

Book Publishers
MAIN STREET
FFALO, N Y.

UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

WIL ONS.

Scots Rev Volumes.
Royal 8v in 10 Vols.
Prospectu
Green's E . By the
most Cor n 13 Vols.
15s. *nett*

The New **ıe Laws**
of Eng rities. In
12 Vols.
Scots Sta npleted in
8 Volum *Prospectus*
and parts

The Parli enty-Fifth
Annual]

The Scots ter. 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.

Dewar on Liquor Laws. A Practical Treatise, with Decisions, 1854 to 1900; Notes, Indices, and Schedules of Licence Duties. By DAVID DEWAR, Chief Constable, Dundee. Third Edition. Demy 8vo. 7s. 6d. *nett.* 1900.

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.

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.

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.

Mackay's Manual of Practice. A Manual of Practice in the Court of Session. By Æ. 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 XI



PRINTED FOR

WILLIAM GREEN & SONS,

BY MORRISON AND GIBB LIMITED,

April 1899.

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 XI

SABBATH TO *STAMPS*

EDINBURGH

WILLIAM GREEN & SONS

LAW PUBLISHERS

1899

T
68528
1896
v. 11

The Articles in this Volume have been Revised by their respective Authors as at *March* 1*st*, 1899.

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

Sale. — Professor RICHARD BROWN, St. Mungo's College, Glasgow.

Sale of Food and Drugs Acts. — DUDLEY STUART, Advocate.

Salvage.—ALEXANDER MOFFATT, Advocate.

Sanctuary, Privilege of. — W. J. CULLEN, Advocate.

Sasine propriis manibus. — JOHN BURNS, W.S.

Savings Banks.—J. WRIGHT FORBES, Advocate.

School Board Elections, Procedure at.—P. J. BLAIR, Advocate.

Sea; Seashore.—J. H. TAIT, Advocate.

Seamen.—F. A. UMPHERSTON, Advocate.

Searches; Search for Incumbrances.—H. P. MACMILLAN, Advocate.

Search-Warrant.—A. M. ANDERSON, Advocate.

Seats in Churches.—JOHN COWAN, Advocate.

Seaworthiness.—F. A. UMPHERSTON, Advocate.

Secretary for Scotland. — L. C. HALLARD, Advocate.

Securities.—W. M. GLOAG, Advocate.

Seduction.—A. T. GLEGG, Advocate.

Semiplena probatio. — J. B. BALLINGALL, Advocate.

Sentence.—A. M. ANDERSON, Advocate.

Sequels.—HAY SHENNAN, Advocate, Sheriff-Substitute of Zetland.

Sequestration.—W. J. CULLEN, Advocate.

Servitudes.—J. BARTHOLOMEW, Advocate.

Session, Court of.—PATRICK SMITH, Advocate, Sheriff-Substitute of Selkirkshire.

Sessions of the Peace. — J. DEAN LESLIE, Advocate.

Settlement (Poor Law). — A. ORR DEAS, Advocate.

Sheep.—A. T. GLEGG, Advocate.

Sheriff; Sheriff Court.—J. C. DOVE WILSON, Advocate.

Sheriff, Executive and Administrative Duties of. — ÆN. J. G. MACKAY, Advocate, Sheriff of Fife and Kinross.

Ship; Shipping. — J. A. SPENS, Writer, Glasgow.

Ship's-Husband; and

Shipmaster.—F. A. UMPHERSTON, Advocate.

Short Titles.—J. A. FLEMING, Advocate.

Singular Successors.—J. H. TAIT, Advocate.

Sisting Process.—JOHN INGLIS, Advocate.

Slains, Letters of. — H. P. MACMILLAN, Advocate.

Slander of Title.—A. T. GLEGG, Advocate.

Slaughter-Houses, etc. — DUDLEY STUART, Advocate.

Small Debt Court (Sheriff); and

Small Debt Court (Justice of Peace).—J. C. DOVE WILSON, Advocate.

Smoke Nuisance, etc., Acts.—J. C. C. BROUN, Advocate.

Smuggling.—A. M. ANDERSON, Advocate.

Solatium.—JOHN INGLIS, Advocate.

Solicitor; and

Solicitors in the Supreme Courts.—J. HENDERSON BEGG, Advocate, Sheriff-Substitute at Greenock.

Sovereign.—R. SCOTT-BROWN, Advocate.

Sowming and Rowming.—WILLIAM HUNTER, Advocate.

25705

T
68528
1896
v. 11

The Articles in this Volume have been Revised by their respective Authors as at *March* 1*st*, 1899.

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

Sale. — Professor RICHARD BROWN, St. Mungo's College, Glasgow.

Sale of Food and Drugs Acts. — DUDLEY STUART, Advocate.

Salvage.—ALEXANDER MOFFATT, Advocate.

Sanctuary, Privilege of. — W. J. CULLEN, Advocate.

Sasine propriis manibus. — JOHN BURNS, W.S.

Savings Banks.—J. WRIGHT FORBES, Advocate.

School Board Elections, Procedure at.—P. J. BLAIR, Advocate.

Sea; Seashore.—J. H. TAIT, Advocate.

Seamen.—F. A. UMPHERSTON, Advocate.

Searches; Search for Incumbrances.—H. P. MACMILLAN, Advocate.

Search-Warrant.—A. M. ANDERSON, Advocate.

Seats in Churches.—JOHN COWAN, Advocate.

Seaworthiness.—F. A. UMPHERSTON, Advocate.

Secretary for Scotland. — L. C. HALLARD, Advocate.

Securities.—W. M. GLOAG, Advocate.

Seduction.—A. T. GLEGG, Advocate.

Semiplena probatio. — J. B. BALLINGALL, Advocate.

Sentence.—A. M. ANDERSON, Advocate.

Sequels.—HAY SHENNAN, Advocate, Sheriff-Substitute of Zetland.

Sequestration.—W. J. CULLEN, Advocate.

Servitudes.—J. BARTHOLOMEW, Advocate.

Session, Court of.—PATRICK SMITH, Advocate, Sheriff-Substitute of Selkirkshire.

Sessions of the Peace. — J. DEAN LESLIE, Advocate.

Settlement (Poor Law). — A. ORR DEAS, Advocate.

Sheep.—A. T. GLEGG, Advocate.

Sheriff; Sheriff Court.—J. C. DOVE WILSON, Advocate.

Sheriff, Executive and Administrative Duties of. — AEN. J. G. MACKAY, Advocate, Sheriff of Fife and Kinross.

Ship; Shipping. — J. A. SPENS, Writer, Glasgow.

Ship's-Husband; and

Shipmaster.—F. A. UMPHERSTON, Advocate.

Short Titles.—J. A. FLEMING, Advocate.

Singular Successors.—J. H. TAIT, Advocate.

Sisting Process.—JOHN INGLIS, Advocate.

Slains, Letters of. — H. P. MACMILLAN, Advocate.

Slander of Title.—A. T. GLEGG, Advocate.

Slaughter-Houses, etc. — DUDLEY STUART, Advocate.

Small Debt Court (Sheriff); and

Small Debt Court (Justice of Peace).—J. C. DOVE WILSON, Advocate.

Smoke Nuisance, etc., Acts.—J. C. C. BROUN, Advocate.

Smuggling.—A. M. ANDERSON, Advocate.

Solatium.—JOHN INGLIS, Advocate.

Solicitor; and

Solicitors in the Supreme Courts.—J. HENDERSON BEGG, Advocate, Sheriff-Substitute at Greenock.

Sovereign.—R. SCOTT-BROWN, Advocate.

Sowming and Rowming.—WILLIAM HUNTER, Advocate.

755795

Special Case.—Patrick Smith, Advocate, Sheriff-Substitute of Selkirkshire.

Specific Performance.—J. C. S. Sandeman, Advocate.

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

Specification.—A. J. Alison, Advocate.

Specification and Diligence for Recovery of Writings.—A. A. Grainger Stewart, Advocate.

Spei emptio.—John Inglis, Advocate.

Spuilzie.—C. D. Murray, Advocate.

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

GREEN'S ENCYCLOPÆDIA

OF

THE LAW OF SCOTLAND

Sabbath.—See SUNDAY.

Sabbath-Breaking.—The due observance of the Sabbath has been enjoined by numerous Scottish statutes from 1503 down to 1701, *e.g.* 1503, c. 83; 1591, c. 122; 1593, c. 63; 1594, c. 198; 1663, c. 19; 1672, c. 22; 1690, c. 5; 1690, c. 25; 1693, c. 40; 1696, c. 31; 1701, c. 11.

These Acts contain various prohibitions against holding fairs or markets; buying and selling, working, gaming, or playing; resorting to ale houses or taverns; salmon-fishing; going of saltpans, mills, or kilns; hiring of reapers, and, in general, all use of ordinary labour, employment, or sport, on that day, the penalties appointed being chiefly pecuniary fines.

