-mentioned Act does not grant any new duties, but provides the machinery under which the tax is collected, and a reference to it is now read into the Income Tax Acts, and substituted for the original references to certain Acts of Geo. IV. and Will. IV. The General Commissioners, whose duty it is to see to the raising of the tax, appoint assessors; they give notice to occupiers of lands, etc., who make returns of rent or value of lands, etc., occupied by them; these returns are considered by the assessor and the Commissioners, and assessment is made and a warrant given to a collector to get payment of the tax; that applies to both Scheds. (A) and (B). Under Sched. (C) the assessment is made by Commissioners appointed for the purpose, and deducted from dividends or other payments. Under Sched. (D) the assessment is made by the Additional Commissioners, or, in certain cases, by the Special Commissioners;

the person to be charged is required to deliver a return of his income; the Commissioners consider this return, and, if satisfied, make their assessment accordingly. The tax is collected by the local collector. Under Sched. (E) the tax is deducted from the official income of persons in the employment of the State or other official employment. Income tax is payable on the 1st January in each year, with the exception of the duties which are paid by way of deduction.

The income tax duties are granted annually; they are charged according to the schedules in the Act of 1853, s. 1, at the rate of so much on each pound and fractional part of a pound. The enactments relating to income tax are kept in force from year to year by a clause in the Act which grants the duties. See sec. 30 of Customs and Inland Revenue Act, 1890. The Finance Act, 1896, ss. 25 to 30, impose the duties for the present year, at the rate of 8d. for every 20s. of the annual value or amount of property, profits, and gains chargeable under Scheds. (A), (D), (C), and (E), and for every 20s. of one-third of the annual value of lands, tenements, hereditaments, and heritages chargeable under Sched. (B) in respect of the occupation thereof. The reduction of one-eighth out of the duties chargeable under Sched. (B) is no longer allowed.

II. Income Tax Officials.

1. General Commissioners.
2. Additional Commissioners.
3. Special Commissioners.
4. Commissioners appointed for certain Duties.
5. Clerk to Commissioners.
6. Assessors.
7. Collectors.
8. Surveyors and Inspectors.
9. Commissioners of Inland Revenue.

There are several authorities on whom the duty of assessing and collecting the income tax is imposed.

1. *General Commissioners.*—The Commissioners for General Purposes, or "General Commissioners," for each district, are appointed by the Commissioners of Land Tax out of their own number or otherwise, and provision is made for the manner of election, filling vacancies, etc. (Income Tax Act, 1842, ss. 4, 5, 6, 7, 8). The Commissioners of Inland Revenue may increase the number of General Commissioners (Taxes Management Act, 1880, s. 28). In Scotland, Commissioners may be appointed by the Commissioners of Supply (Customs and Inland Revenue Act, 1893, s. 7). The qualification of a General Commissioner in shires and boroughs in Scotland is stated as follows in secs. 12 and 13 of the Act of 1842: "No person hereby required to be qualified in respect of estate shall be capable of acting as a Commissioner for general purposes in execution of this Act for any shire or stewartry in *Scotland* unless such person be infeoft in superiority or property, or possessed as proprietor or liferenter, of lands in *Scotland* to the extent of one hundred and fifty pounds *Scots per annum* valued rent, or unless such person be possessed of personal estate of the value of five thousand pounds, or of personal estate, or an interest therein, producing an annual income of two hundred pounds sterling, or be infeoft or possessed as aforesaid of lands and personal estate, or an interest therein, being together of the annual value of two hundred pounds sterling, estimating in every such case one hundred pounds personal estate as equivalent to four pounds

per annum, and an interest from personal estate of four pounds *per annum* as equivalent to one hundred pounds personal estate, or unless such person be the eldest son of some person who shall be infeoft or possessed of a like estate of twice the value required as the qualification of a Commissioner in right of his own estate for such shire or stewartry. No person herein required to be qualified in respect of estate shall be capable of acting as a Commissioner for general purposes in execution of this Act for any city or borough in *Scotland* unless such person be infeoft or possessed of an estate of the like nature and of three-fifths of the value required for the estate of a Commissioner acting for any shire or stewartry in *Scotland*, or unless such person be the eldest son of some person infeoft or possessed of some estate of thrice the value required as the qualification of a Commissioner, in right of his own estate, for the same city or borough."

The Sheriff Depute or Substitute of any county or division in Scotland for the time being shall be *ex officio* and without other qualification a General Commissioner for such county or division (Taxes Management Act, 1880, s. 27). As to other cases in which qualification is not required, see secs. 14 and 15 of Act of 1842. The duties of the General Commissioners are to execute all matters with respect to the duties under all the schedules except such as are directed to be executed by the Special or Additional Commissioners (Act of 1842, s. 22). (See observations of Ld. Pres. Inglis in *Smiles*, 1887, 14 R. 736).

2. *Additional Commissioners.*—The General Commissioners have power to appoint Additional Commissioners, and to divide them into district committees (Act of 1842, ss. 16–20). The General Commissioners and Additional Commissioners are not paid for their services, but are exempted from certain offices and duties (Act of 1842, s. 35; Taxes Management Act, 1880, s. 40). The duties of the Additional Commissioners relate to Sched. (D), under which they make assessments (Act of 1842, s. 111).

3. *Special Commissioners.*—Besides the General Commissioners, there are the Commissioners for special purposes, called the Special Commissioners. These are paid officials (Act of 1842, s. 186) appointed by the Treasury. The Commissioners of Inland Revenue for the time being are also Special Commissioners. Their functions are set forth in sec. 23. They make assessments under Sched. (C) (Act of 1842, s. 29); hear appeals from parties assessed under Sched. (D) (s. 130); and assess under that schedule if person to be assessed requires that they should make the assessment (s. 131). They may also in certain cases exercise the powers of the General Commissioners (s. 132).

4. *Other Commissioners appointed to perform Special Duties.*—The Governor and Directors of the Bank of England and other persons are appointed Commissioners for assessing duties on all annuities, etc., payable by the bank and other corporations (Act of 1842, s. 89).

5. *Clerk to Commissioners.*—The clerk is appointed by the General Commissioners. They may also appoint an assistant clerk (Act of 1842, s. 9; Taxes Management Act, 1880, s. 41). The same section provides for vacancies and for delays by the clerk or his assistant. The clerk in each district is to be appointed clerk to the Additional Commissioners for the said district, and attends their meetings (s. 19, Act of 1842).

The clerks were formerly paid by poundage, but that is abolished, and their remuneration is fixed by the Inland Revenue Act, 1889, s. 13, and the Taxes (Regulation of Remuneration) Act, 1891, ss. 1, 2, 6. The clerk may not take any other fees (Act of 1842, s. 183). He makes abstracts of returns into proper books (s. 59), prepares duplicates of assessments (Taxes Manage-

ment Act, 1880, s. 83). The clerk is often a solicitor, and advises the Commissioners on points of law. When a stated case is demanded by persons dissatisfied with the decision of the Commissioners, the case is prepared by the clerk (Taxes Management Act, 1880, s. 59).

6. *Assessors.*—The assessors are appointed by the General Commissioners (Act of 1842, s. 36; Taxes Management Act, 1880, s. 42). If there has been a failure in the appointment of an assessor in any parish, the justices may appoint. In certain cases the surveyor of the district is required to execute the duties of the assessor. The declaration to be taken by assessors, and the penalties on them for neglect of duty, etc., are found in secs. 45 and 46 of the last-mentioned Act. Their remuneration is fixed by the Customs and Inland Revenue Act, 1885, s. 25, and the Taxes (Regulation of Remuneration) Act, 1891, ss. 1, 3, 5, 6, along with sec. 183 of the Act of 1842. The duties of the assessors are dealt with under the procedure applicable to the various schedules. As to their appointment, see *General Commissioners for Cunninghame District of Ayrshire*, 1895, 22 R. 986.

7. *Collectors.*—The Treasury appoints the collectors of income tax in Scotland. As to their appointment, salaries, and the securities which they must find before acting, see Taxes Management Act, 1880, s. 81. The duties of the collectors will be found in secs. 82, 83, 84, and 85 of that Act; and secs. 117 to 121 of the same Act, and sec. 14 of the Revenue Act of 1889, provide for proceedings against them. The clerk to the Commissioners prepares duplicates of assessments, and hands warrant for collecting to the collector, whose duty is to demand payment. Sec. 97 of Act of 1880 provides for the recovery of duty where payment has been refused in Scotland. Secs. 98 and 99 provide that in Scotland taxes may be paid by stamps or post-office orders.

8. *Surveyors and Inspectors.*—Surveyors are appointed, and their salaries are fixed, by the Treasury (Taxes Management Act, 1880, ss. 17 and 18; Act of 1842, s. 37). In certain cases the surveyor acts as assessor (s. 43 of Act of 1880). The surveyors and inspectors have access to returns and assessments, and have liberty to amend them, and make surcharges (s. 161 of Act of 1842). The surveyor may examine assessments, may call for returns, and amend assessments (ss. 51, 52 of Taxes Management Act, 1880). By the Finance Acts of 1895 and 1896 it is provided that in certain circumstances the surveyors and inspectors may act as assessors under Scheds. (A) and (B).

9. *The Commissioners of Inland Revenue.*—Sec. 4 of the Income Tax Act of 1853 provides: "The duties by this Act granted shall be under the direction and management of the Commissioners of Inland Revenue for the time being, who are hereby empowered to employ all such officers or other persons, and to do all such other acts and things as may be deemed necessary or expedient for the raising, collecting, receiving, and accounting for the said duties, and for putting this Act into execution in and throughout the United Kingdom, in the like and in as full and ample a manner as they are authorised to do with relation to any other duties under their care and management."

The duties of the Commissioners are to be found in secs. 1 to 4 of the Inland Revenue Regulation Act, 1890, 53 & 54 Vict. c. 21. They appoint collectors, officers, and other persons to carry out the Acts. They may also act as Special Commissioners (s. 23 of Act of 1842), deal with claims of exemption, and discharge assessments, and order repayment in case of double assessments (Taxes Management Act, 1880, s. 60). In cases of

doubt as to where assessment may be made, the matter may be referred to them (s. 53 of same Act).

III. On whom the Duties are to be charged.

The duties are to be charged on all persons liable under any of the schedules, whether subjects of Her Majesty or not, and are to be payable by persons whose ordinary residence is in the United Kingdom, even though they be temporarily absent from it. *Temporary residents* in the United Kingdom who are there for less than six months in the year are not to be charged in respect of profits received from abroad during the year: after the six months' residence, the person will be chargeable. Persons departing from the United Kingdom after claiming exemption, and returning within a year, are chargeable for the whole year (s. 39, Act of 1842). Questions as to residence within the United Kingdom, and as to trade carried on in the United Kingdom, are dealt with under Sched. (D). See the cases there cited.

Corporations, bodies politic, fraternities, and societies are chargeable with the like duties as any person. The officers of all such societies are required to do all acts requisite for assessing the societies to which they belong (s. 40), and to do all acts requisite for the assessment of persons employed by the corporations or societies (42 & 43 Vict. c. 21, s. 18).

The *Trustees* and guardians of any person being an infant or married woman, lunatic, idiot, or insane, and having the direction of such person's property, are to be charged in place of such person. Non-residents are to be charged in the names of their factors, trustees, or agents; such trustees, guardians, curators, or agents are required, except in certain cases, to do anything necessary for the assessing of the duties under this Act (ss. 41 and 42, Act of 1842). Trustees, agents, and receivers may retain the duties charged upon them out of trust moneys (s. 44).

A married woman is charged by sec. 45 as follows:—"Any married woman acting as a sole trader by the custom of any city or place, or otherwise, or having or being entitled to any property or profits to her sole or separate use, shall be chargeable to such and the like duties and in like manner, except as hereinafter is mentioned, as if she were actually sole and unmarried. Provided always, that the profits of any married woman living with her husband shall be deemed the profits of the husband, and the same shall be charged in the name of the husband, and not in her name, or of her trustee. Provided, also, that any married woman living in Great Britain separate from her husband, whether such husband shall be temporarily absent from her, or from Great Britain, or otherwise, who shall receive any allowance or remittance from property out of Great Britain, shall be charged as a feme sole if entitled thereto in her own right, and as the agent of the husband if she receive the same from or through him, or from his property, or on his credit."

The Crown is exempt from income tax. This exemption applies to the Queen's establishment for the administration of justice. Where property is occupied for purposes of the government of the country, or for certain other public purposes, such property is not chargeable with the duties. Thus properties used as a Burgh Court (*Magistrates of Edinburgh*, 1889, 17 R. 73), a County Police Station (*Coomber*, 1883, L. R. 9 App. Ca. 61), a Post-office (*Smith*, 1857, 26 L. J. M. C. 105), were held not to be assessable; while, on the other hand, Municipal Buildings (*Magistrates of Edinburgh*, 1889, 17 R. 73), County Lunatic Asylum (*Bray*, 1889, L. R. 22 Q. B. D. 484), University of Edinburgh (*Greig*, 1868, 6 M. H. L. 97), were held not to fall within the

exemption. As to the private estates of the Crown which are liable to the duties, see 25 & 26 Vict. c. 37, s. 8.

IV. What Persons are entitled to Total Exemption from Income Tax, or to Partial Exemption or Abatement.

The Act of 1842 exempted from the tax all persons whose income was less than £150 per annum, irrespective of the sources from which that income was derived. Various changes have been made as to the amount of income from which total exemption could be claimed. It is not proposed to trace these changes. The present limit is fixed by the Finance Act of 1894 (57 & 58 Vict. c. 30, s. 34), which provides that persons whose incomes from all sources do not exceed £160 a year shall be entitled to total exemption from the duties exigible under the Income Tax Acts.

It further provides, as to abatements for persons with small incomes which exceed £160 per annum, that: (1) Any person who shall be assessed or charged to any of the duties of income tax granted by this Act, or shall have paid the same either by deduction or otherwise, and who shall claim and prove in the manner prescribed by the Income Tax Acts that his total income from all sources, although exceeding £160 or upwards, does not exceed £500, shall be entitled to relief or abatement as follows:—(*a*) If the total income of such person does not exceed £400, to relief from so much of the said duties assessed upon or paid by him as an assessment or charge upon £160 of his income would amount to; and (*b*) if the total income of such person exceeds £400 and does not exceed £500, to the relief from so much of the said duties assessed upon or paid by him as an assessment or charge upon £100 of his income would amount to."

By total income from all sources is meant income which is chargeable with duty under any of the schedules of the Income Tax Act. If a deduction can be legally claimed under the rules of any schedule, the amount of income for the purpose of total or partial exemption will be calculated subject to that deduction. There is one exception to this rule, viz. the abatement allowed under Scheds. (D) and (E) by sec. 54 of the Income Tax Act of 1853. That section provides that persons who have made insurance or contracted for a deferred annuity on the lives of themselves or their wives, are to be allowed an abatement of duty in respect of the annual premiums paid. There is a proviso to the section to the effect that any such deduction or abatement shall not entitle any such person to claim total exemption or an abatement for a small income. In ascertaining what was total income, the yearly value of a house in which a bank agent was entitled to reside, but which he could not let, was held not to be assessable (*Tennant*, 1892, 19 R. H. L. 1, L. R. App. Ca. 150); so also, the annual value of a manse, occupied by a Free Church minister, was not counted as part of his total income (*Sutherland*, 1894, 21 R. 753); on the other hand, the yearly value of a manse occupied by a minister of the Established Church, which he was entitled to let, was counted as part of his total income (*Fry*, 1895, 22 R. 422).

Sec. 167 of the Act of 1842 directs how income arising from lands is to be estimated with reference to claims for exemption.

Sec. 7 of the Finance Act, 1896, provides that, for the purposes of any claim to exemption, relief, or abatement from Income Tax, the income arising from the occupation of lands, tenements, hereditaments, and heritages chargeable under Sched. (B) in the Income Tax Act, 1853, shall be taken to be one-third of the annual value thereof under that

schedule, except that if any person occupying, either as owner or otherwise, any lands for the purpose of husbandry only shows at the end of any year, to the satisfaction of the General Commissioners of Income Tax, that his profits and gains arising from the occupation of such lands during the year fell short of one-third of the said annual value thereof, the income arising from the occupation shall be taken at the actual amount of such profits and gains; and if the whole of the income tax has been paid, the amount overpaid shall be certified and repaid in manner provided by sec. 133 of the Income Tax Act, 1842.

Sec. 168 of Act of 1842 provides that co-partners, joint tenants, or tenants in common of the profits of any property whatever may severally claim abatement. Claims for abatement must be made where the claimant resides, or, in the case of offices, pensions, and stipends, before the Commissioners of the Department wherein the duties are cognisable under the regulations of the Act. Persons out of the United Kingdom may claim exemption by affidavit, and claims may be made by agents and trustees on account of others.

Income of Married Women in Questions of Exemption.—As to the income of married women, it is provided by sec. 45 of the Act of 1842: "That any married woman acting as a sole trader by the custom of any city or place, or otherwise, on having or being entitled to any property or profits to her sole or separate use, shall be chargeable to such and the like duties, and in like manner, except as hereinafter is mentioned, as if she were actually sole and unmarried: Provided always, that the profits of any married woman living with her husband shall be deemed the profits of the husband, and the same shall be charged in the name of the husband, and not in her name, or of her trustee: Provided also, that any married woman living in the United Kingdom separate from her husband, whether such husband shall be temporarily absent from her or from the United Kingdom or otherwise, who shall receive any allowance or remittance from property out of the United Kingdom, shall be charged as a feme sole if entitled thereto in her own right, and as the agent of the husband if she receive the same from or through him, or from his property or on his credit."

Sec. 34 of the Finance Act of 1894 provided where the total joint income of a husband and wife charged to income tax, by way either of assessment or deduction, does not exceed £500, and, upon any claim under this section, the Commissioners for the general purposes of the Acts relating to income tax are satisfied that such total income includes profits of the wife derived from any profession, employment, or vocation chargeable under Sched. (D), or from any office or employment of profit chargeable under Sched. (E), they shall deal with such claim as if it were a claim for exemption, or relief, or abatement, as the case may be, in respect of such profits of the wife, and a separate claim, on the part of the husband, for exemption, or relief, or abatement in respect of the rest of such total income.

Procedure for claiming Exemption.—The procedure for claiming exemption or abatement is given in sec. 164 of the Act of 1842. A notice by the person claiming exemption is to be delivered to the assessor of the parish where he resides, together with a statement of his income from all sources; the claim and statement are sent to the General Commissioners; and if the inspector or surveyor makes no objection within forty days, the Commissioners may allow the claim. If the inspector objects, the claim is to be heard by the General Commissioners. If the claim is sustained, and it is proved that the person entitled to exemption has been charged duties

by deduction from any annuity, dividend, grant, etc., the Commissioners may grant a certificate thereof, which shall authorise the collector or receiver to repay the amount of such duties. A claim for repayment must be made within three years after the end of the year of assessment (Income Tax Act, 1860, s. 10). Sec. 166 imposes a penalty on anyone making fraudulent claim for exemption.

V. Schedules (A) and (B).

1. Schedule (A).
2. Rules for estimating the annual value of lands under Schedule (A), being Rules I., II., and III. of the Act of 1842, s. 60.
3. General rules and regulations for charging the duties under Schedule (A), being Rule IV. of the Act of 1842, s. 60.
4. Particular allowances and deductions in respect of the duties under Schedule (A), being Rule V. of the Act of 1842, s. 60.
5. Allowances in respect of duties under Schedule (A) to hospitals, literary and charitable institutions, being Rule VI. of the Act of 1842, s. 61.
6. Other deductions now allowed on duties under Schedule (A).
7. Schedule (B), and rules for assessing the duties under it, being Rules VII. and VIII. of Act of 1842, s. 63.
8. Rules applicable to Schedules (A) and (B), being Rules IX., X., and XI. of Act of 1842, ss. 63, 64.
9. General rule as to assessments under Schedules (A) and (B), Finance Act, 1896.
10. Procedure under Schedules (A) and (B).
11. Appeals under Schedules (A) and (B).
12. Abatements under Schedules (A) and (B).

1. Schedule (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* 20*s. of the annual value thereof*" (Income Tax, 1853, s. 2). The rules as to how the duties under Sched. (A) are to be assessed and charged are found in sec. 60 of the Income Tax Act of 1842. They are as follows:—

"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:

2. Rules for Estimating the Annual Value of Lands under Schedule (A), being Rules I., II., and III. of the Act of 1842, s. 60.

Rule I. General Rule for Estimating Lands, Tenements, Hereditaments, or Heritages mentioned in Sched. (A).

"The annual value of lands, tenements, hereditaments, or heritages charged under Sched. (A) shall be understood to be the rent by the year at which the same are let at rack-rent, if the amount of such rent shall have been fixed by agreement 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, of whatever nature, and for what-

ever purpose occupied or enjoyed, and of whatever value, except the properties mentioned in Rule II. and Rule III. of this schedule."

"Rack-rent" means "a rent of or approaching to the full annual value of the property out of which it issues" (Elph. 618). If there are considerations other than money-rent, or if landlord gives considerations other than subjects let, then the Commissioners must value subjects let independently of rent paid (*Campbell*, 1879, 7 R. 82). See the provisions of the Lands Valuation Act, 1854, 17 & 18 Vict. c. 91, s. 6, and of the Lands Valuation Act Amendment Act, 1857, 20 & 21 Vict. c. 58, ss. 1 and 3, as to assessment of land, etc., in Scotland. It has been held that these Acts have not repealed or altered the rule laid down in the Act of 1842 for ascertaining the value of lands for the purposes of imperial taxation, and that the Commissioners of Inland Revenue, in estimating the annual value of lands and heritages, are not bound by the valuation roll except in counties and burghs in which the officer of Inland Revenue has been appointed assessor for the valuation roll in terms of 20 & 21 Vict. c. 58 (*Menzies*, 1878, 5 R. 531).

Rule II. Rules for Estimating the Lands, Tenements, Hereditaments, or Heritages herein mentioned which are not to be charged according to the preceding General Rule.

This deals with tithes, ecclesiastical dues, including teinds in Scotland, manors, fines and other profits from lands not in the actual possession or occupation of the party to be charged. It is as follows :—

The annual value of all the properties hereinafter 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 :

First.—Of all tithes, if taken in kind, on an average of the three preceding years.

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.

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, except in the cases mentioned in the fourth rule of No. IV. of Sched. (A).

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.

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.

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 No. IV. hereinafter mentioned), to be charged on the receivers of such profits, or the persons entitled thereto.

In estimating the profits of a manor under this rule, no deduction can be made for expenses incurred in collecting the manorial dues. Profits are not to be estimated as net profits in a mercantile business (*Duke of Norfolk*, 1890, L. R. 24 Q. B. D. 485).

As to fines, see *Mostyn*, 1895, L. R. 1 Q. B. 170.

Rule III. Rules for Estimating the Lands, Tenements, Hereditaments, or Heritages hereinafter mentioned which are not to be charged according to the preceding General Rule.

This rule directs how the duty is to be charged on quarries, mines, ironworks, gasworks, railways, and other concerns of the like nature. After the list of properties to be charged, the rules state on whom the duty is to be charged. The last paragraph deals with the case of mines.

The annual value of all the properties hereinafter 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.

First.—Of quarries of stone, slate, limestone, or chalk, on the amount of profits in the preceding year.

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.

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, railways 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.

How the Duty is to be charged in last three Rules.—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 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 of 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.

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.

By sec. 8 of the Revenue Act, 1866, 29 & 30 Vict. c. 36, it was provided that the concerns described in Rule III., quoted above, should be charged and assessed to the duties according to the rules prescribed by Sched. (D) of the Act of 1842, so far as such rules are consistent with the said No. III. (These rules are quoted under heading Sched. (D).) The result of this is not to transfer cases in Sched. (A), Rule III., to Sched. (D), or to alter the averages of years on which returns are required to be made (*Coltness Iron Co.*, 1881, 8 R. H. L. 67, L. R. 6 App. Ca. 315). That case overruled *Knowles*, 1877, L. R. 3 Ex. D. 23, and is inconsistent with certain dicta of Ld. Pres. Inglis in *Miller*, 1878, 6 R. 271.

The rules of Sched. (D) were applied to cases under Sched. (A), Rule III., in *Rychope Coal Co.*, 1881, L. R. 7 Q. B. D. 485, and *Dillon*, L. R., 1891, 1 Q. B. 575. See also sec. 12 of Customs and Inland Revenue Act, 1878, 41 & 42 Vict. c. 15, which is quoted under heading of Sched. (D), and which applies also to cases under Rule III. of Sched. (A). A concern in which slate is obtained by underground workings is to be assessed under subrule 1 as a "quarry," not under subrule 2 as a "mine." The Statute imposes a tax upon what is worked, not on the mode of working (*Jones*, 1879, L. R. 5 Ex. D. 93).

In computing profits of a mine no deduction is allowed for sinking a new pit, which is an expenditure of capital (*Addie*, 1875, 2 R. 431), nor is a deduction allowed for depreciation of capital on account of the minerals being gradually worked out (*Miller*, 1878, 6 R. 271). This last principle was also applied to the case of a company owning a cemetery (which is a "concern of a like nature" under this rule), who sold to certain persons pieces of ground in their cemetery for burial purposes. It was held that the money obtained by such sales was assessable without any deduction on the ground that the company was realising its capital (*Edinburgh Southern Cemetery Company*, 1889, 17 R. 154; see also *Coltness Iron Company*, 1881, 8 R. H. L. 67, L. R. 6 App. Ca. 315).

Questions have been raised as to whether certain concerns earn profits, and so fall within this rule. That depends upon whether there is trading; and if there is, the fact that the profits of the trade are dedicated to some public purpose does not free them from the tax. Water commissioners empowered by a private Act of Parliament to supply water to a district, and to levy a rate therefor, are not liable for the tax unless it is proved that they have been making profit by selling water (*Glasgow Water Commissioners*, 1875, 2 R. 708); but if the commissioners sell water to manufacturers, or get from them a rate which is not compulsory, they are trading in water, and liable to assessments (*Glasgow Water Commissioners*, 1886, 13 R. 489). Or if they supply water to persons not within their district, and charge for it at the ordinary rate, that makes them liable on the profits so obtained (*Hamilton Water Works Commisssoners*, 1887, 14 R. 485). A corporation selling gas to inhabitants must pay tax on surplus revenue (*Glasgow Gas Commissioners*, 1876, 3 R. 857. The reasoning in the judgments in this case has not been followed in later decisions, but the judgment itself has not been impugned).

A corporation was constituted for the management of docks. The surplus revenue received from dock dues was to be applied ultimately to the reduction of rates. It was held that although the profits could be applied only in that way, they were liable to be taxed (*Mersey Docks and Harbour Board*, 1883, L. R. 8 App. Ca. 891). This decision of the House of Lords has been followed in *Paddington Burial Board*, 1884, L. R. 13

Q. B. D. 9; *Portobello Town Council*, 1890, 27 S. L. R. 863; *Corporation of Dublin*, 1887, 20 L. R. Ir. 497, 2 Tax Cases, 206.

3. General Rules and Regulations for charging the Duties under Schedule (A), being Rule IV. of the Act of 1842, s. 60.

General Rules and Regulations respecting the said Duties.

First.—Duties to be charged in Parish where Properties Situate.—All properties chargeable to the duties in Sched. (A) shall be charged in the parish or place where the same are situate, and not elsewhere, except as hereinafter is excepted.

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 hereinafter contained.

Provided also, that the profits arising from any manor or royalty which shall extend into different parishes may be assessed in one account in the parish where the Court for such manor or royalty shall have been usually held. Provided also that the profits arising from all fines received by the same person, body politic or corporate, or company, may be assessed in one account, where the person to be charged under the regulations of this Act shall reside.

As to the assessing of railways, etc., see 29 & 30 Vict. c. 36, s. 8, which provides that railway companies shall be assessed by the special commissioners.

Second.—Lands in same Occupation.—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 proportions 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:

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.

See sec. 53 of the Taxes Management Act, 1880, subs. 2, which provides that in case of doubt the Board may direct where assessment is to be made.

Third.—Houses under £10 to be charged on Landlord.—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, 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.

Fourth.—Tithes.—(This subsection provides that tithes may be charged on occupiers of land.)

Fifth.—Rule regarding Failing Mines, etc.—If any mine, enumerated in the fifth 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.

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.

Sixth.—How Duty to be estimated where Possession has commenced within Year.—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.

Seventh.—(This subsection provides that houses of foreign ministers are to be charged on the landlords.)

Eighth.—Official Houses.—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.

Ninth.—Occupiers to recover from Landlord, according to the Rate, by deducting the Duty out of the Rent.—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 sevenpence 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; and the receivers of Her Majesty, and all landlords, both mediate 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; 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; 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.

See also sec. 40 of the Income Tax Act, 1853, and sec. 15 of the Revenue (No. 1) Act, 1864 (27 & 28 Vict. c. 18), which contain similar provisions. The first-mentioned section contains the following proviso: "Provided that no tenant or occupier of any property chargeable under Sched. (A) of this Act shall be entitled to deduct or retain out of the rent thereof any greater sum than the amount of the duty which shall have been assessed and charged upon or in respect of such property, and actually paid by such tenant or occupier." If a tenant is called upon to pay arrears of duty due by a former occupier, he may deduct the amount from his rent (s. 35 of Income Tax Act, 1853). It has been held that a person who

makes a payment of rent or money without deducting the tax, loses the right to the deduction in respect of such interest (*Galashiels Provident Building Society*, 1893, 20 R. 821).

Tenth.—Landlords may deduct Duty when paying Feu-duty or other Annual Payment.—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 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 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 moneys 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.

This does not apply to a casualty. A singular successor paid to the superior for his entry a casualty of a year's rent of the lands, without deduction of income tax. The Crown, after receiving payment from the superior of income tax on the casualty, assessed the vassal for income tax on the rent. The vassal objected to the assessment on the grounds (1) that the superior had received the whole rent for the year, and (2) that a casualty was of the same nature as a feu-duty, for which deduction was allowed. The Court sustained the assessment (*Macgregor*, 1889, 16 R. 438).

Eleventh.—Mortgagees in Possession are Liable to the Duties.—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; and upon the settlement of accounts between such mortgagee or other creditor as aforesaid, and the mortgagor 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.

Twelfth.—How Duties are to be paid when Owner dies.—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.

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.

(But houses let in several tenements are to be charged on landlords (Act of 1853, s. 36).)

Fourteenth.—Deductions not to be allowed except as authorised by the Act.—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, 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; 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.

4. Particular Allowances and Deductions in respect of the Duties under Schedule (A), being Rule V. of the Act of 1842, s. 60.

Particular Deductions and Allowances in respect of the Duties under this Schedule.

First.—For the amount of the tenths and first fruits, duties, and fees on presentations paid by any ecclesiastical person within the year preceding that in which the assessment shall be made.

Second.—For procurations and synodals paid by ecclesiastical persons on an average of seven years preceding that in which the assessment shall be made.

Third.—For the repairs of collegiate churches and chapels, and chancels of churches, or of any college or hall in any of the universities of the United Kingdom, by any ecclesiastical or collegiate body, rector, vicar, or other person bound to repair the same, on an average of twenty-one years preceding as aforesaid, or as nearly thereto as can be produced.

This third allowance is now to be calculated on the amount so expended in the year preceding that in which the assessment is made, instead of an average of twenty-one years (Income Tax Act, 1853, 16 & 17 Vict. c. 34, s. 34).

Fourth.—For the parochial rates, taxes, and assessments charged upon or in respect of any rent-charge confirmed under the Act passed for the commutation of tithes, on the amount paid in the year in which the assessment shall be made.

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, where the charge thereon shall not have been redeemed.

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. (See *Hesketh*, 1888, 21 Q. B. D. 444.)

Rate of Deduction, and how Allowance is to be made.—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 sevenpence 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 hereinafter otherwise provided for; (that is to say),

Provided always, that the allowances to be granted in pursuance of the first, second, or third case may be granted to the ecclesiastical or collegiate body, rector, vicar, or other person aforesaid liable to the charges therein mentioned, in one sum, either by deducting the same from the assessment upon him (if any), or by certificate; provided that no abatement or deduction shall be made from any assessment for the allowances granted in pursuance of any of the cases mentioned in this rule in respect of any such charges or payments as aforesaid, payable out of any rent-charge confirmed under the Act passed for the commutation of tithes, but such allowances shall be granted by certificate in the manner hereinafter directed

Sec. 61 of the Act of 1842 provides the mode of proceeding in order to payment of the allowances granted under Rule V.

5. Allowances in respect of Duties under Schedule (A), to Hospitals, Literary and Charitable Institutions, being Rule VI. of the Act of 1842, s. 61.

Allowances to be made in respect of Duties, Colleges, Universities, Hospitals, Almshouses, Literary Institutions.

For the duties charged on any college or hall in any of the universities of the United Kingdom, 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.

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.

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 almshouse, 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.

The allowances under Rule VI. are to be certified by the Special Commissioner (s. 62 of Act of 1812). If repayment of duties is claimed, the claim must be made within three years (s. 10 of 23 & 24 Vict. c. 14).

In regard to hospitals and public schools. A hospital which was wholly self-supporting by payments made by patients was held not to come within the Act, although certain patients were attended and maintained gratuitously (*Needham*, 1888, L. R. 21 Q. B. D. 436); but if a hospital is supported partly by charity and partly by payments from patients, Rule VI. applies (*Nottingham Lunatic Hospital*, 1891, L. R. 1 Q. B. 585; see also *Bray*, 1889, L. R. 22 Q. B. D. 484). Similarly, a public school comes under the rule, even though it is supported partly by fees paid by pupils (*Blake*, 1887, L. R. 18 Q. B. D. 437).

As to what is a literary and scientific institution, it has been held that the Royal College of Surgeons of Edinburgh is not, because its main objects are professional (*Royal College of Surgeons, Edinburgh*, 1892, 19 R. 751).

A public library. Free public library falls within the rule. It has been held that a building appropriated to a free public library and used solely for that purpose, whoever may be the owner of the building, and whether or not the library is supported by rates, is exempt from income tax as being the "property of a literary institution" (*Mayor of Manchester*, 1896, L. R. App. Ca. 500).

Part of buildings used as a free library were used by a subscription library which took in new books, and in return for the use of the public library's room handed over the new books to the public library at the end of a year. Held that the public library was not exempt under this rule (*Mags. of Dundee*, 1897, 5 S. L. T. 70).

The trustees of a church were assessed for income tax on the annual value of their assembly hall. The hall was used for church purposes, was unlet, and yielded no profits. The trustees claimed exemption under the branch of Rule VI. relating to charitable purposes. Held that the rule did not apply, as the hall yielded no rent or profit (*Trs. of Free Church of Scotland*, 1893, 20 R. 759). The buildings belonging to a theological training college are not exempt under Rule VI., that institution not being a public school (*Trs. of Free Church of Scotland*, 1897, 24 R. 496).

Meaning of Charitable Purposes.—A Statute of Elizabeth (43 Eliz. c. 4) enumerated charities, and the enumeration has been accepted in English law since then. It was as follows:—Relief of aged, impotent, and poor people. Maintenance of sick and maimed soldiers and mariners. Schools of learning, free schools, and scholars in universities. Repair of bridges, ports, havens, causeways, churches, sea-banks, and highways. Education and preferment of orphans. Relief, stock, or maintenance for houses of correction. Marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed. Relief or redemption of prisoners or captives. Aid and ease of any poor inhabitants concerning payment of fifteenths, setting out of soldiers, and other taxes.

In Scotland, the meaning of the word charity had never been definitely defined for the purposes of income tax till 1888, when a somewhat restricted interpretation was put upon it by the Court of Session in *Baird's Trs.*, 1888, 15 R. 682.

In the subsequent case of *Pemsel* (the *Moravian* case) it was pleaded that as the Income Tax Acts were applicable to the United Kingdom, the word "charity" should not have a wider meaning than it has by the law of Scotland. The decision in *Baird's Trs.* was overruled, and it was held that there was no distinction as to the meaning of the word as used in England and Scotland. The words "charitable purposes" are not restricted to the meaning of relief from poverty, but must be construed according to the legal and technical meaning given to these words by English law, and by legislation applicable to Scotland and Ireland as well as to England. Maintaining missionary establishments of the Moravian Church among heathen nations was held to be a charitable purpose. Lord Macnaghten, in delivering judgment, said: "Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do, either directly or indirectly" (*Pemsel*, 1891, L. R. App. Ca. 531, per Ld. Macnaghten, at 583).

6. Other Deductions and Allowances now allowed on Duties under Schedule (A).

Expenses of making and repairing sea walls (s. 37 of Income Tax Act of 1853).

In charging the duty under Sched. (A) of this Act in respect of lands, an allowance and deduction shall be made for the amount expended by the landlord or owner thereof on an average of the twenty-one preceding years in the making or repairing of sea walls or other embankments necessary for the preservation 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. (See *Hesketh*, 1888, 21 Q. B. D. 444.)

Duties on tolls in Scotland (s. 38 of same Act).

Where in any burgh in Scotland tolls commonly known by the name of customs are levied under the authority of any Act of Parliament or charter, and are applied and expended in such burgh in or towards defraying the expenses of paving, lighting, or cleansing the same, or of the police thereof, or in or towards discharging any other similar public burdens, the duty which may have been assessed and paid under this Act, upon or in respect of such tolls shall, so far as regards so much of the said tolls as shall have been so expended as aforesaid, on due proof of all the necessary facts to the satisfaction of the Commissioners for Special Purposes, be allowed and repaid under an order of the said Commissioners, in like manner as in other cases where duties are allowed and repaid under the provisions in that behalf contained in the said Act of the fifth and sixth years of Her Majesty, chapter thirty-five.

By sec. 42 of the same Act, deduction is allowed on payment of rent-charges under the Drainage Advances Act.

Allowances under Sched. (A) are made to Friendly Societies by 52 & 53 Vict. c. 42, s. 12, and to the Provident Funds of Trade Unions by 56 & 57 Vict. c. 2, ss. 1, 2, and 3.

The Finance Act, 1894 (57 & 58 Vict. c. 30, s. 35), also deals with and grants relief from duties under Sched. (A).

In respect of the income tax hereby imposed under Sched. (A), where the tax is charged upon annual value estimated otherwise than by relation to profits, the following provisions shall have effect:—

(*a*) In the case of an assessment on lands, inclusive of the farmhouse and other buildings (if any), the amount of the assessment shall, for the purposes of collection, be reduced by a sum equal to one-eighth part thereof; and

(*b*) In the case of an assessment upon any house or building (except a farmhouse or building included with lands in assessment), the amount of the assessment shall, for the purposes of collection, be reduced:

(1) Where the owner is occupier or assessable as a landlord, or where a tenant is occupier and the landlord undertook to bear the cost of repairs, by a sum equal to one-sixth part of that amount; and

(2) Where a tenant is occupier and undertook to bear the cost of repairs, by such a sum, not exceeding one-sixth part of that amount, as may be necessary to reduce it to the amount of rent payable by him.

(*c*) As between the owner and a mortgagee of his property, or any person having a charge thereon or entitled to any ground-rent, rent-charge, annuity, or other annual sum payable thereout, the owner's right of deduction under the Income Tax Acts in respect

of income tax shall be in no wise prejudiced or affected by the relief afforded by this section.

(*d*) Where the amount of the assessment in the case of lands (inclusive of the farmhouse and other buildings) is more than one-eighth, and in the case of any house or building (except a farmhouse or building included with lands in assessment) is more than one-sixth, below the rent, after deducting from such rent any outgoing which should by law be deducted in making the assessment, this section shall not apply.

It will be observed that certain of the rules applicable to Sched. (B) apply also to Sched. (A).

7. Schedule (B) and Rules for Assessing the Duties under it, being Rules VII. and VIII. of Act of 1842, s. 63.

Schedule (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 (Income Tax Act, 1853, s. 2).

The number of assessments made under this schedule has not been much reduced by the rule that under the Customs and Inland Revenue Act, 1887, farmers may elect to be charged under Sched. (D) (50 & 51 Vict. c. 15, s. 18).

Rule VII. Rules for Assessing and Charging Properties under Sched. (B), Duties to be Charged in addition to those under Sched. (A).

The duties last before mentioned shall be charged in addition to the duties to be charged under Sched. (A) on all the properties in this Act directed to be charged to the said duties, according to the general rule in Number 1, Sched. (A) before mentioned, on the full amount of the annual value thereof estimated as by this Act is directed (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); provided that in all cases where lands are subject to a rent-charge in lieu of tithes under the Act passed for the commutation of tithes, and in all other cases where lands in England are not subject to tithes, or to any modus or composition real in lieu thereof, there shall be deducted out of the duties contained in this schedule a sum not exceeding one-eighth part thereof; and in all cases where such lands are subject to a modus or composition real, and not subject to any tithes, there shall be deducted out of such duties so much thereof as, together with the like rate on such modus or composition real, shall not exceed one-eighth part of such duties as aforesaid; and in all cases where such lands are subject to a modus or composition real in lieu of certain specific tithes and also are subject to certain other specific tithes, or where such lands are free of certain specific tithes, and are subject to certain other specific tithes, the annual value of such lands shall, for the purpose of charging the duties under this schedule, be estimated at the rack-rent at which the same would let by the year if wholly free from tithes, and there shall be deducted therefrom the amount or value of one-eighth of the said duties chargeable on the said estimate, as in cases of tithe-free lands: provided also, that any person being lessee and occupier of tithes or teinds taken in kind, or being the occupier of the lands from whence such tithes or teinds shall arise, and compounding for the same, shall be charged in respect of the occupation at the rate of twopence for every twenty shillings of the annual value thereof, estimated as aforesaid: provided also, that the several properties hereinafter described in Number VIII. shall be assessed and charged in manner therein mentioned.

The Finance Act of 1896 provides that the deduction of one-eighth out of the duties chargeable under Shed. (B) shall cease (59 & 60 Vict. c. 28, s. 26).

It was held that the lessee of a farm for grazing under one lease, who

was also lessee of the shootings over the farm under another, was liable to be assessed under this rule in respect of occupancy to the extent of the rent for the combined occupation (*Revell*, 1895, 22 R. 772). The lessee of a deer forest is liable to be assessed for his occupancy to the extent of the rent paid, not merely to the extent of the agricultural rent of the subject (*Middleton*, 1876, 3 R. 599).

Rule VIII. This rule provided how nurseries and market-gardens and hop-grounds are to be charged.

This rule directed that these lands were to be charged according to the rules of Sched. (D), but is changed by sec. 39 of Income Tax Act, 1853, which provides that they are to be charged according to the general rules of Sched. (B).

8. Rules Applicable to Schedules (A) and (B), being Rules IX., X., and XI. of Act of 1842, ss. 63 and 64.

Rule IX. Rules for Charging the said Duties under Scheds. (A) and (B).

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 Sched. (A), and shall be charged on and paid by the occupier for the time being, his executors, administrators, and assigns.

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.

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 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.

Rule X. Rules for Estimating the Annual Value of Properties before described in Scheds. (A) and (B), or either of them.

First.—Tenant's Rates and Taxes paid by Landlord to be deducted from Rent.—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, 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 assessments 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.

Relief to Landlords in Scotland in respect of Public Burdens not paid by Landlords in England.—Where the landlord of lands in Scotland is by law charged with any public rates, taxes, or assessments which in England are by law a charge on the occupiers of lands, or with any public rates or taxes, or other public burdens, the like whereof are not chargeable on lands in England, such relief is to be given as shall be just and reasonable in regard to the charge of income tax in respect

of an annual value exceeding by the amount of such rates, taxes, assessments, and public burdens the charge of the said tax on landlords in England (19 & 20 Vict. c. 80, s. 1).

Second.—Landlord's Rates paid by Tenant to be added to Rent.—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 Sched. (A), with the like addition thereto of the amount of such payment.

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 Sched. (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.

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 Sched. (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 or surcharge, be rectified accordingly.

Fifth.—Every estimate of such property in Scotland shall be made without reference to the cess or tax roll or valued rents heretofore used in Scotland, or any stent thereon, and shall be made according to the general rule contained in Sched. (A) to the best of the belief and judgment of the Commissioners, assessors, and others employed in charging the said several duties.

Rule XI.

Upon every account of the annual value of the several properties aforesaid, to be charged under Scheds. (A) and (B), delivered in manner before directed to the assessor, 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; 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*):

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 Sched. (A), the assessment thereon to be made under this Act shall be made on the same sums respectively as in such rate.

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.

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.

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 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 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.

9. General Rule as to Assessment under Schedules (A) and (B).

Secs. 29 and 30 of the Finance Act, 1896, provide that the annual value of any property which has been adopted for the purpose of income tax under Scheds. (A) and (B) of the Act of 1853, during the year ending 5th April 1896, shall be taken as the annual value of such property for the same purpose during the next subsequent year. When any Act enacts that the annual value of any property which has been adopted for the purpose of income tax under Scheds. (A) and (B) during any year shall be taken as the annual value of such property for the same purpose during any subsequent year, the surveyors and inspectors of taxes shall be the assessors for such subsequent year of the income tax under Scheds. (A) and (B).

10. Procedure under Schedules (A) and (B).

Where a dwelling-house or tenement, together with offices, gardens, occupied therewith, or lands separately occupied, is of yearly value of under £10, the assessor may estimate the property to the best of his judgment, and make an assessment thereon without requiring a return of the annual value (Act of 1842, s. 65). If a lease is *bonâ fide*, at rack-rent the assessor may make his assessment, on the production of the lease by the tenant, according to the amount of the rent. But the rent will not be taken as the criterion for assessment if the tenant is bound to execute repairs or improvements (s. 66). If a tenant occupies under a parol lease, or has not custody or possession of a written lease, he is when called upon to deliver an account of the actual rent paid. Lands held under a tenancy from year to year, or at will, are to be rated by value, unless the rent be fixed on a demise within seven years (s. 67). A penalty is imposed on tenants delivering false accounts of rents or premises (s. 68).

Tenants in Scotland are to produce their leases on notice given, and may be assessed thereon. Failing production of a lease, the tenant is required to hand the assessor a note in writing of the actual rent payable

annually, and of any other valuable consideration given to the landlord. If the tenant occupies a farm more than ten miles from the dwelling-house of the assessor, he may lodge his lease or note of his rent with the nearest justice of the peace, or with the parish clergyman (s. 69).

All properties are to be assessed, whether they are occupied or not. But assessments on houses unoccupied are to be discharged for the period during which they are unoccupied (s. 70).

Power is given to distrain where the duties charged on tithes, teinds, composition for tithes, manors, markets, fairs, fisheries, etc. (ss. 71-72).

No contract or agreement between landlord and tenant or any other persons touching the payments of taxes and assessments to be charged on their respective premises is to be deemed or construed to extend to the duties under this Act, or to be binding contrary to the Act (s. 73). It has been held that an agreement between landlord and tenant that a rent should be reduced in the event of the income tax being repealed, and should continue reduced so long as income tax should remain not payable, was not a contravention of the above section (*Colbron*, 1862, 12 C. B. (N. S.) 181). Assessors are directed to make their assessments, and deliver a return of the names of the proprietors and occupiers of the lands assessed, and of their annual value, to the General Commissioners. In cases of difficulty they may apply to the surveyors or inspectors for instructions (s. 74 of Act of 1842, and s. 49 of Taxes Management Act of 1880). The assessors are directed, if required by the General Commissioners or surveyors, to require the overseers of the poor to produce their books. These overseers may be examined by the Commissioners, and the inspectors may rectify the assessments made (s. 75 of Act of 1842, ss. 51 and 52 of Taxes Management Act, 1880).

The Commissioners have the right to inspect public rate books, and in Scotland are to be assisted in making their assessments by the schoolmaster of the parish (ss. 76 and 77 of Act of 1842, s. 39 of Taxes Management Act).

The assessors, inspectors, etc., may, on obtaining an order from the Commissioners, view and examine any lands or other property chargeable, and may call in the assistance of persons of skill (s. 78, Act of 1842).

If no objection is taken to an assessment, the Commissioners, if satisfied with it, are to sign and allow it. They may rectify an assessment if the surveyor or inspector objects to it, and apply to the Commissioners for a revision, on the ground that there has been error, mistake, or fraud in making it.

Assessments under Scheds. (A) and (B) remain in force for three years unless the inspector discovers that the person charged has been under-rated, or unless a person not chargeable in the first year becomes so subsequently, or unless in the second or third year the person charged appeals against the assessment. The assessment may be collected in the second and third years by the book delivered for the first year. But the Commissioners' duplicates of assessment are made each year (Act of 1842, s. 87).

11. Appeals under Schedules (A) and (B).

When the assessments have been made under Scheds. (A) and (B), and allowed and signed by the Commissioners, public notice is given, by delivering a copy of the assessment to the assessors for the inspection of the parties charged, together with a public notice of the day of appeal, or by delivering to each party charged a note of the amount of his assessment and of the day of appeal. Fourteen days' notice must be given of the day fixed for

appeals. When an appeal is taken, the value of lands may be ascertained by actual valuation by order of the Commissioners. The appellant may require the Commissioners to do this. If an occupier appealing produces his lease, or otherwise proves his annual rent, the Commissioners may, if there has been an overcharge, reduce the rate: and where lands are assessed at less than the value proved, the assessment may be increased. The surveyors and the assessor may attend and produce evidence at the hearing of the appeal. No barrister or other person practising the law is allowed to plead before the Commissioners an appeal. The determination of the Commissioners is final, except where a case has been required for the opinion of the High Court.

The determination of the General Commissioners after the appeal on an objection made by the surveyor to an assessment on any person to the duties, or to any estimate on which any assessment is made for any year, shall preclude the surveyor from afterwards making a further charge for the same year on the same person in respect of the same matter, property, or profits included in the assessment or estimate before objected to and determined as aforesaid (ss. 80, 81, 82 of Act of 1842; s. 47 of Income Tax Act of 1853; ss. 57, 58 Taxes Management Act, 1880).

Persons assessed under Sched. (A) for mines or quarries of stone or slate, may appeal to the Commissioners for Special Purposes instead of to the General Commissioners (23 & 24 Vict. c. 14, s. 7).

12. Abatements under Schedules (A) and (B).

1. The General Commissioners may grant an abatement of duty to occupiers and owners for losses caused by flood or tempest (1) where the owner of the lands has in consideration of such loss consented to abate to his tenant the whole or part of the rent; (2) where the proprietor is an infant or otherwise incapable of consenting to an abatement; (3) where lands are in the occupation of their owner. A penalty is imposed for making false claims for an abatement.

2. An abatement was allowed to tenant farmers where at the end of the year of assessment they could prove that their profits had fallen short of the sum on which the assessment was made. The claim required to be put in within three months of the year of assessment, and had to be intimated to the surveyor of taxes for the district. The amount of abatement would be in proportion to the deficiency in the profits. This applied only in the case of persons occupying land for the purposes of husbandry only, and obtaining livelihood principally from husbandry (14 & 15 Vict. c. 12, s. 3). This abatement was extended to apply (1) to tenants, though the person assessed might not obtain his livelihood principally from husbandry, and (2) to owners occupying their own lands and obtaining livelihood principally from husbandry (Income Tax Act of 1853, s. 46). The abatement is now granted to owners though they may not obtain their livelihood principally from husbandry (43 & 44 Vict. c. 20, s. 52). See also Customs and Inland Revenue Act, 1890, 53 & 54 Vict. c. 8, s. 23, granting relief to traders, professional persons, and farmers in case of loss.

VI. Schedule (C).

1. Schedule (C), and rules for assessing the duties under it.
2. Exemptions allowed under it.
3. How the duty is collected.

1. Schedule (C), and Rules for Assessing the Duties.

For and in respect of all profits arising from interest, annuities, dividends and shares of annuities payable to any person, body politic or corporate, company or society, whether corporate or not corporate, out of any public revenue—and to be charged for every 20s. *of the annual amount thereof* (Income Tax Act, 1853, s. 2).

This schedule provides for the taxation of income derived from investments and public securities. The tax is paid "by way of deduction." The persons or bodies who have to pay the income are bound to deduct the tax before payment. Sec. 88 of the Income Tax Act of 1842 gives the rules for assessing and charging the duties under this Schedule.

RULES FOR ASSESSING AND CHARGING THE DUTIES UNDER SCHED. (C).

The said last-mentioned duties shall be paid by the persons and corporations respectively intrusted with the payment of the annuities, dividends and shares of annuities, therein charged, on behalf of the persons, corporations, companies, or societies entitled thereto, their executors, administrators, successors, or assigns, and shall be assessed by the Commissioners hereby authorised or appointed for those purposes; and shall extend to all public annuities whatever payable in *the United Kingdom* out of any public revenue in *the United Kingdom* or elsewhere, and also to all dividends and shares of such annuities respectively which shall become payable after the fifth day of *April* one thousand eight hundred and forty-two, except in the following cases of exemption from the said duties; *viz.*

2. *Exemptions allowed under Sched. (C).*—The following exemptions are allowed under this schedule:—

1. Stock of Friendly Societies, subject to certain limitations. This exemption is extended by the Industrial and Provident Societies Act, 1893, 56 & 57 Vict. c. 39, s. 24. The Provident Funds of Trade Unions are also exempt under this schedule (56 & 57 Vict. c. 2, s. 1).

2. Stock of Savings Banks. See also sec. 36 of Finance Act, 1894, 57 & 58 Vict. c. 30, which provides: (1) Any penny savings bank, or other bank for savings, whether certified under the Savings Bank Act, 1863, or not, shall be entitled to exemption from income tax chargeable under Scheds. (C) and (D) of the Acts relating to income tax in respect of the income of the funds of the savings bank, so far as it is applied in the payment or credit of interest to any depositor not exceeding the sum of five pounds in the year for which exemption is claimed. (2) . . . . . (3) Provided that where interest is paid, or dividends or interest are or is credited, without deduction of income tax, to a depositor in any savings bank whose income exceeds one hundred and sixty pounds a year, such interest or dividends or interest, as the case may be, shall be accounted for and charged under the 3rd Case of Sched. (D), under which profits of an uncertain annual value are directed to be charged.

3. Stock of Charitable Institutions.

"The stock or dividends of any corporation, fraternity, or society of persons, or of any trust established for charitable purposes only; or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, shall be applicable by the said corporation, fraternity, or society, or by any trustee, to charitable purposes only, and in so far as the same shall be applied to charitable purposes only, or the stock or dividends in the names of any trustees applicable solely to the repairs of any cathedral, college, church, or chapel, or any building used solely for the purpose of divine worship, and in so far as the same shall be applied to such

purposes, provided the application thereof to such purposes shall be duly proved before the said Commissioners for Special Purposes by any agent or factor on the behalf of any such corporation, fraternity, or society, or by any of the members or trustees." As to the meaning of "charitable purposes," see Rule VI. of Sched. (A).

4. Stock in the name of the Treasury or of the Commissioners for the Reduction of the National Debt.

5. Stock belonging to Her Majesty or to any accredited minister of any foreign State resident in the United Kingdom.

The rules for making claims of exemption under this schedule, and the penalties for fraudulently claiming exemption, will be found in secs. 98 & 99 of the Income Tax Act of 1842.

3. *How the Duty under Sched. (C) is collected.*—The provisions as to the collection and payment of the duty under this schedule will be found in secs. 89, 93, 94, 95, 96, and 97 of the Act of 1842, and sec. 11 of the Act of 1853. Companies, corporations, etc., are bound to deliver statements to the Commissioners appointed to assess the duties, of the amounts of annuities, etc., payable by them to persons, etc. Companies are to set apart and retain sums assessed; the moneys so set apart are to be paid into the account of the Receiver General of Inland Revenue. Small dividends are to be charged under Sched. (D) if the half-yearly payment does not amount to fifty shillings. Persons intrusted with the payment of colonial annuities are to deliver accounts thereof, and the Special Commissioners are to make assessments thereon. There is also a similar provision as to annuities, dividends, etc., payable out of the revenue of any foreign State (5 & 6 Vict. c. 80, s. 2). See also sec. 26 of the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), and the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8, s. 24), which made provision for further securing income tax on foreign and colonial dividends. By sec. 97 of the Act of 1842 securities issued at the Exchequer and other public office, and India bonds, are to be charged under Sched. C.

VII. Schedule (D).

1. Schedule (D), and who are liable under it.
2. Division of the Schedule into cases.
3. The First Case (profits from trades, etc.), and rules applicable to it.
4. The Second Case (profits from professions, etc.), and rules applicable to it.
5. Rules applicable to both the First and Second Cases.
6. The Third Case (profits of an uncertain annual value), and rules applicable to it.
7. The Fourth Case (interest from foreign securities).
8. The Fifth Case (possessions in Her Majesty's dominions out of the United Kingdom and foreign possessions).
9. The Sixth Case (profits not otherwise charged).
10. Miscellaneous provisions as to Schedule (D).
11. Exemptions under Schedule (D).
12. Abatements or repayment of duty when income has been over-assessed.
13. In what districts the duties under Schedule (D) are to be charged.
14. Procedure under Schedule (D).
15. Appeals under Schedule (D).

1. Schedule (D), and who are Liable under it.

"*For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, and for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, and to be charged for every twenty shillings of the annual amount of such profits and gains: and for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom,—and to be charged for every twenty shillings of the annual amount of such profits and gains, and for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, and to be charged for every twenty shillings of the annual amount thereof*" (Income Tax Act, 1853, s. 2).

A master mariner with a house in Great Britain, occupied by his children, but absent from the country for a year, is resident in Great Britain in the sense of Sched. (D) (*Rogers*, 1879, 6 R. 1109). So is a person having an estate in Scotland, where he lives during summer months (*Lloyd*, 1884, 11 R. 687). Continuous residence is not required (*Young*, 1875, 2 R. 926).

As "person" covers "company" or "corporation" or "body politic," questions have arisen as to the residence of a company. If a company is resident in the United Kingdom, its whole profits are chargeable under the first branch of the schedule. If it is not, then it can only be charged in respect of profits from trade exercised in the United Kingdom under the second branch of the schedule, or for profits actually received in this country. In determining where a company is resident, one of the principal tests is where it is registered. A company resides where its place of incorporation is, where its meetings and the meetings of its governing body are held (*Sesana Sulphur Company*, 1876, L. R. 1 Ex. D. 428; *London Bank of Mexico*, 1891, L. R. 2 Q. B. 378). The Imperial Ottoman Bank was a corporation created by Turkish law. It was the official State bank of Turkey, had its chief office at Constantinople, and had power to establish branches and agencies at other places. It established a branch in London. It was held that the bank was not a person residing in the United Kingdom, and was only liable to pay income tax on the profits of its English business (*Alexander*, 1874, L. R. 10 Ex. 20).

There are many cases as to whether a trade is exercised within the United Kingdom. These were considered in a recent judgment in the House of Lords. (Sec. 41 of the Act of 1842 provides that any person not resident in the United Kingdom, shall be chargeable in the name of such trustee, guardian, tutor, curator, or committee, or of any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such persons, etc. Under that section, agent for a foreign company or trader may be assessed for profits on trade, exercised by the foreigner in this country.) A foreign merchant who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, so long as all contracts for the sale, and all deliveries of the merchandise to customers, are made in a foreign country (*Grainger & Son* (*Agents for Roederer of*

Rheims), 1896, L. R. App. Ca. 325). Ld. Watson distinguished that case from *Tischler*, 1885, 52 L. T. (N. S.) 814, and *Pomery & Greno*, 1886, 56 L. J. Q. B. 155, in which cases the foreign wine merchant traded in England through an English agent, who sold his wine in England and received the price, making delivery to the buyer either from the stock which had been sent to him by his principal or by directing a consignment to be sent from Rheims. See also cases *Ericsen* (*Telegraph Company of Copenhagen*), 1881, L. R. 8 Q. B. D. 414 (the company had offices and agents in various parts of the United Kingdom, and made contracts for the transmission of messages, and received payment at these offices) and *Werle & Company*, 1888, 20 Q. B. D. 753. A company registered in Norway, had its books kept there, and two of its managers resided there. It owned a barque which had never been in Norway, but was registered in Christiania. Profits were made by chartering this vessel. The chartering was all done by the company's agents in Glasgow, and the great majority of the shares were held in this country. The Commissioners assessed the company, and, on appeal, it was held that on the facts stated there was no ground for holding that the company was resident in Great Britain, but that as the company carried on trade in this country, and the appellants, the agents of the company, were in receipt of profits accruing to it from trade exercised in Glasgow, the appellants were assessable under Sched. (D) and sec. 41, and that, although they had not been assessed expressly as agents, the assessment was good (*Wingate & Co.*, 1897, 5 S. L. T. 61).

2. Division of the Schedule into Cases.

It is provided by sec. 100 of the Act of 1842 that the duties under Sched. (D) shall extend to every description of property or profits which shall not be contained in either of Scheds. (A), (B), or (C), and every description of employment or profit not contained in Sched. (E), and not specially exempted from the said respective duties. The section divides the schedule into six cases, and gives rules for ascertaining the duties in each case.

3. First Case of Schedule (D).

Duties to be Charged in Respect of any Trade, Manufacture, Adventure, or Concern in the Nature of Trade not contained in any other Schedule of this Act.

This case includes the ownership of trading vessels let to freight. That is a trade within the meaning of this case, the wording of which is the same as in the Act of 46 Geo. III. c. 65 (*Borrodaile*, 1814, 1 Price, 148). When a trade is carried on either wholly in the United Kingdom, or partly within and partly outside it, and profits accrue therefrom to a person in the United Kingdom, the assessment falls under Case I., not Case V., and the duty is to be computed on the full amount of profits of the trade, and not only upon the actual sums received in the United Kingdom (*San Paolo Brazilian Railway Co.*, 1896, L. R. App. Ca. 31). The tax is payable on all profits, no matter to what purpose they are to be applied (*Mersey Docks*, 1883, 8 App. Ca. 891).

Rules for First Case.

(1) The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years, ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually

made up, or on the 5th day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed :

Provided always that, in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the said period of three years, the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same :

Provided also, that in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the year of assessment, the computation shall be made according to the rule in the 6th Case of this schedule.

The expression "balance of profits and gains" is equivalent to the "amount of such profits" (*Coltness Iron Co.*, 1881, 8 R. H. L. 67, L. R. 6 App. Ca. 315). The balance is arrived at by setting against the receipts the expenditure necessary to earn them (*Gresham Life Assurance Society*, 1892, L. R. App. Ca. 314, per Ld. Herschell, 323).

Where a person or company makes a gain by realising an investment at a larger price than was paid for it, the difference is to be reckoned among profits (*Northern Assurance Co.*, 1889, 16 R. 461 ; *Scottish Investment Trust Co.*, 1893, 21 R. 262 ; see *Assets Co.*, 1897, 34 S. L. R. 486).

A change in partnership or in the individuals conducting a trade does not make the concern one set up and commenced during the year of assessment in the sense of the last clause of this rule (*Rychope Coal Co.*, 1881, L. R. 7 Q. B. D. 485).

How Insurance Companies are Assessed under this Case.— A company carried on a business both of fire and life insurance: held that the net profits and gains from the two branches of the business must be massed together as one undivided income, assessable according to the rules applicable to this case of Sched. (D). The profits were to be estimated : (1) As regards the fire business,—the policies under which one contracts for one year only,—by taking the premiums received for the year of assessment, or on an average of three years, deducting losses by fire during the same period, and other ordinary expenses. No allowance was to be made for the balance of annual risks unexpired at the end of the financial year. (2) As regards the life business, by an actuarial calculation, which might be obtained by taking the result of the quinquennial investigation prescribed by Statute, or of the periodical investigation in use in companies established before the Statute, or by an investigation covering the three years prescribed by the rules of this case (*Scottish Union & National Insurance Co.*, 1889, 16 R. 461). A life insurance company applied part of its profits to policy-holders whose policies entitled them to participate in profits: held that the profits so payable to policy-holders were to be assessed (*London Assurance Corporation*, 1885, L. R. 10 App. Ca. 438). Compare this case with the following. A life insurance company had no shares or shareholders. All the members were holders of participating policies, and were liable to all losses. It was admitted that the income derived by the company from investments and transactions with persons not members was assessable, but it was held that no part of the premium income received under participating policies was liable to be assessed as profits or gains under Sched. (D) (*New York Life Insurance Co.*, 1889, L. R. 14 App. Ca. 381).

(2) The said duty shall extend to every person, body politic or corporate, fraternity, fellowship, company or society, and to every art, mystery, adventure, or concern carried on by them respectively in the United Kingdom or elsewhere as aforesaid ; except always such adventures or concerns on or about lands, tenements, hereditaments, or heritages as are mentioned in Sched. (A), and directed to be therein charged.

(3) *Deductions not to be Allowed.*—In estimating the balance of profits and gains chargeable under Sched. (D), or for the purpose of assessing the duty thereon,

no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of—

Any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply, or repairs, or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor

On account of loss not connected with or arising out of such trade, manufacture, adventure, or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern; nor

For any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern; nor

On account or under pretence of any interest which might have been made on such sums if laid out at interest; nor

For any debts, except bad debts proved to be such to the satisfaction of the Commissioners respectively; nor for any average loss beyond the actual amount of loss after adjustment; nor

For any sum recoverable under an insurance or contract of indemnity.

A deduction is now allowed for diminished value of machinery and plant by reason of wear and tear during the year. The claim must be made within twelve months after expiration of year of assessment (see the section: Customs and Inland Revenue Act, 1878, 41 & 42 Vict. c. 15, s. 12).

Cases as to Deductions claimed.—Capital employed in sinking new pits. Deduction not allowed (*Addie*, 1875, 2 R. 431). A deduction claimed for capital invested in a business was not allowed (*London City Contract Corporation*, 1887, 2 Tax Cases, 239). Brewers claimed deduction in respect of premiums paid for leases of public-houses. They purchased the leases, and let the houses to persons who covenanted to purchase the brewers' beer. Deduction disallowed (*Watney*, 1880, L. R. 5 Ex. D. 241). Losses incurred by brewers on loans made to publicans in course of business may be deducted in estimating their profits (*Reid's Brewery Co.*, 1897, 1 L. R. 2 Q. B. 1). A deduction for yearly depreciation in value of lease of premises occupied by licensed victuallers not allowed (*Gillatt & Watts*, 1885, 2 Tax Cases, 76). A society sold books in a shop at a profit, and by colporteurs at a loss. Held that the society was not entitled to deduct their loss from profits made in shop (*Religious Tract Society*, 1896, 23 R. 390). A seed merchant claimed to deduct losses on a farm which he worked in connection with his business. Claim disallowed (*Brown*, 1886, 13 R. 590). A deduction was not allowed for losses in connection with machinery built and afterwards removed as unsuitable. That was a loss of capital (*Smith*, 1888, 2 Tax Cases, 357). A company borrowed money, and undertook to pay a bonus of ten per cent. thereon when capital was repaid. Held that the amount of this bonus was not to be deducted in estimating profits for the year in which it was paid (*Arizona Copper Co.*, 19 R. 150). A company claimed to deduct interest on short loans obtained from bank for business purposes. Claim disallowed (*Anglo-Continental Guano Co.*, 1894, 2 Tax Cases, 239). A railway company which had been allowed a deduction of sums expended or set aside for renewal of plant during the year, was refused a further deduction of a sum representing the diminished value by reason of tear and wear of new additional plant purchased within five years, which had hitherto required no repairs (*Caledonian Railway Co.*, 1880, 8 R. 89). A railway company was refused a deduction (1) on a sum expended on improving the permanent way of another railway which they had acquired: (2) on relaying part of the main line. The sums were properly chargeable on capital (*Highland Railway Co.*, 1889, 16 R. 950).

The owners of a ship engaged in trade are not entitled under sec. 12 of the Act of 1878, referred to above, to a deduction for depreciation in the value of their ship caused by ships of a better construction being built (*Burnley Steamship Co.*, 1894, 21 R. 965).

(4) In estimating the amount of the profits and gains arising as aforesaid, no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits and gains.

Where payments were made by a life insurance company in respect of annuities granted in consideration of a single sum paid at the time of granting, *held* that the annuities were not paid out of profits or gains, and were not liable to income tax (*Gresham Life Assurance Society*, 1892, L. R. App. Ca. 309. See the opinions as to the meaning and construction of Rule IV.).

Interest on debentures for money borrowed by a company was not allowed as a deduction from profits (*Alexandria Water Co.*, 1883, L. R. 11 Q. B. D. 174).

4. Second Case of Schedule (D).

The Duty to be Charged in Respect of Professions, Employments, or Vocations not contained in any other Schedule of this Act.

The calling of a professional bookmaker is a vocation in the sense of the 2nd Case (*Partridge*, 1886, L. R. 18 Q. B. D. 276).

RULES FOR SECOND CASE.

(1) The said duty on employments shall be construed to extend to every employment by retainer in any character whatever, whether such retainer shall be annual or for a longer or shorter period; and to all profits and earnings of whatever value, subject only to such exemptions as are hereinafter granted.

A bank agent occupied rent-free a house, part of the bank premises. He was bound to live in the house, and could not sublet it. Held that he should not be assessed for the annual value of the house: the advantage of free residence was not to be taken as a part of his income (*Tennant*, 1892, 19 R. H. L. 1, L. R. [1892] App. Ca. 150). But the annual value of a manse occupied by a parish minister is to be reckoned as income. He can let his manse (*Fry*, 1895, 22 R. 422). A gift of £100 had been given to a parish minister. It was raised by subscription among members of the congregation. A similar gift was given to him on each of the two previous years. Held that income tax was payable on the £100 (*Strang*, 1878, 15 S. L. R. 704). On the other hand, a grant was given, from the Curates' Augmentation Fund, of £50 to a curate for faithful services. The directors of the fund were not bound to continue the grant. Held that the curate was not assessable in respect of the grant (*Turner*, 1888, L. R. 22 Q. B. D. 150).

(2) The duty to be charged shall be computed at a sum not less than the full amount of the balance of the profits, gains, and emoluments of such professions, employments, or vocations (after making such deductions, and no other, as by this Act are allowed) within the preceding year, ending as in the 1st Case, to be paid on the actual amount of such profits or gains without any deduction, subject to the like provisions as are made in the 1st Case in respect of the period of average in the case of setting up and commencing such profession, employment, or vocation within the period herein limited.

This rule has been changed by sec. 48 of the Act of 1853, which is as follows:—

The duty to be charged under Sched. (D) in respect of professions, employments, or vocations not contained in any other schedule of this Act shall be computed on a sum not less than the full amount of the balance of the profits, gains, and emoluments

of such professions, employments, or vocations upon a fair and just average of three years, instead of the amount of such profits, gains, or emoluments within the preceding year. . . .

As to allowances to clergymen for expenses incurred in the performance of their duties, see sec. 52 of the Income Tax Act of 1853. That section will not apply to a salary given by an aged minister to his assistant (*Lothian*, 1884, 12 R. 336), but covers (1) expenses of visiting members of his congregation residing out of his parish; (2) expenses of travelling in discharge of duties laid on him by his ecclesiastical superiors (*Charlton*, 1890, 17 R. 785).

(3) The 3rd and 4th Rules in the 1st Case shall also extend to the profits arising under the 2nd Case, as far as they are applicable.

5. Rules Applying to both the First and Second Cases.

(1) In estimating the balance of the profits or gains to be charged according to either of the 1st or 2nd Cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern, or of such profession, employment, or vocation; nor

For any disbursements or expenses of maintenance of the parties, their families, or establishments; nor

For the rent or value of any dwelling-house or domestic offices, or any part of such dwelling-house or domestic offices, except such part thereof as may be used for the purposes of such trade or concern, not exceeding the proportion of the said rent or value hereinafter mentioned; nor

For any sum expended in any other domestic or private purposes, distinct from the purposes of such trade, manufacture, adventure, or concern, or of such profession, employment, or vocation.

The proportion of rent of house on which deduction is claimed must not exceed two-thirds of the total rent (see 101 of Act of 1842). The premises of a bank contained accommodation which was occupied as dwelling-houses for agents. The Commissioners refused to allow deduction from the gross profit of the bank of the annual value of these premises in so far as they were occupied as dwelling-houses. Held that the bank was entitled to deduct the annual value of the whole premises in question (*Town and County Bank*, 1888, 15 R. H. L. 51, L. R. 13 App. Ca. 418). A municipal corporation claimed to deduct expenses of lighting their town from profits made from sale of surplus gas to private customers, as being money expended for the purposes of trade. Held that the lighting of the town and the sale of gas were distinct transactions, and that there were no trade expenses till the corporation began to supply private customers. Claim not allowed (*Dillon*, 1891, 1 Q. B. 575).

Upon the transfer of an insurance business the transferees agreed to take into their service the transferors' manager at a fixed salary, with liberty to commute the same by payment to him of a gross sum to be calculated upon life tables. The transferees retained the manager's services for a short time, and then paid him a gross sum in commutation of his salary. They claimed to deduct that sum in estimating their profits for income tax under the rule quoted above. It was held that the agreement to pay the commutation money was in fact part of the consideration for the transfer of the business, that the payment was therefore a "sum employed as capital," and could not be deducted (*Royal Insurance Company*, 1897, L. R. App. Ca. 1).

(2) The computation of the duty to be charged in respect of any trade, manufacture, adventure, or concern, or any profession, whether carried on by any person singly or by

any one or more persons jointly, or by any corporation, company, fraternity, or society, shall be made exclusive of the profits or gains arising from lands, tenements, or hereditaments occupied for the purpose of such profession, trade, manufacture, adventure, or concern.

(3) The computation of duty arising in respect of any trade, manufacture, adventure, or concern, or any profession carried on by two or more persons jointly, shall be made and stated jointly and in one sum, and separately and distinctly from any other duty chargeable on the same persons, or either or any of them, and the return of the partner who shall be first named in the deed, instrument, or other agreement of copartnership (or, where there shall be no such deed, instrument, or agreement, then of the partner who shall be named singly or with precedence to the other partner or partners in the usual name, style, or firm of such copartnership, or where such precedent partner shall not be an acting partner, then of the precedent acting partner), and who shall be resident in the United Kingdom (and who is hereby required, under the penalty herein contained for default in making any return required by this Act, to make such return on behalf of himself and the other partner or partners, whose names and residences shall also be declared in such return), shall be sufficient authority to charge such partners jointly.

Provided always, that where no such partner shall be resident in the United Kingdom, then the statement shall be prepared and delivered by their agent, manager, or factor, resident in the United Kingdom, jointly for such partners; and such joint assessment shall be made in the partnership name, style, firm, or description; and no separate statement shall be allowed in any case of partnership, except for the purpose of the partners separately claiming an exemption as herein directed, or of accounting for separate concerns.

Provided that if any partner, being entitled to exemption, shall declare the proportion of his share in such partnership, trade, profession, or concern in order to a separate assessment for the above purpose, it shall be lawful to charge such partner separately; but if no such claim be made, then such assessment shall be made jointly, according to the amount of the profits and gains of such partnership.

Provided also, that any joint partner in such trade, profession, or concern which shall have been already returned by such precedent partner as aforesaid, may return his name and place of abode, and that he is such partner, without returning the amount of duty payable in respect thereof, unless the Commissioners respectively shall think proper to require a further return, in which case it shall be lawful for such Commissioners to require from every such partner the like return and the like information and evidence as they are hereby entitled to require from the precedent partner

(4) *As to Change of Partnership, or Profits falling Short from Specific Cause.*—If amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in any such partnership, either by death or dissolution of partnership, as to all or any of the partners, or by admitting any other partner therein before the time of making the assessment, or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein mentioned, notwithstanding such change therein or succession to such business as aforesaid, unless such partners or such person succeeding to such business as aforesaid shall prove, to the satisfaction of the respective Commissioners, that the profits and gains of such business have fallen short, or will fall short, from some specific cause to be alleged to them, since such change or succession took place, or by reason thereof.

An extraordinary depression of trade, which resulted in a falling off of profits, is a "specific cause" in the sense of this rule (*Rychope Coal Co.*, 1881, L. R. 7 Q. B. D. 485; *Miller*, 1878, 6 R. 270).

(5) Every statement of profits to be charged under this schedule shall include every source so chargeable on the person delivering the same on his own account, or on account of any other person; and every person shall be chargeable in respect of the whole of such duties in one and the same division and by the same Commissioners (except in cases where the same person shall be engaged in different partnerships, or the same person shall be engaged in different concerns relating to trade or manufacture in divers places, in each of which cases a separate assessment shall be made in respect of each concern at the place where such concern, if singly carried on, ought to be charged as herein

directed); and every such statement on the behalf of any other person for which such person shall be chargeable, as acting in any of the characters before described, or on the behalf of any corporation, fellowship, fraternity, company, or society, shall include every person, chargeable as last aforesaid, and shall be delivered in that division where such source corporation, fellowship, fraternity, company, or society would be chargeable if acting on his or their own behalf.

6. The Third Case of Schedule (D).

The Duty to be charged in respect of Profits of an uncertain Annual Value not charged in Sched. (A).

First. Duty on Uncertain Profits.—The duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year, ending as in the 1st Case, to be paid on the actual amounts of such profits or gains, without any deduction.