Thus the penalties by the Act of 1661, c. 18, are £20 Scots (£1, 13s. 4d.) for the going of each saltpan, mill, or kiln, payable by the heritors or possessors: £10 Scots (16s. 8d.) for each shearer and fisher of salmon, the half payable by the hirer, and the other by the person hired; and the last-named penalty for any other profanation of the day. Corporal punishment is authorised in the case of non-payment of the penalties, "but this the judge could not probably make use of to any greater extent, for a first offence, than that of inflicting a short imprisonment, or setting the offender in the stocks or jugs" (Hume, i. 573).

By the Act 1594, c. 201, for a *third* offence the offender was declared to have forfeited his moveables, and placed his person in the King's will; and by the Act 1579, c. 70, the goods exposed to sale in a fair or market on a Sunday, or in a kirk or kirkyard on any day, were declared escheated to the poor of the parish.

It is still an open question as to how far these Acts are applicable at the present day. In the case of *Bate*, 1870, 1 Coup. 495, a conviction, obtained under these Acts, of the offence of keeping open shop and selling confectionery on Sunday was quashed, on the ground that the offence had been tried under the Summary Procedure Act, which was inapplicable. But the plea of desuetude was repelled, and the Sabbath Profanation Acts held to be still in force, in so far as they declare the keeping open shop on Sunday to be an offence by the law of Scotland.

Again, in the later case of *Nichol* v. *M'Neil* (1887, 14 R. (J. C.) 47),

observations were made by the judges on the question whether the Act of 1661, c. 18, is in desuetude. (*Vide* also *Jobson*, 1828, 7 S. 83; *Jennings*, 1852, 1 Irv. 115.)

Provisions against the disturbance of public worship are to be found in the Acts of 1551, c. 17, and 1587, c. 27. The penalties in the former Act are pecuniary, and in the latter the culprit is punished by escheat of his moveables. Further, in a later Act (10 Anne, c. 7, s. 9), persons disturbing congregations lawfully assembled for public worship are liable to a penalty of £100 sterling (*Dougall*, 1861, 34 Jur. 29).

The execution of these various statutes against Sabbath profanation is committed to the justices (1661, c. 38).

Sailor.—See Seamen; Ship; Shipmaster.

Salaries.—See Arrestment (vol. i. 313); Sequestration; etc.

Sale.

TABLE OF CONTENTS.

PAGE

I. General Characteristics of Sale—
Distinguished from other Contracts 4
Combined with other Contracts 4
Sale and Lease 5
Hire-Purchase . . . 5, 30
Sale on Approval . . 5, 36
Sale or Return . . . 5, 36
Price as an Element . . . 6
Absolute Transfer as an Element 7

II. Sale of Heritage—
1. *Constitution of the Contract*—
Parties—
Agent, Trustee, Factor, etc. . 7
Subject-Matter—
Destruction — Complete and Partial 9
Heritable distinguished from Moveable 10
Adjuncts of Heritage . . 10
As affecting Legality of Contract 10
Price—
How fixed 11
Consideration other than Money. 11
Excambion 11
Transfer of Ownership—
Distinguishing Feature of Sale 12
Sale or Security 12
Ex facie Absolute Disposition. 12
Requisites of Transfer . . 13
Consent and its Expression—
Consent wanting 14
Causes voiding apparent Consent 14
Requisites of Proof . . . 14

PAGE

Writing 14
Offer and Acceptance . . 14
Locus pœnitentiæ . . . 15
Rei interventus . . . 15
Improbative Writings . . 15
Special Kinds of Sale—
Judicial Sales 15
Sales by Auction . . . 16
2. *Incidents of the Contract*—
Effect of Conditions . . . 16
Implied Conditions . . 17
Express Conditions. . . 17
3. *Performance of the Contract*—
Seller's Obligations—
To give Delivery . . . 17
To give a Good Title . . 18
To grant Warrandice . . 20
Buyer's Obligations—
To accept Delivery . . . 22
To pay the Price . . . 22
4. *Remedies*—
Specific Implement . . 23
Damages 23
Suspension and Interdict . 24

III. Sale of Goods—
1. *Formation of the Contract* . . 24
Sale and Agreement to Sell . 25
Capacity to Buy and Sell . . 25
When is Writing necessary? . 25
Sale of a Ship 26
Subject-Matter of Contract . 26
Existing Goods . . . 26
Future Goods 26
Goods which have perished . 26
The Price—
Ascertainment . . . 27
Usage of Trade . . . 28
Trade Discount . . . 28

PAGE
Legal Tender 28
Payment under Condition . 28
Proof of Payment . . . 28
Valuation by Third Party . 28
Conditions and Warranties . 29
Suspensive Conditions . . 30
Resolutive Conditions . . 30
Warranty 29, 31
Stipulations as to Time . 29, 31
Time of Payment of Price 29, 31
Buyer's Alternative Remedies in Scotland 29, 31
Actio quanti minoris . . 31
Rejection of Goods . . 29, 32
Effect of Delay . . . 32
Special Subjects — Seeds — Machinery 32
Damages in Diminution or Extinction of Price . 33, 51
Implied Undertaking as to Title, etc. 33
Sale by Description . 29, 34
Caveat Emptor and Exceptions 29, 34
Implied Warranty of Quality 30, 35
Sale by Sample . . . 35
2. *Effects of the Contract* . . 36
Transfer of Property . 36, 38
Specific and Non-Specific Goods 38
Future Goods 38
Intention of Parties . 36, 38
Rules for ascertaining Intention 36
Reputed Ownership . . 38
Security in the Form of Sale . 39
Unfinished Ships . . . 39
Reservation of Right of Disposal . . . 37, 40
Transfer of Title—
Implied Consent of Owner to Sale by others . . . 40
Seller in Possession after Ownership passed . 37, 40
Buyer in Possession without Ownership . . . 37, 40
Transfer of Risk—
Primâ facie passes with Property 37, 40
Risk of Deterioration in Carriage . . . 42, 45
3. *Performance of Contract* . . 41
Duties and Rights of Seller—
Duty to give Delivery . . 42
Duty to make Contract with Carrier . . . 42, 44
Effect of Delivery to Carrier 41, 44

PAGE
Title to sue Carrier . . 44
Actual and Constructive Delivery 42
Goods in Hands of Third Persons . . . 41, 43
Sub-Sales 43
Documents of Title . . . 44
Duties and Rights of Buyer—
Duty to accept Goods and pay Price 41, 44
Right of Rejection . . . 44
Right to Examine . . . 45
No Duty to return Rejected Goods 45
4. *Rights of Unpaid Seller against the Goods* 45
Unpaid Seller defined . 45, 47
Unpaid Seller's Rights—
Lien 46, 47
Retention . . . 46, 48
Stoppage *in transitu* . 46, 49
Resale 47, 50
Arrestment or Poinding . 46, 50
5. *Actions for Breach of the Contract* 51
Remedies of the Seller—
Action for Price . . 51, 52
Interest on Price . . 51, 52
Damages for Non-Acceptance 51, 52
Remedies of the Buyer—
Damages for Non-Delivery 51, 52
Specific Performance . 23, 51
Right to Interest, etc., reserved 52
6. *Supplementary*—
Right of Action . . 52, 54
Implied Terms . . . 52, 54
Course of Dealing and Usage . 55
Ready-Money Sales . . 55
Judicial Recognition of Usage 55
Sales by Auction . . 52, 55
Payment into Court in Scotland 53, 55
Common Law reserved . 53, 56
Securities excluded . . 39, 53
Landlord's Hypothec in Scotland 53, 56

IV. Sale of Incorporeal Moveables 56
Formation of Contract . . 56
How far Writing required . 56
Incorporeal Moveables classified 56
Contract distinguished from Vesting 56
Shares in Joint-Stock Company 57
Miscellaneous Illustrations . 57
Performance of Contract . . 58

I. GENERAL CHARACTERISTICS OF SALE.

Sale is defined by Bell as "a contract for transferring property in consideration of a price in money" (*Com.* i. 458); but since the Sale of Goods Act, 1893, this definition must be extended to meet the case of goods not only agreed to be transferred, but actually transferred by the contract.

The English definition prior to the Act was "a transfer of the absolute or general property in a thing for a price in money" (Benjamin, *Sale*, 1). In other words, in England the sale transferred the property, while in Scotland it only formed an agreement to transfer; the actual transfer being effected by something else, such as infeftment or delivery. In Scotland, as well as in England, a contract for the sale of goods may now, by its inherent force, transfer the property *without delivery*. Where, however, the subject of sale is heritage or incorporeal moveables, neither of which falls under the Sale of Goods Act, the sale still continues to give only a *titulus transferendi dominii*, and does not transfer the property without delivery, or an equivalent for delivery in the form of registration or intimation.

A general definition of sale as applicable to Scotland may be adapted from the definition of the Sale of Goods Act (s. 1) as follows: "Sale is a contract whereby the seller transfers or agrees to transfer the ownership of property to the buyer for a money consideration called the price." In this definition the term "ownership" has been used as less ambiguous than the English term "general property." The latter phrase, though now imported into Scotland by the Act of 1893 (s. 62 (1)), itself requires definition, which in its turn can only be supplied by a reference to English common law. In England the "general" or "absolute" property in goods means ownership, as distinguished from the "special" or "qualified" property implied in bailments, such as loan, factory, carriage, etc.