Second. Duty on Interest, not being Annual.—The profits on all securities bearing interest payable out of the public revenue (except securities before directed to be charged under the Rules of Sched. (C), and on all discounts, and on all interest of money, not being annual interest, payable or paid by any person whatever, shall be charged according to the preceding rule in this case.

Third. Duty on Dealers in Cattle and Sellers of Milk.—Whenever the Commissioners shall, on examination, find that any lands occupied by a dealer in cattle, or by a dealer in or seller of milk (which lands shall have been estimated and charged on the rent or annual value), are not sufficient for the keep and sustenance of the cattle brought on the said lands, so that the rent or annual value of the said lands cannot afford a just estimate of the profits of such dealer, it shall be lawful for the said Commissioners to require a return of such profits, and to charge such further sum thereon as, together with the charge in respect of the occupation of the said lands, shall make up the full sum wherewith such trader ought to be charged in respect of the like amount of profits charged according to the 1st Rule in this Case.

7. The Fourth Case of Schedule (D).

The Duty to be charged in respect of Interest arising from Securities in the British Plantations in America, or in any other of Her Majesty's Dominions out of the United Kingdom, and Foreign Securities, except such Annuities, Dividends, and Shares as are directed to be charged under Sched. (C) of this Act.

The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in the *United Kingdom* in the current year, without any deduction or abatement.

(This case is given above not as it originally was, but as altered by secs. 5 and 7 of the Income Tax Act of 1853, which extended the duties to Ireland.)

Questions have arisen as to whether interest should be assessed under this case or under the 1st Case. A company carried on a business of borrowing money in this country and lending it on American securities. Held that it was competent to assess the company under the 4th Case on the interest received from American investments. The assessment might also have been made under Case I. (*Scottish Mortgage and Land Investment Co. of New Mexico*, 1886, 14 R. 98; *Northern Investment Co. of New Zealand*, 1887, 14 R. 734). A Scottish company carried on business of wool brokers in Australia, and made advances of money which were secured on real property or by lien upon wool and other produce in the colony. The advances were of fluctuating amount. Held that the company fell to be assessed for income tax only in respect of its whole profits and gains, including the interest received for its investments in foreign and colonial securities, according to the rules of the 1st Case of Sched. (D), and was not

chargeable for its income arising from interest on said securities under the rules of the 4th Case, and for its profits and gains from transactions in the nature of trade under the 1st Case (*Australian Mortgage and Agency Co.*, 1888, 15 R. 872).

A Scottish company, which had invested funds in America, instead of bringing home the interest invested it in America, but deducted an equivalent amount from capital raised in this country for transmission to America for investment. The amount so deducted was divided as income among the shareholders. Held that the interest was to be regarded as interest received in this country, and was therefore liable to assessment for income tax under the 4th Case of Sched. (D) (*Scottish Mortgage and Land Investment Co. of New Mexico*, 1886, 14 R. 98. See also *Scottish Provident Institution*, 1895, 23 R. 322).

8. The Fifth Case of Schedule (D).

The Duty to be charged in respect of Possessions in the British Plantations in America, or in any other of Her Majesty's Dominions out of the United Kingdom, and Foreign Possessions.

The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in the *United Kingdom* either for remittances from thence payable in the *United Kingdom*, or from property imported from thence into the *United Kingdom*, or from money or value received in the *United Kingdom*, and arising from property which shall not have been imported into the *United Kingdom*, or from money or value so received on credit or on account in respect of such remittances, property, money, or value brought or to be brought into the *United Kingdom*, computing the same on an average of the three preceding years, as directed in the 1st Case, without other deduction or abatement than is hereinbefore allowed in such case.

A person resident in the United Kingdom, and engaged in a trade carried on entirely abroad, is liable to income tax in respect of so much only of the profits of that trade as are received in the United Kingdom; the part of the profits not sent to this country, but retained for him abroad, is not liable to the duties, and did not fall under the 5th Case of Sched. (D) (*Colquhoun*, 1889, L. R. 14 App. Ca. 493. That case practically overruled *Cesana Sulphur Co.*, 1876, L. R. 1 Ex. D. 428. It was followed in *Bartholomay Brewing Co.*, 1893, L. R. 2 Q. B. 499, and *Nobel Dynamite Trust Co.*, 1893, L. R. 2 Q. B. 499).

See *San Paolo Brazilian Railway Co.*, 1896, L. R. App. Ca. 31, cited under 1st Case.

Trustees who were assessed under this case on the amount of trade profits received by them in this country from trade in India claimed a deduction of the expenses of trust management, on the ground that the beneficiaries on whom the tax fell could only receive the profits subject to this deduction. Held that trust administration not being an expenditure for trade purposes, the deduction could not be allowed (*Macdonald's Trs.*, 1894, 22 R. 88).

9. The Sixth Case of Schedule (D).

The Duty to be charged in respect of any Annual Profits or Gains not falling under any of the foregoing Rules, and not charged by virtue of any of the other Schedules contained in this Act.

The nature of such profits or gains, and the grounds on which the amount thereof shall have been computed, and the average taken thereon (if any), shall be stated to the Commissioners, and the computation shall be made either on the amount of the full value of the profits and gains received annually, or according to an average of such period greater or less than one year, as the case may require, and as shall be directed by the said Commissioners; and such statement and computation shall be made to the best of the knowledge and belief of the person in receipt of the same, or entitled thereto.

As to what profits fall under Case 6, see *Tennant*, 1892, L. R. App. Ca. 150, 19 R. H. L. 1, per Ld. Watson, at p. 7. The Commissioners of Brighton have a power to levy duties on coal brought into the town, the money so levied to be applied to public purposes. Held that the corporation are liable to pay income tax either under this case of Sched. (D) or under the 3rd Rule of Sched. (A) (*Black*, 1871, L. R. 6 Ex. 308. See also *Rychope Coal Co.*, 1881, L. R. 7 Q. B. D. 485).

10. Miscellaneous Provisions as to Schedule (D).

Sec. 102 *charges with Duty all Annual Interests not otherwise charged under Sched. (D).* —Upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half-yearly or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of sevenpence, without deduction, according to and under and subject to the provisions by which the duty in the 3rd Case of Sched. (D) may be charged; provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction hath been made, shall be authorised to deduct out of such annual payment at the rate of sevenpence for every twenty shillings of the amount thereof, and the person to whom such payment liable to deduction is to be made shall allow such deduction, at the full rate of duty hereby directed to be charged, upon the receipt of the residue of such money, and under the penalty hereinafter contained, and the person charged to the said duties having made such deduction, shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; but in every case where any annual payment as aforesaid shall, by reason of the same being charged on any property or security in the *British* Plantations, or in any other of Her Majesty's dominions, or on any foreign property or foreign security, or otherwise, be received or receivable without any such deduction as aforesaid, and in every case where any such payment shall be made from profits or gains not charged by this Act, or where any interest of money shall not be reserved or charged or payable for the period of one year, then and in every such case there shall be charged upon such interest, annuity, or other annual payment as aforesaid the duty before mentioned, according to and under and subject to the several and respective provisions by which the duty in the 3rd Case of Sched. (D) may be charged: Provided always, that where any creditor on any rates or assessments not chargeable by this Act as profits shall be entitled to such interest, it shall be lawful to charge the proper officer having the management of the accounts with the duty payable on such interest, and every such officer shall be answerable for doing all acts, matters, and things necessary to a due assessment of the said duties, and payment thereof, as if such rates or assessments were profits chargeable under this Act, and such officer shall be in like manner indemnified for all such acts, as if the said rates and assessments were chargeable.

As a case falling under this section, see *North British Railway Co.*, 1880, 7 R. 419. See also *Clerical, Medical, and General Life Assurance Society*, 1889, L. R. 22 Q. B. D. 444; *Commissioners of Supply for Aberdeenshire*, 1890, 17 R. 943. It has been held that, in so far as this section subjects to assessment income not covered by the schedules, it is not now in force, and that it does not now impose duties, but merely contains provisions as to the duties granted in the schedules (*Scottish Provident Institution*, 1895, 23 R. 322).

Losses in one Business may be set off against Profits in another and separate Business, if both are charged under Sched. (D) (see 101 of Act of 1842).—Nothing herein contained shall be construed to restrain any person carrying on, either solely or in partnership, two or more distinct trades, manufactures, adventures, or concerns in the nature of trade, the profits whereof are made chargeable under the rules of Sched. (D), from deducting or setting against the profits acquired in one or more of the said concerns the excess of the loss sustained in any other of the said concerns over and above the profits thereof, in such manner as may be done under this Act where a loss shall be deducted from the profits of the same concern, or to restrain any of such persons from making separate statements thereof.

A PERSON IS ENTITLED TO DEDUCT FROM HIS PROFITS A PART NOT MORE THAN TWO-THIRDS OF THE RENT PAID FOR HIS DWELLING-HOUSE IF IT IS USED BY HIM FOR THE PURPOSES OF HIS TRADE.—Nothing herein contained shall be construed to restrain any such person renting a dwelling-house, part whereof shall be used by him for the purposes of any trade or concern or any profession hereby charged, from deducting or setting off from the profits of such trade, concern, or profession such sum not exceeding two-third parts of the rent *bonâ fide* paid for such dwelling-house, with the appurtenances, as the said respective Commissioners shall on due consideration allow; and the respective Commissioners shall have authority to allow such deductions as in other cases, and to assess such person accordingly.

In one case a corporation, founding on and claiming a deduction under this section, were held to be correctly assessed for profits of market hall, fish-market, and meat-market, and not entitled to deduct and set against profits in these concerns, losses on industrial schools, baths, disposal of sewage, and other concerns of that nature (*Corporation of Birmingham*, 1875, 1 Tax Cases, 26).

Doubtful Debts.—In estimating and assessing profits under Sched. (D) it is lawful to estimate the value of all doubtful debts; and in the case of the bankruptcy or insolvency of the debtor, the amount of dividend reasonably expected on such debt is to be deemed the value thereof (Income Tax Act, 1853, s. 50).

GENERAL RULE AS TO DEDUCTION OF DUTY ON PAYMENT OF INTEREST, ETC.

Section 40 of the Income Tax Act of 1853 provides that every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled, and is hereby authorised, on making such payment to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable for every 20s. of such payment, and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction upon the receipt of the residue of such money under penalty of £50 . . . . . (proviso as to Sched. (A)— . . . . .).

By the Customs and Inland Revenue Act, 1888, 51 & 52 Vict. c. 8, s. 24, it is provided that, upon payment of any interest of money or annuities charged with income tax under Sched. (D), and not payable, or not wholly payable, out of profits or gains brought into charge to such tax; the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be, and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly. (See *Forth Bridge Railway Co.*, 1890, 28 S. L. R. 576.)

11. Exemptions under Schedule (D).

The following are the exemptions from the duties under Sched. (D):—

1. *Charitable Institutions* (see s. 105 of Act of 1842).

As to what are charitable institutions, see cases given under Sched. (A), Rule VI. If duties are to be repaid, the claim must be made within three years (s. 10 of 23 & 24 Vict. c. 14). As to sec. 105, see *St. Andrew's Hospital, Northampton*, 1887, L. R. 19 Q. B. D. 624.

2. *Friendly Societies* legally established (see s. 49 of Income Tax Act, 1853).

3. *Provident Funds of Trade Unions* (see The Trade Union (Provident Funds), Act, 1893, s. 1).

4. *Industrial and Provident Societies*, if registered (see the Industrial and Provident Societies Act, 1893, s. 24).

5. *Savings Banks* (see the Finance Act, 1894, s. 36).

6. *An Abatement in respect of Premiums paid by Persons who have Insured their Lives* (see 54 of Income Tax Act, 1853).

"Any person who shall have made insurance on his life or on the life of his wife, or shall have contracted for any deferred annuity on his own life or on the life of his wife, in or with any insurance company which shall become registered under any Act to be passed in the present Session of Parliament for that purpose, and which shall comply with the requirements of such Act, and any person who shall under any Act of Parliament be liable to the payment of an annual sum, or to have an annual sum deducted from his salary or stipend, in order to secure a deferred annuity to his widow or a provision to his children after his death, shall be entitled to deduct the amount of the annual premium paid by him for such insurance or contract, or the annual sum paid by him or deducted from his salary or stipend as aforesaid, from any profits or gains in respect of which he shall be liable to be assessed under either of the Scheds. (D) or (E) of this Act, or to have any assessment which may be made upon him under either of the said schedules reduced or abated by the deduction of the amount of the said annual premium from the amount of the profits or gains on which such assessment has been made; or if such person shall be assessed to duties under any of the schedules contained in this Act, and shall have paid such assessment, or shall have paid or been charged with any of the said duties by deduction or otherwise, such person, on claim made to the Commissioners for Special Purposes, and on production to them of the receipt for such annual payment, and on proof of the facts to the satisfaction of the said Commissioners, shall be entitled to have repaid to him such proportion of the said duties paid by such person as the amount of the said annual premium bears to the whole amount of his profits and gains on which he shall be chargeable under all or any of the schedules of this Act: Provided always, that no such abatement, allowance, or repayment as aforesaid shall be made in respect of any such annual premium beyond one-sixth part of the whole amount of the profits and gains of such person so chargeable as aforesaid, nor shall any such deduction or abatement entitle any such person to claim total exemption or any relief from duty on the ground of his profits and gains being thereby reduced below £160, or £400, or £500, as the case may be."

To have the benefit of the above-quoted section, the insurance company insured with must either have been in existence on 1 Nov. 1844, or be registered pursuant to 7 & 8 Vict. c. 110. This provision does not apply to an insurance effected with a foreign company, even though that company was in existence on 1 Nov. 1844, and has an office in England (*Colquhoun*, 1890, L. R. 25 Q. B. D. 127).

7. *Persons having made Insurances with Friendly Societies*

are entitled to a like abatement to that granted in sec. 54 of Income Tax Act of 1853 (see 18 & 19 Vict. c. 35, s. 1).

8. *Persons who have contracted for Deferred Annuities* on their own lives or the lives of their wives with the *National Debt Commissioners* are entitled to a like abatement (22 & 23 Vict. c. 18, s. 6).

12. Abatements or Repayment of Duty when Income has been Over-assessed.

Sec. 133 of the Act of 1842 provided: "If within or at the end of the year current at the time of making any assessment under this Act, or at the end of any year when such assessment ought to have been made, any person charged to the duties contained in Sched. (D), whether he shall have computed his profits or gains arising at last aforesaid on the amount thereof in the preceding or current year, or on an average of years, shall find and shall prove to the satisfaction of the Commissioners by whom the assessment was made, that his profits and gains during such year for which the computation was made fell short of the sum so computed in respect of the same source of profit on which the computation was made, it shall be lawful for the said Commissioners to cause the assessment made for such current year to be amended in respect of such source of profit, as the case shall require, and in case the sum assessed shall have been paid, to certify under their hands to the Commissioners for Special Purposes at the head office for Stamps and Taxes in *England* the amount of the sum overpaid upon such first assessment, and thereupon the said last-mentioned Commissioners shall issue an order for the repayment of such sum as shall have been so overpaid, and such order shall be directed to the Receiver-General of Stamps and Taxes, or to an officer for receipt or collector of the duties granted by this Act, or to a distributor or sub-distributor of stamps, and shall authorise and require the repayment of the said sum so overpaid as aforesaid, in like manner as is hereinbefore provided with respect to the allowances to be granted under No. V. of Sched. (A) of this Act."

This provision was modified by the Revenue Act, 1865, 28 & 29 Vict. c. 30, s. 6, which provided: "No such reduction or repayment shall be made in any such case unless the profits of the said year of assessment are proved to be less than the profits of one year on the average of the last three years, including the said year, of assessment; nor shall any such relief extend to any greater amount than the difference between the sum on which the assessment has been made and such average for one year as aforesaid."

It has been held that a claim under sec. 133 must be made either within the year, or within the shortest period after the close of the year sufficient in the circumstances to enable the person assessed to ascertain, by using due diligence whether and to what extent an overpayment had been made. A company discovered the error in October 1888 as to their assessment for the year 1888–89. Their claim for abatement, put in in July 1890, was held to be too late, and the abatement was refused. It was also held that an appeal from the General Commissioners to the Court of Session on the subject of the abatement was competent (*North of Scotland Bank*, 1891, 18 R. 543). This case followed the rule laid down in *Special Commissioners of Income Tax*, 1888, L. R. 21 Q. B. D. 313.

Sec. 134 of the Act of 1842 provides that when a person ceases to exercise his trade, etc., or dies or becomes bankrupt before the end of the year, or from any specific cause is deprived of or loses the profits and gains on which the computation of duty was charged or paid, he or his executors may

make application within three months from end of year of assessment to the General Commissioners, who, after proof, shall direct repayment of sum overpaid. If anyone has succeeded to the trade of the person charged, no abatement is to be made, unless it be proved that the gains have fallen short for some specific cause.

If a claim is made under sec. 133 or 134, and the income from every source of the person charged is proved to be less than £160, he is entitled to the same relief as if he had claimed total exemption on the ground of his income being under £160 (s. 30 of Income Tax, 1853, and s. 34 of Finance Act, 1894).

The Customs and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8, s. 23), grants relief to persons carrying on trades, professions, etc., or occupying lands for the purposes of husbandry only, who have sustained losses in the trade, etc. Notice must be given to the General Commissioners within six months of close of year of assessment. The aggregate income must be stated, and the amount of loss; and, on these being proved, the Commissioners give a certificate authorising repayment of so much of the sum paid for income tax as would represent the tax upon income equal to the amount of loss.

The Income Tax Act, 1853, s. 52, grants an abatement of duty to clergymen for expenses incurred in the performance of their duties, and provides for repayment of a proportional part if the whole duty has been paid.

13. In what Districts the Duties under Schedule (D) are to be charged (see s. 106 of Act of 1842).

1. Every person who is a householder (unless engaged in trade, profession, or vocation) is to be charged by the Commissioners acting for the parish where his dwelling-house is situated.

2. If he is engaged in trade, etc., he is to be charged by the Commissioners acting for the parish where the trade is carried on . . ., except in the case where the same person is engaged in different trades, and a loss from one concern is to be deducted from the profits of another.

3. Every person not being a householder nor engaged in trade, etc., is to be charged by the Commissioners of the parish where he ordinarily resides.

4. Every person not described above is to be charged by the Commissioners acting for the parish or place where such person resides at the time of beginning to execute the Act for the year.

5. If a person carries on a trade of manufacturing goods, the trade is to be charged where the goods are made, not where they are sold.

6. If a person not engaged in trade has two residences, he is to be charged in the parish where he usually resides at the time of beginning to execute the Act for the year.

7. The duties on profits of foreign or colonial possessions are to be charged as set forth in sec. 108 of the Act of 1842. "In default of owner, on the trustee or agent." See the section.

See sec. 109 of the Income Tax Act of 1842, and the Income Tax Foreign Dividends Act of 1842, 5 & 6 Vict. c. 80, and s. 10 of Income Tax Act of 1853, and s. 36 of Revenue Act. See also *Gilbertson*, 1881, L. R. 7 Q. B. D. 562.

Every charge is valid notwithstanding the subsequent removal of the person charged from the parish or place where the charge was made.

14. Procedure under Schedule (D).

Every person is required to sign a declaration stating where he is chargeable, and whether he is engaged in trade, and if so, where the trade is carried on (s. 106 of Act of 1842). If he has more than one residence, he must make the declaration or statement in each place (s. 110). All statements of profits and gains under Sched. (D) are to be laid before the Additional Commissioners, who make assessments on such as are satisfactory, and have been made *bonâ fide* in accordance with the provisions of the Act (s. 111, Act of 1842). Where the surveyor or inspector is dissatisfied with an assessment or determination of the Additional Commissioners, he may require a case to be stated for the opinion of the General Commissioners (s. 112). Where the person to be charged makes no statement, or an insufficient one, the Additional Commissioners make an assessment on him to the best of their judgment (s. 113). The Additional Commissioners may, if they think it proper, without making an assessment, refer any statement made by a person to be charged to the Commissioners for General Purposes, and the General Commissioners are to inquire into the statement in like manner as if an assessment had been made (s. 114). Where the Commissioners for General Purposes have increased an assessment, they may charge the party assessed with a penalty not exceeding treble the amount by which the duties have been increased (s. 127). Penalties may also be recovered from persons neglecting to deliver schedules or attend summons of Commissioners (s. 128). Schedules may be amended (s. 129).

Persons assessed under Sched. (D.) may appeal to the Special instead of to the General Commissioners, and an appeal lies from the determination of the Special Commissioners to the Court of Session. But a person who claims exemption on the ground that his income is less than £150 cannot appeal to the Special, but must go to the General Commissioners (s. 130). Persons who have elected to be assessed by the Special Commissioners have an appeal from them to Commissioners of Inland Revenue (s. 131); and also, on points of law, to the Court of Session (Taxes Management Act, 1880, s. 59). The inspector and surveyor may examine assessments and amend erroneous ones. The inspector's and surveyor's objections to assessments must be stated in writing, and notice must be given to the party to be charged (ss. 115 and 116 of Act of 1842; s. 63 of Taxes Management Act, 1880).

The Additional Commissioners are directed to make out certificates of the assessments which they have made. These certificates are entered in a book kept for the purpose, and are sent to the General Commissioners along with the statements on which they were made, provided that no assessment made by Additional Commissioners, or persons acting as such, shall be delivered to the respective parties until the expiration of fourteen days after the assessment, so signed as aforesaid, shall have been delivered to the Commissioners for General Purposes, or the persons acting as such, and the inspector or surveyor shall have had notice thereof (s. 117 of Act of 1842).

Any person chargeable under Sched. (D) may require the proceedings in order to an assessment to be had before the Special Commissioners (s. 131). Commissioners acting under the Act are to be assessed under Sched. (D) as other persons are, but they are not allowed to be present when their statements are being considered (s. 135). The General Commissioners are directed to enter their assessments in book, and send accounts to the office of Inland Revenue (s. 136). Assessments under Sched. (D) are to be entered and certificates of the amount to be delivered

by a number or letter, without the name of the parties, where they intend payment to the officer for receipt (s. 137). In cases where the Commissioners have not received a declaration of intended payment to the officer, they deliver warrants to collectors, except where parties are assessed by a number or letter (s. 138). Duplicates of assessments are delivered to officers for receipt, with warrants for receiving the duties, where the assessments are made under a number or letter (s. 139). Duties may be paid in advance; and if so paid, will be subject to discount at the rate of £2, 10s. per cent. (s. 141 of Act of 1842, and s. 10 of Inland Revenue Act, 1889). Certificates are to be given for the duties paid, and on delivery of these certificates to the General Commissioners, their clerk will give a receipt, which is a discharge for the duties (s. 142 of Act of 1842).

15. Appeals (Schedule (D).

Persons aggrieved by assessments of Additional Commissioners may appeal to the Commissioners for General Purposes in the same district (s. 118 of Act of 1842), or to the Special Commissioners (s. 130). The General Commissioners are to give notice of the time limited for hearing appeals (s. 119). When hearing an appeal, if an objection is made by the surveyor, the Commissioners must require a schedule of particulars to be put in by the appellant (s. 120). The inspector or surveyor, having examined the schedule of particulars, may state objections thereto in writing, of which objections notice must be sent to the person to be charged (s. 121). The Commissioners may confirm or alter the assessment; but before doing so they may call on the person charged to appear before them, and put questions to him touching his statement or schedule (s. 125). They may also call upon him to appear and verify his answers on oath (s. 124), and may summon witnesses and examine them on oath . . ., except the clerk, agent, or servant of the person to be charged, or other person confidentially intrusted or employed in the affairs of the person to be charged. These excepted persons may be called to answer questions; but they may refuse to be put on oath, and may refuse to answer questions put to them. Penalties are imposed on other persons for refusing to attend and be examined (s. 125). The Commissioners, having considered the statement, etc., make an assessment. In certain cases their judgment was final; but sec. 59 of the Taxes Management Act provides that, on the determination of any appeal under the Income Tax Acts by the General Commissioners, the appellant or surveyor may, if dissatisfied with the determination, as being erroneous in point of law, declare his dissatisfaction to the Commissioners who heard the appeal, and within twenty-one days may require a case to be stated for the opinion of (in Scotland) the Court of Session, sitting as Court of Exchequer.

VIII. Schedule (E).

1. Schedule (E), and rules for charging duties under it.
2. Allowances and deductions under Schedule (E).
3. How the duty under Schedule (E) is to be collected.

1. Schedule (E) and Rules.

For and in respect of every Public Office or Employment of Profit, and upon every Annuity, Pension, or Stipend payable by Her Majesty or out of the Public Revenue of the United Kingdom, except Annuities charged to the Duties under the said Sched. (C), and to be charged for every Twenty Shillings of the Annual Amount thereof. (Income Tax Act, 1853, s. 2.)

RULES FOR CHARGING THE SAID DUTIES.

First. How the Duties are to be Assessed.—The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Sched. (E), or to whom the annuities, pensions, or stipends mentioned in the same schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and *bonâ fide* paid and borne by the party to be charged; and each assessment in respect of such offices or employments shall be in force for one whole year, and shall be levied for such year without any new assessment, notwithstanding a change may have taken place in any such office or employment, on the person for the time having or exercising the same; provided that the person quitting such office or employment, or dying within the year, or his executors or administrators, shall be liable for the arrears due before or at the time of his so quitting such office or employment, or dying, and for such further portion of time as shall then have elapsed, to be settled by the respective Commissioners, and his successor shall be repaid such sums as he shall have paid on account of such portion of the year as aforesaid; and each assessment in respect of such annuity, pension, or stipend shall be in force for one whole year, unless the same shall cease or expire within the year, by lapse, death, or otherwise, from which period the assessment thereon shall be discharged.

Second. Where the Duties are to be Assessed.—The said duties to be assessed by the respective Commissioners for all the offices in each department in the place where the said Commissioners shall execute their offices, although certain of the offices in the same department may be executed elsewhere, and shall be due and payable from the respective officers, and their respective successors, for the time being.

Third. Description of the Offices to be charged.—The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within the United Kingdom (*videlicet*), any office belonging to either House of Parliament, or to any Court of Justice . . . . or Court-martial; any public office held under the Civil Government of Her Majesty . . . . any commissioned officer serving on the staff, or belonging to Her Majesty's army, in any regiment of artillery, cavalry, infantry, royal marines, royal garrison, battalions, or corps of engineers or royal artificers; any officer in the navy, or in the militia or volunteers; any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society, whether corporate or not corporate; any office or employment of profit under any public institution, or on any public foundation, of whatever nature or for whatever purpose the same may be established; any office or employment of profit in any county, riding, or division, shire, or stewartry, or in any city, borough, town corporate, or place, or under any trusts or guardians of any fund, tolls, or duties to be exercised in such county, riding, division, shire, or stewartry, city, borough, town corporate, or place; and every other public office or employment of profit of a public nature.

As to what offices fall under the words "every other public office or employment of profit of a public nature," it has been held they cover the salaries of a national schoolmaster (*Bowers*, 1891, L. R. 1 Q. B. 560); bank agent (*Tennant*, 1892, 19 R. H. L. 1 L. R. App. Ca. 150); bursar of a college (*Langston*, 1891, 1 Q. B. 567). Persons employed by railway companies are assessed under this schedule by the Special Commissioners (23 & 24 Vict. c. 14, s. 6). That Act does not apply to the wages paid by a railway company to porters, engine-drivers, or labourers. They are to be charged under Sched. (D) (*Lancashire and Yorkshire Railway Company*, 1864, 33 L. J. Ex. 163).

Fourth. Perquisites to be estimated either on Profits of the preceding Year or on Average of Three Years.—The perquisites to be assessed under this Act shall be deemed to be such profits, of offices and employments as arise from fees or other emoluments, and payable either by the Crown or the subject, in the course of executing such offices or employments, and may be estimated either on the profits of the preceding year, or of the fair and just average of one year of the amount of the profits thereof in the three years preceding; such years in each Case respectively ending on the fifth day of April in each year, or such other day of each year on which the accounts of

such profits have been usually made up. See *Turner*, 1888, L. R. 22 Q. B. D. 150, as to a voluntary grant made to a curate, which was held not to be assessable. That case practically overrules *Strang*, 1878, 15 S. L. R. 704.

Fifth. Duties on Salaries payable at Public Offices to be stopped.—In all cases where any salaries, fees, wages, or other perquisites or profits, or any annuities, pensions, or stipends, shall be payable at any public office, or by any officer of Her Majesty's household, or by any of Her Majesty's receivers or paymasters, or by any agent employed in that behalf, the duties chargeable under this Act in respect of such salaries, fees, wages, perquisites, or profits, or in respect of such annuities, pensions, or stipends, shall be detained and stopped out of the same, or out of any money which shall be payable upon such salaries, fees, wages, perquisites, or profits, or upon such annuities, pensions, or stipends, or for the arrears thereof, whenever the same shall happen, and be applied to the satisfaction of the duties on such offices or employments, or on such annuities, pensions, or stipends respectively (not being otherwise paid) in the manner directed by this Act; and whenever the same so payable shall be assessed by the Commissioners for General Purposes in their respective districts, they shall transmit an account of the amount of the duty assessed to the office where the same are payable, in order that the amount so assessed may be there stopped or detained.

Sixth. Duties on other Case to be stopped by Person paying the Salary.—In all cases where the salaries, fees, wages, allowances, or profits of any officer chargeable to the said duties shall not arise out of any of the offices mentioned in the foregoing rule, but shall arise from any other office or employment of profit chargeable to the said duties, and the salaries, fees, wages, perquisites, or profits shall be payable at such office by any officer thereof, or by any receiver of the same respectively, or by any agent employed in that behalf, the duties chargeable under this Act in respect of such salaries, fees, wages, perquisites, or profits shall be detained and stopped out of the same, or out of any money which shall be paid upon such salaries, fees, wages, perquisites, or profits, or for arrears thereof, whenever the same shall happen, and be applied to the satisfaction of the duties (not otherwise paid) in the manner directed by this Act.

Seventh. Such portion of the said duties on offices or employments of profit, or on annuities, pensions, or stipends, as are charged with any sum of money payable to such other person, shall be deducted out of the sum payable to such other person as a like rate on such sum would amount unto; and all such persons, their agents and receivers, shall allow such deductions and payments upon receipt of the residue of such sums.

Eighth. Such portion of the said duties charged on any office or employment of profit executed by any deputy or clerk, or other person employed under the principal in such office, and paid by such principal out of the salary, fees, wages, perquisites, or profits of such principal, shall be deducted out of the salary or wages so payable as a like rate on such salary or wages would amount unto; and all such deputies, clerks, and other persons so employed shall allow to their respective principals such deductions and payments upon the receipt of the residue of such salaries or wages.

Ninth. In estimating the duty payable for any such office or employment of profit, or any pension, annuity, or stipend, all official deductions and payments made upon the receipt of the salaries, fees, wages, perquisites, and profits thereof, or in passing the accounts belonging to such office, or upon the receipt of such pension, annuity, or stipend, shall be allowed to be deducted, provided a due account thereof be rendered to the said Commissioners, and proved to their satisfaction.

Tenth. In all cases where any annuity or pension shall be payable out of any particular branch of the public revenue, and at the office of that branch of revenue, the Commissioners acting for that department shall have authority to assess and levy the same as a salary or wages payable thereout.

2. Allowances and Deductions under Schedule (E).

Sec. 51 of the Act of 1853 provides as follows:—

"In assessing the duty chargeable under Sched. (E) of this Act in respect of any public office or employment where the person exercising the same is necessarily obliged to incur and defray out of the salary, fees, or emoluments of such office or employment the expenses of travelling in the performance of the duties thereof, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to lay out and expend money wholly, exclusively, and necessarily in the performance of the duties of his

office or employment, it shall be lawful to deduct from the amount of the said salary, fees, and emoluments to be assessed under this Act the amount of all such expenses and disbursements necessarily incurred and defrayed in manner aforesaid."

This will not cover the travelling expenses of the directors of a company when going to attend meetings of the Board (*Revell*, 1890, 3 Tax Cases, 12; see also *Cook*, 1887, 2 Tax Cases, 246). A deduction claimed by a schoolmaster and his wife, a schoolmistress for the wages of a domestic servant whose employment was necessary in order that the household of the schoolmaster might be looked after when his wife was engaged in the school, was not allowed (*Bowers*, 1891, L. R. 1 Q. B. 560). By sec. 52 of the same Act, in assessing the duty payable on the emoluments of a clergyman or minister of any religious denomination, deduction may be made for expenses incurred in the performance of his duties. By sec. 149 of the Act of 1842 allowances under this schedule are to be granted to the trustees of the British Museum and charitable institutions as in Rule 6, Sched. (A). The abatement allowed under Sched. (D) to persons who have insured their lives, in respect of premiums paid, also applies to Sched. (E). See Sched. (D).

3. How the Duty under Schedule (E) is to be collected.

Secs. 147 and 150–157 provide for the assessing and collecting of the duties. The Commissioners on duties have power to appoint clerks, assessors, and collectors from the officers in their department. These assessors are to have access to documents, and may require returns. Any person holding an office must state its full value, although he wishes to claim exemption. Where the duties of an office are being executed by a deputy who is in receipt of the profits, the assessment is to be charged on him. Public officers becoming entitled to increased salaries are to be charged by supplemented assessment (Act of 1853, s. 53). The assessors are to be furnished with accounts of salaries, etc., in all public departments. They are to make up their assessments and deliver them to the Commissioners, who are to make an assessment, which will be in force for one year. Duties on offices which cannot be stopped are to be certified, in case of non-payment, to the Commissioners of the district where the parties reside. These Commissioners are to issue warrants for levying the said duties. No qualification is required for a Commissioner under this Schedule. The assessors, collectors, etc., are liable to certain penalties for default.

IX. General Provisions as to the Execution of the Act.

Procedure before Assessment. — The General Commissioners summon and administer oaths to the assessors, and give them instructions. The assessors issue their notices requiring persons to be assessed to deliver their lists, declarations, and statements (s. 46 of Act of 1842). Notice is given on the church-door and at the houses of the persons chargeable (ss. 47 and 48). The statements are to be delivered to the assessor (s. 49); the statements contain a list of the names of lodgers, inmates, and persons in their employment (s. 50), and of the annual value of property and amount of profits of person making the statement (s. 52). If the person to be charged is incapacitated or absent from the United Kingdom, the statement is made by his trustees or agents (s. 53). Officers of corporations, companies, etc., are to prepare statements of their profits and gains (s. 54). Penalties are imposed on persons failing to make the statement

(s. 55); but not unless notices have been given to the person who has failed (s. 56). The assessors make a list of persons on whom notices have been served, and the inspector or surveyor may serve notice on persons omitted (s. 57). It is the duty of the assessors to verify the delivery of notices and the affixing of general notices (s. 58). The clerks to Commissioners are to make an abstract of the returns of statements delivered to them, and the inspectors have the right to take copies from such abstracts (s. 59). Sched. (G) attached to the Act of 1842 gives the form of statement to be made by persons chargeable under the Act.

Relief from Double Assessments.—If it appears to the satisfaction of the Board that a person has been assessed more than once to the duties for the same cause and for the same year, they shall direct the whole or such part of one or more of the assessments as appears to be an overcharge to be vacated (Taxes Management Act, 1880, s. 60; Act of 1842, s. 171).

Collection of the Tax.—After appeals, if any, have been decided, the Commissioners issue duplicates of assessments to the collectors, with warrant to collect (s. 172). Parents and guardians are liable for the payment due by infants, and executors for that due by persons who have died (s. 173). If persons come to reside in any parish in which they have not been before charged, the assessor gives them notice to declare where they were charged, or to deliver a statement for the purpose of being assessed (s. 177). Penalties are imposed upon persons fraudulently changing their residence, or converting property, or making false statements, or guilty of other fraud (s. 178), or giving false evidence (s. 180), or forging or altering certificates or receipts given under this Act (s. 181).

Penalty on Persons refusing to allow Deduction of Income Tax.—Sec. 103 of the Act of 1842 imposes a penalty on any person refusing to allow deductions authorised by the Act to be made out of any payment of interest, etc. All contracts made or entered into for payment of such interest without allowing such deduction as aforesaid are declared to be void. There are a great many old cases as to provisions made in wills or otherwise, clear of taxes and deductions. The section does not appear to apply to wills; and questions as to whether income tax is to be paid by the testator's estate or by the legatee depend upon the wording of the will, and need not be discussed here (see *Mackie's Trs.*, 1875, 2 R. 312; *Rodgers' Trs.*, 1875, 2 R. 294; *Kinloch's Trs.*, 1880, 7 R. 596). It is not the whole contract that is made void by this section, but only that part of it which stipulates for full payment without deduction of tax. The provisions authorising deduction of income tax are in sec. 40 of the Income Tax Act of 1853, and in sec. 24 of 51 & 52 Vict. c. 8 (quoted under sub-division 10 of Sched. (D)), and in the rules applicable to the various cases.

X. Appeal to Court of Session.

The procedure as to appeals from the determination of Commissioners as to an assessment is regulated by sec. 59 of the Taxes Management Act, 1880. If either party is dissatisfied with the determination of the Commissioners, as being erroneous in point of law, he may declare his dissatisfaction to the Commissioners; and, having so done, may within twenty-one days after the determination require the Commissioners, by a notice in writing addressed to their clerk, to state and sign a case for the opinion of the High Court. In Scotland, the High Court means the Court of Session, sitting as Court of Exchequer.

The case sets forth the facts and the determination, and the party who has required the same transmits it to the High Court within seven days; he, previously to transmitting it, gives notice to the other party interested of the fact that the case has been stated, and sends him a copy of the case. An appeal may be taken to the House of Lords against the judgment of the High Court. The fact that a stated case is pending before the High Court does not interfere with the payment of the duties assessed; if, on the decision, it appears that there has been an overcharge, the balance is repaid with interest. The High Court may send back the case to be amended. An Act of Sederunt regulating procedure under the Taxes Management Act, 1880, was passed on 9 December of that year. The case, when lodged, is to be laid before the Lord Ordinary in Exchequer Causes (or, in case of his absence or inability, the Lord Ordinary on the Bills), who may either hear the case himself or appoint it to be heard before a Division of the Court.