As a rule, it is not difficult to distinguish between sale and other contracts. It being *ownership* that is transferred, the term is not applicable to any contract where the transferee enjoys a less complete right than the person transferring. Thus feus and leases are grants of the use of property for a money consideration, but these, even if in perpetuity, cannot properly be called sales. No doubt the feuar is in a sense the absolute proprietor of the land feued, and a proper sale of land for a price is sometimes by arrangement converted into a feu, in which the price arranged is the capitalised value of the feu-duty. So also the tenant under a long lease, say for 99 years or 999 years, or in perpetuity, has in many respects the full rights of a proprietor, and is commonly treated as such (see LEASE; also Rankine, *Leases*, pp. 1, 123 *seq.*, 172 *seq.*; but *contra*, see *Welwood*, 1874, 1 R. 507). When once constituted, the right, whether of feu or lease, may be transmitted by way of sale, the purchaser's right in each case being completed by registration in lieu of symbolical delivery of possession. Again, the presence in sale of a price serves to distinguish it from donation and from exchange or barter. Donation, although it forms a transfer of ownership, implies that no price or consideration is received in return. Hence as a transaction it is governed by legal rules entirely distinct from those of sale. In like manner, barter is an exchange of goods for goods; excambion an exchange of lands for lands; in neither case is there any price.

No doubt other contracts are ocasionally grafted upon sale, or sale upon other contracts, as in the case of a lease where the lessee has an option to purchase (*e.g. Robertson*, 1874, 12 S. L. R. 11). So also, where a grassum is paid or promised to be paid to a lessor in addition to the periodical rent, it is held to be an alienation of the rent to that extent, and thus practically a sale (*Buccleuch*, 1819, 1 Bligh, 339). Again, sale is often combined with *locatio operarum*. Indeed, every executry contract of sale may be said to be a sale of the material together with a hiring of the work done upon the article furnished (see Bell, *Com.* i. 193 *seq.*; M. P. Brown, *Sale*, 574 *seq.*). There are also sales so near the border line of other contracts as to obscure their identity. Thus where growing turnips were sold to be consumed by

sheep on the ground, the Court seem to have been misled by the analogy of natural grass, and to have doubted whether the contract amounted to a sale of the turnips or to a lease of the ground (*Ferguson*, 1868, 6 S. L. R. 68). More doubtful contracts have, however, been classed as sales, as in the case of an agreement for the supply of steam-power (*Clark*, 1872, 10 S. L. R. 152), or a contract between author and publisher resembling joint adventure (*Cunningham*, 1891, 18 R. 460).

The confusion between sale and lease takes an acute form and is of much practical importance in connection with hire-purchase. At common law the ordinary form of an agreement of hire-purchase forms a sale, to which is appended the condition that although the possession and use of the article is transferred to the buyer, the ownership is retained by the seller until the last of certain stipulated periodical payments has been made (*Murdoch & Co. Ltd.*, 1889, 16 R. 396). It is not a conditional sale, for that implies the fulfilment of a condition without which the sale, as such, never comes into existence, *e.g.* "sale or return," "sale on approval." The condition in hire-purchase does not attach to the constitution of the contract, as in the case of the other contracts mentioned, but is merely a term or incident of a contract already established (see *infra*, p. 30). But it is a very important incident, seeing that the apparent ownership is by express contract separated from the real ownership, and innocent buyers from the person in possession are often deceived (see, *e.g.*, *Murdoch*, *v.s.*). A remedy was attempted by the Factors Acts (see now Factors Act, 1889, s. 9, and Sale of Goods Act, 1893, s. 25 (2)) on the principle that, as between two innocent sufferers by the fraud of a third person, the loss should be borne by the one who, by intrusting the possession and control to another, had enabled the fraud to be committed. The provisions referred to have been held to apply to the ordinary contract of hire-purchase because it is a sale (*Lee*, [1893] 2 Q. B. 318, approved H. L. in *Helby*, [1895] App. Ca. 471). But by a slight alteration in the form of the contract it ceases to be a sale, and becomes a lease or contract of hire, to which the remedial statutory provisions do not apply. The contract in each case is the same in substance, because the so-called "hire" is intended to form in the long-run an instalment of the price. The legal effects are, however, entirely changed by the insertion in the contract of an option to return the article without further penalty than payment of the proportion to date of the current instalment and forfeiture of the instalments already paid (*Helby*, *v.s.*). The option to return should, however, be stated in express terms. A contract to make payments at stated intervals until a certain amount is reached will be construed as a present obligation for the future payment of the whole sum, and as such it will be held to be a price, and therefore subject to the provisions of the Factors Act and the Sale of Goods Act (*Hull Rope Works Ltd.*, 1895, 65 L. J. Q. B. 114; see also *Payne*, [1895] 1 Q. B. 653; *Strohmenger*, 1894, 11 Times L. R. 7; *Horton*, 1897, 13 Times L. R. 408; *M'Laren*, 1896, 12 Sh. Ct. Rep. 308).

The inchoate contracts of "sale on approval" and "sale or return" are not sales, but are capable of becoming such on the fulfilment of a condition. From their nature they can only apply to corporeal moveables (*i.e.* goods), and they are in the strict sense of the term "conditional" sales, seeing that the condition attaches to the constitution of the contract itself. Prior to 1894 some divergence of opinion existed as to whether the condition was really "suspensive" of the sale, or whether it was not rather "resolutive," to the effect of putting an end to a sale already completed (cf. *Brown*, 1880,

7 R. 427, with *Macdonald*, 1888, 15 R. 988; and see M. P. Brown, *Sale*, 431, and Brown, *Sale of Goods Act*, 94, 95). The question had some importance as affecting property and risk, but any doubt is now set at rest by the S. of G. Act, 1893 (s. 18, r. 4), which clearly implies a condition suspensive of the sale. Sale on approval means that while the seller is bound to sell at the agreed-on price, the prospective buyer is not bound until, after examination, he has signified his approval and consequent acceptance. In like manner, in sale or return the owner intrusts the possession to another on the footing that if that other sells or disposes of the article the transaction as between the original parties immediately becomes a sale, but if the person to whom possession is thus given fails to effect a sale, he may return the article to the owner without further obligation. Under the provisions of the S. of G. Act, 1893 (s. 18, r. 4), any act on the part of the "buyer" which signifies that he intends to become the absolute purchaser will form an adoption of the transaction. Thus, pawning the goods, being inconsistent with the free power of return, transforms a mere transaction as to possession into a contract of sale, and gives a good title to the pawnee, since by the very act of pawning the pawner acquires a title as owner (*Brown*, 1880, 7 R. 427; *Kirkham*, [1897] 1 Q. B. 201). The mere fact that the goods when handed over to the "buyer" were accompanied by an invoice bearing the words "bought of," will not exclude proof that the contract was one of sale or return (*Woodrow*, 1845, 7 D. 385). It has been suggested that a person *bonâ fide* buying or receiving in pledge goods held under sale on approval or sale or return, is protected by sec. 25 (2) of the S. of G. Act, or sec. 2 of the Factors Act, but the former only applies to proper sales, and the latter is only applicable where the title is derived from a "mercantile agent" as defined by the Factors Act (*Inglis*, 1898, 25 R. H. L. 70; *Hastings Ltd.*, [1893] 1 Q. B. 62). The same effect may, however, follow at common law from personal exception or estoppel, as in the case of *Brechin Auction Co. Ltd.*, 1895, 22 R. 711. See further, as to sale or return, *Macdonald*, 1888, 15 R. 988.

The question what forms a price so as to bring a transaction within the *nomen juris* "sale" is sometimes attended with difficulty. Thus where a private firm consisting of eight partners resolved to form themselves into a limited company, a conveyance of the whole assets by the partnership to the company was held to be a "conveyance on sale" in terms of the Stamp Acts, and therefore liable to *ad valorem* stamp duty on the total nominal capital of the company (*John Wilson & Son Ltd.*, 1895, 23 R. 18; see also *Foster & Sons*, [1894] 1 Q. B. 516). It was argued that, the individual owners being in each case the same, and the substance of the transaction being a mere conversion of title, an ordinary deed stamp was sufficient; but the Court were of opinion that, although in this particular case there was substantial identity between the partnership and the company, there was no *legal* identity, the new company being by statute a corporation having an identity distinct from that of its constituent members. "There is no exhaustive definition of sale in the Stamp Duties Act, but there is a series of clauses in which a number of cases which look a little different from sale are placed under that category. . . . Where land, or a *universitas* or capital stock being the subject of sale, is given in exchange for securities or shares, the securities or shares are considered to be the equivalent of a price, and the value of the securities or shares is charged with duty as consideration money" (per Ld. M'Laren, 23 R. at pp. 23, 24). In like manner, a decree of Court conveying the subject of a heritable security

to a creditor in virtue of the Heritable Securities (Scotland) Act, 1894, must carry an *ad valorem* stamp applicable to the sum at which the lands were last exposed, or at which they were bought in (*Inland Revenue* v. *Tod*, 1898, 25 R. H. L. 29). It is significant that in the form of decree appended to the Act, the sum referred to is called the "price" (57 & 58 Vict. c. 44, Sched. D; see also *Huntingdon*, [1896] 1 Q. B. 422).

The existence of a completed and absolute transfer is of importance in distinguishing sale and donation from donation *mortis causa* and security. See generally on this head, *Lord Advocate* v. *M'Court*, 1893, 20 R. 488. The distinction between sale and security will be afterwards noticed under the general headings applicable respectively to heritable and moveable sales. Other characteristics of sale will also be incidentally mentioned under these headings.

II. SALE OF HERITAGE.

The law of Scotland in regard to immoveable property is founded on the feudal system, and thus differs from that of England, where the original relation between the Crown and the chief lords or tenants *in capite*, and between the lords and their dependants, has long ceased to exist. (See as to sales of real estate in England, VENDOR AND PURCHASER, in *Ency. of English Laws*.) This branch of the law of sale must therefore be treated exclusively from a Scottish point of view.

I. CONSTITUTION OF THE CONTRACT.

Every contract requires two or more parties legally capable of giving consent, and the consent must be expressed in such form as the law prescribes. In sale, there must in addition be a subject-matter, a transfer or agreement to transfer the ownership, and a price. There may also be specialties connected with the kind of sale or the conditions attached to the contract. The constitution of the contract of the sale of heritage will therefore be considered under the following heads: (1) Parties, (2) Subject-matter, (3) Price, (4) Transfer of ownership, (5) Consent and its expression, (6) Special kinds of sale.

1. *Parties.*—The seller must either be owner or act under a valid power from the owner or from the Court. Where an agent is employed to sell or buy heritage, it is not necessary that the mandate be in writing. Contrary to the usual rule of the law of Scotland, onerous obligations relating to heritage may be incurred through an agent without the obligant being personally a party to any written document (*Boswell*, 1811, Hume, 350; and see Dickson, *Evidence*, s. 570). The same exception exists in England. "An agent either for purchase or sale of an estate may be appointed by word of mouth even where the contract is required to be in writing by the Statute of Frauds" (Dart, *Vendors, etc.*, 6th ed., 210). Where an agent contracts in his own name, it is in the power of the other contracting party, on discovering the principal, to hold both agent and principal bound, and it does not derogate from or qualify the written contract that a new party (*i.e.* the principal) has been added to it (*Trueman*, 1840, 11 A. & E. 589; *Higgins*, 1841, 8 M. & W. 834). In Scotland, where an agent employed to purchase heritage has taken the title in his own name, the remedy of the principal may be confined to the agent's writ or oath (Act 1696, c. 25; *Dunn*, 1898, 25 R. 461). But where a law agent or a joint adventurer, instructed to buy heritage, buys for himself in breach of his mandate, the Act of 1696 does not apply

(*Horne*, 1877, 4 R. 977; *Dunn*, *v.s.*) In such cases mandate, not trust, is involved; but in any case a relevant averment that the constitution of the alleged trust is due to fraud will exclude the Act (*Wink*, 1867, 6 M. 77). Trustees delegating a power of sale to a factor may be personally liable for the factor's actings under such authority (*Thomas*, 1832, 11 S. 162). On the other hand, where a buyer has notice of a defect in the selling agent's power, the seller may reduce the sale (*Hamilton*, 1818, 2 Mur. 38). A law agent, though professing to act for both seller and buyer, cannot at his own hand validate improbative missives of sale (*Mitchell*, 1874, 2 R. 162). A trustee or agent professing to sell heritage not belonging to his constituent may be personally liable in repetition of the price though he acted *bonâ fide* and had parted with the proceeds (*Bald*, 1847, 10 D. 289). Testamentary trustees have in the ordinary case no implied authority to sell heritage (*Allan*, 1835, 2 S. & M'L. 333; and see *Brownlie*, 1879, 6 R. 1233, per Ld. Shand, at p. 1241); but the trust purposes may be such as to give a power of sale by implication, on the principle that "where a man declares his will with respect to a certain event, he undoubtedly wills every necessary means" (Kames, *Equity*, 5th ed., p. 155; *Campbell's Trs.*, 1838, 11 D. 153; *Graham*, 1850, 13 D. 420, per Ld. Moncreiff, at p. 429).

A husband's right of administration does not empower him to sell his wife's heritage (*Kennedy*, 1848, 11 D. 171). A tutor cannot alienate his ward's heritage, and the Court will only authorise such alienation upon "great necessity" or "high expediency" being shown (*Colt*, 3 July 1801, F. C.; *Finlaysons*, 22 Dec. 1810, F. C.; *Fraser*, 1810, Hume, 889; *Wilson*, 1834, 13 S. 176; *Gilligan*, 1898, 25 R. 876). In this matter the Court have even set aside a feu-right previously authorised by themselves (*Vere*, 29 Feb. 1804, F. C.). Such derogation from the *nobile officium* places the Court in "a very awkward predicament" (*Finlaysons*, 22 Dec. 1810, F. C.), and throws unnecessary doubt upon the title of a purchaser. The words of Ld. Eldon in another case may be applied here: "It is impossible to hold, without establishing a doctrine so full of danger and so frightful that nobody can look at it, that if a purchaser purchases under the authority of the Court of Session and it appears that there is a mistake in their judgment, that the purchaser is to be made answerable for that mistake" (*Wemyss*, 1824, 2 Sh. App. 1, at p. 8). A tutor will, however, be bound to implement an agreement to feu, entered into by the pupil's father before his death (*Aberdeen*, 1823, 2 S. 527). Where in any case the authority of the Court is necessary, it must be obtained before the sale (*Clyne*, 1894, 21 R. 849). Where a power of sale exists, it may, unless otherwise directed, be exercised either by public roup or private bargain (Trusts (Scotland) Act, 1867, s. 4). A power of sale attached to a curatory ends with the death of the ward (*Duff*, 1849, 11 D. 1054).

Apart from stipulated or recognised remuneration, no fiduciary can make personal profit by transacting with the property under his charge. This extends to prevent an agent or trustee or factor from buying debts due by his principal or constituent. If he does so for a sum less than the full amount, and receives from the debtor or his estate more than he paid, he cannot appropriate the surplus to himself, but must communicate the "ease" to his principal or to the estate (*Murray*, 1710, Mor. 9214; *Corsan*, 1736, Mor. 9504; A. S., 25th Dec. 1708). For a like reason a tutor cannot buy the property of his ward, and the suggestion of Erskine that he may do so where the sale is by public auction does not seem well founded (Ersk. i. 7. 19; M. P. Brown, *Sale*, 192; but see as to interdictor, *Kyle*, 1826, 5 S. 128). The same principle prevents any trustee or fiduciary

from buying, either directly or indirectly, where he is himself the seller (*York Buildings Co.*, 1795, 3 Pat. 378). Thus a heritable creditor cannot purchase the subjects sold under his bond (*Taylor*, 1846, 8 D. 400), unless subject to the special provisions of the Heritable Securities (Scotland) Act, 1894 (but see *Maxwell*, 1823, 2 S. 130; *Browning*, 1837, 15 S. 999). Nor can a heritable creditor buy through the medium of a third person (*Jeffrey*, 1826, 4 S. 722). An heir of entail cannot be both seller and purchaser in a sale authorised by statute (*Lawrie*, 1814, 2 Dow, 556). A trustee or commissioner in bankruptcy cannot purchase any part of the sequestrated estate, but the same restriction does not apply to a creditor (Bankruptcy (Scotland) Act, 1856, s. 120). Where a trustee in bankruptcy attempted to buy through the medium of his son, it was held to warrant a petition for his removal from office (*Brown*, 1848, 11 D. 338). In addition to the sale being ineffectual, the offending trustee is liable in the difference between the price offered by him and a lower price subsequently realised (*Abercrombie*, 1851, 13 D. 679). It was, however, held in one case that the sale was not void but only voidable, and that challenge might be barred by acquiescence (*Fraser*, 1847, 9 D. 415). A law agent employed by the trustee is not, as such, disqualified from purchasing the bankrupt's estate, but the relationship of trust may render the sale reducible at common law (*Noble*, 1876, 4 R. 77; *Rutherfurd*, 1891, 18 R. 1061). In England the general principle is strictly applied in the case of the solicitor for an assignee in bankruptcy. "If the principle is right as to the assignee under the commission, *à fortiori* it is necessary to adhere to it in the case of the solicitor" (per Eldon, L. C., in *James*, 1803, 8 Ves. at 348). A law agent employed by the seller is not entitled to purchase for himself while ostensibly purchasing for another (*M'Pherson's Trs.*, 1877, 5 R. H. L. 9); but an advocate who had acted in an application to the Court for authority to sell, was held not precluded from purchasing (*Wemyss*, 1824, 2 Sh. App. 1). A residuary legatee for whose benefit trustees exposed heritage to sale by auction was held not entitled to purchase (*Faulds*, 1859, 21 D. 587). But one of several beneficiaries may buy trust property at an auction sale (*Shiell*, 1874, 1 R. 1083; see also *Darling*, 1838, 1 D. 213).