XI. Acts of Parliament dealing with Income Tax.

5 & 6 Vict. c. 35, Income Tax Act, 1842.
5 & 6 „ c. 37, Land Tax Act, 1842.
5 & 6 „ c. 80, Income Tax Foreign Dividends Act, 1842.
14 & 15 „ c. 12, Income Tax Act, 1851.
16 & 17 „ c. 34, Income Tax Act, 1853.
16 & 17 „ c. 91, Income Tax Insurance Act, 1853.
17 & 18 „ c. 24, Income Tax Act, 1854.
18 & 19 „ c. 35, Income Tax Insurance Act, 1855.
18 & 19 „ c. 124, Charitable Trusts Amendment Act, 1855.
19 & 20 „ c. 80, Taxes Act, 1856.
20 & 21 „ c. 56, Lands Valuation (Scotland) Act, 1857.
22 & 23 „ c. 18, Income Tax Act, 1859.
23 & 24 „ c. 14, Income Tax Act, 1860.
24 & 25 „ c. 91, Revenue No. II. Act, 1861.
25 & 26 „ c. 37, Crown Private Estates Act, 1862.
25 & 26 „ c. 103, Union Assessment Committee Act, 1862.
26 & 27 „ c. 33, Revenue Act, 1863.
26 & 27 „ c. 73, India Stock Certificate Act, 1863.
27 & 28 „ c. 18, Revenue No. I. Act, 1864.
28 & 29 „ c. 30, Revenue Act, 1865.
29 & 30 „ c. 36, Revenue Act, 1866.
31 & 32 „ c. 28, Revenue Act, 1868.
35 & 36 „ c. 82, Income Tax Public Offices Act, 1872.
39 & 40 „ c. 16, Customs and Inland Revenue Act, 1876.
40 & 41 „ c. 13, Customs, Inland Revenue, and Savings Bank Act, 1877.
41 & 42 „ c. 15, Customs and Inland Revenue Act, 1878.
42 & 43 „ c. 21, Customs and Inland Revenue Act, 1879.
42 & 43 „ c. 42, Valuation of Lands (Scotland) Amendment Act, 1879.
43 & 44 „ c. 19, Taxes Management Act, 1880.
43 & 44 „ c. 20, Inland Revenue Act, 1880.
44 & 45 „ c. 12, Customs and Inland Revenue Act, 1881.
44 & 45 „ c. 59, Statute Law Revision and Civil Procedure Act, 1881.
45 & 46 „ c. 43, Bills of Sale Amendment Act, 1882.
45 & 46 „ c. 72, Revenue Friendly Societies and National Debt Act, 1882.
46 & 47 „ c. 55, Revenue Act, 1883.
47 & 48 „ c. 62, Revenue Act, 1884.
48 & 49 „ c. 51, Customs and Inland Revenue Act, 1885.
49 & 50 „ c. 15, Sporting Lands Rating (Scotland) Act, 1886.
50 & 51 „ c. 15, Customs and Inland Revenue Act, 1887.
51 & 52 „ c. 8, Customs and Inland Revenue Act, 1888.
52 & 53 „ c. 42, Revenue Act, 1889.
53 & 54 „ c. 8, Customs and Inland Revenue Act, 1890.
53 & 54 c. 21, Inland Revenue Regulation Act, 1890.
54 & 55 c. 13, Taxes Regulation of Remuneration Act, 1891.
54 & 55 c. 24, Public Accounts and Charges Act, 1891.

55 & 56 Vict. c. 25, Taxes Regulation of Remuneration Amendment Act, 1892.
56 & 57 „ c. 2, Trade Union Provident Funds Act, 1893.
56 & 57 „ c. 7, Customs and Inland Revenue Act, 1893.
56 & 57 „ c. 39, Industrial and Provident Societies Act, 1893.
56 & 57 „ c. 61, Public Authorities Protection Act, 1893.
57 & 58 „ c. 30, Finance Act, 1894.
57 & 58 „ c. 60, Merchant Shipping Act, 1894.
58 & 59 „ c. 16, Finance Act, 1895.
59 & 60 „ c. Finance Act, 1896.

[See Dowell's *Income Tax Laws*; Robinson on *Income Tax*.]

Incompetency.—Incompetency is one of the grounds on which a cause may be brought under review from an inferior Court to the Court of Session. Prior to 1868 this review was by way of advocation, but advocation was abolished and appeal was substituted as the mode of review by the Court of Session Act of that year (31 & 32 Vict. c. 100, ss. 64, 65, 66). This right of appeal exists both at common law and by statute. See Erskine, iv. 2. 40, 42; Stair, iv. 37. 12–18, where summaries are given of the circumstances in which actions might be held incompetent; and 50 Geo. III. c. 112, s. 36, which enacts that "bills of advocation from the sheriffs and other inferior judges . . . shall be allowed . . . on the following grounds: first, of incompetency, including defect of jurisdiction, personal objection to the judge, and privilege of party." The latter ground exists no longer; members of the College of Justice were formerly privileged to have their causes tried in the Court of Session, but this privilege was abolished by 16 & 17 Vict. c. 8, s. xlviii.

Of the various grounds at some time considered sufficient to justify advocation for incompetency, the following remain:—

Defect of Jurisdiction.—The determination of what amounts to a defect of jurisdiction depends naturally on the extent of the jurisdiction of the inferior Court in question in each case. A defect of jurisdiction, however, arising from some irregularity of procedure in the inferior Court, such as lack of citation, should be pleaded in the inferior Court itself: and if not so pleaded, will be held to be waived by the party to whom it was available (*Denholm*, 7 S. 781). A plea of no jurisdiction on the ground of domicile of the defender is one which should be raised in the inferior Court, and in the case of *Denholm* (*supra*) it was held that, pending a proof on the question of domicile in the inferior Court, it was not open to the defender to bring the cause under review by way of advocation: the ultimate decision of this, as of other points decided in the inferior Court, being still open to review on the merits. A plea of *res judicata* has been held not to create such incompetency as to warrant advocation from an interlocutor (*Johnston*, 1862, 4 S. 8).

Personal objections to the judge may be on the following grounds:—(1) Interest in the cause, whether arising from innocent connection with the matters in dispute or from bribery, and (2) relationship to the parties. See Declinature. There is this distinction between objections on the ground of interest, and those arising from relationship with the parties, that on appeal every step taken by the judge in the latter case is held as void, and parties have not the power of prorogating his jurisdiction (*Ommanney*, 1851, 13 D. 678; *Duke of Atholl*, 1869, 8 M. 299), whereas in the case of interest (*Duke of Atholl, ut supra,*) an objection should be stated *ab initio* if the circumstances are then known; and if this is not done, the right is held to be waived.

It would appear from the doctrine of prorogation (see Erskine and Stair, *supra*) that a pursuer is barred from advocating a cause on incompetency from the Court in which he raised it.

A case reported in Morrison's *Dictionary* (p. 374, *Procurator-Fiscal of Haddington* v. *Forrest and Others*) decides to the contrary. Sheriff Mackay in his *Court of Session Practice* (ii. p. 458) suggests that, on the analogy of the case of *Eyers* (1711, Mor. 7596), the decision in question was arrived at on the principle that the Crown cannot be prejudiced by the errors of its servants.—[See Mackay, *Court of Session Practice*, i. 95 *et seq.*, ii. 456–8; Shand, *Practice*, 441, 443; M'Glashan, *Sheriff Court Practice*, 453; Mackay, *Manual*, 590.] See also ADVOCATION; APPEAL TO COURT OF SESSION; DECLINATURE.

Incorporation.—An incorporation, or, more popularly, corporation, is a legal *persona*, formed by the union of individual persons, and continuously exercising rights and privileges for the public good. In Scotland, our burghs, guildries, universities, hospitals, the Faculty of Advocates, and certain other legal bodies, our older banks, and certain of our large insurance companies, are the prominent types of the institution. In comparatively recent years school boards and county councils have been created bodies corporate (by Acts of Parliament, 35 & 36 Vict. c. 62, s. 22, and 52 & 53 Vict. c. 50, s. 72). The growth of such institutions in Scotland has, especially in the earlier instances,—municipal corporations, guildries, etc.,—aspects of historical, in addition to legal, interest; and reference is made to Mr. Hill Burton's treatment of the subject, in his *History of Scotland*, chap. xvii. etc.; and to such books as *The Edinburgh Dean of Guild Court* (1896), by Mr. Robert Miller; and *The Incorporated Trades of Edinburgh* (1891), by the late Mr. James Colston.

The law of incorporation was not elaborated in the time of Stair, although the principles were fixed (*Inst.* ii. 3. 41). Erskine treats of "communities or corporations" in connection with "the doctrine of persons," and he thus begins his chapter on the subject: "A corporation, styled by the Romans *collegium* or *universitas*, is composed of a number of men united or erected by proper authority into a body-politic, to endure in continual succession, with certain rights and capacities of purchasing, suing, etc., as appear most suitable to the nature of that special community, and most necessary for answering the purposes intended by it" (*Inst.* i. vii. 64). Similarly, Professor G. J. Bell writes: "A corporation may be described as an ideal and legal person, intended to perpetuate the enjoyment of certain rights and privileges for the public benefit" (*Prin.* s. 2176); and again: "When a community is thus established by public authority, it has a legal existence as a person, with power to hold funds, to sue, and to defend" (*Com.*, 7th ed., ii. 157). There is no separate book on the law of corporations in Scotland.

The institution is, as Erskine indicates, of Roman origin, and civil-law terms, principles, and rules have passed over into the Scottish law of incorporation. The Roman terms for or concerning the institution were such as these: *corpus, corpus collegii, collegium, universitas, persona, ordo, perpetua consuetudo*, terms adopted or represented in the phraseology in use with us; and the important rule, *si quid universitati debetur, singulis non debetur, nec quod universitas debet, singuli debent*, is found expressed in our law books in the very words of the Digest (*Digest*, iii. 4. 7, s. 1; *Muir, et al.*,

1878, 6 R. 392). Feudal custom, too, has affected the constitution and law of corporations in this country, and elsewhere in Europe. The law of England, partaking in different proportions from the Scottish law of civil law and of feudal principles and rules, is not a sure guide in questions of the common law of incorporation in Scotland (see *University of Glasgow*, 1834, 13 S. 9; 1835, 2 S. & M'L. 275; 1837, 15 S. 736; 1840, 1 Rob. 397).

The object in view in instituting or recognising corporate bodies was with the Romans, and is with us, as Professor Bell above states, and as Erskine succinctly declares, some "permanent public good" (*loco citato*). This permanence or perpetuity of corporations, which arises from their relation of continued service to the successive generations of a community, is the most prominent and familiar feature in their constitutions—expressed popularly in the phrase "a corporation never dies," in words substantially adopted from Stair ("an incorporation that never dies," ii. 3. 41: so also Erskine, "they are for the most part formed to perpetuity, and don't die," i. vii. 64). To this effect Ld. Brougham says (in *University of Glasgow*), "perpetual existence is the very essence of the corporate character." The nature of the object thus in view—"a permanent public good"—and the legal conception of *persona* are the fundamental matters in connection with the system and law of incorporation.

The public purposes for which, in Scotland, corporations have thus principally been created are, as has been indicated, civil government, learning and education, charity, and trade or manufacture. Corporations of the last class (commercial corporations) have, in various degrees, according to circumstances, had in their institution another element of purpose, viz. pecuniary interest: and in them a particular incident of corporation law comes into prominence, viz. the limitation of the corporators' responsibility for the common debts, which becomes even a substantive object in the creation of such corporations. This limitation is a result of the separate legal personality of corporations, in respect of which each "has its own estate and its own responsibilities" (per Ld. Pres. Inglis in *Muir, et al.*); and the privilege, as Professor G. J. Bell states, "is nothing more than the sanction of a contract by which the company and the public deal on the credit of the stock and property of the corporation" (*Com.*, 7th ed., ii. p. 546).

Corporations are constituted by royal charter (or letters-patent) or by special Act of Parliament (Ersk. i. vii. 64). In the former case the privileges granted may infer incorporation, although there be no such express grant, nor the bestowal of a corporate name (*University of Glasgow* —a very interesting case with regard to the institution of corporations in Scotland). Where the Crown's original patent is not extant, prescriptive use of corporate rights is taken to imply its previous existence and subsequent loss or destruction. Chartered corporations, further, used to have the power of creating minor corporations within their own body by "seal of cause," as in the case of guilds and crafts in burghs (Ersk. *l.c.*; see, for example of this form of grant or charter, *Mowat*, 1825, 4 S. 53; see also *Gray*, 1836, 14 S. 1062). But these are not independent methods of creation: the one is held to imply, and the other *ex hypothesi* implies, an original charter from the Crown. Creation by special Act of Parliament formerly had this important characteristic, that only thus could a monopoly be created, after the power of creating monopolies had been taken from the Crown (Bell, *Prin.* s. 2177; *Com.* ii. 546). Since 1846 trade monopolies ("exclusive privileges") of guilds and similar incorpora-

tions in burghs in Scotland are altogether abolished (9 & 10 Vict. c. 17, s. 1).

Creation by special Act of Parliament confers the fullest corporate rights, including, unless provided otherwise, the common-law incident of limited responsibility for debt. Thus, for instance, the Bank of Scotland, a corporation created by Act of Parliament (1695, recited in 14 Geo. III. c. 32; see Bell, *Com.* i. 102), has limited liability of shareholders. But incorporation of joint-stock companies, merely by registration under the general Companies Acts (of 1862, etc.), not by special Act of Parliament, while it confers all the other privileges of corporations, does not limit liability, unless the Statute's limited liability provisions are expressly adopted (*Muir, et al.*, 1878, 6 R. 392; *Sanders*, 1879, 7 R. 157; see also *M'Kinnon, Petr.*, 1884, 11 R. 676; see JOINT-STOCK COMPANY, where statutory incorporated trading companies are treated).

The powers of corporations vary, according to the object and nature of each and the terms or tenor of the constitution, from, for instance, the wide and multiform powers belonging at common law and by a long series of Statutes to such great municipal corporations as Edinburgh and Glasgow, down to the precise and limited powers of a trade, guild, or an insurance company. The following powers are held to belong to corporations of all classes, and, even where the charter does not expressly confer them, to be implied as *naturalia* of corporations—

(1) Power to sue in the corporate name, with corresponding liability to be sued.

This power follows from the legal personality of corporations. It is unnecessary, in suing, to instance the particular source and method of incorporation; but it is proper to do so. Office-bearers, or a committee or commissioner, may appear for a corporation, where duly authorised to represent the body. Citation of a corporation usually takes place, at common law, at a general meeting: (Mackay, *Practice*, i. 324–5, 402–3, and *Manual*, 155, 203, and cases cited; Goudy, *Bankruptcy*, 127, 172). A trading corporation has its domicile at its place of business, but may have subordinate offices fixing jurisdiction and determining the local law to be applied with regard to its contracts (Ersk. *Prin.*, 19th ed., p. 666). Power in a corporation to impose penalties does not exclude right of interdict for infringement of privileges (*University of Glasgow, supra*).

(2) Power to elect or admit new members, and to appoint officers for the administration of the corporate affairs.

Erskine mentions three methods of carrying on the membership, recognised in charters, viz. succession to the deceased (as heirs), election by the survivors, nomination by the founder; and the second of these—co-optation—is the rule, where the charter or custom fixes no other (Ersk. *Inst.* I. vii. 64; *Loudon*, 1891, 18 R. 549, per Ld. M'Laren). The sphere of usage with regard to a claim for admission to membership in respect of succession as son is recognised in *Loudon, supra*. The officers appear under different names in our historic corporations, *e.g.* deacons, wardens, magistrates, visitors, masters, managers.

(3) Power to have and use a common seal, and to hold meetings or courts of members or managers.

The rule with regard to a quorum, where the constitution makes no special provision, is that a majority of the whole members is necessary (*Meiklejohn*, 1805, Mor. *voce* "Burgh Royal," App. No. 17; affd. 5 Pat. 298). When a meeting is duly constituted, the voice of the majority present is the voice of the meeting (see *Gray*, 1836, 14 S. 1062; *Howden*, 1840, 2 D.

996; *Earnest*, 1897, L. R. Ch. D. 1, 1). The right to vote, where the terms of a charter are not clear, may be affected by usage (see *Walker*, 1872, 45 Jur. 122).

(4) Power to hold property, moveable or heritable.

The corporation itself is the owner, and the members are only administrators, or trustees, for themselves and their successors (*Thomson*, 1855, 17 D. 765; *Webster*, 1893, 21 R. 107). As Erskine writes, "no particular member can claim any property in the goods belonging to the community" (I. vii. 64). A corporation's interest in property is a "partial or qualified" interest in the sense of the Lands Clauses Consolidation (Scotland) Act of 1845; and power is given under that Act to a corporation, as to a party under disability, to sell to promoters of undertakings under the Act (ss. 67, 7, 17; see *Caledonian Railway Co.*, 1869, 7 M. 1072). A corporation, being a continuing *persona*, with perpetual succession, is, when once infeft in heritable estate, never in non-entry and subject to the casualty of composition. A superior is entitled to refuse entry to a corporation. Entry given to office-bearers or other representatives and their successors in office for a corporation is equivalent to entry of the corporation itself; but mere entry of office-bearers does not exclude the superior's claim for casualties (see special case, *Earl of Lauderdale and Others*, 1897, 5 S. L. T. No. 59, and earlier cases there cited). Both the positive and the negative prescription run against corporations (Ersk. *Prin.*, 19th ed., p. 460). Special immunities have sometimes been given, by charter, to corporations with regard to the public obligations of property, *e.g.* to the University of Glasgow, exemption from taxation—a right in this case limited by usage to local taxation and the original site of the university (*University of Glasgow*, 1872, 10 M. 1000).

(5) Power to act within the scope of the purposes of the institution, as fixed by charter or Act of Parliament, or as modified by usage.

A majority binds a minority in matters within the limits of a corporation's powers, but any individual member or a committee has a title to prevent misapplication of the funds; and a minority, and perhaps an individual member, can sue for reduction of an illegal act (Mackay, *Manual of Practice*, p. 139, and cases there cited). In *Baird* (1865, 4 M. 69) the title of two individual burgesses to sue for sequestration of certain charitable trust funds in the hands of the defenders, and for the appointment of a judicial factor, in respect of alleged illegal use of these funds, was upheld (see also *Howden*, 1840, 2 D. 996, per Ld. Gillies, p. 1000); and in *Morrison* (1853, 16 D. 86) a widow of a member was held to have an interest and title to prevent the diminution of the security for an annuity to which, as widow, she was entitled (*Rodgers*, 1842, 5 D. 295, is a similar case). The estates of an insolvent corporation are liable to notour bankruptcy and sequestration, in the case of ordinary corporations as well as of those which carry on trade (Bell, *Com.* ii. 157–8; Ersk. *Prin.*, 19th ed., p. 567; Goudy, *Bankruptcy*, pp. 78, 122, 435; *Wotherspoon*, 1863, 2 M. 348). Similarly, in respect of its juristic personality, a corporation may defend its reputation and sue for damages for slander (*North of Scotland Banking Co.*, 1857, 19 D. 881; see Glegg, on *Reparation*, 67, 109—as to malice, 77). Ordinary corporations (not trade incorporations) may act as trustees, and they often do so for charitable purposes (M'Laren, *Wills and Successions*, 3rd ed., ss. 1620, 1621).

(6) Power to make bye-laws and ordinances for the administration of affairs, within the limits of the purposes and constitution of the corporation.

The principle of the cases cited under (5) *supra*, *Baird*, *Howden*.

Morrison, Rodgers, applies here. Bye-laws duly made bind the members (*Gray,* 1836, 14 S. 1062; *Dempster,* 1831, 9 S. 313); and ordinances duly made, in some cases, in consequence of the nature of the institution, even affect the public (see *University of Glasgow,* 1837, 15 S. 736, and especially, per Ld. Brougham, 1 Rob. p. 431; but see Clark on *Partnership,* i. p. 37).

Corporations are extinguished either by natural cause, such as the death or failure otherwise of all the persons interested; or by Act of Parliament, recalling the privileges granted; or by forfeiture, on abuse of powers (Ersk. I. vii. 64; Bell, *Prin.* s. 2179; Clark on *Partnership,* i. 38). Insolvency or bankruptcy, where creating inability to fulfil the purposes of the institution, may bring a corporation (especially a trading corporation) to an end, upon distribution of the corporate funds among the creditors—the corporators having no further liability even *subsidiarie.* Trading or other corporations created for a limited time cease to exist upon the expiry of the period named in the constitution. The Act 9 & 10 Vict. c. 17 (an "Act for the Abolition of the exclusive Privilege of trading in Burghs in Scotland") practically brought to an end the whole existing corporate guilds and crafts in Scotland as active trading or manufacturing incorporations, while it saved their existence, and provided for their reconstitution on non-monopolistic and non-trading lines, practically as benefit societies, subject to the approbation of the Court of Session (*United Incorporation of Masons, etc., of Haddington, Petrs.,* 1881, 8 R. 1029, where a scheme sanctioned by the Registrar of Friendly Societies was approved by the Court). The Court, under a provision (s. 3) for "the management and application of . . . funds and property," cannot sanction any scheme involving the extinction of a corporation, on the ground that the whole Statute implies the continued existence, though under altered conditions, of the class of corporate bodies referred to in its provisions (*Incorporation of Wrights, etc., of Leith, Petrs.,* 1856, 18 D. 981).

English law divides corporations into corporations sole and corporations aggregate. A corporation sole is a body politic, with perpetual succession, constituted in a single person (Grant on *Corporations,* pp. 6, 626; Clark on *Partnership,* i. 35). The sovereign is such a corporation, and in England certain ecclesiastical personages—a bishop, dean, parson, etc. Prof. G. J. Bell (*Prin.* s. 2176) says that a minister of a parish in Scotland is a corporation sole; but he gives no authority; and Mr. Duncan, in his *Parochial Law,* does not seem to make reference to the subject.

A kirk session has been expressly held not to be a corporation (*Kirk Session of North Berwick,* 1839, 2 D. 23). The heritors, minister, and kirk session of a parish have been recognised as together forming a corporation, to certain effects, one being (at that date) the management of funds left for pious uses (*Earl of Galloway,* 22 Feb. 1810, F. C.; see M'Laren, *Wills and Successions,* 3rd. ed., s. 172; Mackay, *Practice,* i. p. 325; *Manual,* p. 156). In the same case (*Earl of Galloway*) it seems to be denied that any one of the three component elements is a corporation; but in another early case a body of heritors is spoken of as a corporation, to the effect that their duly formed resolutions bind the whole body (*Boswell,* 1834, 13 S. 148).

The distinction between incorporation and partnership lies in the public relations of the former as contrasted with the private and personal scope of the latter, and in the full personality of the one compared with the less complete personality of the other. These and other consequent "salient points of difference" are concisely set forth by Mr. F. W. Clark (*Law of Partnership*), in a chapter on "Partnerships and Corporations, and their

Differential Characteristics," in language which, so far as the law of corporations is concerned, leaves nothing to be desired (i. iii. p. 39). See PARTNERSHIP.

General References.—Stair, *Inst.* i. 17. 14; ii. 3. 41; Ersk. *Inst.* i. vii. 64; *Prin.*, 19th ed., p. 365; Bell, *Com.*, 7th ed., ii. 4, 157, 546; *Prin.* ss. 2176–2187; Clark on *Partnership*, i. pp. 29–39; Mackay, *Practice*, i. 298, 324, 402; *Manual*, 139, 155, 202; M'Laren, *Wills and Successions*, 3rd ed., ii. p. 840, 934, 952; Sohm, *Institutes of Roman Law* (translated by J. C. Leslie), s. 20; Savigny, *Droit Romain*, ss. 85–102; Grant on *Corporations*; Lindley on *Companies*, 5th ed., p. 8; on *Partnership*, 6th ed., p. 20; Brice, *Ultra Vires*.

See BURGH, ROYAL; BURGHS OF BARONY AND REGALITY; EXCLUSIVE PRIVILEGE; FRIENDLY SOCIETIES; GUILD; HERITORS; JOINT-STOCK COMPANY; PARTNERSHIP; TOWN COUNCIL; VOLUNTARY CHURCHES.

Incumbrances.—See BURDENS; HERITABLE SECURITIES; SEARCH OF INCUMBRANCES.

Indecent Advertisements. — See ADVERTISEMENTS, INDECENT.

Indecent Practices, etc.—1. *Indecent Practices.*—Filthy and indecent conduct is usually libelled as "lewd, indecent, and libidinous practices." If practised upon children, such conduct is criminal, though there be no assault. Instances of this offence are: exposure of person before young girls, or indecently handling them (*Mackenzie*, 1864, 4 Irv. 570). Another instance is when children are induced to commit indecencies (*M'Lean*, 1838, Bell, *Notes*, 86).

In the case of females above twelve years of age there is no crime, unless there be assault (*Philip*, 1855, 2 Irv. 243), except under the CRIMINAL LAW AMENDMENT ACT (*q.v.*). But if a woman is of weak intellect, it is thought that she may be regarded as a child in such cases (see *Philip, supra; Macnamara*, 1848, Ark. 521; *Clark*, 1865, 5 Irv. 77). There is no limitation of age in the case for boys (*Philip, supra*; *Brown*, 1844, 2 Broun, 261; *Lyall*, 1853, 1 Irv. 218). If the boy is old enough to give an intelligent consent to the indecency, he will be regarded as art and part in the crime. Indecencies between males may now be prosecuted under the Criminal Law Amendment Act.

2. *Indecent Behaviour.*—Shameless and indecent conduct is criminal. Exposure of the person to amount to a crime must be libelled as having been to the annoyance of particular persons, who must be named in the *charge* (see *Smyth*, 1819, Shaw, 2; *Thomson*, 1831, Bell, *Notes*, 86; *Mackenzie, ut supra*).

3. *Aggravations.*—It is regarded as an aggravation of such offences that the parties were in such relation to each other as that of teacher and pupil (*Brown, ut supra*), nurse and children in her charge. It is also an aggravation if venereal disease is communicated to the child (*Mack*, 1858, 3 Irv. 310).—[Macdonald, 204; Anderson, *Criminal Law*, 94.]

Indecent Works.—See OBSCENE WORKS.

Indefinite Payments.—See Payments.

Indenture (Apprenticeship).—The contract between master and apprentice can be constituted only by writ, and the instrument in which the contract is embodied is termed an indenture. For the purposes of the Stamp Acts, "every writing relating to the service or tuition of any apprentice, clerk, or servant placed with any master to learn any profession, trade, or employment (except articles of clerkship to a solicitor, or law agent, or writer to the signet), is to be deemed an instrument of apprenticeship" (54 & 55 Vict. c. 39, s. 25). The stamp required is fixed by the schedule of the same Statute at 2s. 6d., with certain exemptions there stated. (See Apprentice, where, however, the amount of the stamp is incorrectly stated, the Act 33 & 34 Vict. c. 97 having been repealed by the Stamp Act of 1891).

Indictment.—The process under which a person charged with crime is brought to trial in the High Court of Justiciary and in the Sheriff and Jury Courts. Prior to the Criminal Procedure Act of 1887, prosecution by indictment was confined to the Court of Justiciary, while in certain circumstances Criminal Letters (which see) were also used there, but in the Sheriff and Jury Court prosecution was by criminal letters or libel alone. That form has been abolished (50 & 51 Vict. c. 35, s. 2). Baron Hume says: "By custom the process by indictment is the exclusive privilege of the Lord Advocate or public prosecutor, who alone is possessed of that notorious and public character which entitles him, summarily and of his own authority, to state himself to the Court, as an accuser, and call on the judges for trial of, his charge without any previous licence obtained" (vol. ii. 155).

The indictment is the written instrument which is delivered to the panel, containing the particulars of the charge with which he is accused (Alison, ii. p. 211). Before the Procedure Act, the indictment was a document of much formality, bristling with words of style, and a brief description of it cannot be better given than in the words of Baron Hume (vol. ii. 155): "The manner and form of setting forth the criminal accusation in the indictment and in criminal letters is quite the same, and has long been settled in our practice, viz. a syllogistic form wherein the major or leading proposition states the appellation of the crime meant to be charged, or, if it have no proper name, describes it at large, and characterises it as a crime that is severely punishable; the minor proposition avers the panel's guilt of this crime, and supports this averment with a narrative of the fact complained of; and the conclusion infers that, on conviction by the verdict of an assize, he ought to be punished with the pains by law attached to his transgression." He adds: "As in this form the whole charge coheres with a dependency of each member on the others, so any omission or inaccuracy which breaks the texture of the syllogism and hinders the connection of sense, or even of language, shall, in strictness, vitiate the libel—no matter though it be evident what the words to be supplied are, and that they are words of form only, and that the error has been owing to a hasty transcription of the libel. It is not decent that the face of a criminal record should be slurred with those lame and disjointed accusations, and no allowance can be had of such slovenly blunders in the preparing of this sort of business." There have been many cases which illustrate

this, and which may be seen by reference to the Justiciary Reports, but these need not now be quoted.

Old Form.—The particulars of the old form of indictment are here briefly mentioned, for comparison with the forms enacted by, and in use, since the Criminal Procedure Act, 1887. There was (1) the accused's name and address—he was usually designed as "prisoner in the prison of ," or, if on bail, his address as given in his bond. (2) The instance—the name of the Lord Advocate, followed by the words, "Her Majesty's Advocate for Her Majesty's interest." Then followed (3) the major proposition, beginning with the words, "That albeit by the laws of this and of every other well-governed realm," and the *nomen juris* or other description of the crime, adding, "is a crime of an heinous nature and severely punishable." (4) The minor proposition, beginning with the words, "Yet true it is and of verity that the said is guilty of the said crime, actor or act and part, in so far as"—(*a*) the time, and (*b*) the place, of the crime being here stated, and (*c*) the nature and description of the act charged. If the accused was previously convicted of crime, a statement to that effect followed, and an addition to the major proposition was required stating that the crime was aggravated by previous conviction. (5) The apprehension of the accused, and his being brought before the Sheriff and emitting a declaration, were then narrated, and here followed the words, "Which declaration, as also" (then all the productions were shortly enumerated), and the words "being to be used in evidence against the accused at trial," added thereto. The indictment closed with the words, "All which being found proved by the verdict of an assize, or the judicial confession of the said panel, he ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming." This indictment might be signed by the Lord Advocate, but was in practice signed by one of his deputes. Annexed to the indictment there was a list of witnesses, the names, designations, and addresses of each being given, and this list was also signed.

This form of indictment was a source of much trouble and anxiety to those on whom the duty of drawing and revising indictments devolved, as the smallest error in form, logical or otherwise, and even a misspelling, was enough to throw out an indictment.

The Criminal Procedure Act of 1887 was therefore hailed with general approval, since it abolished the syllogistic form of indictment, and dispensed with all merely formal words and words of style, and gave authority for indictments being framed in plain and simple words, expressing the act charged as criminal. The parts of that Act which refer chiefly to the form are secs. 2 and 4 to 15 inclusive, and Sched. A gives specimens. Though the formal words referred to in those sections are not put in the indictment, they are now to be read into it as if they were there (see sec. 8 of the Act and the cases of *Her Majesty's Advocate* v. *Jas. Swan*, 2 White, 137, and *Macleod*, 2 White, 9).

New Form.—The indictment, as now regulated by that Act, may be written or printed, or partly both (s. 21), and contains the following particulars, viz.:—

(1) The accused's name and address in general—he is designed as "prisoner in the prison of "; but if on bail, he should be named and designed as in his declaration (s. 4).

(2) The instance. The indictment proceeds, "you are indicted at the instance of (here the name of the Lord Advocate is inserted), followed by the words "Her Majesty's Advocate, and the charge against you is." The

instance does not now fall though there be a change of Lord Advocate (s. 3; and case of *Haliday*, 3 White, 38).

(3) The time when the act complained of was committed. The prosecutor must libel the exact date when the act was committed, though the latitude of three months usually allowed him is still implied, but not stated (s. 10). This latitude, however, is only available provided the exact date is not of the essence of the charge; and if the accused pleads an *alibi* on the date charged, the *alibi*, if proved, will free him from the charge. There are cases, however, which, from their nature or circumstances, necessitate the charging of the full latitude of three months, and sometimes a much longer period, *e.g.*, (1) where an accused has been in a position of trust, and had opportunities of appropriating goods or money without immediate detection, and (2) cases of reset where the property appropriated is not recovered till long after the theft or robbery. In the case of *Charles Macdonald*, 1 White, 593,—a charge of reset,—a latitude of fifteen months was taken. See also case of *Simon and R. G. Macleod*,—fraud,—2 White, 71, as an example of time charged under the Statute and at common law.

(4) The place where the act was done. If in a house, or on a stair, or on a street, this should be stated, the house being specified by the occupier's name. A minute description is not required; the words "in or near," or similar words formerly used, need not be stated, but are implied (s. 10).

(5) The description of the act done (the *modus*). "It is a sacred rule of law," said Ld. Alemore, "that the facts must be laid with precision in a criminal charge" (Alison, ii. 298). Forms of indictment are given in Sched. A to the C. P. Act, and many more may be usefully referred to in Macdonald's manual or key to that Act. From these examples, and from the views of the judges in the case of *Bewglass*, 1888, 1 White, 574, it will be gathered that minute specification is not now required.

(6) Where the accused has been previously convicted, a statement to that effect. This statement should agree with the crime or crimes in the extract and any schedule thereto. Appended to the indictment is (1) a list of productions, which in general consist of the accused's declaration, a medical report, extract convictions, and any documents or articles intended to be produced at trial. These should be enumerated briefly. (2) A list of witnesses for the prosecution. These should be numbered consecutively, and the names of each given in full, with their last-known address. In practice this is now done by giving the name of the house or number of the street where the witness lives.

The indictment must be signed by the Lord Advocate or one of his deputes, or by the procurator-fiscal, the words "By authority of Her Majesty's Advocate" being put before the signature of the procurator-fiscal.

In practice, the advocates-depute sign the indictments for the High Court, and the procurator-fiscal those for the Sheriff and Jury Court; but the C. P. Act seems to sanction any deletion or correction on the record copy of the indictment made before service being authenticated by the initials of anyone who could have signed the same. That is, a procurator-fiscal may authenticate by initials a deletion or alteration made on an indictment signed by an advocate-depute (ss. 2 and 21). The inventory and list must each be signed by the person signing the indictment. Sec. 23 of the Act provides for warrants being obtained for citation of the accused for trial. The indictment *may* be served upon an accused by any macer, messenger-at-arms, sheriff-officer, or officer of

police at any place; but where the accused is in prison, it *shall* be served by any governor, deputy governor, or warder of that prison (s. 24); and the notice shall call upon the accused to appear before the Sheriff Court which is nearest to the prison in which he is confined, or, if on bail, to the Court nearest to the domicile fixed in his bail bond; and the notices shall call upon the accused to appear at two diets, the first not less than six clear days after service, and the second not less than nine clear days after such first diet (s. 26).

We mention a few particulars in which the C. P. Act has, with reference to indictments, simplified procedure. The description of persons, things, quantities, etc., are not required in detail (ss. 11 to 15 inclusive). It is not necessary to quote the words of a Statute contravened, but sufficient to refer to the section of it (s. 9). Robbery, theft, fraud, and embezzlement are now treated generically as dishonest appropriation of property; and under an indictment charging robbery, theft, embezzlement or fraud, an accused may be convicted of reset; under an indictment for robbery, embezzlement, or fraud, he may be convicted of theft; under one for theft, he may be convicted of embezzlement, or fraud, or of theft, though the evidence amount to robbery (s. 59). This provision was no doubt intended to prevent any miscarriage of justice, and not to sanction careless drafting of an indictment. Under an indictment such as those just mentioned, a verdict of resetting property appropriated by any of the modes mentioned can also be obtained, and it is not necessary to specify the particular mode by which the resetted property was appropriated (s. 58). Extract convictions are not now laid before the jury (s. 67), unless when an accused attempts to set up good character, or, in charges of reset, where, under the Prevention of Crimes Act, they may be used as evidence of guilty knowledge (34 & 35 Vict. c. 112, s. 19; and case of *Watson*, 1 Adam, 355). Where an accused pleads not guilty, any convictions in the list of productions are held to apply to him, unless he gives notice of objection to them five days before trial; and where an accused intimates his intention to plead guilty to the charge under sec. 31, he must give notice of objection to convictions two days before the diet (s. 66).

It may be here noted that the Act contains a provision for the speedy trial of accused who intimate through an agent their intention to plead guilty, and desire to have their cases early disposed of. The indictment in this case is in the ordinary form, but no list of witnesses is required, and the only necessary productions are extract convictions; and the *inducia* of service in these cases is four clear days. The principal indictment and extract convictions in ordinary trials require to be lodged with the Sheriff Clerk of the district where the first diet is to be held, on or before the day of service (s. 27). No objection to the validity of citation upon an accused on ground of discrepancy between the record copy and the service copy on account of any error or deficiency in such copy, is competent unless stated at first diet; and unless the Sheriff thinks any such objection tends to prejudice the accused, it shall not entitle accused to object to plead. All objections to relevancy must also be stated at first diet (31 & 32 Vict. c. 95, s. 7; *Smith*, 1862, 4 Irv. 170). The law on this subject has not been changed by the Procedure Act. See case of *Bell*, 3 White, 313, where it was observed that, under that Act, ss. 29 and 33, objections to relevancy should be stated at first diet, and could not be stated thereafter, but that the Court was entitled to interfere should it appear that gross injustice would be done

by refusing to hear an objection to relevancy at second diet, which had not been stated at the first. A plea in bar of trial should also be stated at first diet, and will not be heard at second diet unless on account of something occurring after first diet, or if the plea has been reserved by the judge (31 & 32 Vict. c. 95, s. 7).

For examples of charges where relevancy was discussed, see Macdonald, 434–6, and cases there noted. Objections to relevancy of indictments, formerly of frequent occurrence, are now rarely taken; indeed, from the simplicity of the present form, there is little opportunity for objections. Formerly, when an objection taken to an indictment was likely to be sustained, an amendment might be made by the deletion of certain words; but the Court would not sanction an amendment if the nature of the charge was thereby altered. It was formerly a general principle that nothing could be added to an indictment, but the Procedure Act made an important innovation, by providing that any discrepancy or variance between the indictment and the evidence may be rectified by amendment of the indictment at any time before the case for the prosecution is closed, provided the accused be not prejudiced thereby. Any amendment may be authenticated by the Clerk of Court (s. 70).

A plea to the whole or any part of a charge may be taken. A plea of guilty should be signed by the accused, or, if he cannot write, by his agent on his behalf, and by the Sheriff; and in pleas of guilty under sec. 31, where the accused is remitted by the Sheriff to the High Court for sentence, the plea should be written on the record copy of the indictment, and signed by the accused and by the Sheriff (ss. 29 and 31; and *H.M. Advocate* v. *Galloway*, 1894, 1 Adam, 375). A plea of guilty under sec. 31, duly tendered and recorded, cannot be withdrawn (*H.M. Advocate* v. *Lyon*, 1887, 1 White, 539); but in the case of *H.M. Advocate* v. *W. M. Black*, 1894, 1 Adam, 312, the Crown departed from a charge to which panel had pled guilty under sec. 31. The plea had been duly recorded before the Sheriff, and panel remitted to the High Court for sentence; but at the High Court accused's counsel stated a fact, of the legal significance of which panel had been ignorant when he pled, and counsel urged that the indictment was by that fact made irrelevant. The advocate-depute, with approval of the Court, withdrew the indictment, and panel was dismissed from the bar. Any accumulation of charges in an indictment which may tend to injustice will be checked (Macdonald, 465, and note 8 thereto).