2. *Subject-matter.*—At present we are dealing only with heritage, but the rule is common to all sales, that there must be something to which the contract may attach. If one sells a house in ignorance of the destruction of the house by fire, there is no sale. There must be "an existing something to be sold and bought" (per Cranworth, L. C., in *Couturier*, 1856, 7 H. L. Cas. 673). The chief difficulty arises where the destruction is only partial. The rule of the Roman law was that if the greater part of the house had escaped the flames, the contract was not void, but the buyer was allowed a deduction from the price. Further, if he could show that he would not have entered into the contract at all if he had known of the destruction of that particular part, it was in his option to avoid the sale (*Dig.* 1. 18. 57, 58). This rule was subject to exceptions, according to the knowledge of seller and buyer respectively of the occurrence of the loss, but there does not seem to be room in our law for similar distinctions. The question with us is whether the subject of sale continues to answer the description of the thing sold. Possibility or impossibility of performance is probably the true test of the validity of the contract. Impossibility is not removed by a part remaining possible, nor can fulfilment of part of a contract be said to be fulfilment of the contract itself (see Brown, *Sale of Goods Act*, 32, 33). But to render the contract null, the impossibility of performance must be absolute and not merely relative to

particular persons. One may competently bind himself to do an act not in itself impossible, yet not practicable to the person who has bound himself to do it. Thus he may contract to sell a property belonging to another in the expectation of being able to acquire it. If he is disappointed he is nevertheless liable to the other in damages for breach of contract (Stair, i. 10. 13; Pothier, *Oblig.* 133, 136; *Vente*, 7).

Assuming a subject to exist, our first concern in this connection is whether it is heritable or moveable. The word "heritage" is conventionally applied to things immoveable in their nature, and rights directly relating thereto, as distinguished from things and rights which are moveable. But, in its literal sense, it implies a distinction applicable only to succession, viz. between things which, as a rule, go undivided to a single heir and things which are divided between a deceased's next of kin. The two distinctions have no necessary connection and have been very inconveniently mixed together. The distinct characteristics of immoveable and moveable property would continue although the existing distinctions in the law of succession were abolished. See HERITABLE AND MOVEABLE. Heritage embraces "whatever is either part of the ground or united to it *fundo annexum*" (Ersk. ii. 2. 4). It therefore includes lands, buildings, minerals, growing trees, and natural growing crops, also rights of superiority, teinds, casualties, feu-duties, ground-annuals, servitudes, real burdens, and leases. The phrase "industrial growing crops" is used in opposition to natural growing crops, and is employed in the Sale of Goods Act to indicate moveable property subject to that Act (s. 62 (1)). Rights having a tract of future time, such as annuities and public offices, are *quasi feuda*, and therefore, for certain historical and other reasons, heritable. Many things in themselves moveable (*e.g.* wire-fencing, *Graham*, 1875, 2 R. 438) become heritable by being attached to land for its beneficial use, or by being so closely associated with land as to form a pertinent or accessory. There are also certain rights, such as servitudes, which cannot be held separately from the heritage with which they are connected.

Difficulties may arise as to whether things not in themselves heritable, pass to a purchaser as adjuncts of heritage. In the absence of contract, express or implied, conversion or its opposite is determined by much the same rules as in similar questions between heir and executor (*Nisbet*, 1880, 7 R. 575; *Cochrane*, 1891, 18 R. 1208). See FIXTURES; HERITABLE AND MOVEABLE.

Questions relating to the quantity, quality, or description of the subject sold imply a valid contract already in existence, and therefore fall to be considered in connection with warranty of title and warrandice (*v.i.*). The only remaining inquiry connected with the subject-matter of sale as affecting the constitution of the contract is whether the subject can be lawfully sold. Certain things are from their nature excluded from sale. Thus *res publicæ*, such as seas, navigable rivers, harbours, and highways, are vested in the State or in public bodies for the use of the community (Ersk. ii. 1. 5 *seq.*). The sale of certain other things is prohibited for reasons of public policy. Thus sales of offices of public trust are rendered void by statute (5 & 6 Edw. VI. c. 16, amended and extended to Scotland by 49 Geo. III. c. 126). As in the case just mentioned, rules of law dictated by public policy usually strike at the constitution of an immoral or improper contract and render it null. An exception, however, exists in the case of the Statute 1594, c. 220, by which judges and members of any Court of justice are prohibited from purchasing claims of heritable rights concerning which an action is depending. The penalty is loss of office

and any privileges connected therewith, but the sale itself is good (*Purves*, 1683, Mor. 9500).

3. *Price.*—The rule of the Roman law that there could be no sale without a definite price fixed by the contract, or in some mode provided by the contract, has, with some modifications, been adopted in Scotland. Hence all our institutional writers describe a price *certain* as an essential of sale (Stair, i. 14. 1; Mackenzie, *Inst.* iii. 3. 1; Bankt. i. 19. 3; Ersk. iii. 3. 4; Bell, *Com.* i. 461; Bell, *Prin.* s. 92; Bell, *Sale*, 18). The English rule, slightly different from the above, is now, by the Sale of Goods Act, extended to Scotland (see *infra*, p. 28), but sales of heritage continue to be regulated by the common law. It is true that "No price, no sale" (Bell, *Prin.* s. 92), but it is not true that "No price, no obligation or contract." Where price is absent, the contract is not sale. If there is no consideration, or if the consideration is merely nominal or illusory, the transaction is donation, and may imply a different degree of warrandice (Ersk. iii. 3. 4), or be open to revocation as between husband and wife (see DONATIONS INTER VIRUM ET UXOREM), but it is not, for that reason alone, invalid. If there is a consideration not in money, the contract may be excambion, *i.e.* the exchange of lands for lands; or it may be barter, as where heritage is exchanged for goods. Occasionally the consideration is of a mixed character, *e.g.* money combined with heritage or goods, or perhaps both, to which there may even be added an *ad factum præstandum* obligation. In one case the proprietor of a house sold it for a sum in money together with an obligation to discharge a debt and a further obligation to procure for the seller a commission in the army (*Cargill*, 1 Sh. App. 134). The ensigncy could at the time be purchased for a definite sum of money, and consignation was in the end held equivalent to implement, but it suggests a possible difficulty as to the nature of the contract where heritage bears to be sold for a consideration resolving itself into a pure *ad factum præstandum* obligation.

Excambion of lands differs from sale in three respects: (1) As regards *form.*—A verbal agreement to excamb may be more easily validated by possession than a similar agreement in the case of sale. "The pleas of acquiescence and homologation are entitled to very different effect when pleaded in reference to a prior contract of excambion from that which would be due to them when pleaded to the effect of transferring property for a price" (per Ld. Gillies in *Melville*, 1830, 8 S. 841, at 843; see also *Kennedy*, 1836, 15 S. 102). (2) As regards *title.*—Where a deed bears to be an excambion, and possession follows, there is implied real warrandice, available not only against the party and his heirs, but against singular successors, so that if one of the contracting parties or his heir or singular successor should suffer eviction, he may have recourse upon his own original lands to the effect of taking them back from the other party or his heir or singular successor. In sale, on the other hand, the warrandice though absolute is only personal, not real, unless in the very exceptional case of a seller disponing other lands in security of the principal lands (Ersk. ii. 3. 28). (3) As regards *risk.*—It seems to follow from the existence of real warrandice that in excambion there is no transfer of risk by the mere contract, as in the case of sale; so that if one excambs a mansion-house for other heritage, and the house is destroyed by fire before sasine or its equivalent is recorded, the risk remains with the original owner. In such case it would seem that the other party is under no obligation, and that if he has implemented his part of the contract he is entitled to be reinstated. The fact that lands have been excambed does not free them

from real burdens; and where the party has bound himself to take the title as it stands, he cannot claim damages for non-disclosure of such burdens (*Wood*, 1886, 13 R. 1006). Where heritage is disponed in payment of the price of goods, the price must form a lawful consideration for the heritage, otherwise there is no contract (*Russell*, 1844, 6 D. 1138). If the parties are not agreed about the price, there is no contract; and if under these circumstances the property has been conveyed, a reconveyance may be ordered (*Stirling*, 1824, 2 S. 765).

4. *Transfer of Ownership.*—"Every proprietor of a heritable subject who has the free administration of his estate, and is not debarred by statute or by the nature of his grant, may dispose of it in fee to another; for the right or property where it is absolute, necessarily includes a power in the owner not only to use the subject by himself, but to make it over to whom he will" (Ersk. ii. 3. 13). The completed contract is an exercise of this power, and involves such a transfer of ownership as to distinguish sale from feu and lease (*v.s.* p. 4). The same feature serves to distinguish sale from security. In security it is not intended that there should be an absolute transfer of property, yet the transaction is often carried through by means of an *ex facie* absolute disposition together with a collateral agreement or back-letter, or possibly, even a verbal understanding. If the qualifying writing is recorded along with the absolute disposition, it reduces the latter to a proper security, which may be pleaded against onerous disponees of the creditor. If, on the other hand, the qualification rests on an unrecorded document or a verbal arrangement, it is merely personal, and at most can only affect the immediate parties and their respective heirs. In this respect an *ex facie* absolute disposition resembles the old wadset, which though at first a proper pledge of the lands, afterwards became an out-and-out alienation, with a right of reversion in a separate writing (Ersk. ii. 8. 4). Like the back-letter of modern times, the bond of reversion was in itself personal, but was capable of being made real by registration.