Where the accused pleads not guilty at first diet, the trial is adjourned to the second diet. At the latter a jury is empannelled and sworn to try the case. Any objection in respect of misnomer or misdescription of any person named in an indictment, or of a witness in list of witnesses, must be stated before the jury have been sworn. An accused must give four clear days' notice before the trial diet of objection to any witness, otherwise his objection shall be no ground for postponing a trial or excluding the witness (s. 53). Motion for separation of trials where more than one accused is included in an indictment is made at second diet before jury are sworn. It is a trite saying that this is a motion often made, but practically never granted. It can only be granted on special cause shown. The most weighty reason for it would be that without one of the accused as witness there would be *penuria testium* (*Kerr*, 2 White, 480; *M'Leod, etc.*, 2 White, 9; and *Parker, etc.*, 2 White, 79). The jury may find the whole or a part of the indictment proven or not proven, or they may find the panel not guilty.

Indirect Evidence.—See Evidence.

Indorsing a Warrant.—See Backing a Warrant.

Induciæ.—The term *inducia* (*sc. legales*) means a specified period allowed in legal proceedings for the performance of some act. The cases for which such a period is fixed by law are very numerous, and only the more common and important of them can be given here.

Inducia of Citation.—The *inducia* of citation in ordinary Court of Session actions, or the time allowed to the defender between citation and compearance, is now fixed by the Court of Session Act, 1868, at seven days where the defender is in Scotland, and fourteen days where he is in Orkney or Shetland, or any other island of Scotland, or furth of Scotland (31 & 32 Vict. c. 100, s. 14). The summons cannot be called until these periods respectively have expired. In certain special cases, known as privileged summonses, where shorter *inducia* were competent at the commencement of the Act, the old *inducia* of six days are competent still. The only such cases which are now of any consequence are removings, poindings of the ground, and furthcomings (A. S., 29 June 1672; 6 Geo. IV. c. 120, s. 53). To these, practice has added multiplepoindings; but multiplepoindings which contain other conclusions, *e.g.* for exoneration, are brought upon the ordinary *inducia*; and indeed the privilege is now rarely taken advantage of.

In summary petitions in the Court of Session the *inducia* are usually eight days where the respondents are in Scotland, and fourteen where furth of it. In the case of petitions under the Entail Amendment Acts the periods are the same as in an ordinary summons (38 & 39 Vict. c. 61, s. 12 (4)). These periods must expire before the next step in the procedure is taken, and a certificate bearing *inter alia* that they have expired must be lodged along with the execution of service.

Where the citation is by registered letter, as provided by the Citation Amendment (Scotland) Act, 1882, "the *inducia*, or period of notice, shall be reckoned from twenty-four hours after the time of posting" (45 & 46 Vict. c. 77, s. 4 (2)). The summons may be called on the last day of compearance (*Spence*, 1772, Mor. 12001). The legal *inducia* are sometimes dispensed with where, instead of being made formally, service is accepted by the agent of the party on whom it has to be made. This course is often adopted in the procedure in petitions and in amicable lawsuits.

In the Sheriff Court, ordinary petitions proceed on *inducia* of seven days, or, where the defender is in an island of Scotland or furth of Scotland, of fourteen days (Sheriff Court Act, 1876, 39 & 40 Vict. c. 70, s. 8). Notice of appearance by the defender must be lodged with the Sheriff Clerk by the seventh or fourteenth day after citation (s. 16). A shorter period is still competent where it was so before the Act, and the Sheriff is empowered to shorten the *inducia* as he shall see fit in any case which he considers to require special despatch (*Muir*, 1881, 19 S. L. R. 59). Certain special Statutes (*e.g.* the Small Debt Act, 1 Vict. c. 41, s. 3) give a fixed period, which must be strictly adhered to. In other cases, where no time is specified, reasonable notice must be given, its length depending on the distance of the defender's residence from the Court. For edictal citation the period is fourteen days (s. 9), except that tutors or curators

of a pupil or minor defender are cited upon the same *inducice* as the principal defender himself (A. S., 10 July 1839, s. 22).

[Mackay, *Practice*, 196, 202; Dove Wilson, *Sheriff Court Practice*, 107.]

See CITATION; SERVICE; SUMMONS; APPEARANCE, ENTERING.

Bankruptcy Proceedings.—The *inducice* of citation in a petition for sequestration, when the citation is made personally, or at a dwelling-house or place of business, must be not less than six days nor more than fourteen. The practice of the Bill Chamber is to order the debtor to appear on the seventh day after citation. Where the citation is edictal, the *inducice* must be twenty-one days (Bankruptcy Act, 1856, 19 & 20 Vict. c. 79, s. 28). See SEQUESTRATION.

In petitions for cessio, notice of the creditor's intention to present the petition on a specified day must be given to the debtor at least six days, and not more than fourteen, before the presentation thereof (A. S., 22 Dec. 1882, s. 1). The Sheriff is empowered to appoint any diet of compearance or proceeding under the Cessio Acts to be held on *inducice* of any number of days, not less than eight (44 & 45 Vict. c. 22, s. 12). See CESSIO.

Inducice in Criminal Proceedings.—A person on being served with an indictment receives a notice appended to it, citing him to appear at two diets. The first, at which he is called on to plead, must be not less than six clear days after service, and the second, for trial, not less than nine clear days after the first (Crim. Proc. Act, 1887, 50 & 51 Vict. c. 35, s. 25). Where, however, the accused gives written notice to the Crown Agent that he intends to plead guilty, and desires his case to be disposed of, he may be served with an indictment to which is appended a notice citing him to a first diet only on *inducice* of four days (s. 31). Where persons abroad are cited at their last-known residence, *inducice* of sixty days are allowed (Hume, ii. 259; Alison, ii. 336; Macdonald, 418). The Summary Procedure (Scotland) Act, 1864 (27 & 28 Vict. c. 53, s. 6), provides that, on a complaint under the Act, the Court may grant warrant to cite the respondent to appear before the Court on *inducice* of not less than forty-eight hours. Certain Statutes make special provision regarding the *inducice* in the particular cases to which they relate. And these special provisions are not superseded by the general provision in the Summary Procedure Act (*Laird*, 1895, 23 R. (J. C.) 14).

For the *inducice* in the case of letters of diligence, charges on extract decrees, etc., reference is made to the articles on CHARGE and HORNING, LETTERS OF. See also *Jurid. Styles*, 5th ed., iii. pp. 337, 369.

Industrial Schools.—See EDUCATION (XIII.).

Industrial and Provident Societies. — These are regulated by the Industrial and Provident Societies Act, 1893, and amending Act, 1895, the principal Act being 56 & 57 Vict. c. 39, s. 9. Under it an industrial and provident society is defined as "a society for carrying on any industries, businesses, or trades specified in or authorised by its rules, whether wholesale or retail, and including dealings of any description with land." The interest of any member in the shares of the society is limited to £200. In many respects the provisions of the Act are similar to those contained in the Friendly Societies Acts. The main points of difference are :—

(1) Such as arise from the fact that industrial and provident societies are incorporated bodies, while friendly societies are not, but act through trustees. A registered industrial and provident society may therefore sue and be sued in its corporate name (cf. s. 21).

(2) That they are not, like friendly societies, now exempt from stamp duty.

The statutory provisions for industrial and provident societies are similar to and often identical with those under the Friendly Societies Acts in regard to—

(*a*) Registry of the society and its rules, and the cancelling and suspension of the registry (ss. 5–16). Secs. 3, 4, and 6 of the Friendly Societies Act, 1896, are incorporated with this Act (s. 66).

(*b*) Power of nomination by members (ss. 25, 26).

(*c*) Member's right to inspect the society's books (s. 17); but this right is not so extensive as under the Friendly Societies Acts.

(*d*) Payments on intestacy (ss. 27–31).

(*e*) Membership of minors (s. 32).

(*f*) Security to be given by officers (s. 47).

(*g*) Settlement of disputes (s. 49).

(*h*) Inspection of society's affairs (s. 50).

(*i*) Change of name, amalgamation, and conversion (ss. 51–57).

(*j*) Dissolution (ss. 58 and 61).

(*k*) Offences and penalties (ss. 62–70).

(*l*) Power of Treasury to issue regulations for carrying out the Act (s. 64).

These matters have already been dealt with under the subject of FRIENDLY SOCIETIES, and it is sufficient here to refer to them.

The Act further makes provisions in regard to—

1. *Banking by Societies.*—(*a*) Where a society has any withdrawable share capital, it is prohibited from carrying on the business of banking. But

(*b*) Societies taking deposits of not more than ten shillings in any one sum, nor more than £20 from any one person, are not banking societies.

(*c*) A society for banking must keep a half-yearly statement of its funds conspicuously hung up in every place of business (s. 19).

2. *Incorporation of Society.*—An industrial and provident society by registration becomes a body corporate, capable of suing and being sued by its registered name, with perpetual succession, and a common seal, and with limited liability (s. 21).

3. *Remedy for Debts from Members.*—All sums payable by members are declared to be debts to the society and recoverable in the Sheriff Court, and for such debts the society has a lien over the members' shares in the society (s. 23).

4. *Exemption from Income Tax.*—Sec. 24 embodies part of the Customs and Inland Revenue Act, 1880, and enacts that a registered society shall not be chargeable under Scheds. (C) and (D) of the Income Tax Acts, unless it sells to persons not members, and the number of shares of the society is limited either by its rules or its practice (s. 24).

5. *The Register as Evidence* (s. 34).—The register is *prima facie* evidence of—

(*a*) The designation of the member, the shares held by him, and the amount paid on them.

(*b*) The date he became a member.

(*c*) The date he ceased to become a member.

6. *Contracts.*—The provisions of this section (35) are adopted from the

Companies Acts, and give contracts by a society the same validity as those between private persons. The section further provides that all contracts made conform to these provisions shall be effectual and binding in law on the society, and all other parties thereto, their heirs, executors, and administrators, as the case may be.

7. *Investments, and Execution of Deeds.*—Sec. 38 gives an increased power of investing to the society, and further ratifies and confirms all investments made before the passing of the Act which would have been valid had the Act been in force. Power is also given under sec. 39 to a society not chargeable with income tax to invest in saving banks, and, under sec. 40, to make advances to members. Sec. 44 deals with special regulations for simplifying the discharge by the society of heritable securities in Scotland, it being enacted that the registration in the appropriate Register of Sasines of a receipt in full, signed by two members of the committee and countersigned by the secretary, shall be sufficient to discharge the bond and disburden the property. But the forms and procedure under the Conveyancing Acts may be adopted if preferred. And a deed by a society in Scotland is duly executed if subscribed by two members of committee and the secretary, whether attested by witnesses or not (s. 46).

Liability of Members in Winding up.—Where a society is being wound up under sec. 58 the liability of present and past members of the society is specially provided for. So a member is not liable to contribute—

(*a*) Where he has ceased to be a member for a year prior to the commencement of the winding up.

(*b*) Where the debt or liability was contracted after he ceased to be a member.

(*c*) Where he is no longer a member, unless the contributions of the existing members are insufficient.

(*d*) Beyond the amount, if any, unpaid on the shares held by him (s. 60).

The amending Act of 1895 (58 & 59 Vict. c. 30) provides by sec. 2 that in all proceedings in winding up a society in Scotland under the Act the Court having jurisdiction shall be the Sheriff Court. Sec. 3 assimilates appeals for refusal to register to that under the Friendly Societies Acts.

See Friendly Societies; Building Societies.

Infamous.—See Witness.

Infant.—The word *infant* has no precise meaning in Scotland. In England, all under twenty-one years of age are in infancy, but with us the period of nonage is divided—girls and boys being pupils, or in pupilarity, until the ages of twelve and fourteen years respectively; and minors thereafter, until they attain majority at the age of twenty-one. The term *infant* is, however, used in certain Statutes which apply to Scotland. In the Betting and Loans (Infants) Act, 1892, "infant" means and includes "any minor or pupil" (s. 7); and in the Guardianship of Infants Act, 1886, the word means "pupil" (s. 8).

See Age; Pupil; Minor; Tutor; Curator.

Infeftment.—The word "infeftment" is used to describe both the act of completing a real right to heritable property held by any of the

feudal tenures, and the writ or instrument in which the act is expressed.

There can be no infeftment except on or under a grant from the Crown, mediate or immediate. This follows from the considerations that infeftment is a feudal fact, and that the Crown is the head or lord paramount of the feudal system. That this is a matter not merely of antiquarian or theoretical interest, but of practical importance, is evidenced by the case of *Beatton* (1832, 10 S. 286), in which it was held that disposition and sasine in feudal form did not suffice to convert udal lands into a feu-holding, or to give a true infeftment, there being a failure to show any feudal chain of title going backward and upward to the Crown, and that accordingly an heir had a complete right without sasine, while at that time he would have had no right at all if the holding had been feu. Under the modern system of land rights one is apt to treat recording in the Register of Sasines and infeftment as synonymous terms, but there was infeftment long before there was registration; even after registration was introduced, the two acts—or at least the two steps in one act—remained distinct for over 200 years: and it was not until 1847 (*Young*, 9 D. 932) that it was held, and even then not without considerable difference of opinion, that without registration there could be no completed infeftment: in other words, that an unrecorded sasine was null. While it is thus seen that there can now be no infeftment without registration, it would be misleading to lose sight of the fact that, so far from the act of sasine having been simply declared unnecessary and abolished, the act of registration has by statute (Consolidation Act, s. 15) been declared to import the force and effect of sasine. On the other hand, there may be registration without infeftment, of which there are instances in the case of *Beatton*, *supra*, registered leases (see *infra*), real burdens (*infra*), and the cases where registration in the Register of Sasines completes a right to a *jus crediti* to heritable property, not by way of infeftment, but by operating as an equivalent to intimation to the holder of the feudal title. These, it will be seen, are not instances in which there is any mistake or defect, such as infeftment failing by reason of the grant flowing *a non domino*; on the contrary, the registration is in each of these cases sufficient to complete the right, but nevertheless there is no infeftment.

The following is a list of those exceptional cases in which there may be

Real Rights without Infeftment.

1. The estates of the Crown and Prince, including the paramount superiority of the whole land of the realm. But this exception does not embrace the private estates of the sovereign for the time being (1874 Act, ss. 59–60).

2. The churches, churchyards, manses, and glebes of the Established Church of Scotland. The title is an act of designation by the presbytery (Ersk. ii. 3. 8); but as to the title under a sale of a glebe, or part thereof, see the 1874 Act, s. 36.

3. Udal lands in Orkney and Shetland. See Udal.

4. Leases. At common law and under statute (1449, c. 18) the mode of completing a right under a lease, or under an assignation thereof, is by possession, *i.e.* actual natural possession, if possible, or civil possession by intimation to a sub-tenant, if there be such. Even as regards leases which have been competently recorded under the Registration of Leases Act, 1857, the only difference is, that recording is an alternative method of completing a title, and if advantage is to be taken of the privileges conferred by the

Act, *e.g.* constituting securities without possession, the recording is essential. If the method by registration is to be adopted, the rules of the Act must be followed, the outstanding one being that no one who has not himself a registered title can grant a right which may be validly registered *de plano* by itself alone to complete the grantee's title. But even after a lease has been registered under the statute, recourse may be had to the method of completing a transfer of title by transfer of possession. Thus, suppose A. has a registered lease, he may assign it to B., who may, without registering his assignation, complete it by entering into actual possession, if there is no sub-lease, or by intimation to the sub-tenant, if there is. If thereafter A. should assign the lease to C., who relies upon a search in the Register of Sasines, a competition would arise in which B. would prevail (see *dicta* in *Rodger*, 1867, 6 M. 24). The same will hold whether the assignations be absolute or in security. This is a distinct risk connected with recorded leasehold rights which is apt to be forgotten, and which it may not always be possible to guard against thoroughly. The risk is all the greater inasmuch as in the majority of these cases there will be sub-leases, and accordingly there is no outward change of possession to put one on one's inquiry. The distinction here between property under recorded leases and ordinary heritable titles is founded on the facts that leases are not feudal rights; that the Act 1693, c. 13, making infeftment the criterion of preference, is limited to such rights: and that the Registration of Leases Act, 1857, goes no further than to make registration equivalent to possession (s. 16). Sec. 12 is applicable to the preference of different recorded deeds *inter se*.

5. Kindly tenants and the somewhat analogous rights introduced by the Dwelling Houses (Scotland) Act, 1855 (18 & 19 Vict. c. 88).

6. Real Burdens. These do not constitute feudal estates in the creditor's person (Bell, *Prin.* s. 923). Prior to 1874 transfers were completed, not by registration, but by intimation to the debtor; but by sec. 30 of the 1874 Act, registration is made the criterion "in competition with third parties." It would rather appear, however, that a valid title may still be completed to a real burden, even "in competition with third parties," by recording an assignation granted by a prior assignee, or by an heir, though his own title should not have been recorded, assuming at least that the assignation contains a deduction of title. If this be so, it rests on the ground that the estate is not a feudal estate; that a recorded title is not feudal infeftment, and that the elementary rules of feudal conveyancing do not apply.

7. Servitudes (*q.v.*).

8. Assignees of Liferents. The assignee of a liferent of heritage cannot be infeft (Ersk. ii. 9. 41). Indeed, it is not correct to speak of an assignee of the liferent: there can be no liferent in A. for the lifetime of B. (*Weller*, 1868, 6 M. 627). Liferent is personal: *inharet ossibus*. But if not effectually made alimentary (and it does not appear that a direct liferent without the intervention of trustees can be so protected) (*Murray*, 1895, 22 R. 927), the profits of the liferent right may be assigned. It is laid down that the only method of completion is by intimation to the tenants, and that such notice requires to be renewed on changes of tenancy; but in any case the assignation will also be recorded, and it is at least a possible view that such recording would be held equivalent to intimation. It is said that this difficulty as to transmission of liferents extends to liferent annuities. It is suggested that these difficulties may perhaps be got round (at least where it is desired to create a security over the liferent, as will be the more common

case) by taking from the liferenter not merely an assignation of the liferent, but a deed containing (1) a personal obligation for an annuity of a specified amount in favour of the creditor during the liferenter's life, (2) a disposition of such annuity furth of the liferent and rents and profits thereof, and (3) an assignation (without prejudice) of the liferent and rents and profits, in security of the whole obligations contained in the deed.

9. Personal bonds excluding executors, and annuities, and other rights which are heritable as having a tract of future time, do not, of course, admit of infeftment. Though rights of succession under trust settlements may be held heritable in the person of the beneficiary, they do not form any proper exception to the general rule that infeftment is necessary to complete the title, for the title is, or ought to be, complete by infeftment in the persons of the trustees.

Subject to the exceptions which have been stated, the following are the

Results of Non-infeftment.

1. The Granter is not divested. The consequence is that the uninfeft grantee is exposed to the granter's debts and deeds. Under the old law, even though the grantee had obtained a charter of resignation, so long as he was not infeft thereon, there was no divestiture of the granter (Bell, *Prin.* s. 802).

2. The Grantee is not invested. This is only the same thing, looked at from the other point of view. Accordingly, the grantee can grant no warrant for infeftment to anyone else; and even his leases are not good against singular successors (*Gordon*, 1780, M. 10309).

3. No Feudal Relation. The party so failing to take infeftment establishes no feudal relation; he is not vassal (*Earl of Mar*, 1838, 1 D. 116). Thus if A. grant a charter to B., who, without taking infeftment, dispones to C., who is infeft, B. is not vassal: the first vassal is C. Accordingly, under a charter granted before 1874, no casualty can be due on B.'s death: the first casualty would be due on C.'s death, whether he die before or after B.

4. Apparent Heirs. Prior to 1874, if an heir had not made up title and taken infeftment in any property in which his ancestor died infeft, the heir's debts and deeds had no effect against the property, except as regards his onerous debts and deeds if he had been three years in possession (1695, c. 24).

5. Prescription. Infeftment is the necessary basis of prescription under 1617, c. 12, but for this purpose an apparent heir and an uninfeft disponee may connect themselves with their ancestor or author who was infeft, and plead the benefit of such infeftment (Bell, *Conveyancing*, 704–5). But as to teinds in this connection, see Teinds and Prescription.

6. Terce. Without infeftment the property yields no terce, unless the infeftment have been fraudulently delayed. But the widow is not to be deprived, at the instance of the heir, on objections to the husband's infeftment, not raised in his lifetime, though it is otherwise in a question with creditors. On the other hand, though the husband disponed the property in his lifetime, if the disponee is not infeft before the selling husband's death, the widow of the latter will be entitled to terce. The purchaser's personal claim of warrandice does not affect the terce; but it would be good against the husband's personal estate, and would thus reach the widow if she were also claiming *jus relictæ* (*Fraser, H. & W.* 1094–5, 1110). And see Terce.

7. Heritable Creditor. An heritable creditor uninfeft has no title to

poind the ground, but this does not extend to an assignee who has derived right from an infeft author, though he himself should not have taken infeftment (*Tweedie*, 1836, 14 S. 337). It does not appear that infeftment is a necessary condition of exercising the power of sale in an heritable security.

Passing now to the consideration of the modern methods of infeftment, by far the most common is—

Infeftment by Direct Registration.

The rule is that there can be no infeftment by *de plano* registration unless the immediate author is himself infeft. To this there is no proper exception. It is true that immediate and direct infeftment may proceed on conveyances granted by trustees in sequestration (Bankruptcy Act, s. 105), liquidators (Companies Act, 1862, s. 95), and tutors, *curators bonis*, and other guardians acting on behalf of others (*Scott*, 1856, 18 D. 624), even though the granters of such conveyances have made up no title, provided the bankrupt, or company, or ward, as the case may be, is infeft. But these do not properly form an exception to the rule, any more than does the case of a conveyance signed, not by the proprietor himself, but by a factor and commissioner for him, to which, indeed, they are closely analogous. This is seen most clearly in the case of a liquidator, for then the conveyance runs in name of the company as granter, though it is signed only by the liquidator, who also affixes the seal. Another case which may be mentioned is the completion of title by a judicial factor under sec. 24 of the Consolidation Act, in terms of which the warrant of the Court may be recorded to the effect of infeftment though the ward is not infeft; but that rests upon the combined legislative and judicial authority.

Though in the vast majority of cases infeftment by direct registration is the natural method, and no question arises as to its competence, there are, on the other hand, cases in which such questions do arise, even under deeds granted by an infeft proprietor. These turn mostly on whether there is in the conveyance sufficient specification of (1) the grantee, and (2) the property.

Specification of Grantee.—Before a real right can be acquired by infeftment, it is essential that the person infeft shall be named and identified in the writ by which infeftment is taken, and which is published in the Register of Sasines. Bell (*Prin.* s. 876) indicates the view that, on a warrant to infeft "the heir of A.," there may be a valid infeftment provided the person is made specific by a service recited in the instrument of sasine. Other instances in which the same question arises are: conveyances to "the children of the marriage between A. and B.," or to "the partners of the firm of A., B., & Co," or to "such persons as I shall hereafter name as trustees," or to "such persons as the Court shall appoint to execute this trust." It is clear that under the old law a sasine taken in such terms as these would have been no sasine at all, and that under the present law there could be no infeftment by recording a deed with a warrant of registration in any such indefinite terms. But the question is whether there might not have been a valid sasine, and whether there may not now be a valid infeftment, on such a warrant, provided the party infeft shall be made specific *nominatim* in the instrument of sasine, or notarial instrument, or warrant of registration. Of course it is clear that in all these and similar cases recourse could always be had to a decree of adjudication in implement. But then, in that case, the infeftment would proceed upon the decree, and not upon the conveyance, which it would practically be

admitted was not habile to sustain infeftment, though it might be good enough evidence of a grant or of an agreement to convey. The question, however, is whether it is necessary to proceed by adjudication, or, in lieu thereof, to obtain a new conveyance in apter terms, if that be possible. May not infeftment proceed *de plano* if the party taking infeftment be identified; and if so, is it necessary to set out any, and what, evidence of identity? The answer is that every *disponee* may take infeftment *de plano*, subject to certain exceptions arising either from want of legal *persona* or inability to sustain the feudal relation. The term "disponee" includes three separate branches.

(1) Disponees *Nominatim*.—This is the ordinary case of a conveyance to A., who is properly designed in the deed. But assume that there was (as, in the case of testamentary conveyances, there very well might be) a grant simply to "John Brown," without any designation, would the title be properly completed by recording the deed with a warrant on behalf of the person claiming under it, he being designed in the warrant? or by recording a notarial instrument with a similar warrant? It is clear that without evidence of identity no one would be in safety to rely on such a title, and the best evidence would be a decree of the Court obtained *in foro*. But it might be impossible to obtain that: and besides, these matters are apart from the pure question whether, assuming that the right truly exists, the *title* has been properly made up in either of the ways above indicated. On that question it is thought that the infeftment so taken is valid, but it would at least do no harm to add after the designation in the warrant, "being the disponee named in the foregoing deed"; or, in the case of a notarial instrument, to introduce such a clause as, "who it was represented to me was the same person as the disponee named in the disposition after mentioned." A very common case, again, is a change of designation between the date of the disposition and the date of the infeftment. Thus it could never be suggested that there was any doubt of the validity of an infeftment which, without any reference to evidence or authority, simply set out both designations: and, indeed, there seems no reason for thinking that it would not be equally effectual though one only of the designations were given, or that it would matter which that was. The correct practice, however, is to give both. From this case it is but a short step to a case of *wrong designation* in the grant: it is thought that this may be corrected *de plano* in the infeftment, leaving any question of identity as affecting the true ownership to be settled as a separate matter, not affecting the validity of the infeftment in the event of success. But go one step further and take the case of a *wrong name* occurring in the grant. If the error were "John Brown" instead of "John James Brown," or even *vice versâ*, it cannot be doubted that a *de plano* infeftment in the correct name would be valid. It seems a strong thing to say that this would hold even in the case of a complete error in name, or in both name and designation: but, on principle, it is difficult to find a reason to the contrary. Two things are clear, viz. that there is a conveyance, and (*ex hypothesi*) that the person expeding the infeftment is the true person thereby favoured. A sasine under such circumstances would apparently have been bad, as being disconform to the precept; and as to the bearing of this, see the Consolidation Act, s. 15. Certainly no one could be required to accept such a title without judicial sanction. No doubt, in many of the cases which have been referred to, it would be more satisfactory to proceed to make up the title by notarial instrument, setting out (*a*) the conveyance, and (*b*) a decree of declarator finding that the person taking the infeftment is the true grantee.

But even such a decree, if not *in foro*, will not be conclusive on the matter of *right*; and, on the other hand, it appears unnecessary on the matter of *title*.

If, on the other hand, the conveyance were to an unincorporated body, whereas it ought to have been to trustees for such body, there appears no ground, either in authority or in principle, for the view that any general trustees, acting on behalf of the body, could take infeftment directly on the conveyance by merely describing themselves as trustees therefor. There would require to be a decree of adjudication, unless a new disposition could be obtained from the granter or his heir. The difference between this case and the previous ones is, that here there is no conveyance to the only persons who can hold the title. This applies both to bodies devoid of legal *persona* and to ordinary partnership companies not incorporated. These latter may, however, hold leases *socio nomine* (*Dennistoun*, 1808, Mor. App. "Tack," 15), which would apparently hold good though the lease should be registered under the Registration of Leases Act, 1857. The point of the objection to firms holding feudal property appears to be that they cannot be vassal; and if that be so, it would seem to follow that though they can never be infeft, except through the medium of trustees, they might, *socio nomine*, hold a recorded title to a real burden, and also might in like manner accept and transmit a title to feudal property as an unfeudalised conveyance, on which infeftment might be taken in favour of their disponee; but this is certainly not to be relied on.

(2) Descriptive Disponees. These include such cases as conveyances to "the heir of A.," or "the children of the marriage between A. and B.," or "the partners of the firm of A., B., & Co., as trustees therefor," or trustees to be named by the granter or otherwise, or to be appointed by the Court. All of these may take *de plano* infeftment on the conveyance, provided they be named and designed in the warrant of registration, or in the notarial instrument if that method be adopted. The warrants would run in the respective cases as follows, all the persons being, of course, designed:—

Register on behalf of *B.*, the heir of *A.*, in the register of the county of .

Register on behalf of *C.*, *D.*, and *E.*, the children of the marriage between *A.* and *B.*, in the register of the county of .

Register on behalf of *A.*, *B.*, and *C.*, the partners of the firm of *A.*, *B.*, *& Co.*, as trustees therefor, in the register of the county of .

Register on behalf of *A.*, *B.*, and *C.*, trustees appointed by *X.* to act under the above deed, conform to deed of appointment by him dated , in the register of the county of .

Register on behalf of *A.*, *B.*, and *C.*, trustees appointed to act under the above deed, conform to decree of the Lords of Council and Session dated and extracted , in the register of the county of .

In connection with these last two cases, reference is made to sec. 3 of the Consolidation Act, which enacts that—

All codicils, deeds of nomination, and other writings annexed to or endorsed on deeds or conveyances, or bearing reference to deeds or conveyances separately granted, and decrees of declarator naming or appointing persons to exercise or enjoy the rights or powers conferred by such deeds or conveyances, shall be deemed and taken, for the purposes of this Act, to be parts of the deeds or conveyances to which they severally relate, and shall have the same effect in all respects, as to the persons so named and appointed, as if they had been named and appointed in the deeds or conveyances themselves.

In connection with such conveyances as to the heir of A., or to the heir of a marriage, or to the children of a certain person or marriage, the

first thing is to determine who are the favoured persons and at what date they take a vested interest. As no one can have an heir until he himself is dead, a conveyance to the heir of A. vests no beneficial right until A.'s death (*Ferguson*, 1875, 2 R. 627). This will be so whether A. has or has not the liferent. The heir of a marriage is ascertained on, but not before, the dissolution of the marriage (*Maule*, 1876, 3 R. 831). A conveyance to children, on the other hand, if in unqualified terms, will give a vested beneficial right to each child at birth, subject to partial defeasance in the event of future children of the class coming into existence, so as to allow these also to take an equal share (*Douglas*, 1870, 8 M. 374).

Considerable confusion has been introduced into this branch of the law with reference to the proper nature of the title vested in the persons called, the function of a service in connection therewith, the invention of what is called a fiduciary fee, and its nature and duration. Thus it has been seen that Bell (*Prin.* 876) suggested that, under a conveyance to the heir of A. such heir might be infeft, provided his identity were established by a service produced to the notary, and deduced in the sasine. This is correct, but it is apt to produce a wrong impression. From the fact that the most natural way to establish heirship is a service, it is natural to infer that a service is a necessary step in the title. But what kind of service? The proper function of a service is to transmit a right, not to prove a fact. But under a disposition by X. to the heir of A., it is manifest that a service as heir of A. can transmit no right from A., for he never had any. At no time, therefore, could there have been required a special service to A. in the particular lands; it must have been only a general service, even when such a service was useless to transmit any right from an infeft ancestor. What was and is wanted is not something to transmit the right from anyone else to A.'s heir: it is transmitted already under the conveyance; and what is wanted is simply evidence that he is the person he claims to be. Bell's *dictum* may, however, be quite correct, even in the sense that, in the case of a sasine as an *actus legitimus*, nothing less than a service as heir of A. would entitle the notary to recognise anyone as possessing that character. But, however that may have been, what is required now is simply evidence, which may be a service, or a declarator, or whatever may in the particular case be considered sufficient, whether it be judicial or extrajudicial. And even this arises on the question of *right*; the *title* may be completed on the bare assertion of heirship in the warrant of registration (*Hutchison*, 1872, 11 M. 229; Hendry, *Styles*, 155).

Another element is introduced when the conveyance is "to A. in liferent for his liferent use only, and his heir (or children) in fee." Here the law has invented the fiction of a fiduciary fee in A. for the ultimate beneficial liars. This fiduciary fee was at one time treated as a reality in a trust capacity, and it was laid down that the proper way to complete a title to the beneficial fee was by disposition from, or service to, the fiduciary liar (Bell, *Conveg.* 1105). It now appears, however, that that is unnecessary, and, further, it is thought that it would be insufficient (*Maule*, 1876, 3 R. 831). In that case the destination was to the spouses and the survivor in liferent only, and to the heirs-male, whom failing, the heirs-female of the marriage in fee. The marriage was dissolved by the death of the husband. The Lord President (Inglis) said: "The liferenters must sustain a fiduciary fee for the heirs of the marriage, and therefore *during the subsistence of the marriage* there was such a fee in the *spouses*. At the moment of the dissolution of the marriage, the heir of the marriage was ascertained, the right of the real liar at that moment emerged, and the fiduciary fee came to an end.

The survivor of the spouses had therefore no fiduciary fee." Now this makes it clear that a conveyance from the surviving spouse would not have given a title, and it seems equally clear that a service to the predeceasing spouse would have carried nothing. At most, such a service could have taken up only one-half *pro indiviso*,—for the fiduciary fee, while it lasted, was in "the spouses,"—and there would have been no corresponding method of taking up the other half. But the judgment makes it quite plain that there was no fiduciary fee or fiar at all at the only time when a service or conveyance might have been wanted, viz. after the beneficial fiar was ascertained. The judgment in no way turns on the specialty of the joint and survivorship liferent or the husband's predecease; and the result is not only to demonstrate that *de plano* infeftment is open to the beneficial fiar, but also to throw the gravest doubt on any title made up through the medium of a "fiduciary fiar."

So far it has been assumed that the beneficial fiar is in life at the time when it is wished to take infeftment. But it is manifest that it may often be desired to protect the rights of future possible fiars long before they are in existence. For instance, in the case of a provision by a husband in his marriage-contract, in the form of a conveyance of property direct to himself in liferent only and the heir of the marriage in fee, if the right is not somehow completed at once, the property will be exposed to the husband's creditors, for he then remains undivested fiar under his prior infeftment. Nor will infeftment under the marriage-contract in favour of the husband, in liferent only, be sufficient to protect the fee, for he still remains undivested *quoad* the fee (*Houldditch*, 1847, 9 D. 1204). The solution lies in the feudalising of the new fiduciary fee which the law invents in the husband's person for behoof of the heir of the marriage. Such infeftment is validly taken by recording the deed with a warrant of registration in such terms as—

> Register on behalf of *A.* in liferent, for his liferent use only, and for behoof of the heir of the marriage in fee.

While this secures the end aimed at (*Barstow*, 1858, 20 D. 612), it has given rise to a doubt whether, notwithstanding *Maule's* case, it will thereafter be open to the heir of the marriage to take infeftment *de plano* in the beneficial fee. "Where infeftment (*i.e.* in the fiduciary fee) has been so taken, the precept is exhausted, and there seems to be no mode of making up the heir's title unless by adopting one of those above mentioned," *i.e.* service to or conveyance by the fiduciary fiar (Dr. Mowbray in Hendry's Styles, p. 155). But it is submitted that this doubt is without foundation. It is common ground that the heir is a disponee. It follows that there can be no "exhaustion of the precept" till the heir is infeft. But it is also common ground that he has not been infeft, for his infeftment is the object in view. In this connection it will be observed that the warrant above suggested directs registration on behalf of A. (1) in liferent only, and (2) for behoof of the heir in fee. An alternative form of expression would be on behalf of (1) A. in liferent only, and (2) the heir in fee. The latter form certainly looks like an infeftment in the heir's person, but that cannot be; for at the time supposed there is no heir, and there can be no infeftment in a person unborn or unascertained. The true view is that the conveyance contains three branches, viz. (1) the liferent, (2) the ultimate beneficial fee, and (3) a temporary fiduciary fee, which, though not expressed in the instrument, the law constructs out of the two other elements. It follows that, until all three are feudalised, the precept is not

exhausted; and therefore it is submitted that the rule of *Maule's* case applies whether or not the fiduciary fee may have been feudalised. As between the alternative forms of warrant in such cases in order to feudalise the fiduciary fee, the first form—in favour of the liferenter for behoof of the heirs—was objected to in *Barstow's* case, but it was held good; and Hope, L. J. C., observed: "I am not sure that this is not the best and the most logical and consistent way of executing such a precept." It is submitted that this is the better view, for it avoids the apparent nullity of taking infeftment in favour of non-existent persons; it leaves untouched that part of the grant which will afterwards be feudalised when these persons come into existence and take the right; and it expressly recognises that what is meantime being feudalised is something which is not within the four corners of the grant *per expressum*, but is deduced therefrom by legal construction.

It is assumed that these rules will operate whoever is liferenter under the grant, whether the parent of the fiar or not. But suppose there is no liferenter at all under the grant, as would be the case in a direct testamentary conveyance to the heirs of A. Again, even if there is a liferenter, is he bound to accept the fiduciary fee and to allow it to be feudalised? and might that be done by those interested on behalf of the fiars without his consent or any communication with him? If any such difficulties arose, it is thought that the Court would make an appointment, in exercise of the *nobile officium* if necessary, under which infeftment could be taken so as to protect the fee.