An *ex facie* absolute disposition passes the property, and is therefore more than a mere pledge (see Absolute Disposition). It need not express any consideration, and if consideration is stated, it may take any form except security. "The right conveyed by an absolute disposition is an absolute right of property. . . . It may in the end be no better than a security, but it is a perversion of terms to call it so" (per Ld. Pres. M'Neill in *Leckie*, 1854, 17 D. 77, at 80; see also *Baillie*, 1884, 12 R. 199, per Ld. J.-Cl. Moncreiff). The disposition as a transfer of property is not affected by a general statement of the cause of granting, such as "good and onerous causes and considerations," or by a statement of a price paid, or of a donation made, but its absolute character is lost if the deed bears *in gremio* any qualification pointing to a security, and showing that mere possession and not property is intended to be transferred (*Campbell*, 1865, 4 M. 25; but see Bell, *Com.* i. 725). A similar effect follows if the back-letter is made real by recording, for then the transaction becomes a proper security, and the creditor is prevented from selling, or at least limited by the actual terms of the contract (Bell, *Com.* ii. 272; but see *Duncan*, 1893, 21 R. 37). Hence many absolute disponees, though truly creditors, refuse to grant a back-letter, and the debtor is obliged to trust to the creditor's good faith or to private evidence, such as entries in the creditor's books. Further, although, as between the parties themselves, the absolute disposition may by competent evidence be reduced to a security, the former owner is by the Trust Act, 1696, c. 25, limited in his proof to the writ or oath of the absolute disponee (*Douglass*, 1770, 2 Pat.

187). In these circumstances it is often difficult for a debtor or his general creditors to vindicate the property conveyed. The difficulty is increased where the absolute disposition bears to be for a price paid, for then the contract is *ex facie* one of sale. Even where a power of redemption is expressed, it can scarcely be distinguished from the *pactum de retrovendendo*, which is a sale under a resolutive condition that the purchaser shall be bound to reconvey to the original proprietor within a limited time upon repayment of the price or implement of any other specified stipulations. Again, reverting to the analogy of the wadset, we find that when it took the form of the *pactum de retrovendendo* the test as between sale and security depended largely on whether the sum paid was adequate value for the subjects conveyed. If it was much less than the value, the presumption was security, and the reverser was allowed to redeem even after the lapse of the prescribed term, provided the sum was offered before declarator of the irritancy. If, on the other hand, the amount paid formed a just price, the irritancy was strictly construed, and the right of redemption was not available after a stated period (Stair. i. 13. 14; ii. 10. 6; Ersk. ii. 8. 14; iii. 3. 12). The same principles have been applied to the *ex facie* absolute disposition where it bears to proceed upon a sale of the subjects. "There is everything here to indicate that there was a *bonâ fide* transaction of sale, with a right reserved to the seller to recover within a certain time. But if it be a sale, the law is well fixed. The right of reversion requires no declarator to bar it; the mere expiry of the time fixed is sufficient" (per Moncreiff, Ld. J.-Cl., in *Martin*, 1875, 13 S. L. R. 86, at 88). "The different principle applicable to clauses of redemption in the case of loans from that applied to cases of sale, arises from the fact that in a loan the subject is often more valuable than the sum advanced, which has introduced the equitable rule that in the case of a loan the borrower is not barred by the mere expiry of the time from exercising his right of reversion" (per Ld. Gifford, in *Martin*, *v.s.*). It is true that "mere inadequacy of price is far from conclusive against a transaction being a sale, but it does forcibly suggest that the transaction is something else and something short of sale" (per Ld. Trayner, in *Robertson*, 1896, 24 R. 120, at 132; see also *Simson*, 1770, 2 Pat. 227; *Boyd*, 1775, 2 Pat. 368; *Fraser*, 13 December 1810, F. C.; *Hadden*, 1814, Hume, 159; *Young*, 1826, 4 S. 617; *Wayne*, 1829, 7 S. 795; *M'Kirdy*, 1839, 1 D. 855; *Stiven*, 1878, 15 S. L. R. 422; *Smith*, 1879, 6 R. 794).

In transactions regarding heritage a recorded conveyance is equivalent to delivery, and there is thus no room for the perplexing questions often submitted for judgment regarding the validity of securities over moveables where delivery has not been given in the ordinary way. Before the Sale of Goods Act, delivery in the case of goods was equally necessary to a transfer of property whether the contract was sale or security. Where, however, goods were closely connected with heritage, the cases seem to show that the heritable title duly completed had some effect in determining whether the ownership of the moveable property was effectually conveyed. This may be said where a combined transfer of heritage and moveables was followed by a lease to the possessor and reputed owner, *e.g.* moveable machinery in a mill (*Union Bank*, 1865, 3 M. 765; *Robertsons*, 1882, 9 R. 772), or furniture in a hotel (*Duncanson*, 1881, 8 R. 563). So also, where the moveable plant of a newspaper was transferred to the proprietor of the building, and by him leased to the former owner (*Orr's Trustee*, 1870, 8 M. 936; see also Bell, *Com.* i. 786). Not that any such principle was ever formally recognised. On the contrary, when the question arose in

its pure form, delivery of the moveable subject was emphatically negatived (*Stiven*, 1878, 15 S. L. R. 422). It made no difference that the conveyance (embracing subjects both heritable and moveable) was recorded in the Register of Sasines, or that a formal ceremony of taking possession of the moveables was gone through and embodied in a notarial instrument or instrument of possession. The important facts were that the moveables (machinery in a mill) never really changed hands, and that no consideration was given either in the shape of rent or price (*Stiven, v.s.*).

5. *Consent and its Expression.*—Sale is a contract, and the basis of all contract is the consent of parties (Stair, i. 10. 2; Ersk. iii. 1. 16; Bell, *Com.* i. 313). There are, however, circumstances in which the law will not recognise consent or apparent consent. This may arise from the status or condition of the parties, or one or more of them (see PUPIL; MINOR; MARRIED WOMAN; INSANITY; INTOXICATION); or from influences brought to bear upon one or more of the parties (see FRAUD; CIRCUMVENTION; EXTORTION); or from essential error induced by representations of the party seeking to enforce the contract (see ERROR); or from something in the nature of the contract itself which renders it illegal (see ILLEGAL AND IMMORAL CONTRACTS). In regard to proof of consent, sale is usually classed as a "consensual" contract, *i.e.* a contract capable of being proved either by writing or by witnesses (Bell, *Com.* i. 335). This, however, applies only to goods. A sale of heritage requires writing both for the constitution of the contract and for its proof (Ersk. iii. 2. 2; *Allan*, 1875, 2 R. 587), while a sale of incorporeal moveables stands in a doubtful position in this respect, of which more hereafter. The distinction between the constitution and the proof of contract must be clearly kept in view. What is technically known as proof by writ or oath does not *constitute* a contract. It only serves in certain circumstances to *prove* a contract capable of being constituted and actually constituted in some other manner, but in regard to which the law has restricted the mode of proof. Contracts regarding heritage must be constituted by probative writings (see PROBATIVE WRITINGS), while writings produced in proof of a truly consensual contract, such as loan or guarantee, do not require the usual solemnities, but are effectual if shown to be genuine (*Bryan*, 1892, 19 R. 490; *Paterson*, 1897, 25 R. 144).

While sale is a contract involving at least two parties, each under obligation to the other, "it is possible that a bargain concerning heritage may be completed by a unilateral obligation" in writing, which would be binding on the promissor and yet not binding on the person to whom the writing is delivered (Stair, i. 10. 3, 4; Ersk. iii. 3. 88; *Ferguson*, 1748, Mor. 8440). There is, however, a strong presumption against this form of obligation, the effect of which would be to prevent the grantor from resiling, and yet leave the receiver free to accept or reject at his pleasure (*Fulton*, 1761, Mor. 8446; *Barron*, 1794, Mor. 8463; *Malcolm*, 1891, 19 R. 278; see PROMISE).