(3) Conditional Disponees. These are of two classes, usually distinguished as proper and constructive conditional disponees or institutes. In a testamentary conveyance "to A., if I shall die without heirs of my body," A. is a proper conditional disponee; whereas, in a similar conveyance "to the heirs of my body, whom failing, to A.," A. will be a constructive conditional disponee, if the testator leaves no descendants. The difference is, that under the former grant A. is the first fiar called under the deed; if the granter leaves an heir of his body, such heir takes the estate, but not under the deed, which contains no grant in his favour; and in that case A. can never take the estate, even though the heirs of the granter's body should subsequently become extinct, for he is either immediate disponee or nothing. Under the other grant—"to the heirs of my body, whom failing, to A"—A. is called only after the heirs of the body: if such an heir survive the granter, the heir takes the estate, and takes it under the deed; but even then, if such heirs become extinct, and if the destination is not altered, A. will take the estate as substitute heir of provision under the deed. If, however, under such a destination, the granter should leave no heir of his body, A. then steps forward in the order of the grant and takes the estate as disponee or institute. A simple instance is a testamentary conveyance to A., whom failing, to B. If A. predecease the testator, B. takes the estate as immediate disponee. Similarly, if the grant were to A., whom failing, to B., whom failing, to C., and if A. and B. both predecease the testator, C. takes the estate as immediate disponee. Put shortly, every substitution implies a conditional institution in the event of the original immediate disponee and prior substitute or substitutes, if any, failing to take a vested right. At one time very conflicting views were held as to the manner in which, in such cases, the person who took the estate ought to complete his title; and in the result it came to this, that if he wished to be certain that his title was duly made up, he required to serve as heir both to the granter of the conveyance and also to the person or persons, one or more, standing

prior to himself in the destination (Bell, *Convey.* 1106). But these doubts were finally cleared away and the whole matter placed firm and clear on principle in the case of *Hutchison* (1872, 11 M. 229). Ld. Pres. Inglis there delivered two *dicta* as the judgment of the Court. The one was: "When by a *mortis causa* undelivered disposition the conveyance is directly to A. *nominatim*, whom failing, to B., and A. predeceases the granter, B. takes as conditional institute, and not as heir either of A. or of the granter." The other *dictum* was: "When one, by *mortis causa* conveyance in the ordinary form, dispones to the heirs of his body, or the heirs-male of his body, whom failing, to a person named, the person so named (there being no heirs of his (the granter's) body then existing) is conditional institute; and if no heirs of the body of the granter come into existence, or, existing, predecease him, the condition is purified, and the person named is, on the death of the granter, without qualification or condition, disponee, and as such is entitled to use the executory clauses of the disposition for the purpose of feudalising his right as disponee without service or declarator." The last clause deals directly with the completion of title, and shows that it is sufficient in such cases to record the disposition (assuming that it contains a special conveyance) with a warrant of registration, and that without any reference to evidence of the facts on which the title depends. The warrant may run in such terms as these—

Register on behalf of *A.* [*designation*], as disponee and institute under the foregoing deed,—the granter thereof having died without heirs of his body,—in the register of the county of .

Specification of the Property.

To allow of a valid sasine being *de plano* expede, it was necessary that the property should be identified in the deed containing the precept, or at least that deed required to contain such a description as, coupled with the possession, resulted in identification: and the same condition must still be fulfilled before there can be infeftment by direct registration. But even if the grant was in such general terms as "all my heritable property in Scotland," and contained a precept of sasine, it always was a sufficient warrant to sustain a sasine, but only on condition that there should be produced to the notary, and set out in the sasine, the granter's infeftment in the particular lands, so as to bring them within the general description in the grant (*Graham*, 1753, M. 49; *Belches*, 21 Jan. 1815, F. C.). The same distinction still holds. Such a general description would make a good enough disposition, but infeftment could not be taken *de plano* by recording it. There would require to be a notarial instrument setting out the granter's infeftment. This is the ordinary case of a general conveyance contained in a will. Again, assuming that a man had only one property in Scotland, a conveyance of "my landed estate in Scotland" clearly would not sustain infeftment, except on production of his infeftment and on it being set out in the notarial instrument. In such a case, however, there appears no reason to doubt that the notary would be entitled to expede the instrument on the statement made to him that the granter's infeftment and the conveyance by him referred to the same property, without requiring any evidence of that fact. But that, of course, would not prevent questions being raised as to whether, as matter of fact, there was such identity. It is recommended that in such cases the notarial instrument should expressly set forth the representation of identity, which may be in such words as: "Which landed property so conveyed, it was represented to me, was the lands and others in which the said X. was infeft as hereinbefore set forth."

Similar cases arise where a will, for instance, contains a bequest of heritage described in popular terms, such as "my house, 1 King Street, Edinburgh." Under such a bequest doubt might arise on the question of the identity of the subject of bequest with the property described in the testator's infeftment, either on account of the indefinite description in the infeftment or on account of intervening changes. These are matters on which, of course, third parties would require to be satisfied; but the point is, that there would be a good infeftment without production of evidence of identity, whether the title were made up by direct registration (as such a description would warrant) or by a notarial instrument on the will alone, or on it and the testator's infeftment. It is again recommended, however, that any notarial instrument should set out an allegation of identity.

Infeftment in Terms of Clause of Direction.

This was first introduced by the Titles Act, 1858, s. 3, which was re-enacted in the Consolidation Act, s. 12. The clause is inserted immediately before the testing clause. It may run in either of two forms—

> And I direct to be recorded in the Register of Sasines the part of this deed from its commencement to the words on the line of the page, and also the part [*specify each part in the same way*].

Or—

> And I direct the whole of this deed to be recorded in the Register of Sasines, with the exception of the part (*or parts, as the case may be, specifying the part or parts excepted as above*).

Even after such a clause has been inserted, it is optional on the part of the grantee to use it or not as he pleases. If he does not wish to use it, he simply writes an ordinary warrant on the deed, and gives it in to be recorded, in which case the whole deed is recorded in the usual way. If the benefit of the clause is to be taken, it is registered with a special warrant in the following form:—

> Register the above deed, in terms of the clause of direction therein contained, on behalf of *A. B.* [*designation*] in the register of the county of .

In that case the keeper of the register records (1) the parts directed, (2) the clause of direction itself, (3) the testing clause, and (4) the warrant of registration.

When a deed contains a clause of direction, the statute provides that, in any notarial instrument which may be expede thereon, no part or parts of the deed directed to be recorded shall be omitted from such instrument. It is clear that the words "directed to be recorded" occurring in this provision do not include the clause of direction or testing clause, assuming, that is, that the clause of direction has been framed in the first of the two forms given above. But if that clause has been framed in the second form, the case is different, for the clause itself in that case directs these clauses to be recorded; and, generally, if a notarial instrument is to be expede on a deed which contains a clause of direction framed on the plan of specified *exceptions*, great care will require to be taken in order not to infringe the enactment now under consideration. But even if in all respects correct, the result must needs be very awkward, and the practical advice is to avoid it altogether.

Infeftment on Transmitted Warrants.

As has been already stated, the rule is that no one who is not himself infeft can grant a conveyance on which, by itself alone, the grantee may

take infeftment. In other words, he can grant no warrant for infeftment at all: he can simply transmit the warrant which he himself holds from the person last infeft. The operation of this rule was seen more clearly in the days of precepts of sasine, for then the infeftment bore expressly to be given to C., by virtue of the precept of sasine granted by A., the proprietor last infeft, to B., and the assignation of such precept by B. to C. The corresponding case now is that of a conveyance being granted by an infeft proprietor, the grantee under which, however, for some reason or other, does not record it, but, without doing so, conveys to a third party; or there may be several such transmissions without any infeftment. The last grantee [illegible] wishes to complete his title, and the question is, How may he do so? There are three methods—

1. By notarial instrument alone. A notarial instrument may be expede and recorded in terms of Sched. J of the Consolidation Act (s. 23). The instrument will, in the first place, set out all the material parts, and particularly the full description, contained in the disposition granted by the proprietor last infeft, and then it will go on to set out the deed or deeds of transmission which have since been granted. This method is competent whatever may be the form of the deeds of transmission. In particular, it is enacted by sec. 29 of the 1874 Act, that it is no objection that the progress includes more than one general disposition, or that such general dispositions do not contain assignations to writs. The instrument is recorded by itself alone, with a warrant of registration on behalf of the proprietor, and the title is complete.

2. By recording both the disposition by the proprietor last infeft and a notarial instrument (Consolidation Act, s. 23). In this case the instrument is in a simpler form (Sched. N). The difference is, that as the disposition is also to be recorded, the instrument merely specifies it, and refers to "the lands of X. as therein described, and which disposition is to be recorded along with this instrument." It may sometimes be thought a difficulty to find a suitable phrase in which to name, without describing, the property. The series of unrecorded deeds is then set out, but they are not recorded. The only warrant is written on the disposition: there is no warrant on the notarial instrument. The warrant (Sched. H 2) runs—

> Register on behalf of *A. B.* [*design*] in the register of the county of along with notarial instrument docqueted with reference hereto.

The docquet on the instrument (Sched. N) runs—

> Docqueted with reference to warrant of registration on behalf of *A. B.* written on the said disposition.

Whoever signs the warrant will sign the docquet also. There is no direction to design the party in the docquet, and from the fact that the disposition is referred to simply as "the said disposition" (for of course it must have been specified in the instrument), but without any substantive specification in the docquet, the inference seems clear that as the designation of the party in the docquet is not ordered, it is not necessary. At the same time, it is recommended that the words "the said" should be introduced before the party's name; and if there are two persons of the same name mentioned in the instrument, it is further recommended that the proper designation be added, though, even in that case, it appears not to be necessary; for though there are two identical names in the instrument, there is no such ambiguity in the warrant of registration, and the reference

in the docquet is to "warrant of registration on behalf of A. B." Then, as regards the reference in the docquet to "the said disposition," if there are, as there very well may be, two or more dispositions specified in the instrument, it will be more creditable to add in the docquet such particulars of the deed as will remove all suggestion of ambiguity; though again this appears non-essential, for, in the first place, it is not directed, and in the second place it is expressly made clear *in gremio* "which disposition is to be recorded along with this instrument."

3. By recording all the deeds, *i.e.* the disposition by the proprietor last infeft and the transmission or transmissions thereof. This method is apparently available only if the assignations are in the forms, or substantially in the forms, prescribed by statute. The Consolidation Act gives two forms of assignations of unrecorded conveyances (Sched. M 1 and 2). The one is to be written as a separate deed, while the other is to be written on the disposition. In either case the operative part is a mere assignation of the unrecorded deed, not a disposition of the lands: there is, however, in the description of such disposition, a reference to the lands by name, not description: the title is deduced; and if what is transmitted is different in any respect from the grant contained in the unrecorded deed, "the nature of the right conveyed or assigned" is to be specified. This last point refers to the case of transmissions either limited as regards extent or qualified in their nature, *e.g.* a restriction to a liferent or in security. The disposition by the proprietor last infeft will bear a warrant ordering registration of that deed, and also of the assignation or assignations, which, if separate, will be referred to as "docqueted with reference hereto" (and in that case they will be docqueted accordingly); but if the assignations are endorsed upon the disposition, the warrant upon the latter will identify them as "the assignations hereon," and no docquets are in that case necessary. In no case is there any warrant on any of the assignations.

Sec. 22 of the Act provides that the effect of such recording is the same

> as if the lands contained in the assignation, or, if there be more than one, in the last assignation, had been disponed by the original deed or conveyance in favour of such assignee, and the deed or conveyance with the warrant of registration had been recorded in the manner hereinbefore provided, of the date of recording such deed or conveyance and assignation or assignations.

This clause is by no means perfect, for in view of the statutory form of assignation, it is not correct to speak of there being any "lands contained" therein: and, further, in declaring the effect of the infeftment, regard ought to have been had to qualifications in nature as well as in extent which may have been imposed in any of the assignations. But even so, the clause is more correct than the corresponding provision in sec. 23 with reference to the completion of such titles by either kind of notarial instrument (methods 1 and 2 above), which is that the effect, as regards the title of the person expeding the notarial instrument, is the same "as if the original deed or conveyance had been granted to himself," without recognition of any restriction in the transmissions as to either extent or nature. Both kinds of restriction may be exemplified in one deed, *e.g.* a disposition of two houses to A., in fee and absolute property, may by him be assigned to B., but only as regards one of the houses, and only in liferent, or in security (*Melvin*, 1843, 5 D. 1217).

Infeftment by Notarial Instrument.

Notarial instruments are used under two different sets of circumstances. The one case is where there is such a deed—say a special disposition by an

infeft proprietor—as might have been competently recorded *de plano*, but for some reason or other it is not desired to do so. The other case is where a deed by an uninfeft proprietor forms a link in the chain on which infeftment is to be taken, or where, though the granter has been infeft, the grant is in general terms, without any specific description of the property. The main difference is that in the former case it is unnecessary to set out anything but the immediate conveyance, while in the latter case one must go back to the last infeftment and set it forth. See Scheds. J and L of Consolidation Act.

Notarial instruments in irredeemable rights were first introduced in 1858, to meet the special cases of deeds containing other lands, or other interests in the same lands, or trust purposes; and it is in these cases, including therein all cases of general dispositions, that they are still most useful. But there is now no case in which infeftment may not be taken by notarial instrument, unless it be when the warrant is a Crown writ of *clare constat* or Chancery precept, as to which see sec. 86 of the Consolidation Act, which appears to provide that the writ or precept must itself be recorded.

Sec. 46 of the 1874 Act affords what may in a sense be called an instance of a title being completed by notarial instrument without any warrant. The case is that of a will containing direct bequests of heritage to legatees, and also naming "trustees *or* executors," but without any conveyance in their favour. Under such circumstances two titles may be completed: (1) by the trustees or executors, "as if the bequest had been expressed to be in favour of them as such trustees or executors," and as such they must of course "hold, administer, and dispose of such lands for the purposes of such" will; (2) by the legatee, if "the completion of such title shall not be at variance with the purposes or directions" of the will. Under such circumstances the proper course, from a purchaser's point of view, is to have one or other title completed, and a conveyance by the trustees *and* the legatee. From which it follows that the most satisfactory method of completing the title, when there is no immediate intention of selling, is by a notarial instrument in favour of the trustees, and a disposition by them to the legatee.

Infeftment *ex propriis manibus*.

For the historical connection, reference is made to the article on Sasine *Propriis manibus*.

So far as this form of infeftment survives, it rests upon sec. 15 of the Consolidation Act, 1868, which provides—

> And where it is desired to give investiture *propriis manibus*, it shall be competent for the person in whose favour the conveyance or deed has been or shall be granted or conceived, to record the conveyance or deed itself in the Register of Sasines applicable to the lands therein contained, with a warrant of registration thereon in, or as nearly as may be in, the form of No. 3 of Schedule H hereto annexed, signed by such person; and such conveyance or deed being so recorded, along with such warrant, shall have the same legal force and effect in all respects as if the conveyance or deed so recorded had been followed by an instrument of sasine, or of resignation and sasine, *propriis manibus*, expede in favour of the wife of such person and signed by such person, and recorded at the date of recording the said conveyance or deed, according to the law and practice heretofore in force.

The form of warrant is—

> Register on behalf of *A. B.* [*insert designation*] in the register of the county of and also *ex propriis manibus* on behalf of *L.*, wife of the said *A. B.*, in liferent (*or as the case may be*). (Signed) *A. B.*

It will be observed that the warrant must be signed by the husband himself, and not by an agent. The expression "in liferent" occurs in the form of warrant, but it will be noted that the statute says nothing about liferent; and the words "or as the case may be," which occur in the schedule, express a power of variation. For instance, it might be "in liferent after his death, in the event of her surviving him" (which indeed is most probably what would usually be intended), or it might be "in security of an annuity of £50 for her lifetime after his death, in the event of her surviving him": and in either case there might be a restriction to viduity. But could the warrant be altered so as to import a fee to the wife, whether immediate and absolute, or postponed and contingent on her surviving her husband? And if, under such circumstances, feudal objections resulted in the wife's infeftment being held null, would the warrant hold good as a destination to her according to its terms? It will of course be understood that such procedure is mentioned only to be condemned. There ought always to be either a short separate deed in favour of the wife, or—even better, as being cheaper—the interests of both husband and wife may be incorporated in the one deed, which will be recorded with an ordinary warrant for their respective rights and interests. In point of fact, it appears that infeftment *propriis manibus* to any effect is now very little used. If in any case it is to be resorted to, care should be taken to make the nature of the wife's right perfectly clear in the warrant, for the bare expression "in liferent" which occurs in the statutory warrant may certainly be ambiguous.

Constructive Infeftment.

There are certain cases in which, with the view of avoiding expense, statutory authority has been interponed in a general form for the sake of supplying the effect of infeftment, or rather, more correctly, infeftment having been once taken, the enactments referred to prevent its effect being lost by reason of the death or other failure of the persons originally infeft. In short, one benefit of an incorporation is given to an unincorporated body, viz. perpetual succession.

1. Consolidation Act, 1868 (s. 26). If the property of any religious or educational body be taken in name of office-bearers, or of "trustees appointed or to be from time to time appointed, or of any party or parties named in such conveyance or lease, in trust for" the body and such title be feudalised, the result is to give a feudalised title to their successors in office for the time "and that without any transmission or renewal of the investiture whatsoever, anything in such conveyance or lease contained to the contrary notwithstanding."

2. 1874 Act, s. 45. When, under a trust title to heritable property, the office of trustee is conferred upon "the holder of any place or office or proprietor of any estate and his successors therein," and the title has been feudalised, "any person subsequently becoming a trustee by appointment or succession to the place or office or estate," has "a valid and complete title by infeftment . . . without the necessity of any deed of conveyance or other procedure."

It will be observed that the section of the 1874 Act is both wider and narrower than the section of the 1868 Act, which, of course, still remains in force. The later enactment is not limited to religious and educational bodies, as the 1868 Act is; but, on the other hand, it does not include, as the 1868 Act does, trustees "to be from time to time appointed," merely as trustees. Further, it will be observed that the provision of the 1868 Act is to have effect notwithstanding anything to the contrary contained in the

deed, whereas it is a necessary condition of the application of the 1874 Act that there shall be an express destination to successors.

The Operation of Accretion.

While the rule is that, to warrant infeftment of a disponee, the disponer must himself be infeft, it is not essential that the latter's infeftment be the earlier in date. His subsequent infeftment will operate *retro* to validate his grant, and the grantee's infeftment thereon. This is on the principle of Accretion (*q.v.*). It is a principle which ought never, under ordinary circumstances, to be invoked; for the title ought to be complete before any transaction is entered into. But there is a class of cases in which it is impossible for the granter to be infeft at the time, *e.g.* heirs apparent and heirs presumptive under entails, and persons presumptively entitled under such a destination as "to A. in liferent only, and his heir in fee." In transactions with the future heir of entail during the lifetime of the heir in possession, or with the heir under the fee-simple destination during the subsistence of the liferent, the precedure is: (1) to take a disposition with obligation and warrant for completion of title, and to record such disposition at once; and (2) to use inhibition against the granter in terms of a special consent inserted in the deed, and in virtue of the exception contained in sec. 157 of the Consolidation Act, 1868. If the granter should succeed, and if his title be then completed, accretion will perfect the creditor's security; while even if there should be a depending sequestration when the succession opens, the inhibition (duly renewed, if necessary) will give a preference, except as regards debts and obligations prior in date to the first recording of the inhibition; these last being a risk which apparently cannot be perfectly guarded against. See, further, Inhibition.

Warrants of Registration.

Throughout this article constant reference has been made to warrants of registration. Without such a warrant no deed can now be recorded in the Register of Sasines. The case of assignations and notarial instruments recorded without separate warrants in the completion of title under transmissions of unfeudalised conveyances (p. 103–4) are not proper exceptions, for the warrants in these cases expressly order the recording of both or all the documents. The case of the constitution of real burdens comes nearer a true exception; for while the deed of conveyance in which the burden is created cannot be recorded without a warrant of registration on behalf of the disponee, his infeftment *eo ipso* completes the right of the person entitled to the real burden, without any warrant on the latter's behalf, and whether he be the disponer or a third party. This, however, holds only in the case of a mere burden, whether by reservation or constitution; if an active right is to be conferred, it can be completed only by aid of a warrant on behalf of the creditor. This distinction is exemplified in the former and present forms of contracts of ground-annual (Bell, *Convey.* 1156).

Warrants of registration were first introduced in 1858, when sasines were superseded. Sasines never bore such warrants; nor did security writs, though allowed to be recorded direct under the Heritable Securities Acts of 1845 and 1847; nor did notarial instruments after 1858 and down to 1868. But by the Lands Registers Act, 1868, and the Consolidation Act, 1868 (s. 141), it was provided that all writs must bear warrants of registration, so that even an instrument of sasine, if now used, would require to have such a warrant. One reason of this was the arrangement of the Register of Sasines in divisions corresponding to the counties, the other was

that it should be made clear whose interest under the deed was being feudalised by the registration. There must be no real divergence from the forms laid down in the statutory schedules. For instance, though the party is designed in the deed itself, it is fatal if the warrant refers to him simply as "the said A. B.," instead of designing him substantively (*Johnston*, 1865, 3 M. 954). This is on the ground that those who take advantage of improved legislative machinery must comply with the statutory conditions. But in practice this is not held to require that the capacity in which the party acts shall be set out at length in the warrant, much less that the deed or deeds under which he is appointed or acts should be specified. Thus trustees may in the conveyance be described as the testamentary trustees of a certain person named and designed, and there may be a long specification of the will and relative codicils and deeds of assumption: but it is in practice held to be quite sufficient that the warrant shall name and design the trustees, and refer to them simply "as trustees within mentioned." The warrant may be signed by the party or by his agent, "and in the latter case the warrant may be signed either by an individual agent or by the signature of any firm of which such agent may be a partner" (Consolidation Act, s. 141). This is not very happily expressed to cover the case of an individual agent carrying on business by himself, but under a firm name. It is thought, however, that that case is fairly within the section; but if any doubt should be entertained, there is no reason why such agent, though practising under a firm-name, should not sign all warrants with his own personal signature.

The mere fact that a deed is regularly and duly engrossed in the Register of Sasines does not necessarily complete all the rights conferred by the deed. Thus, if a disposition to A. and B. is recorded with a warrant on behalf of A. only, B.'s right remains personal and unfeudalised. In the case of such a deed, there may either be separate warrants on behalf of A. and B. respectively, or one warrant on behalf of both for their respective rights and interests. But if, in point of fact, a deed is on record, though with a warrant which does not complete one of the rights thereunder, it would be difficult for a third party subsequently to seek to ignore such right, or to obtain a preference, on the ground that he dealt on the faith of the records.

If it is necessary to record a deed in the divisions of the register applicable to more than one county, one warrant is sufficient, naming both or all the counties in which the deed is to be recorded. In that case the deed is entered in the presentment and minute books of both or all the counties, but it is recorded at length in the register volumes of the first-named county only, and by memorandum merely in the other county or counties. Even if, on the first registration of such a deed, there should be an omission to refer to one of the counties in the warrant, the deed may again be presented with a new warrant referring to such county, and then the registration therein is by memorandum only (Land Registers Act, 1868, ss. 3, 5)

Informer.—See CONFIDENTIAL COMMUNICATION: WITNESS.

Inhabited House Duty.

(1) *The Course of Legislation.*
(2) *Administration of Acts.*
(3) *The Subject and Rules of Charge.*
(4) *Exemptions.*
(5) *Change of Occupancy; Non-Occupancy; Caretaker.*

(6) *Persons Chargeable; the Occupier.*
(7) *Rates of Duty.*
(8) *The Assessment; Stated Cases.*
(9) *Collection; Recovery; Certificate of Removal; Receipt and Account.*
(10) *Annual Value; Ascertainment of.*

(1) *The Course of Legislation.*—The duty was first imposed in 1778 by the Act 18 Geo. III. c. 26; it was recast in the following year (19 Geo. III. c. 59); in 1798 it and the window tax were combined in one enactment (38 Geo. III. c. 40); and in 1803 the Act 43 Geo. III. c. 161 embodied in a set of rules of charge the previously existing law, with certain additions. In 1808 these rules were re-enacted by the Act 48 Geo. III. c. 55. The law was modified in 1817 (57 Geo. III. c. 25), in 1824 (5 Geo. III. c. 44), in 1825 (6 Geo. IV. c. 7), in 1832 (2 & 3 Will. IV. c. 113), and in 1833 (3 & 4 Will. IV. c. 39). In 1834 the tax was repealed (4 & 5 Will. IV. c. 19). In 1851 it was revived by an Act which abolished the window tax (14 & 15 Vict. c. 36). Since 1851 the law has been modified by 30 & 31 Vict. c. 90; 32 & 33 Vict. c. 14; 34 & 35 Vict. c. 103; 41 & 42 Vict. c. 15; 43 & 44 Vict. c. 19; 44 & 45 Vict. c. 12; 53 & 54 Vict. c. 8; and 54 & 55 Vict. c. 25.

The duty as at present leviable rests upon the Act of 1851, the Acts which it incorporates, and the Acts by which it is amended. This body of law, in its application to Scotland, is the subject of this article.

(2) *Administration of the Acts.*—The duties are placed under the management of the Commissioners of Inland Revenue (14 & 15 Vict. c. 36, s. 2). The Taxes Management Act, 1880 (43 & 44 Vict. c. 19), enacts that the local commissioners for this tax shall be the general commissioners (s. 27 (1)). To Part III. and sec. 81 of that enactment reference may be made for the provisions affecting the commissioners, and regulating the appointment of their clerk, the surveyors, and the collectors, and to Part VIII. as to proceedings against collectors (see also 52 & 53 Vict. c. 42, ss. 11–14). See INCOME TAX.

(3) *The Subject and Rules of Charge.*—(*a*) *What is an Inhabited Dwelling-house?*—The first section of the Act 14 & 15 Vict. c. 36 provides that "there shall be assessed, levied, collected, and paid into and for the use of Her Majesty, upon inhabited dwelling-houses in and throughout Great Britain, the several duties set forth in the schedule to this Act annexed, payable according to the annual value of such dwelling-houses." The subject of charge is "the inhabited dwelling-house . . . with the household and other offices, yards, and gardens therewith occupied" (14 & 15 Vict. c. 36, Schedule). Still, the tax includes buildings which are not dwelling-houses in the ordinary sense of the term. "The duty is laid upon inhabited dwelling-houses; but it must be observed that, according to the construction put upon these words in the Statute itself" (48 Geo. III. c. 55), "they comprehend not merely houses in which people live,—that is to say, in which they eat and sleep,—but also houses which are occupied in different ways, although nobody eats or sleeps in them at all" (per Ld. Pres. Inglis in *Scottish Widows' Fund Society*, 1880, 7 R. 491; see his observations in *Glasgow Coal Exchange Co.*, 1879, 6 R. 850). In other words, a house, "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" (per Ld. Pres. Inglis in *Corporation of Glasgow*, 1880, 8 R. 17). In the case last cited, and in a recent case (*Trs. of the Free Church of Scotland*, 1897, 34 S. L. R. 374), it was contended unsuccessfully that these views were erroneous, and that effect should be given to the English view (*Riley*, L. R. 4 Ex. D.

100, per Kelly, C. B.; *London Library*, 62 L. T. R. 466; and *Clifton College*, L. R. [1896] 1 Q. B. 432; but see *Rusby*, L. R. 10 Ex. 322; *Chartered Bank of India*, L. R. 3 Ex. D. 116; and *Riley*, *ut supra*, per Pollock, B.), that a house is not an inhabited dwelling-house in the sense of the Acts unless someone sleeps there. It is to be observed, however, that in the latest of the Scots cases the subjects assessed fell under Rule V. (see (*c*) below).

(*b*) *Household Offices; Gardens; Curtilage.*—The second rule of Sched. B of 48 Geo. III. c. 55, provides that "every coach-house, stable, brewhouse, washhouse, laundry, wood-house, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure grounds, belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house; provided no more than one acre of such gardens and pleasure grounds shall in any case be so valued." This rule stands unaffected by subsequent legislation (*Douglas*, 1879, 7 R. 229). Observe that market gardens and nursery grounds occupied by a market gardener or nurseryman *bonâ fide* for the sale of the produce thereof, in the way of his trade or business, are not to be included in the valuation of houses (14 & 15 Vict. c. 36, s. 3). It has been held that stables and dwelling-house, occupied together, and for one combined purpose, form one subject of assessment, although the stables are let at a separate rent, and are separated from the dwelling-house by a court or yard, or even by a passage subject to a public right of way (*Douglas*, *ut supra*; *Smith*, 1892, 19 R. 405; cf. *Cheape*, 1889, 16 R. 144; *Lambton*, L. R. [1895] 2 Q. B. 233; as to the question whether school buildings, other than the houses in which master and boys reside, fall within this rule, see *Clifton College*, L. R. [1896] 1 Q. B. 432; *Charterhouse School*, L. R. [1896] 1 Q. B. 437). Decisions will be found (in the *Assessed Tax Cases, Scotland*; see Rankine, *Landownership*, 733) in which house and offices have been treated as one assessable subject although upon different feus (1063), separated by an interval of several hundred yards (608, 664), held under different agreements (1099), of different landlords (*English Tax Appeal Cases*, 2350, 2787). It is otherwise in the case of farm buildings (*Ass. Tax Cases, Scotland*, 1062, 1086).

(*c*) *Shops and Warehouses; Caretaker; Business Premises.*—Rule III. provides that "all shops and warehouses" (see (*b*) above) "which are attached to the dwelling-house, or have any communication therewith, shall in charging the said duties be valued together with the dwelling-house, and the household and other offices aforesaid thereunto belonging; (except such warehouses and buildings upon or near adjoining to wharfs which are occupied by persons who carry on the business of wharfingers, and who have dwelling-houses upon the said wharfs for the residence of themselves or servants employed upon the said wharfs.) And also except such warehouses as are distinct and separate buildings, and not parts or parcels of such dwelling-houses, or the shops attached thereto, but employed solely for the purpose of lodging goods, wares, and merchandise, or for carrying on some manufacture; (notwithstanding the same may adjoin to or have communication with the dwelling-house or shop.") As to the second exemption, see *in re British and Foreign Bible Society*, 1875, 1 T. C. 113. The words "which are attached to the dwelling-house or have any communication therewith" are to be read disjunctively; and, accordingly, physical attachment, although there be not internal communication, is sufficient to attract the charge (*Russell*, 1877, 15 S. L. R. 270; *Salmond*, *ib.*; *Union Bank of Scotland*, 1878, 5 R. 598; *Commercial Bank of Scotland*, 1879, 1 T. C. 222; *Cowan & Strachan*, 1880, 7 R. 491; *British Linen Co. Bank*, 1892, 3 T. C. 198).

This principle was applied in the case of a tenement of four flats, of which the ground, first, and third were occupied by a firm as business premises, and the second as a dwelling-house by one of their salesmen (*Cowan & Strachan, ut supra*. See also *Glasgow and South-Western Railway Co.*, 1880, 7 R. 1161; *Russell*, 1881, 9 R. 261). It was held, however, that the principle did not apply where the occupier of the business premises is not the occupier of the dwelling-house (*Chapman*, L. R. 7 Q. B. D. 136). Nor is it applicable to a case falling under the provisions of 41 & 42 Vict. c. 15, s. 13 (1) (see (*c*) below).

The effect of the Acts 57 Geo. III. c. 25, s. 1, and 5 Geo. IV. c. 44, s. 4, as amended by 30 & 31 Vict. c. 90, s. 25, was to free from charge every house, formerly occupied as a dwelling-house, when occupied solely in the day-time for trade or professional purposes, by which the occupier seeks a livelihood or profit. This exemption was not to extend to chambers in the Inns of Court or to any college or hall in the Universities of Oxford or Cambridge if they were "severally in the tenure or occupation of any person or persons" (5 Geo. IV. c. 44, s. 4; see 48 Geo. III. c. 55, Sched. B, Rule IV.); nor does it apply save to whole tenements or to parts of tenements belonging to different owners, and, as such, separately assessed (*Glasgow and South-Western Railway Co.* and *Russell, ut supra*). The Act 57 Geo. III. c. 25, s. 4, provided that mills and places of manufacture, not attached to or adjoining or communicating internally with any dwelling-house, were not to be made taxable by the residence therein at night of a servant licensed by the commissioners to guard the premises. This provision was extended by the Act 6 Geo. IV. s. 7 to all the cases mentioned in the Acts 57 Geo. III. c. 25, and 5 Geo. IV. c. 44, referred to above. The Act 32 & 33 Vict. c. 14, s. 11, exempted premises occupied for the purposes of trade only (see *Edinburgh Life Assur. Co.*, 1875, 2 R. 394), warehouses, shops, and counting-houses, although a person dwelt therein for the protection thereof. The Act 41 & 42 Vict. c. 15, s. 13 (2), provides 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 said 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 house or tenement for the protection thereof." Lastly, the Act 44 & 45 Vict. c. 12, s. 24, provides that the term "servant" in the Act last cited "shall be deemed to mean and include 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." The provision of 41 & 42 Vict. c. 15, s. 13 (2), was held not to apply to an attendant in a subscription library, who not only took care of the premises, but acted as a sort of sub-librarian (*London Library*, 62 L. T. R. 466); nor to a woman, with whom resided her son in independent employment as a clerk, a daughter, and a servant (*Weguelin*, L. R. 14 Q. B. D. 838); nor to a farm-servant occupying a farmhouse as the landlord's grieve (*Ainslie*, 1881, 1 T. C. 342); nor to a messenger whose duty it was not only to protect the buildings, but to perform various miscellaneous services (*Standard Life Assur. Co.*, 1894, 21 R. 820). The words "for the protection thereof," in the section last cited, apply to "servant" as well as to "other person"; and this construction is not modified by 44 & 45 Vict. c. 12, s. 24 (*ib.*). The question whether the exemption would cover a plurality of caretakers has

been treated as open (*Standard Life Assur. Co.*, per Ld. M'Laren; but see *Wegnelin, ut supra*, per Mathew, J.).

In order to bring a house or tenement within the exemption it is not necessary that it be let, but it is necessary that it belong to one proprietor (*Scottish Widows' Fund Society*, 1880, 7 R. 491; *Glasgow and South-Western Railway Co.*, 1880, 7 R. 1161; *contra*, *Commercial Bank of Scotland*, 1879, 1 T. C. 222, per Ld. (Ordinary) Curriehill). In the second place, it must be "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." Regard must be had to the primary purpose for which the premises are occupied; and if it be clear that in respect of their primary purpose they would be exempt, they are not chargeable because they are occasionally used for other purposes (*Glasgow Coal Exchange Co.*, 1879, 6 R. 850). The exemption does not apply to a hotel, although used entirely by guests and hotel servants, the landlord living elsewhere (*Douglas*, 1879, 7 R. 229: *Smith*, 1892, 19 R. 405); nor to buildings occupied for purposes of philosophical or scientific discussion (*Corporation of Glasgow*, 1880, 8 R. 17: *London Library*, 62 L. T. R. 466); nor to premises occupied in part for the business of someone other than the occupier (*Smiles*, 1889, 17 R. 151); nor to a house occupied by a large landed proprietor as an estate office (*Muat*, 1890, 17 R. 371).

It has already been observed that the exempting Acts 57 Geo. III. c. 25, s. 1, and 5 Geo. IV. c. 44, s. 4, as amended by 30 & 31 Vict. c. 90, s. 25, apply only to whole tenements or to parts of tenements belonging to different owners, and, as such, separately assessed (*Glasgow and South-Western Railway Co.*, 1880, 7 R. 1161; *Russell*, 1881, 9 R. 261). But by the Act 41 & 42 Vict. c. 15, s. 13 (1), the exemption is extended to the case of houses divided into different tenements (see (*c*) below).

(*d*) *Chambers.*—Rule IV. provides that "every chamber or apartment in any of the Inns of Court, or of Chancery, or in any college or hall in any of the universities of Great Britain, being severally in the tenure or occupation of any person or persons, shall be charged thereto as an entire house, and on the respective occupiers thereof" (see (6) below).

(*e*) *Halls; Offices.*—Rule V. provides that "every hall or office whatever belonging to any person or persons, or to any body 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, shall be subject to the duties hereby made payable as inhabited houses; and the person or persons, bodies politic or corporate, or company to whom the same shall belong, shall be charged as occupier or occupiers thereof" (see (*a*) above, and (6) below).

(*f*) *Composite Houses.*—Rule VI. provides that "where any house shall be let in different storeys, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only; and the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged to the said duties . . . " (see (6) below). Rule XIV. provides that "where any dwelling-house shall be divided into different tenements, being distinct properties" (*i.e.* the properties of distinct owners, *Mutual Tontine Westminster Chambers Association*, L. R. 1 Ex. D. 469, per Jessel, M. R.: *Scottish Widows' Fund Society*, 1880, 7 R. 491: *Glasgow and South-Western Railway Co.*, 1880, 7 R. 1161), every such tenement shall be subject to the same duties as if the same was an entire house,

which duty shall be paid by the occupiers thereof respectively" (see (6) below).

The exemption granted by the Acts Geo. III. c. 25, s. 1, and 5 Geo. IV. c. 44, s. 4, as amended by 30 & 31 Vict. c. 90, s. 25, and in respect of non-occupancy (see (5) below), was extended to the case provided for by Rule VI., by sec. 13 (1) of 41 & 42 Vict. c. 15, which is as follows: "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 chargeable 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 for the parish or place in which the house is situate, stating therein the facts; and after the receipt of such notice by the surveyor, the commissioners . . . shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed, if it has been a house comprising only the tenements other than such as are occupied as aforesaid, or are unoccupied." It does not apply, however, to an entire house belonging to, and entirely occupied by, one proprietor, but used for different purposes in its different parts (*Glasgow and South-Western Railway Co.*, 1880, 7 R. 1161); nor, it is thought, to a house, being one property, partly let and partly retained in the proprietor's hands (*Yorkshire Fire Office*, L. R. 6 Q. B. D. 557, 8 Q. B. D. 421; *Lord Walsingham*, 3 T. C. 247; *Hoddinott*, L. R. [1896] 1 Q. B. 169; see, however, *Chapman*, L. R. 7 Q. B. D. 136, per Hawkins, J., and *Russell*, 1891, 9 R. 261, per Ld. Pres. Inglis), or let as a *unum quid* to a tenant, who sublets part and occupies the rest (*Hoddinott*, *ut supra*).

The requirement of the enactment is that the house, "being one property, shall be divided into, and let in, different tenements." In the case of the *Yorkshire Fire Office* (*ut supra*), Jessel, M. R., explains the word "tenement" as follows: "Formerly houses were built each on one piece of ground, each house occupying a separate site. In modern times a practice has grown up of putting separate houses one above the other, so that they are all superimposed upon the same site or piece of ground. They are commonly called houses built in separate flats or in separate storeys; but for all legal purposes, and for all ordinary usage purposes, they are separate houses. Each house has a separate door, is separately let, is separately occupied, and has no connection with those above it or below it, except deriving support from the house instead of from the ground below." To a Scotsman the word at once suggests the mode in which houses are occupied in those large buildings where the different tenements are approached by a common stair (*Russell*, *ut supra*, per Ld. Pres. Inglis; see also *Scott*, 1841, 4 D. 292). The words of the enactment require that there be some physical division of the house so as to make separate portions of it, to be treated as separate tenements. The ordinary division of a house into different floors and different rooms is not sufficient: it must be so constructed that different portions of it may be used for the purposes of separate occupation (cf. *Yorkshire Fire Office*, *ut supra*, per Cotton, L. J.; *Chapman*, *ut supra*; *Russell*, *ut supra* (foll. in *Clerk*, 1885, 12 R. 1133); and *Hoddinott*, *ut supra*, with *Corke*, 1883, 10 R. 1128 (foll. in *Visbet*, 1884, 11 R. 1095)). If two tenements, structurally distinct —one being occupied solely for business, the other as a dwelling-house— are let for a *cumulo* rent to the same tenant, they being described separately in the lease, the exemption will apply (*Smiles*, 1886, 13 R. 730; see also

Allan, 1884, 21 S. L. R. 741); and the result is the same if the tenements be of such a character that, had there been a lease, they must have been separately described in it (*Allan*, 1889, 16 R. 557).

(4) *Exemptions.*—In addition to the exemptions already noted, the Act Geo. III. c. 55, Sched. B, relieves of duty: (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 of poor persons, . . . provided that an assessment shall be duly made in every such case, and the fact be truly returned in manner directed by this Act in other cases of exemption from the said duties, and the exemption be allowed by the commissioners . . . ." The latter exemption does not include the case of an hospital founded, but not maintained, by charity, and carried on at a profit by means of paying patients (*Needham*, L. R. 21 Q. B. D. 436); or of a self-supporting lunatic asylum founded by charity, governed gratuitously, and possessed of two mortifications, in respect of which two indigent lunatics were maintained at less than actual cost, the other inmates being private paying patients, and pauper lunatics, the cost of whose maintenance was defrayed by the District Lunacy Board (*Dundee Royal Lunatic Asylum*, 1895, 22 R. 784). The case is different where there is a substantial charitable endowment, paying patients being also taken at remunerative rates (*Cawse*, L. R. [1891] 1 Q. B. 585). Thus the applicability of the exemption does not depend, in such a case, upon whether the institution does or does not in any particular year receive from patients payments enabling it to pay its way. The question is, What is the character of the institution itself? (*ib.*, per Charles, J.); and its character is to be determined by looking not to its origin, but to its status at the time of assessment (*Charterhouse School*, L. R. 25 Q. B. D. 121). Buildings, in so far as they are necessary parts of institutions which fall under the exemption, are exempted when they are so situated within the grounds of the institution to which they belong as to be reasonably within it (*Congreve*, 33 L. J. M. C. per Blackburn, J.). Accordingly, a house within the precincts of an infirmary, wherein the medical superintendent is required to live, whether by Statute (*Jepson*, L. R. 1 Ex. D. 151), or by minute of the managers and by the exigencies of the hospital (*Fasson*, 1883, 10 R. 870), is exempted. As to a chaplain's house, see *Jepson* and *Fasson*, *ut supra*. As to "charity school," see *Southwell*, L. R. [1895] 2 Q. B. 487; *Charterhouse*, *ut supra*.

(5) *Change of Occupancy; Non-Occupancy; Caretaker.*—As administered in Scotland, the statutory rules (contained in 43 Geo. III. c. 161, s. 15; 48 Geo. III. c. 55, Scheds. A and B; 57 Geo. III. c. 25, s. 1; 6 Geo. IV. c. 7, ss. 2, 3; 2 & 3 Will. IV. c. 113, s. 3; 14 & 15 Vict. c. 36) have effect as follows: A house, unoccupied at the time of making the assessment, is entered in the assessment at the annual rent at which it might be let. If it come into occupation during the year of assessment, it is charged as from the commencement of the occupation. Where the occupier or tenant shall, whether at the determination of the lease or not, quit the house after assessment, the duty is discharged for the period during which the house shall be unoccupied. If a house be not built or completed for occupation at the time of assessment, and be occupied thereafter, the duty is charged only for that part of the year during which it was actually occupied. A house, wholly unfurnished at the time of assessment, *bonâ fide* quitted by the owner or tenant, is deemed an unoccupied house although committed to a person or servant as caretaker. In the case of *Ainslie* (*Assessed Tax Cases, Scotland*, 845) it was held, overruling previous cases, that a house furnished but unoccupied

during the year of assessment escaped the duty. In England, the practice is different (see *English Tax Appeal Cases*, 1563,—disregarded in *Ainslie's* case). See the observations of Ld. Pres. Inglis in *Corporation of Glasgow*, 1880, 8 R. 17, quoted above (3) (*a*); and note the terms of 48 Geo. III. c. 55, Exemption V. Where a person has occupied a house for the purposes exempted by the Acts 57 Geo. III. c. 25, and 5 Geo. IV. c. 44, as amended by 30 & 31 Vict. c. 90, s. 25 (see (3) (*c*) above), for a lesser period than the year of assessment, the commissioners may, on exemption being claimed as provided in those Acts, discharge the assessment.

(6) *Persons Chargeable; The Occupier.*—The duties are to be charged on the occupier (48 Geo. III. c. 55, Sched. B, Rule I.; see *Clifton College*, L. R. [1896] 1 Q. B. 432; *Charterhouse School*, L. R. [1896] 1 Q. B. 437). The landlord or owner is to be deemed the occupier where the house is let in different storeys, etc. (see (3) (*f*) above). But where the house is divided into different tenements, being distinct properties, each such tenement is chargeable as an entire house, and the duty is payable by the occupiers thereof respectively (see *ib.*). As to the case of chambers and halls or offices, see (3) (*d*) and (*e*) above. Where, by virtue of these rules, the duties are charged on the landlord or owner, and the landlord or owner does not reside in the parish or place in which the house is situate, or has not sufficient goods or chattels in the parish or place whereon the duties may be levied, or has not paid the duties, then the collector may demand the same from the tenant or occupier, and recover the duties from him as if they were charged upon him. Such tenant or occupier shall deduct, and the landlord or owner shall allow, the amount of the duties paid by the former from the rent payable to the latter (43 Geo. III. c. 161, s. 55; 48 Geo. III. c. 55, Sched. B, Rule VI.).

It is to be observed that the occupation of a lodger is that of his landlord—of a servant, that of his master (*Bent*, L. R. 3 Ex. D. 66; *Scottish Widows' Fund*, 1880, 7 R. 491; *Cheape*, 1888, 16 R. 144; *British Linen Co. Bank*, 1892, 3 T. C. 198; cf. *Russell*, 1888, 15 R. (H. L.) 51; *Tennant*, 1892, 19 R. (H. L.) 1). In the case of *The Commercial Bank of Scotland*, 1879, 1 T. C. 222, the bank was held to be occupier where its agent, with its consent, let the house granted to him by it to a third party.

(7) *Rates of Duty.*—The amount of the charge depends not only upon the annual value (see (10) below), but upon the purpose and manner of the use. Accordingly, where the dwelling-house, etc., is of an annual value not exceeding £40, the rate of duty is 2d. for every 20s. of annual value; where the value exceeds £40 and does not exceed £60, the rate is 4d.; and where the value exceeds £60, the rate is 6d. (14 & 15 Vict. c. 36, Schedule; 53 & 54 Vict. c. 8, s. 1); provided always that the 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 same dwelling-house, and in the front and on the ground or basement storey thereof" (14 & 15 Vict. c. 36, Schedule).

"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 liquors shall be exposed to sale, sold, drunk, or consumed, shall not be such shop or warehouse as aforesaid" (*ib.*);

"Shall be occupied by any person who shall carry on in the said dwelling-house the business of an hotel-keeper, or an inn-keeper or coffee-house keeper, although not licensed to sell therein by retail, beer, ale, wine, or other liquors . . ." (34 & 35 Vict. c. 103, s. 31; this enactment was held

to apply to a hydropathic establishment, *Strathearn Hydropathic Co.*, 1881, 8 R. 798);

"Shall be a farmhouse occupied by a tenant or farm-servant, and *bonâ fide* used for the purposes of husbandry only" (14 & 15 Vict. c. 36, Schedule). A farmhouse is regarded as entitled to this relaxation, although occupied by a person who combines with the calling of farmer some other calling (see *Assessed Tax Cases, Scotland*, 273, 288, 449, 452, 610, 611, 612, 1042: Rankine, *Landownership*, 731), unless the premises are used mainly otherwise than as a farmhouse (see *ib.*, 211, 286, 287, 330, 368, 450, 609, 643, 763, 1089; Rankine, *ib.*).

Where such dwelling-house shall not be occupied and used for any such purpose and in manner aforesaid, there shall be charged 3d. for every 20s. of the annual value thereof, where the annual value does not exceed £40, 6d. where it exceeds £40 but does not exceed £60, and 9d. where it exceeds £60 (14 & 15 Vict. c. 36, Schedule; 53 & 54 Vict. c. 8, s. 25).

Sec. 26 (1) of the Act last cited provides that where any such dwelling-house is occupied in any year by a person for the main purpose of letting furnished lodgings therein as a means of livelihood, such person may before 1 July register his name in a list of lodging-house keepers kept by the clerk to the general commissioners, and after such registration, and before 1 October, he may apply to the said commissioners for reduction of the rate of charge from 9d. to 6d., or for the further reduction of the reduced rate of 6d. to 4d., or of 3d. to 2d.; and on proof of the facts to the satisfaction of the commissioners, they shall reduce or amend the charge or amount accordingly.

Sec. 26 (2) of the same Act, as amended by the Act 54 & 55 Vict. c. 25, s. 4 (1), provides that where a house is originally built or adapted by additions or alterations, and used, for the sole purpose of providing separate dwellings, and the annual value of each dwelling in the house does not amount to £20, the house shall be discharged of liability to house tax on production of a certificate by the medical officer of health (see below) that the house is sanitary, and affords suitable accommodation for those inhabiting it; and sec. 4 (2) of 54 & 55 Vict. c. 25 provides that where a house so built or adapted is used, so far as it is used as a dwelling-house, for the sole purpose of providing separate dwellings of an annual value not exceeding £40 for each dwelling, then, on production of a like certificate, the house shall be discharged of liability in respect of any dwelling therein of an annual value below £20, and, *quoad* the rest of the house, the rate shall be reduced to 3d. for every 20s. of annual value. In Scotland, "medical officer of health" means a medical officer within the meaning of the Public Health (Scotland) Act, 1867 (53 & 54 Vict. c. 8, s. 26 (2)). As to the procedure in obtaining the certificate and the employment of a qualified substitute, see the enactment last cited.

(8) *The Assessment.*—(*a*) *The Year.*—The assessment shall be made for the year, commencing the 24th day of May and ending on the following 23rd day of May inclusive (43 & 44 Vict. c. 19, s. 48 (2) (*b*)). (*b*) *The Place.*—Where a dwelling-house is situate within more parishes or places than one, it is charged as an entire house in such parish or place as the surveyor may deem most expedient; and he shall notify his choice by a certificate to the commissioners acting for either of such parishes or places (43 Geo. III. c. 161, s. 10). If a question arises as to the parish in which a person should be assessed, the Board of Inland Revenue may determine it (43 & 44 Vict. c. 19, s. 53 (2)). If there is doubt as to the parish in which any lands are situate, or if such lands are extra-parochial, the Board of Inland Revenue

may, by written order, direct that for house duty purposes the lands shall be deemed to be within such neighbouring parish or division as the Board may think convenient; and the Board may revoke such order, and substitute any other order therefor as often as they think expedient (*ib.* s. 54).

(*c*) *General Machinery.*—The provisions of the Act last cited as to the examination of assessments (s. 51), errors of description in the assessment (s. 55), allowance of assessments (s. 56), double assessments (s. 60), assessment books (s. 61), omissions from first, and from additional first assessments (s. 63), amended returns (ss. 64–66), appeals against surcharges (ss. 67, 68), supplementary assessments (s. 69), and charge duplicates (s. 70), apply to income tax as well as house duty. House duty appeals are conducted in the same manner as appeals under Schedule A of the Income Tax Acts (s. 57); and the provisions of sec. 52 as to the amendment of assessment apply not only to house duty, but to the duties charged under Schedules A, B, and E of the Income Tax Acts. As to all these provisions, see INCOME TAX.

Observe that sec. 59, which determines the procedure (originally introtroduced by 37 Vict. c. 16, ss. 8–10) for obtaining the opinion of the High Court, applies both to the Income Tax Acts and to the House Duty Acts. See INCOME TAX.

The same observation applies to the provisions of secs. 49 and 50 as to assessors' certificates, and as to the estimates of the amount to be charged in default of returns. See INCOME TAX. The surveyor's certificate must contain the particulars of every dwelling-house, inhabited or uninhabited, within the place for which he acts, its annual value (see (10) below), the name and surname of the occupier, the amount of duty payable by him, and the name and surname of every person claiming exemption, together with the grounds of his claim (43 Geo. III. c. 161, s. 62).

It is to be observed that an assessor is empowered, at seasonable times, to view and examine each dwelling-house in order to ascertain its annual value; and, for doing so, may pass through any house, and go into any court, yard, back side, or premises thereunto belonging, and externally to view and inspect the premises. He may do this twice a year (*ib.* s. 60); and a similar power is conferred on him of inspecting buildings, in respect of which exemption is claimed, under the Act 57 Geo. III. c. 25, s. 2.

If an assessor omit to charge according to the annual rent at which the dwelling-house is really and *bonâ fide* worth to be let, he shall, whether the occupier be or be not entitled to be discharged from the assessment, forfeit for every such neglect a sum not less than £5, nor exceeding £20 (43 Geo. III. c. 161, s. 10).

(9) *Collection; Recovery; Certificate of Removal; Receipt and Account.*—The provisions of the Act 43 & 44 Vict. c. 19, as to collection (ss. 82–85), recovery (s. 97), certificates of removal (s. 90, as amended by 47 & 48 Vict. c. 62 s. 7), and receipt and account (Part VII.) apply both to house duty and income tax, and are dealt with under the latter heading. See INCOME TAX.

(10) *Annual Value; Ascertainment of.*—The provisions of the Lands Valuation (Scotland) Act, 1854, as amended by subsequent enactments, regulate the ascertainment of "the annual rent" at which the subjects "are really and *bonâ fide* worth to be let" (43 Geo. III. c. 161, s. 10), or "the annual value" (14 & 15 Vict. c. 36, s. 1). In such matters the valuation roll, when made up by officers of the Inland Revenue, is conclusive, so far as that department is concerned (20 & 21 Vict. c. 58, s. 3; *Menzies*, 1878, 5 R. 531). When not so made up, the question of value is open to general

inquiry. Where, in a case in which the assessor was not an officer of the Inland Revenue, it appeared upon the face of a lease that the so-called rent was payable in part for something not assessable to house duty, it was held that the commissioners were bound to inquire how much of the rent was, and how much was not, payable in respect of the assessable subjects (*Campbell*, 1879, 7 R. 82). See also (8) above.

[Dowell, *The House Tax Laws*, 1893; Rankine, *Landownership in Scotland*.]

Inhibition.—Inhibition is a personal prohibition, at the instance of a creditor, restraining the person inhibited from contracting any debt, or granting any deed, by which any part of his lands may be alienated to the prejudice of the inhibitor (Ersk. II. xi. 2). It is available either as an intermediate security employed while the creditor's claim is future or contingent or still in dependence, or as part of the execution by a creditor for a debt already liquidated, payment of which he is about to enforce by diligence (Bell, *Com.* ii. 136). It corresponds closely to arrestment in the case of moveables, and to a large extent is governed by the same rules.

Inhibition may proceed on a liquid ground of debt immediately exigible, a decree of a Court or a decree of registration, provided it is not a decree under the Small Debt Act or under the Debts Recovery Act (*Lamont*, 1867, 6 M. 84). It may be founded also upon an action concluding for the payment of a sum of money as presently due. On the principle that diligence is not in general competent for a future or contingent debt, inhibition, like arrestment, cannot proceed upon an action to enforce a claim of that character, unless the debtor is *vergens ad inopiam* or *in meditatione fugæ* (*Anderson*, 1848, 11 D. 118; *Dove*, 1865, 3 M. 339; *Symington*, 1875, 3 R. 205). In an action of count and reckoning, where it appeared from the summons that the balance might be on either side, diligence was allowed, but with some hesitation (*Telford's Exor.*, 1866, 4 M. 369). And in one case, where the debtor had been twice charged for payment of certain arrears of interest, diligence for future interest was held competent, though without further proof that he was *vergens ad inopiam* (*Campbell*, 1848, 10 D. 1496).

The action founded on must be one with pecuniary conclusions other than a conclusion for expenses (*Weir*, 1870, 8 M. 1070; *Stafford*, 1875, 3 R. 148). Inhibition is not competent on an action of declarator or reduction alone, or on a consistorial action without pecuniary conclusions (*Kitchen*, 1871, 9 M. 966), but it is competent on an action of separation and aliment (*Thomson*, 1828, 7 S. 1; cf. *Gordon*, 1827, 5 S. 544; *Burns*, 1879, 7 R. 355). If competent, it covers interest on the principal sum sued for (*Macdonald & Halket*, 1825, 3 S. 494). Where the expenses of process are awarded, these also are covered by it (*Wight*, 1822, 1 S. 395; *May* v. *Malcolm*, 1825, 4 S. 76); and it has been held that where expenses were found due to the defender, though not modified or decerned for, inhibition for these expenses was competent at his instance against the pursuer, who was making away with his heritage (*Wilkie*, 25 Feb. 1815, F. C.; but see *Jack*, 1880, 7 R. 465). The dependence of an action against a firm has been held to found inhibition, otherwise competent, against the heritable estate of an individual partner (*Ewing & Co.*, 1860, 22 D. 1347).

A general mandate to an agent to recover a debt includes authority to use inhibition (*Clarke*, 1888, 15 R. 569).

Procedure.—The old forms have been greatly simplified by recent enactments. Inhibition proceeds on letters passing the signet, the

warrant for signeting being obtained by production of a *Fiat ut petitur* duly obtained in the Bill Chamber on a bill presented along with a proper ground of debt, or along with a depending summons on which the inhibition is to be raised (A. S., 18 Nov. 1871, s. 1. For forms, see *Jurid. Styles*, 3rd ed., iii. 271 *et seq.*). The bill must set forth fully the grounds of debt which justify the creditor in asking for the diligence (*Stevens*, 1873, 11 M. 772; *Clarke*, 1888, 15 R. 569). The depending summons may be at any stage prior to final decision in the House of Lords (*Heron*, 1774, Mor. 7007; *Countess of Haddington*, 1822, 1 S. 387). The old form of letters is still competent (*Jurid. Styles*, 2nd ed., iii. 526), but an abbreviated form has been provided by Statute (31 & 32 Vict. c. 101, s. 156, Sched. QQ). It is addressed to messengers-at-arms, and, after setting forth the document on which the creditor founds, charges them to inhibit the debtor "from selling, disponing, conveying, burdening, or otherwise affecting his lands or heritages to the prejudice" of the creditor. It is served on the debtor personally or at his dwelling-place, or, if he is furth of Scotland, edictally.

Formerly this was the only method of raising inhibition. It is now competent to insert in the Will of a summons passing the signet a warrant of inhibition, which has the same force and effect as the letters (31 & 32 Vict. c. 100, s. 18, where a form is given). The warrant may be executed either when the summons is served or at any time thereafter. After execution, the letter or the summons (the latter of which must include the warrant of inhibition, but not necessarily the condescendence or note of pleas in law) must be registered with the execution thereof in the General Register of Inhibitions. Such registration is declared to be equivalent to the publication and registration formerly in use, and from the date of registration in either case the inhibition is held to be duly intimated and published to all concerned (31 & 32 Vict. c. 64, s. 16; c. 100, s. 18; c. 101, s. 155). The *inducice* are the same as in the case of summonses before the Court of Session (31 & 32 Vict. c. 100, s. 14).

It has been said that the procedure by bill and letters of inhibition is still the appropriate course where the diligence is used on the dependence in security of a future debt, in order that the debtor may have an opportunity of answering the allegation that he is *vergens ad inopiam* (*Symington*, 1875, 3 R. 205, per Ld. Pres. Inglis, at p. 206). In most cases, however, even where this procedure is adoped, the warrant is granted by the Bill Chamber Clerk, and the inhibition ordinarily passes without any opportunity being given to the debtor of appearing at all.

Inhibition takes effect from the date of registration. Where it is raised on the dependence, it is suspended during the process, but the effect draws back to the date of registration on decree being obtained. But a preliminary notice, containing the names and designations of the parties by and against whom the inhibition is used, and the date of signeting, may be registered, even before execution. Where this is done, and the inhibition with the execution thereof is registered within twenty-one days thereafter, the effect of the inhibition draws back to the date of the registration of the notice (31 & 32 Vict. c. 101, s. 155, Sched. PP).

The expenses of using inhibition on the dependence of an action are held not to form part of the expenses of process, and are never awarded as a part of these (*Taylor*, 25 January 1820, F. C.). The principle is that "the using of diligence on the dependence, however necessary it may be to make a pursuer's decree effectual when obtained, has nothing to do with obtaining that decree, which is the sole object of the action" (*Symington*,

1874, 1 R. 1006, per Ld. Pres. Inglis, at p. 1007; *Black*, 1887, 14 R. 678). Consistorial causes are not excepted from this rule (*Symington*, *supra*). These expenses must be recovered separately.

As in the case of other forms of diligence, vitiations and material erasures in the letters, executions, or service copies are fatal to inhibitions. Thus, a misdescription in the service copy of one of several documents on which the inhibition proceeded was held sufficient to render the diligence ineffectual so far as founded on the debt contained in that document (*Burleigh* v. *Fearn*, 1848, 10 D. 1517). An error in stating the amount of the debt in the record is equally fatal (*Cooke*, 1850, 13 D. 157: *Malcolm*, 1846, 8 D. 1201, affd. 1849, 6 Bell's App. 359). Where the debtor was furth of Scotland, the fact that the words "office of Edictal Citation" in the warrant were written on an erasure, was held to nullify the inhibition (*Burleigh* v. *Horwood*, 1848, 10 D. 1512). An error, such as a mistake in the debtor's Christian name in the letters, produces the same result (*Walker*, 1853, 16 D. 226). The omission in the entry in the minute-book of the names of two out of three debtors against whom the inhibition was to be raised, rendered the diligence ineffectual *quoad* the two omitted (*Park*, 1838, 16 S. 1363).

Subjects affected by Inhibition.—In their old form, letters of inhibition were directed against the debtor's whole estate, both heritable and moveable. It has, however, long been settled that only heritage is affected by it (*Braco*, 1623, Mor. 7016; Stair, iv. 50. 5), and in the modern statutory form the inhibition is directed only against "lands or heritages" (31 & 32 Vict. c. 100, s. 18; c. 101, s. 156, Sched. QQ). Arrears due to the inhibited debtor on a *debitum fundi* are moveable, and are therefore not affected (*Scott*, 1750, Mor. 6988). All heritable subjects are affected by it, with a possible exception in the case of heritable bonds on which no infeftment has been taken. As to the latter, doubts have been entertained (Dirleton, 101; Stewart, 168; Stair, iv. 50. 2; More, *Notes to Stair*, 426; Bell, *Com.* ii. 136). But it has been decided that a heritable bond which has once been feudalised, and has then been assigned, cannot after inhibition be further transferred, notwithstanding that the right of the disponer who is inhibited is only personal (*Low*, 6 December 1814, F. C.; and see *Dryburgh*, 1896, 24 R. 1, per Ld. Kincairney, at p. 3). (See FIXTURES.)

Inhibition formerly covered not only *acquisita* but *acquirenda*, provided it was registered (under the system of particular registers) in the jurisdiction in which the lands subsequently acquired were situated (*Ellis*, 1667, Mor. 7020; Stair, iv. 50. 17; More, *Notes to Stair*, 427; Ersk. II. xi. 10). The Particular Registers of Inhibitions have been abolished; and inhibition does not now—since 31 December 1868—affect lands acquired after its date, or after the date of the previous notice, unless such lands were at that date destined to the debtor "by a deed of entail, or by a similar indefeasible title" (31 & 32 Vict. c. 101, s. 157).

Inhibition is strictly personal to the debtor inhibited, and, unless renewed, does not affect his heir (*Roberts*, 1829, 7 S. 611; *Menzies*, 1841, 4 D. 257).

Effects of Inhibition.—Inhibition, which is ordinarily called a real diligence, is in fact merely negative and prohibitory in its effects. The debt founded on remains personal, and inhibition, unless followed up by adjudication, gives the creditor no real right and no active title to enforce payment out of the estate affected. It, however, strikes at all voluntary deeds, whether onerous or gratuitous, posterior to its date and affecting the debtor's heritable property, and at all diligence, as by adjudication, against such property founded on debts contracted subsequently to its date.

Necessary deeds, *i.e.* those which the debtor was under an antecedent obligation to grant, are not affected, because these could have been enforced before the inhibition was raised. Such are, *e.g.*, a conveyance of lands in implement of a binding minute of sale, or heritable security for debt granted in fulfilment of a prior personal obligation to do so (*Livingstone*, 1842, 5 D. 1; Stair, iv. 50. 18, 19; Ersk. II. xi. 11). It is otherwise in the case of a heritable bond granted in security of a prior debt where there is no such obligation (*Strachan*, 1708, Mor. 2609, 7037). Nor does inhibition destroy the effect of a cash-credit heritable bond, recorded prior to it, as security for advances made subsequently (*Campbell's Tr.*, 1870, 9 M. 252). Adjudications on anterior debts, not being voluntary on the part of the debtor, are not struck at. And it has been held that where the titles of the debtor's lands were deposited with his law agent after inhibition, the agent acquired a security which might, in the event of a sale of the estates, entitle him to a preference over the inhibiting creditor on the price, for his business accounts incurred even after the inhibition (*Menzies*, 1841, 4 D. 257).

Ordinary administration of the debtor's property is not interrupted by inhibition. He is not barred by it from uplifting and discharging the rents, or the interest of heritable debts (*Scott*, 1750, Mor. 6988). He may grant leases for an adequate rent and of ordinary duration. It is otherwise where the lease is a mere "attempt to obtain, in the form of a lease, a security for debt which the creditors could not have obtained directly by the voluntary act of the debtor or by legal diligence" (*Wedgwood*, 13 Nov. 1817, F. C. 386). Thus a lease was set aside which had been granted in consideration of a sum in name of grassum and a certain rent, the tenant being allowed to retain the whole rent for his repayment (*Wedgwood, supra*; *Gordon*, 1780, Mor. 7008). Similarly, inhibition was held to strike at a lease for fifty-seven years, for a rent clearly inadequate, and giving the tenant unusual powers of cutting and disposing of wood (*E. Breadalbane*, 1802, Hume, *Decisions*, 242). (Bell, *Com.* ii. 142; More, *Notes to Stair*, 425.)

Subsequent voluntary deeds, and diligence on subsequent debts, affecting the heritable estate of the person inhibited, are not rendered void *ipso facto* by the inhibition. They are, however, reducible by the inhibitor in so far as he is prejudiced by them. They are reducible only to that extent, since the inhibition rests solely on the inhibitor's interest. A decree of reduction *ex capite inhibitionis* is, in effect, equivalent to a declarator that, notwithstanding the posterior alienation or burden, the inhibitor is entitled to affect the lands as if such alienation or burden had never been granted. The reduction does not interfere with the relations of other creditors *inter se*, and after the inhibitor has secured what he would have received from the debtor's estate if the act inhibited had never occurred, the burden or alienation is fully effectual, and in a question with the other creditors, is not affected by the reduction. For this reason, where there are prior debts preferable to his own, sufficient in amount altogether to exclude the creditor inhibiting, posterior debts are not reducible by him *ex capite inhibitionis* (Ersk. II. xi. 16).

This right of reduction gives the inhibitor indirectly this important practical advantage, that a purchaser of the subjects covered by the inhibition is entitled before paying the price to have the inhibition discharged by payment of the inhibitor's debt (*Horn*, 1824, 3 S. 54). It affords a ground for suspending a charge to pay the price. And where a voluntary sale has taken place *spretâ inhibitione*, the inhibitor acquires indirectly a preference on the price, since he can at any time reduce the sale so far as

he is prejudiced by it and can proceed to adjudge, while no other creditor can effectually adjudge after the sale has been completed. This exclusive right gives him, even without actual reduction and adjudication, a preference on the price in a question with other creditors using arrestment, for example, after the sale (*Monro of Poyntzfield*, 1777, Mor. "Inhibition," App. 1; *M'Lay*, 1807, Mor. "Competition," App. 3).

The inhibitor has, however, no real right, and is not entitled merely by his inhibition to rank on the estate in competition with other creditors whose right is real. This fact, combined with the inhibitor's right to reduce posterior deeds and diligence founded on posterior debts, but to reduce them only so far as they are hurtful to him, causes considerable disturbance in the application of the ordinary rules of ranking in the distribution of the debtor's estate. Many difficult questions may arise, of which only an illustration rather than a full statement can here be given. The subject is elaborately discussed by Professor Bell (*Com.* ii. 139, 407 *et seq.*) in a passage in which are set forth his five well-known "Canons of Ranking." The rules as stated by him have been judicially approved (*Baird & Brown*, 1872, 10 M. 414, at p. 416) and are well established. The general principle in all cases is that the inhibitor is to be neither prejudiced nor benefited by the right at which his diligence strikes. He is to draw from the distribution simply the amount which he would have drawn if such right had never been granted, but without disturbing the ranking of other creditors *inter se*. "The holder of the excluding right shall have the full benefit of his preference against those on whom it legally operates, and this preference shall not, on the one hand, be suffered to affect creditors not legally subject to its influence, nor, on the other, to give advantage to those who have no right to take benefit under it" (Bell *Com.* ii. 407; *Cockburn's Crs.*, 1709, Mor. 2877).

Thus in a question simply with the holders of voluntary heritable securities, the ordinary rule of *Prior tempore potior jure* applies, and the preference is determined solely by the dates of their respective securities. Prior securities are not affected by the inhibition at all (*Campbell's Tr.*, 1870, 9 M. 252). As regards the holders of posterior securities, the inhibitor, though he is not entitled to rank with them, since his debt is still personal, nevertheless draws back from them in the ranking the amount which he would have received if their securities had never been granted. If the holders of these posterior securities rank *pari passu inter se*, the burden of the inhibitor's debt falls proportionally upon them all. If there is a preference among them, it falls ultimately upon the creditor who ranks lowest (*Lithgow*, 1747, Mor. 6974; *Creditors of Langton*, 1760, Mor. 6995).

Adjudication led by one or more personal creditors makes the question more complicated. Adjudication is not a voluntary act of the debtor, and, so far as founded on prior debts, is not affected by the inhibition. Accordingly, the creditor inhibiting is postponed to creditors adjudging on such debts, and if the estate is insufficient to satisfy their claims he is entirely excluded. He acquires a preference only from the date at which he makes his right real by adjudging. All adjudications led within year and day of that first made effectual, and all before it, rank *pari passu* (1661, c. 62), and, subject to this rule, the inhibitor may by adjudging rank *pari passu* with the creditors adjudging on prior debts, while he has a preference over those adjudging on posterior debts. He may even, by adjudication, wholly exclude prior personal creditors who have failed to lead adjudication within year and day of his. The principle is applied by allocating, in the first instance, a proportional dividend to all whose rights rank *pari passu*. Effect is then

given to the exclusive right created by the inhibition by allowing the inhibitor to draw back, from the posterior creditors at whose right his inhibition strikes, the difference between the sum actually allotted to him and that which he would have received in the ranking had the posterior debts never existed. "The inhibitor's preference must be secured to him entirely at the expense of the subsequent creditors, while creditors whose debts were contracted prior to the inhibition draw just what they would have done had the whole creditors been ranked *pari passu*" (*Baird & Brown*, 1872, 10 M. 414, per Ld. Pres. Inglis, at p. 419).

Where there are more than one inhibition, and all of them are followed by adjudication, the inhibitors are preferable, not according to the dates of the inhibitions, but according to the adjudications, and therefore *pari passu* if they adjudge within year and day of each other.

Again, a heritable security may have been granted which is struck at by the inhibition, but is preferable to adjudications on prior debts. Here the same principles as before are applied. The heritable creditor's claim is satisfied *primo loco*. The adjudgers, including the inhibitor if he has adjudged, draw a *pari passu* dividend. The inhibitor then draws back from the holder of the heritable security the sum which he would have received in addition to that already allotted to him if the heritable security had never been granted (*Gordon* v. *Campbell*, 1841, 3 D. 629, revd. 1842, 1 Bell's App. 563. For a practical application of these principles, see the report by Mr. James Webster, S.S.C., printed in the Session Papers of this case).

The same rules apply where the debtor is sequestrated. By the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 102, the whole heritable estate of the bankrupt vests in the trustee in the sequestration, subject to existing preferable securities. The same section provides that the right of the trustee shall not be challengeable on the ground of any prior inhibition, but the preference to which such inhibition may be entitled in the ranking is expressly saved. The effect of this provision is that while the trustee may realise the debtor's heritable estate, he must recognise the inhibiting creditor's preference in the distribution of the price (*Ewing & Co.*, 1860, 22 D. 1347; *Baird & Brown*, 1872, 10 M. 414). One important practical application of this is in cases where money is borrowed by an heir-apparent of entail under a post-obit bond, or a bond of like nature. Inhibition, as has been stated, affects heritable property destined to the debtor by an indefeasible title, such as an entail, and it is commonly used in such cases to secure the creditor's preference in the event of the borrower's sequestration before the opening of the succession. And to prevent recall of the inhibition, since the debt is future or contingent, and the borrower may not be *vergens ad inopiam*, it is usual to insert in the bond a clause in which the borrower consents to the immediate use of inhibition.

Extinction, Recall, etc.—An inhibition is "purged" by payment of the debt on which it is founded. The proper discharge is a probative deed granted by the inhibitor (*Jurid. Styles*, 5th ed., ii. 744). This is recorded in the Register of Inhibitions; or it may be recorded in the Register of Deeds, and on extract of it being produced at the Register of Inhibitions the inhibition is marked as discharged on the margin of the minute-book. Any creditor whose debt is struck at by the inhibition may pay the inhibitor's claim, and become thereby entitled to an assignation of the debt and diligence against the inhibited debtor.

The threatened use of inhibition, if malicious and oppressive, may be prevented by interdict (*Beattie & Son*, 1880, 7 R. 1171). The Court used formerly to interpose in certain cases, sometimes even *ex proprio motu*, to

prevent the issue or the registration of letters. The more usual practice now is to allow the inhibition to pass, and, where proper, to recall it afterwards. To obtain recall or restriction of inhibition, the appropriate procedure is by petition. An action of declarator that an inhibition had fallen by lapse of time has been dismissed as incompetent (*Baring Bros.*, 1824, 2 S. 609). At common law such a petition was competent only in the Inner House, as being addressed to the *nobile officium* of the Court. The Court refused even to remit to the Lord Ordinary on the Bills in vacation (*Greig*, 1866, 4 M. 1103), but it would probably not refuse to do so now. By Statute a petition for the recall of inhibition on a depending summons may be presented to the Lord Ordinary before whom the case is enrolled, or, in vacation, to the Lord Ordinary on the Bills. The Lord Ordinary may order answers, and may recall or restrict the inhibition, with or without caution: and his judgment is subject to review by reclaiming note, which must be presented within ten days (31 & 32 Vict. c. 101, s. 158). In practice, a minute may be lodged, even without a separate petition, and the recall or restriction granted thereafter on the motion of the defender (*Barbour's Trs.*, 1878, 15 S. L. R. 438; Mackay, *Manual*, 577). The Inner House is still the proper tribunal where there is no depending process, or where the process is already before the Court on a reclaiming note.

The inhibition will be recalled if nimious or oppressive, or if it has been otherwise improperly used (*Kitchen*, 1871, 9 M. 966; *Stevens*, 1873, 11 M. 772; *Symington*, 1875, 3 R. 205). Recall is not granted where the debt is immediately exigible and proved by a liquid document (*Royal Bank*, 1729, 1 Pat. 14), nor usually where the debtor is *vergens ad inopiam*. When it is granted, caution is usually deemed for as a condition, the amount of caution depending on the circumstances of the case (*Robertson*, 1800, Hume, *Decisions*, 242; *Gordon*, 1827, 5 S. 544; *Herbertson*, 1830, 5 S. 564; *Cox*, 1830, 5 S. 599; *Dove*, 1865, 3 M. 339; *Burns*, 1879, 7 R. 355; *James*, 1886, 13 R. 1153; *Johnstone*, 1897, 4 S. L. T. 312). The keeper of the Register of Inhibitions is authorised by the decree to mark the inhibition as discharged or restricted, and this is done by him on the margin of the record on the extract decree being produced.

The expenses are in the discretion of the Court. They may be refused to the defender even where the sum sued for has been paid and the pursuer refuses to loose the inhibition (*Roy* v. *Turner*, 1891, 18 R. 717; but see *Robertson*, 1896, 24 R. 30; *Lickley*, 1871, 8 S. L. R. 624). Where a defender had used inhibition to secure expenses awarded him in the Outer House (a practice of which the Court disapproved), and the Division reversed the judgment and recalled the diligence, he was found liable in the expenses of the petition for recall (*Jack*, 1880, 7 R. 465). When recall is granted by the Lord Ordinary, the expenses, unless reserved, must be obtained at that time. It has been held that, even where inhibition was recalled only on caution, the expenses of recall, not having been disposed of or reserved, could not be obtained subsequently by a motion either in the petition for recall or in the process on the dependence of which the diligence was used (*Dobbie*, 1872, 10 M. 810).

Inhibitions, where properly registered, were at common law subject only to the long negative prescription (Stair, iv. 50. 23). But by the Conveyancing Act, 1874, inhibitions in force at the commencement of the Act—1 October 1874—prescribe not later than five years from that date. Subsequent inhibitions prescribe in five years from the date at which they take effect (37 & 38 Vict. c. 94, s. 42). But the inhibitor, or his heirs or assignees, may keep up the inhibition by recording it, or a statutory

memorandum provided by the Act (Sched. J), before the expiration of the prescriptive period. The effect is to give the inhibition force for another period of five years from the date of re-recording. The inhibition or the memorandum may be again recorded within each subsequent period of five years. Inhibitions prior to 1 October 1874 may be renewed in the same way, but are not thereby to be made effectual for any longer period than, apart from the enactment, they would have been. In dealing with modern titles, therefore, the search in the Register of Inhibitions need not extend for more than five years against the successive proprietors of the property for the last forty years (*Jurid. Styles*, 5th ed., i. 489; Bell, *Conveyancing*, ii. 715–6).

[Stair, iv. 50, iv. 20. 26, iv. 35. 21; Ersk. II. xi ; Bell, *Com.* ii. 134, 407; More, *Notes to Stair*, 423: Goudy, *Bankruptcy*, 2nd ed., 557; *Jurid. Styles*, 3rd ed., iii. 269. For a history of inhibitions, Ross, *Lectures*, iii. 459.] See INFEFTMENT; CIVIL PROCESS, ABUSE OF.