Where the contract takes the form of offer and acceptance, both documents must be probative (*Park*, 1764, Mor. 8449). An offer admittedly written and signed by a party in his brother's name, and with his brother's authority, is not holograph of the brother (*Scottish Lands Co.*, 1880, 7 R. 756), but the holograph letter of an agent may bind his principal (*Whyte*, 1879, 6 R. 699). An offer in the handwriting of one partner and signed with the company signature by another, is holograph of the firm (*M'Laren*, 1871, 44 Sc. Jur. 17; see HOLOGRAPH WRITINGS). An undertaking by letter to accept an offer if made, is equivalent to an

offer, and will be sufficiently met by a letter accepting (*Bate*, 1869, 6 S. L. R. 401); but a letter enclosing particulars of an estate, following upon a verbal expression of a desire to sell, is not an offer, and another letter bearing to be an acceptance will not make a contract (*Milne*, 1837, 2 S. & M'L. 494). The *posting* of an acceptance concludes the contract, and a retractation of the offer posted on the same day will not free the offerer (*Thomson*, 1855, 18 D. 1). The offer and acceptance must meet each other in exact or at least substantial agreement. Thus where the acceptance is qualified (*Nelson*, 1889, 16 R. 898), or where conditions are inserted (*Johnston*, 1855, 18 D. 70), there is no contract till the offerer expresses his acquiescence. In like manner, where the terms of intended servitudes are left unsettled (*Heiton*, 1877, 4 R. 830), or where certain matters are left to be arranged by the respective agents (*Bakers of Edinburgh*, 1868, 6 S. L. R. 144), either party may resile (see OFFER AND ACCEPTANCE; LOCUS PŒNITENTIÆ). To these rules exceptions have been admitted. Thus a condition made by the buyer that the seller give a good title and grant warrandice, will not entitle the seller to take advantage of a better offer (*Bruce*, 1785, 3 Pat. 5). So also in the sale of an entailed estate, a condition by the seller that the sale be ratified by the Court, will not free him from taking the statutory steps necessary for this purpose (*Stewart*, 1890, 17 R. (H. L.) 1). Conditions inserted by one party may be virtually accepted by actings of the other party, such as entering into possession (*Colquhoun*, 1860, 22 D. 1035).

A verbal agreement relating to heritage may be validated by *rei interventus*, but only to the effect of permitting proof by the writ or oath of the party seeking to be free (*Gowan's Trs.*, 1862, 24 D. 1382, per Ld. Deas, at 1388; see also *Lawrie*, 1697, Mor. 8425). Where writing exists but is improbative, it may be rendered binding by *rei interventus* without reference to oath or any other writ. Thus where the seller delivered the keys of a house and took down a sale-ticket, and the buyer made alterations on the grounds, the buyer was held bound (*Westren*, 1879, 7 R. 173). So also where the seller gave an existing tenant notice to quit, and the buyer let the premises to another tenant (*Stewart*, 1877, 4 R. 427). But mere possession, which may be referred to another contract, will not suffice (*Rait*, 1833, 12 S. 131; *Robertson*, 1874, 12 S. L. R. 11); nor will an allegation by the buyer that he had incurred expense and trouble in investigating the value of the subject and forming a syndicate (*Mowat*, 1895, 23 R. 270). Improbative missives cannot be validated by a law agent professing to act for both parties (*Mitchell*, 1874, 2 R. 162), nor can an improbative acceptance by a charitable corporation be amended after the granting of interim interdict against the managers carrying through the sale (*Law*, 1871, 44 Sc. Jur. 17). Where a contract relating to heritage has been formally completed, all previous communings and contracts, however formal, are superseded (*Hughes*, 1819, 1 Bligh, 287). Thus a conveyance becomes the sole measure of the contracting parties' rights (*Orr*, 1893, 20 R. H. L. 27, per Ld. Watson, at 29; *Lee*, 1883, 10 R. H. L. 91). The document forming the contract cannot be modified or interpreted by previous writings or advertisements (*Stevenson*, 1845, 7 D. 418), or controlled by an alleged verbal understanding (*Virtue*, 1843, 5 D. 1251), unless it is admitted that the document does not give a true account of the transaction (*Grant's Trs.*, 1875, 2 R. 377), or unless it is in itself ambiguous (*Davidson*, 1843, 7 D. 342; *Macdonald*, 1898, 36 S. L. R. 77).

6. *Special Kinds of Sale.*—Under this head are included judicial sales, sales regulated by statute, and sales by auction. Judicial and statutory

sales are almost invariably sales by auction (see Bell, *Com.* ii. 251, 345: Titles Consol. Act, 1868, s. 119); and in the few cases where sale by private bargain is permitted, it is subject to special statutory restriction (*e.g.* Bankruptcy Act, 1856, s. 115). The term judicial sale is applied in a general sense to any sale under judicial authority, *e.g.* under an action for the sale of heritable subjects held by several proprietors *pro indiviso* in order that the proceeds may be divided among them (see COMMON PROPERTY), or under judicial process for the realisation of a debtor's heritable estate (see RANKING AND SALE; ADJUDICATION FOR DEBT). Judicial sale is recognised under the Bankruptcy Act, 1856 (ss. 96, 114), though it is practically superseded by voluntary public sale under that Act (see SEQUESTRATION). Among sales authorised, or wholly or partially regulated, by statute, are those under Entail Acts (see ENTAIL), under Railway Acts (see RAILWAY), and under Heritable Securities and Conveyancing Acts (see BOND AND DISPOSITION IN SECURITY). The general principles applicable to sales by auction are summarised under AUCTION; AUCTIONEER; and ARTICLES OF ROUP (*q.v.*). The conditions usually inserted in articles of roup oblige the buyer to take the title as it is offered, and to raise no objection on the ground of misdescription, insufficiency of title, or otherwise. Where the title, though incomplete, is not invalid (*Carruthers*, 1825, 4 S. 34), or where the result is merely to cause expense to the buyer (*Anderson*, 4 December 1818, F. C.), or to impose upon the buyer burdens and restrictions of which he was ignorant (*Davidson*, 1881, 8 R. 990; *Wood*, 1886, 13 R. 1006), or to induce the buyer inadvertently to purchase a small portion of his own property (*Morton*, 1877, 5 R. 83), full effect is given to the obligation. In like manner, a condition that the buyer is to take the risk of error in the particulars furnished to him will receive effect (*Brownlie*, 1880, 7 R. H. L. 66), and a declaration that the seller is not to purge incumbrances will throw the risk of such incumbrances upon the buyer (*Young*, 1849, 11 D. 1482). So also a condition that the buyer shall perform the obligations contained in the titles will throw on him the burden of inquiry as to their existence and extent (*Murray*, 26 January 1815, F. C.). But while "the regulations in the articles of roup will receive fair effect, a clear case of injustice and inequity will not be covered by them" (*Morton*, 1877, 5 R. 83, per Moncreiff, Ld. J.-Cl.). Thus an objection to the validity of the title was held not excluded (*Waddell*, 1828, 6 S. 999); and where buildings purporting to be sold, were found to be placed to a considerable extent on ground not belonging to the seller, the buyer was restored (*Hamilton*, 1861, 23 D. 1033). So also an agreement to take the title as it stands and subject to all exceptions will not compel the buyer to take an unmarketable title which cannot be made marketable by any expenditure (*Carter*, 1890, 18 R. 353).

II. INCIDENTS OF THE CONTRACT.

Under this head are included conditions (implied or express), warranty of title, and warrandice. Erskine's *dictum* as to a feu may be applied to any kind of alienation of heritage: "Some things are essential, some natural, and others only accidental" (Ersk. ii. 3. 11). Thus writing is essential to the contract, and infeftment is necessary to the completion of the disponee's right. Conditions arising from the nature of the contract, and deemed part of it though not expressed, are natural; while express conditions are accidental. A natural condition differs from an essential of the contract in respect that it may be altered by the will of the parties; in

other words, an express condition may take the place of an implied condition.

1. *Implied Conditions.*—Acceptance of a disposition may imply an obligation on the disponee to fulfil its terms (*Magistrates of Inverness*, 1827, 6 S. 160); but where a seller by public auction undertook that an assignation would be granted by a third party, an offer by that party at the sale was held not to imply an obligation to grant it (*Crawford*, 1827, 5 S. 259). A sale of heritable subjects always implies a right of access (*Louttit's Trs.*, 1892, 19 R. 791, *per cur.*). In a sale of growing wood there is an implied condition that the seller will not part with the estate without making provision to enable the buyer to cut and remove it (*Welsh*, 1818, 1 Mur. 397); but the wood must be cut within a reasonable time (*Duff*, 1817, 6 Pat. 332). The conditions, whether implied or express, of warranty of title and warrandice, will be considered under "Performance" (*v.i.*).

2. *Express Conditions.*—These are as varied as the language employed, and where lawful are usually given effect to according to their terms. Opinions have been expressed that the Court is entitled to look beyond the technicalities of conveyancing language if the intention of parties would thereby be fulfilled (*Leith Heritages Co.*, 1876, 3 R. 789). A buyer may be held by his silence to have acquiesced in a condition made after the bargain has been completed (*M'Neill*, 1830, 8 S. 362). A condition that "the feu-duty is understood to be not more than £4" was held satisfied by the seller's allocation of that amount to the part sold, though there was a *cumulo* feu-duty of £35, and the superior's consent had not been obtained (*Robertson*, 1886, 13 R. 1133; see also *Nisbet*, 1876, 3 R. 781). It has been questioned whether a buyer who is subject to a condition in a minute of sale imposing a restriction unlimited in time, is entitled to object to a clause in the disposition tendered by the seller, making the condition a real burden binding on the buyer's singular successors. A restriction of this nature, limited to ten years, was held only personal to the buyer and his heirs, and the seller's demand was disallowed (*Corbett*, 1872, 10 M. 329; see also *Bisset*, 1898, 36 S. L. R. 84). A condition of perpetual personal liability for a ground-annual was held (by Ld. Gifford) not to be a real condition attaching to a singular successor (*Leslie*, 1870, 43 Sc. Jur. 95). As to the interpretation of conditions regarding relief from taxes and other local burdens, see CONDITIONS IN FEUDAL GRANTS. An express condition covering the same ground as an implied condition may be held *pro non scripto*, and though not expressly accepted will not void the sale (*Bruce*, 1785, 3 Pat. 5).