Inhibition of a Wife.—Inhibition is a method by which a husband informs the public that his wife has no authority to pledge his credit for articles supplied to her. There is a presumption that a wife as *præposita rebus domesticis* is entitled to purchase necessaries on the husband's credit (Fraser, *H. & W.* i. 604; *Debenham*, 1880, 6 App. Ca. 24). Inhibition is a legal way of displacing this presumption. A bill is passed in the Bill Chamber as matter of course, and letters of inhibition are then framed. The inhibition is executed by a messenger-at-arms serving a short copy upon the wife or at her place of residence (see the style in Fraser, *H. & W.* ii. 1555; and *Jurid. Styles*, iii. 280). The only publication necessary is to register the inhibition in the General Register of Inhibitions (31 & 32 Vict. c. 64, s. 16). The inhibition prohibits the lieges from dealing with the wife without the special authority of the husband. It is effectual although the tradesman show that he never heard of it (*Topham*, Mor. App. *voce* "Inhibition," No. 2; Ersk. i. 6. 26; Fraser, *H. & W.* i. 633). But inhibition will not prevent the husband from being liable if he has failed to supply his wife with necessaries (Ersk.; Fraser, *ut sup.*; *Auchinleck*, 1675, Mor. 5879). The husband may be held barred from founding on the inhibition if he have expressly or tacitly sanctioned his wife's pledging his credit thereafter (*Ker*, 1709, Mor. 6023). There is little to be said in favour of the equity of this mode of displacing the presumption that the wife has her husband's authority to buy necessaries. No tradesman can make a weekly search of the General Register of Inhibitions, and without this he cannot be sure that the wife's authority has not been withdrawn.—[Ersk. i. 6. 26; Fraser, *H. & W.* i. 629; Walton, *H. & W.* 189.]

Inhibition of Teinds.—Leases of teinds, as of other subjects, for a fixed number of years, may be prolonged by tacit relocation. In the case of teinds, the titular may exclude this by announcing to the tacksman his intention of removing him. The announcement takes the form of an inhibition, a writ passing under the Signet, which interpels the tacksman and all other persons from intermeddling with the teinds. It is published at the parish church. Such inhibition is competent only at the instance of the proprietor or one who has a proper title to possess (*United Colleges of St. Andrews*, 1760, Mor. 15344). It does not by itself entitle the titular to turn

the tacksman out of possession (*Bearford*, 1665, Mor. 1817), but affords him ground for an action by which he may vindicate his right to draw, not merely the teind stipulated in the lease, but the actual proven teind of each year, or, where there has been a valuation, the valued teind. The inhibition is assumed to be waived, and the right thereby acquired by the titular is lost, if the inhibition is not followed up by action (*Urquhart*, 1823, 2 S. 567; *Trinity Hospital*, 1848, 11 D. 266; *Lord Advocate* v. *Skene*, 1860, 22 D. 987; *Lord Advocate* v. *Drysdale*, 1872, 10 M. 499; *Lord Advocate* v. *Duke of Athole*, 1885, 12 R. 882).—[See Stair, ii. 8. 23; iv. 24. 2; Ersk. *Inst.* ii. 10. 45; *Jurid. Styles*, 3rd ed., iii. 283; Connell on *Tithes*, 2nd ed., i. 128; ii. 79.]

Initials.—See Deeds (Execution of); In re mercatoria Writings.

Injury.—Injury means damage which has been caused by a wrong. It therefore covers all cases of loss for which an action of reparation will lie. The mere fact of damage suffered, of itself gives no right of action; but if the damage has been caused by violation of a right, or, in other words, if the person causing the damage has committed a breach of duty, an action is maintainable, because an injury has been done. For example, a person, in order to have the proper use of his own ground may necessarily damage the amenity and enjoyment of his neighbour's property, as by winning minerals or draining, and thereby causing smoke or water to come on his neighbour's land, and yet he will not be liable, for he has not exceeded the lawful use of his own (*Hurdman*, 1878, L. R. 3 C. P. D. 174; Ersk. ii. 1. 2). But if a person uses his land in disregard of the rights of his neighbour, as by removal of lateral support, or by collecting and sending on to land an accumulation of water, then he will be liable, because he has committed a breach of duty (*Shotts Iron Co.*, 1882, 9 R. H. L. 85). Similarly, in cases of verbal injury the person complaining must show that the words complained of were used wrongfully, as, for instance, maliciously, in addition to showing that they have damaged him. Consequently an issue in action for reparation always bears that the act complained of was done to the injury of the pursuer, as well as to his loss and damage. See Culpa; Damages.

Inner House.—The Court of Session is divided into the Inner House and the Outer House. The Inner House is composed of two Divisions of four judges each, the First Division being presided over by the Lord President, the Second Division by the Lord Justice Clerk. The Divisions possess co-ordinate jurisdiction. Three judges form a quorum, except in questions of interim execution or possession pending appeal, when four judges are required: a Lord Ordinary may be called in to form a quorum if required. See Interim Execution. The appellate jurisdiction of the Inner House covers interlocutors of the Outer House and inferior Courts, verdicts of juries and directions of judges on points of law in jury trials; the original jurisdiction of the Inner House covers all questions appropriated to the Divisions either by custom or by Statute, and all questions involving the exercise of the *nobile officium* of the Court. Provisions are made for cases of divided opinion between the judges of either Division. See Consultation of Judges.

Innkeeper.—An innkeeper is one who invites all the public to come to his house, where, for reasonable remuneration, he offers them board and lodging.

When a person thus holds himself out as an innkeeper or keeper of a common inn, certain rights and duties arise as between him and the public.

The innkeeper is bound to receive every traveller who presents himself, provided he has room in his inn and there is no good personal objection to the traveller. "He is the servant of the public, and bound to receive every decently behaved member of the public, unless his house is full; and if he does not, he is liable in an action of damages" (*Ewing*, 1877, 5 R. 230). There has been no express decision in Scotland on the point, though there have been several in England (*Hawthorn*, 1844 1 C. & K. 404); but the statement above given, which was an *obiter dictum* by Ld. Pres. Inglis, has been generally accepted as law. It appears to rest not only on common law, but on a series of Statutes of the Scots Parliament, which were passed primarily with the object of protecting private individuals from the exactions of bands of "ridaris and gangaris throu the cuntre." Thus the Act 1424, c. 25, "ordainyt that in all burowis townys of the realme and thruthfaris, quhar common passagis are that thar be ordanyt hostilaris and resetteris, haifande stabillis and chawmeris to ridaris and gangaris, fynde with thame brede and aile, and all uthir fuyde, alsueill to horse as men, for resonable price efter as the chapis of the cuntre standis." This was followed by the Act 1425, c. 11, which provided that no traveller on horse or on foot should lodge in any other place than these hostelries, excepting those who travelled with a large retinue, who were allowed to lodge with their friends, if they sent their horses and followers to the hostelry. Burgesses were forbidden, under penalty of a fine, to receive such travellers. By the Act 1427, c. 3, the king ordained all his burgesses in the realm "quod faciant fieri hostellaria seu hospicia publica in burgis honesta et competencia more aliorum regnorum ad recipiendum omnes et singulos hospites tam pedestres quam equestres per Regnum laborantes sub pena." By the Act 1535, c. 23, the former Acts were approved, and further provision was made for securing that proper accommodation should be made for travellers, to be sold "apoun ane competent price, ande as sielike stuff is saulde commonlie in the cuntre abouut quhare sik ostillaris duellis."

This obligation, however, is subject to the qualification that an innkeeper is not bound to receive and supply a traveller if, on request, he gives no security to pay his bill (*Fell*, 1841, 8 M. & W. 276), nor if he comes with a dog causing alarm to other guests (*Rymer*, 1877, 2 Q. B. D. 136), nor if the traveller be in a condition in which his admission would be dangerous to the other inmates, as, for instance, where he is suffering from an infectious disease, nor if there be really no room available.

The innkeeper is bound to take in not only the traveller, but his luggage; and luggage is not confined to personal luggage, but extends to whatever the traveller may bring with him, provided it is not exceptional nor dangerous, such as a piano, or a tiger, or dynamite (*Robins*, L. R. [1895] 2 Q. B. 501).

This obligation extends only to supplying food and shelter to travellers, including drink (*Oliver*, 1896, 23 R. (J. C.) 34); and, it is thought, does not give the public generally a right to demand drink at the drinking bar of an hotel.

It attaches only so long as the guest is a traveller; and a person who has been received at an inn as a traveller, does not necessarily continue to

reside there in that character. Whether at any given time during his residence he is still a traveller is a question of fact, and one of the ingredients for determining this fact is the length of time that has elapsed since his arrival. If the guest has lost the character of traveller, the innkeeper is not bound to supply him with lodging, but is entitled, on giving him reasonable notice, to require him to leave (*Lamond*, L. R. [1897] 1 Q. B. 541).

An innkeeper is responsible under the edict Nautæ, caupones, stabularii, for the absolute safety of the property of his guests while in the inn.

So far as the responsibility extends only to the exercise of reasonable care by the innkeeper, it rests upon the rule as to the diligence prestable by a depositary. But as the persons comprehended within the edict have frequent opportunities of conspiring with criminals in circumstances which render sufficient proof of their connivance difficult, the public safety is secured by presuming everything against them, and taking nothing as an excuse for the loss or injury to goods but the act of God or the king's enemies.

This responsibility attaches to all innkeepers, whether licensed or not (*Ewing*, 1877, 5 R. 230), and extends to the whole premises used as an inn, but not to a refreshment bar, although forming part of the building in which the inn was situated (*Rymer*, 1877, 2 Q. B. D. 136). It does not extend to keepers of restaurants (*Rymer, ut supra*), nor to keepers of coffee-houses or public-houses (*Thomson*, 1820, 3 Barn. & Ald. 286; *Doe*, 4 Camp. 77), nor to boarding-house keepers (*Dansay*, 3 El. & Bl. 144). As to keepers of furnished lodgings, the question was expressly reserved by the Court (*Watling*, 1825, 4 S. 83); but it is thought that now it would be held that the edict does not apply to them (see *Lamond*, L. R. [1897] 1 Q. B. 541, at 548).

It covers whatever is placed under the charge of the innkeeper or of his servants, or brought into the inn by or for his guests, and whether the innkeeper is aware of their being brought or not, for he is liable for whatever is *infra hospitium* (*Calye*, 8 Co. 202). But if the person for whom the goods were left merely intended to become a guest, but in point of fact did not do so (*Medewar*, L. R. [1891] 2 Q. B. 1), or merely called and went on with post-horses (*Meikle*, 16 Feb. 1813, F. C.), the innkeeper is not liable.

When once the goods are *infra hospitium* the innkeeper must answer for their return in the same condition, unless they have perished or been injured by inevitable accident. Nothing is an excuse for failure to do so except an act of God or of the king's enemies. Thus it is no answer for the innkeeper to plead that the goods were lost by robbery, even by an irresistible number of persons (*Coggs*, Ld. Raymond, 919), or by theft (*Chisholm*, 1714, Mor. 9241).

Nor is it any answer for the innkeeper that the loss was caused by the act of his servant, or even of strangers who have come as guests to the inn, for by the edict his obligation is extended to cover these cases (Stair, i. 13. 3).

Fire is considered in Scotland a *damnum fatale* for which the innkeeper is not responsible (*M'Donnell*, 15 Dec. 1809, F. C.), though it is otherwise in England (*Forward*, 1 T. R. 27).

The innkeeper also evades responsibility if he can show that the guest himself has been negligent. What amount of negligence will relieve the innkeeper is a jury question, but the statement of the rule of law by Erle, J., in *Cashill*, 1856, 6 El. & Bl. 891, has been frequently adopted: "The

innkeeper is liable for breach of duty unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may reasonably be expected to have taken under the circumstances." Not locking the bedroom door before going to sleep has been held such negligence (*Oppenheim*, 1871, L. R. 6 C. P. 515).

So also if the guest has himself undertaken the exclusive custody (*Farnworth*, 1816, 1 Stark. 249), as where he was provided with a room for the exclusive purpose of exhibiting his goods, and has had the key handed to him: for the only duty on the innkeeper is to provide rooms for lodging, and not rooms to be used as a shop (*Burgess*, 1815, 1 Stark. 251, n.). Handing the guest the key of his bedroom does not free the innkeeper from liability (*Calye*, 8 Co. 202), nor does the fact that the guest has locked up the goods for greater security (Stair, i. 13. 3). The innkeeper, however, is not liable for loss or injury caused by the guest's own servant or friend, whom he has invited to the inn (*Calye*, *ut supra*).

The Innkeepers Liability Act, 1863 (26 & 27 Vict. c. 41), while in no way altering the rights and obligations of an innkeeper and his guest, restricts in certain cases the amount for which the innkeeper may be made liable. It provides (s. 1) that an innkeeper shall not be liable to make good to a guest any loss or injury to goods or property, other than a horse or live animal, or gear appertaining thereto, brought to his inn, to a greater extent than £30, unless (1) the loss or injury has been caused by the wilful act, default, or neglect of the innkeeper or his servant, or (2) the goods have been deposited with him expressly for safe custody, and sealed up by the guest, if required. Should the innkeeper (s. 2) refuse to receive such goods for safe custody, or make it impossible for the guest to deposit them, or (s. 3) fail to keep a notice containing sec. 1 exhibited conspicuously in the entrance hall of his inn, he is not entitled to the benefit of the Act. The notice must contain substantially a correct copy of sec. 1 (*Spice*, L. R. 2 Ex. D. 463). The effect of the Act is that, as regards the excepted articles and claims of under £30, the common-law liability of the innkeeper remains, and the onus is on him to show a sufficient excuse. If the claim be over £30, the onus is on the guest to show fault on the part of the innkeeper or his servants which alone caused the loss (*Medewar*, L. R. [1891] 2 Q. B. 11).

As a counterpart to the obligation on an innkeeper to receive any traveller and his goods, he has a right of retention or lien over the goods, horses, and carriages of the traveller for the expense of keeping them, as well as for the cost of the food and entertainment of the traveller. This lien covers all property brought by the traveller to the inn, whether it be his own or not, and whether the fact that it is not the property of the guest be known to the innkeeper or not (*Robins*, L. R. [1895] 2 Q. B. 501). In this case it was pointed out that the case of *Broadwood*, 10 Ex. 417, is not an authority for the argument that the innkeeper has no lien over goods which he knows to be the property of a third person, and to this extent the statement of the law in Bell's *Principles*, s. 1428, must be corrected. The lien is not lost by the occasional and temporary absence of the guest *animo revertendi* (*Allen*, 12 C. B. (N. S.) 267), nor by the innkeeper allowing the guest to go away without paying his bill, his luggage remaining in the inn (*Snead*, 1 C. B. (N. S.) 267). Not being a general lien, it does not revive upon the return of the guest if the innkeeper has allowed him to go away permanently with his luggage without paying his bill (*Jones*, 8 Mod. Rep. 172). It, however, extends over all the goods brought by

the traveller to the inn for all the debt incurred by him, and so his horse may be retained for his personal expenses (*Mullinor*, 3 Q. B. D. 484). If the horse be stolen, the innkeeper may retain it even against the true owner, but only for the keep of the horse itself (*Robinson*, 3 Bulst. 269). While the innkeeper may retain, he can only deprive the owner of his use of the subjects until the debt be paid. He cannot at common law sell them, and so pay himself; but this power is given to him, under certain conditions, by the Act 41 & 42 Vict. c. 38. That Act provides that when goods have lain in the innkeeper's hands for six weeks without the debt being satisfied, he may sell them by public auction, to pay himself the debt for which he could have retained the goods under his lien. If the goods realise more than the debt and the expenses of the sale, he must, on demand, pay the balance to the former owner of the goods. At least one month before the sale an advertisement, with a description of the goods, the name of the owner, and notice of the sale, must be inserted in one London and one local newspaper. It is thought that this Act applies to Scotland, notwithstanding the latter provision.

An innkeeper must have his premises in a fit state of repair, and safe. Should any injury be caused to a guest from neglect in this respect, in any part of the inn in which he has a legitimate reason for being, the innkeeper will be liable (*Walker*, 1886, 2 T. L. R. 450; cf. *Brady*, 1887, 14 R. 783).

In addition to the duties and obligations imposed upon an innkeeper by common law, he is subject to very considerable statutory regulations.

Under the Licensing (Scotland) Acts, 1828 to 1887, restrictions were placed upon the sale of exciseable liquors. These Acts will be dealt with *in extenso* under the head of PUBLIC-HOUSES, and in this article it will be necessary to refer only to those provisions of these Acts which apply more peculiarly to inns.

The scheme of the Acts is that no person shall be permitted to sell exciseable liquor without a licence, and no licence shall be granted until the applicant can produce a certificate granted by the proper licensing authorities, the justices in counties and the magistrates in burghs. These certificates are only granted upon certain conditions; and there are thus imposed upon all innkeepers who are licensed to sell such exciseable liquors many restrictions as to the hours and places within which, and the persons to whom, they may sell these liquors, and generally as to the conduct of their business.

In these Acts "inn and hotel" is defined to mean, "in towns and the suburbs thereof, a house containing at least four apartments set apart exclusively for the sleeping accommodation of travellers; and in rural districts and populous places not exceeding one thousand inhabitants according to the census last before taken, to a house containing at least two such apartments."

The certificate which is granted to an innkeeper is in the form appointed by Sched. A of the Public Houses Acts Amendment (Scotland) Act, 1862, as amended by sec. 4 of the Public Houses Hours of Closing (Scotland) Act, 1887.

FORM OF CERTIFICATE FOR INNS AND HOTELS.

At a general meeting for granting and renewing certificates for the sale of exciseable liquors held by Her Majesty's justices of the peace acting in and for the county [*or* of the magistrates of the burgh, *as the case may be*] of , holden at , within the said county [*or* burgh] on the day of in the year one thousand eight hundred and , Her Majesty's justices of the peace acting in and for said county [*or* the magistrates of the said burgh], assembled at the said meeting, did authorise and empower *A. L.*, now dwelling at , to

keep an inn and hotel at , in the parish of and county aforesaid [*or* burgh aforesaid], for the sale in the said house, but not elsewhere, of victuals and of spirits, wine, porter, ale, beer, cyder, perry, or other exciseable liquors [*or* of victuals, and of porter, ale, beer, cyder, or perry] [*or* of victuals, wine, porter, ale, beer, cyder, or perry], provided the said *A. L.* shall be licensed and empowered to sell such liquors under the authority and permission of any excise licence to him or her in that behalf granted, on the terms and conditions following; that is to say, that the said *A. L.* do not fraudulently adulterate the bread or other victuals or liquors sold by him, or sell the same knowing them to have been fraudulently adulterated; and do not use in selling the same any weight or measure which is not of the legal imperial standard; and do not sell any groceries or other uncooked provisions in the said house or premises, to be consumed elsewhere; and do not knowingly permit any breach of the peace, or riotous or disorderly conduct, within the said house or premises; and do not knowingly permit or suffer men or women of notoriously bad fame, or girls or boys, to assemble and meet therein; and do not supply exciseable liquors to girls or boys apparently under fourteen years of age, or to persons who are in a state of intoxication; and do not permit or suffer any unlawful games therein; and do not keep open house, or permit or suffer any drinking on any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning, or after such hour at night, of any day, not earlier than ten and not later than eleven, as the licensing authority may direct, with the exception of refreshment to travellers or to persons requiring to lodge in the said house or premises; and do not open his house for the sale of any exciseable liquors, or permit or suffer any drinking therein or on the premises belonging thereto, or sell or give out the same, on Sunday, except for the accommodation of lodgers and travellers; and do maintain good order and rule within his house and premises; and, lastly, do not transgress or commit any breach of the conditions of any permission to sell on a public or special occasion within his own house or elsewhere. This certificate to continue in force, upon the terms and conditions aforesaid, from the day of one thousand eight hundred and , and until the day of one thousand eight hundred and , and no longer.

The above certificate is made out according to the deliverance in the book or register appointed to be kept in terms of the Act of Parliament.

C. D., Clerk.

Most of these conditions are the same as those contained in the certificate for a public house, and questions arising thereunder will be treated of under public-houses; but two of them are peculiar to inns.

An innkeeper, like any other licensed dealer in exciseable liquor, may not sell during prohibited hours, "with the exception of refreshment to travellers or to persons requiring to lodge in the said house or premises," or on Sundays, "except for the accommodation of lodgers and travellers." Thus the only persons who can be supplied by an innkeeper during these prohibited times are lodgers and travellers.

This power to supply lodgers and travellers during prohibited hours is not confined to the personal and individual wants of the lodger or traveller. The innkeeper may supply friends or guests of a lodger or traveller, provided that the refreshment is ordered and paid for by the lodger or traveller (*Gemmell*, 1882, 10 R. (J. C.) 17; *Murray*, 1883, 10 R. (J. C.) 17; *Pine*, 1887, L. R. 20 Q. B. D. 221). The entertainment must be *bonâ fide*, and not a plot or device to evade the Act (*Oliver*, 1896, 23 R. (J. C.) 34). The onus is on the innkeeper to show that he took reasonable precautions to ascertain the *bona fides* of the lodger or traveller (*Gallimore*, 1874, 38 J. P. 597). The amount supplied must not be more than is reasonable and necessary in the circumstances. In one case supplying one quart bottle of whisky to each of two *bonâ fide* travellers was held not a contravention (*Welsh*, 1886, 13 R. (J. C.) 61).

In England, it is matter of statute law (37 & 38 Vict. c. 49, s. 10) that a person is not considered a *bonâ fide* traveller, so as to be entitled to be supplied on Sundays, unless he have lodged the previous night three miles at least from the inn where he demands the drink. In Scotland, there is no

decision as to the distance a person must travel on Sunday to become a *bonâ fide* traveller. It has been observed (*Johnston*, 1876, 3 Coup. 250) that it was not necessary that a man should be travelling on business, or otherwise than on foot. It was sufficient that he was from home fairly and honestly—not out for drink, but for exercise or legitimate amusement such as the law allowed, and at some distance from home; and four miles was an abundantly sufficient distance. The traveller must be still *in itinere* (*Galloway*, 1889, 16 R. (J. C.) 46).

Another form of certificate for inns is a six-day certificate, where the condition is inserted that the inn must be kept closed during the whole of Sunday. Under this certificate the innkeeper is not bound to, and may not, supply travellers with intoxicating liquor, and may only supply persons lodging in his house. The holder of such a certificate is entitled to a remission of one-seventh of the ordinary duty on the excise licence. These certificates are rare in Scotland. They were introduced in the English Licensing Act of 1872 (35 & 36 Vict. c. 94), s. 49, which section was extended to Scotland by 43 & 44 Vict. c. 20, s. 44.

Another certificate introduced by the English Licensing Act of 1874 (37 & 38 Vict. c. 49, ss. 7 and 8) was at the same time extended to Scotland. That is the early closing certificate, which entitles the holder to a further remission of one-seventh of the ordinary duty if he accepts the condition to close his premises at night one hour earlier than they would otherwise have to be closed. The hour must be earlier than that fixed by the Early Closing Act, 1887 (50 & 51 Vict. c. 38) (*Henderson*, 1888, 16 R. 147).

The Licensing Acts also contain provisions for special permissions for extension of hours or sale of liquor at uncertificated premises, and for occasional excise licences for the exercise of these permissions.

The Excise Licence Duty for innkeepers is provided by 43 & 44 Vict. c. 20, s. 43 (1). It varies with the annual value of the dwelling-house in which the business is carried on. By subsec. (4), where the premises are structurally adapted for use as an inn and hotel for the reception of guests and travellers desirous of dwelling therein, and are mainly so used, the maximum duty is £20, unless some part of the premises of a greater annual value than £25 is set apart and used as an ordinary public-house.

There are various other statutory provisions referring to inns and innkeepers which may be noted so far as peculiar to this subject.

The Tippling Acts, 24 Geo. II. c. 40, s. 12, and 25 & 26 Vict. c. 38, which provide that no person can recover at law a debt due for spirituous liquor, or upon a security given therefor, unless such debt was incurred *bonâ fide* at one time to the amount of £1 at least, do not apply to spirits supplied to one lodging at an inn (*Procter*, 1835, 7 C. & P. 67), even though part of the liquor had been supplied to the lodger and his friends at the bar (*Guthrie's Trs.*, 1891, 18 R. 833).

By 14 & 15 Vict. c. 36, the *Inhabited House Duty*, which in the ordinary case was at the rate of 9d. per £, was fixed at 6d. per £ in cases where the dwelling-house was occupied by any person duly licensed to sell therein, by retail, beer, ale, wine, or other liquors. By 34 & 35 Vict. c. 103, s. 31, this reduced rate of 6d. was extended to cases of houses occupied by persons carrying on therein the business of hotel-keeper, or innkeeper, or coffee-house keeper, although not licensed to sell therein, by retail, beer, ale, wine, or other liquors. By 53 & 54 Vict. c. 8, s. 25, the rate was still further reduced to 2d. in the case of houses under the value of £40 per annum, and 4d. where the annual value is over £40 but under £60. For questions as to the amount of the valuation, see the articles on Rating and Valuation.

Infectious Diseases.—The provision in the Public Health Scotland Act, 1867 (30 & 31 Vict. c. 101, s. 50), that "if any person knowingly lets any house, room, or part of a house, in which any person suffering from any infectious disorder has been, to any other person, without having such house, room, or part of a house, and all articles therein liable to retain infection, disinfected to the satisfaction of a qualified medical practitioner, as testified by a certificate given by him and lodged with the sanitary inspector, or other person appointed to perform the duties of sanitary inspector, such person shall be liable to a penalty not exceeding twenty pounds," is expressly extended to keepers of an inn or hotel, who are for the purpose of that provision "deemed to let part of a house to any person admitted as a guest into such inn or hotel."

Game.—By 1 & 2 Will. IV. c. 32, the provisions of which are by 23 & 24 Vict. c. 90, s. 13, extended and made applicable to Scotland, it is declared (s. 18) that licences to sell game shall not be issued to innkeepers and victuallers, and persons licensed to sell beer by retail, but by sec. 26 liberty is given to any innkeeper or tavern-keeper, without any licence to deal in game, to sell game, provided that it be for consumption in his own house.

Male Servants.—By 32 & 33 Vict. c. 14, s. 19 (5), it was provided that the licence for a male servant need not be taken out "by any licensed retailer of exciseable liquors, or licensed keeper of a refreshment house, for any servant employed by him solely for the purposes of his business, such servant being the only male servant employed by him." By the Excise Duties Act, 1873 (36 Vict. c. 18), this limitation of the exemption to the case where only one male servant is employed is swept away, and the exemption now applies to "any hotel-keeper, retailer of intoxicating liquor, or refreshment-house keeper, for any servant wholly employed by him for the purposes of his business."

On the subject of GOODWILL and TRADE NAME, so far as affecting inns, reference is made to the articles on these subjects.

[Stair, i. 9. 5: More, *Notes*, lvii.; Ersk. iii. 1. 28; Bell, *Com.* i. 498, ii. 99; Purves, *Scottish Licensing Laws*; Dewar, *Liquor Laws for Scotland.*]

Innominate Rights. — Innominate rights, as opposed to nominate rights, are rights which spring from such contracts or other sources of obligation as are not known to the law under a *nomen juris.* The distinction between these two classes of rights is as old as the science of law and legal remedy. In the civil law innominate contracts were regarded as real, and, to be binding, required that something should have been actually given or performed by one of the parties, otherwise it resolved into a *nudum pactum*, from which no right of action arose. Where binding, the civil law provided a remedy by the *actio in factum* or *præscriptis verbis* (Gaius, *Inst.* 3. 89; *Vinn. ad Inst.* 3. 14. 2. 9, 3. 15 in pr.; 3. 25. 1. 1). The history of the division of the Courts in England into Courts of Law and Courts of Equity affords another illustration of the same distinction (see Snell, *Prin of Eq.* c. i.). Our law has rejected the distinction of the civil law between contracts and *nuda pacta*; and with us, accordingly, all contracts, nominate or innominate, are equally binding upon both parties from their date (Ersk. 3. 1. 35).

The leading difference between nominate and innominate rights is, that, in the case of nominate rights such as those which spring from the ordinary contracts of sale, lease, etc., the force of law, apart from the contract, invests the parties with certain rights and duties *hinc inde*, these

being implied in the very name of the contract; innominate rights, on the other hand, derive their whole force, unaided by any implication of law, from the contract or other source of obligation from which they arise. In short, the rule here is *pacta dant legem contractui*.

It follows that, in questions of legal construction, innominate are less favourably regarded than nominate contracts, and the Court will not be diligent to support the former if irregular or defective in point of form.

As regards constitution and proof, the rule of our older law was that not only in regard to heritage, but also in regard to moveables, contracts which are not distinguished by proper *nomina juris* could not, at least where the subject was beyond £100 Scots, be constituted verbally, or be proved by parole (Ersk. 4. 2. 20; see *Tassie*, 1764, 5 Bro. Supp. 899; Ld. Benholme, *Edmonston*, 1861, 23 D. 995, 1001). Since, however, the admissibility of parties as witnesses *in causa*, the tendency here, as elsewhere, has been towards the allowance of proof *prout de jure*. It is now settled that there is no general rule of law restricting the proof in innominate contracts to writ or oath (*Forbes*, 1877, 4 R. 1141); that this restriction is only applicable to cases of innominate contracts in which the terms are of an extraordinary or anomalous nature (*Edmonston*, *v.s.*: *Taylor*, 1853, 24 D. 19; *Johnston*, 1868, 6 M. 1067, p. 1072: see *Reid*, 1887, 14 R. 789: *Garden*, 1893, 20 R. 896. See also *Stewart*, 1882, 9 R. 501); and that in other cases of innominate contracts, parole evidence is admissible as a means of proof (*Forbes*, *v.s.*: *Thomson*, 1868, 7 M. 39; *Moscrip*, 1880, 8 R. 36; *Downie*, 1885, 13 R. 271. See Dickson, *Evid.* s. 565, and authorities there cited).

In cases in which parole proof is not admissible, *rei interventus* cannot be appealed to as confirming the contract: for it is clear that the very uncertainty which renders proof by witnesses of the terms of the contract incompetent, makes it impossible to determine whether the acts founded on as forming *rei interventus* are referable to the contract or not (*Edmonston*, *v.s.*).

As regards innominate rights over heritage, the early development of the system of registration, with the consequent security for purchasers and creditors, has rendered our law extremely jealous of admitting any burdens upon property that are not disclosed by the records. Hence the rule of our law which, in spite of Erskine's dictum to the contrary (Ersk. ii. 9. 2), seems to be well established, that in the case of servitudes—at least as regards negative servitudes, which, not being dependent upon possession, are not apparent to third parties—only those which are well established and defined in our law can be constituted as real burdens on land so as to be effectual against singular successors (Bell, *Prin.* ss. 979, 998. See SERVITUDES).

Innuendo.—See DEFAMATION.

Supplemental Notes.

Law Books published by William Green & Sons.

Williamson's Conveyancing Cases. A Digest of Conveyancing Cases from the passing of the Conveyancing (Scotland) Act, 1874 to March 1892. By A. M. Williamson, M.A., Advocate, Aberdeen. Demy 8vo. 15s.

Graham's Poor Law and Parish Councils. A Manual of the Acts relating to Poor Law and Parish Councils in Scotland. By J. Edward Graham, Advocate, Author of "Sellar's Education Acts." Demy 8vo. 10s. 6d. *nett.* 1897.

Deas on Railways. A Treatise on the Law of Railways applicable to Scotland. Second Edition. By James Ferguson, M.A., LL.B., Advocate. Royal 8vo. 45s. *nett.* 1897.

A necessary Supplement to above.

Ferguson's Railway Statutes: The Public Statutes relating to Railways in Scotland, with Appendix, the Act of Sederunt regulating Appeals from the Railway Commission, also Rules regulating Applications for Light Railways, &c., &c. Royal 8vo. 25s. *nett.* 1898.

Purves' Licensing Laws. The Scottish Licensing Laws, with Acts, Notes, and Introduction. By James Purves, S.S.C. Crown 8vo. 7s. 6d. *nett.* 1896.

Renton on Lunacy. The Law of, and Practice in, Lunacy. By A. Wood Renton, M.A., LL.B., Barrister-at-Law. Royal 8vo. 50s. *nett.* 1897.

Glegg on Reparation. A Practical Treatise on the Law of Reparation. By Arthur Thomson Glegg, M.A., LL.B., Advocate. Royal 8vo. 28s.

Stewart's Law of Horses. A Practical Treatise on the Law of Horses. By D. Ross Stewart, M.A., LL.B., Advocate. Demy 8vo. 10s. 6d.

Shennan's Boundaries of Counties and Parishes, as settled by the Boundary Commissioners. By Hay Shennan, Advocate, Sheriff-Substitute at Lerwick, and formerly Secretary to the Boundary Commissioners for Scotland. 8vo. 14s.

Black's Shipping Law. A Digest of Decisions in Scottish Shipping Cases, 1865–90, with Notes by William George Black, Writer, Glasgow, Author of "Law relating to Scottish County Councils," &c., &c. 10s. 6d.

Broun on Nuisance. The Law of Nuisance in Scotland. Part I. Nuisance at Common Law. Part II. Statutory Nuisance. By J. C. C. Broun, M.A., LL.B., Advocate. 8s.

Bar's Private International Law. Translated, with Notes, by G. R. Gillespie, B.A. Oxon., Advocate. Second Edition, revised and enlarged. Royal 8vo. 45s.

Black's Teinds. What are Teinds? An Account of the History of Tithes in Scotland. By Wm. Geo. Black. Crown 8vo. 2s. 6d. *nett.*

Black's Parochial Ecclesiastical Law. A Handbook of the Parochial Ecclesiastical Law of Scotland. By Wm. George Black. Second Edition. 8s.

Law Books published by

Black's Parochial Law. A Handbook of Scottish Parochial Law, other than Ecclesiastical. By Wm. Geo. Black. Crown 8vo. 8s.

Graham Murray's Registration Cases. Qualification of Voters and Revised Edition of the Solicitor-General's Digest of Registration Cases. By Robert L. Blackburn, Advocate. 5s.

Currie's Confirmation of Executors. The Confirmation of Executors in Scotland, according to the Practice in the Commissariot of Edinburgh, with Appendices of Forms, &c. By James G. Currie. Second Edition. 8vo. 14s.

—— With Supplement on Finance Acts, 1894 and 1896. 18s. 1897.

Mackay's Practice. The Practice of the Court of Session. By Æ. J. G. Mackay, Advocate. Two volumes, royal 8vo. £3, 12s.

Murray's Notaries Public. The Law Relating to Notaries Public, with Forms of Instruments. By J. C. Murray. 8vo. 12s.

Campbell's Mercantile Law. Principles of Mercantile Law in the Subjects of Bankruptcy, Cautionary Obligations, Securities over Moveables, Principal and Agent, Partnership, and the Companies Acts. By R. Vary Campbell, Advocate. Second Edition, revised and enlarged. 8vo. 12s.

Trayner's Maxims. Latin Maxims and Phrases. Collected from the Institutional Writers on the Law of Scotland and other Sources. By John Trayner, one of the Senators of the College of Justice. Fourth Edition. 8vo. 21s. 1894.

Ferguson's Railway Law. A Summary of the Law relating to a Railway in Operation. By James Ferguson, Advocate. 8vo. 18s.

Ferguson's Five Years' Railway Cases, 1889–1893, with Acts of Parliament and of Sederunt; and the Railway and Canal Commission Rules. Demy 8vo. 5s. *nett.* 1894. Being a Supplement to the above work.

Both Treatises may be had bound in 1 vol., at 21s. *nett.*

Balfour's Court of Session Practice. A Handbook of Court of Session Practice for the use of Students. Second Edition, revised by Robert Berry. 8vo. 12s.

Macdonald's Criminal Law. A Practical Treatise on the Criminal Law of Scotland. By J. H. A. Macdonald, Q.C. (Lord Justice-Clerk). Third Edition, greatly enlarged. 8vo. £1, 11s. 6d. 1894.

Kirkpatrick on Evidence. A Digest of the Scottish Law of Evidence. By John Kirkpatrick, M.A., LL.B., Advocate. Second Edition, revised and enlarged. Crown 8vo. 8s.

LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES
DEC 3 1952

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 695 590 0

M'Kechnie and Lyell's Court of Session Styles: Being Forms of Summonses, Notes of Suspension, Petitions, &c. Compiled by D. M'Kechnie, M.A., and W. D. Lyell, M.A., Advocates. 8vo. 16s.

Mackenzie on Cessio. Manual of the Law of Cessio. With an Appendix containing the Statutory Provisions and Forms for all matters occurring in the Process of Cessio. By A. Mackenzie, Solicitor. 8vo. 5s.

Seton's Registration Acts. A Practical Analysis of the Acts relating to the Registration of Births, Deaths, and Marriages in Scotland, with Statutes, Forms, Tables, &c. By George Seton, Advocate. Fifth Edition. 8vo. 7s. 6d. *nett.*

Burns on Conveyancing. A Handbook of Conveyancing, for the use of Students. By John Burns, B.L. 6s.

Lorimer's Joint-Stock Companies. An Outline of the Law of Joint-Stock Companies. By J. Campbell Lorimer, LL.B., Advocate. Crown 8vo. 5s.

Report of the Trial of the Dynamitards before the High Court of Justiciary, at Edinburgh, December, 1883, for Treason-Felony. By C. T. Couper, Advocate. 8vo. 9s. 1884.

Moncreiff on Review. A Treatise on the Law of Review in Criminal Cases by the High Court and Circuit Court of Justiciary, and on Procedure in Criminal Cases in Inferior Courts in Scotland. By Hon. H. J. Moncreiff (Lord Wellwood). 8vo. 15s.

Lorimer's Studies, National and International. Occasional Lectures delivered in the University of Edinburgh, 1864–1889. By the late James Lorimer, Professor of Public Law, University of Edinburgh. 10s. 6d.

Styles of Writs in the Sheriff Courts of Scotland. By James Forrest, Advocate, and R. B. Shearer, Writer, Greenock. 8vo. 12s.

Scottish Chamber of Agriculture Series. The Agricultural Holdings (Scotland) Act, 1883. By Professor Rankine. 2s. *nett.* 1894. The Farmer's Legal Handbook. By Isaac Connell, Solicitor. Crown 8vo. 3s. 6d. *nett.* 1894. The Law of Entail: A Lecture. By Professor Wood. Crown 8vo. 6d. 1894.

Manual of the Law of Scotland, specially for the Use of Students. By William Kinniburgh Morton, S.S.C. One Large Volume. 12s. *nett.* 1896.

Guide to Local Government in Counties, Parishes, and Burghs, containing the Text of all Acts dealing with County and Parish Councils and their Duties. Fourth Edition. 7s. 6d. *nett.* 1898.