III. PERFORMANCE OF THE CONTRACT.

Seller's Obligations.

1. *To give Delivery.*—The principal obligation of the seller is to give delivery of the subject sold. This is done by means of a DISPOSITION (*q.v.*) on which infeftment may follow. The infeftment forms the delivery, and is the title by which the buyer possesses. Infeftment is properly speaking symbolical possession, which in former times was given by means of a ceremony on the lands, a record of which was embodied in an instrument of sasine (see SASINE). After the Act 1693, c. 13, the efficacy of infeftment came to depend not so much on the ceremony, as on the registration of the sasine in the public records. A statute of 1845 (8 & 9 Vict. c. 35) rendered symbolical delivery unnecessary, and infeftment was thereafter obtained by producing the warrants of sasine to a notary public, and by expeding and

recording an instrument of sasine. By a further development in 1858, the instrument of sasine was rendered wholly unnecessary, the conveyance itself with a warrant thereon, recorded in the appropriate register, having the full effect of a recorded sasine (21 & 22 Vict. c. 76, s. 1. See now 31 & 32 Vict. c. 101, ss. 15, 142). The "faith of the records" is of the utmost importance in Scottish conveyancing, and is illustrated by the following cases: *Napier*, 1765, 2 Pat. 108; *Calder*, 1806, Hume, 440; *Campbell*, 1811, Hume, 444; *Wilson*, 1828, 3 W. S. 60; *Earl of Mar*, 1838, 1 D. 116; *Fraser*, 1847, 9 D. 415; *Ross*, 1888, 15 R. 282; *Dowie & Co.*, 1891, 18 R. 986; *Monerieff*, 1896, 23 R. 577.

If the seller is unable to give entire possession at the appointed time, the buyer is free (*Hunter*, 1822, 1 S. 248). The phrase "immediate entry" means only such early possession as is possible and practicable in the circumstances. Thus entry on the fourth day after the completion of the contract did not involve a breach (*Heys*, 1890, 17 R. 381); but where time is a material element, as in the case of land bought for resale, the seller's inability to give entry at the stipulated period will enable the buyer to resist a claim for implement or damages (*Kelman*, 1878, 5 R. 816). A delay of fourteen months in the completion of a house sold during construction entitled the buyer to resile (*Hutchinson*, 1830, 8 S. 377).

If the natural possession at the term of entry is in the hands of third parties without title, the buyer is entitled to remove these parties and vindicate his own possession. If, however, the natural possessors occupy under leases granted by the seller or his authors, the effect of the Statute 1449, c. 17, is to make such possession equivalent to sasine in favour of the lessees for the terms of their leases (see LEASE). The buyer's possession of the lands so leased and occupied is civil, not natural. He is entitled to the rents, but has no power to remove tenants. It is usual for the seller expressly to except current leases from the warrandice clause of the disposition; but even where this is not done, it would seem that such leases are by implication excepted (Duff, *Feud. Conv.* 89; but see Bell, *Lect.*, 3rd ed., 644). A seller was found not liable in damages in respect of a lease said to have been concealed from the buyer at the time of the sale (*Reddie*, 1832, 6 W. S. 188); but relief to the extent of a proportionate part of the price was given to a buyer who founded on a latent and confused transaction between the seller and a tenant by which the apparent rental was diminished, and which was not discoverable from the leases exhibited (*Ferrier*, 1823, 1 Sh. App. 455). A lease of game, though with possession, is not effectual against a singular successor (*Pollock*, 1828, 6 S. 913); but a special privilege of diverting a stream, granted to a tenant, was found to attach to the favoured lands in perpetuity, and to be available to a singular successor (*M'Intyre*, 1868, 41 Sc. Jur. 112). Tenant-rights arising from local custom have sometimes been given effect to as against the buyer without relief from the seller (*Bell*, 14 June 1814, F. C.; *M'Tavish*, 1790, Hume, 546). An obligation by the seller in favour of tenants binding himself to make repairs is personal, and if after the sale the seller arranges with the tenants to dispense with the repairs, the buyer cannot enforce the obligation (*Barr*, 1878, 5 R. 877). As to the division of rents between seller and buyer, see *Sheppard*, 1817, 5 Dow, 278; *Deeside Ry. Co.*, 1869, 7 M. 1068; *Maxwell's Trs.*, 1873, 1 R. 122; *Ld. Glasgow's Trs.*, 1889, 16 R. 545).

2. *To give a Good Title.*—Warranty of title differs from "warrandice," as to which see below. It is a condition of the contract itself, as distinguished from the disposition, the latter being merely the means by which the seller

implements his primary obligation to give delivery of the subject sold. Warranty of title proceeds on the assumption that the seller must not only convey the property to the buyer, but must establish it in his person (Ersk. iii. 3. 9; M. P. Brown, *Sale*, 200 *seq.*). The law of Rome only implied warranty against eviction; but it was early settled in Scotland that, at least in the case of heritage, the seller is bound to give a good title to the subject sold (*Nairn*, 1676, Mor. 14169; *Dick*, 1826, 2 W. S. 522; but see Stair, i. 14. 1). Doubts had been expressed as to whether, in Scotland, the same rule applied to moveable subjects (see M. P. Brown, *Sale*, 231 *seq.*); but these have been set at rest by the Sale of Goods Act (s. 12). A good title involves a title unencumbered by securities or other rights in favour of third parties, not declared or known to the buyer at the time of the contract (*Horne*, 1824, 3 S. 81). This was held where mines and minerals were found to be reserved to the superior (*Robertson*, 1841, 4 D. 121; *Whyte*, 1879, 6 R. 699; but see *Macdonald*, 1898, 36 S. L. R. 77); also, where there was a latent servitude against breweries, etc. (*Urquhart*, 1835, 13 S. 844); so also, where the feu-duty was found to be double that shown by accounts rendered by the seller at the time of the contract (*Clason*, 1844, 6 D. 1201). But the existence of a notorious and light servitude will not free the buyer (*Gordonston*, 1682, Mor. 16606); nor will discrepancies or burdens of a slight and insubstantial character entitle the buyer to relief, especially if he is not prepared to abandon the purchase (*Aikman*, 1773, Mor. 14179; affd. H. L. 2 Pat. 326; *Gray*, 23 January 1801, F. C.; *Brown*, 1813, Hume, 700; *Baird's Trs.* 1830, 8 S. 622; *Woods*, 1893, 20 R. 477). Knowledge on the part of the buyer of the existence of a burden may prevent him *personali exceptione* from repudiating (*Lang*, 29 June 1813, F. C.; *Magistrates of Airdrie*, 1850, 12 D. 1222; *Stodart*, 1876, 4 R. 236; *Macdonald*, 1898, 36 S. L. R. 77). If the seller offers an imperfect title and refuses to give any other, the buyer is justified in repudiating, even though a perfect title be afterwards tendered (*Gilfillan*, 1893, 21 R. 269). The effect of delay in furnishing a good title is a question of circumstances. If the property is bought for resale, any delay may entitle the buyer to resile (*Kelman*, 1878, 5 R. 816). On the other hand, a delay of six months was held not to have this effect (*Raeburn*, 1832, 10 S. 761). Delay even to the extent of years may be condoned by acquiescence or justified by the conduct of the buyer or his agent (*Smith*, 1827, 5 S. 340; *Ross*, 1829, 7 S. 738; *Brown*, 1833, 11 S. 497; *Carter*, 1890, 18 R. 353; but see *Fleming*, 1823, 2 S. 373, 374).

A seller has been held bound to furnish a title so free from fault as to secure the buyer against risk of trouble and expense (*Dunlop*, 1850, 12 D. 518). If there is a rational doubt, it is unnecessary to determine whether the objection is fatal or not (*Brown*, 1833, 12 S. 176). The seller is liable in the expense of any judicial proceedings necessary to put the title beyond question and remove any objection not frivolous (*Smith*, 1827, 5 S. 340; *Dunlop*, 1850, 12 D. 518; *Hope*, 1851, 13 D. 1268; *Kerr*, 1854, 1 Macq. 736; *Howard & Wyndham*, 1890, 17 R. 990; *Walker*, 1895, 23 R. 347; but see *Dundee Calendering Co.*, 1869, 8 M. 289). The record must be cleared of an inhibition against the real proprietor though he has been *ex facie* divested by absolute disposition (*Dryburgh*, 1896, 24 R. 1; but see *Sprot's Trs.*, 1830, 9 S. 120). Even where burdens do not appear on the record, if they can be shown to exist, the buyer is entitled to withhold payment of the price till they are cleared (*Ralston*, 1830, 8 S. 927). A claim to rescind on the ground of restrictions is strengthened by the fact that the buyer had not the services of a separate agent (*Smith*, 1895, 23 R. 60).

It is a common condition of the contract that the buyer shall accept a specified title, or take the title as it stands, or, in case of a sale by auction, that he shall satisfy himself as to certain particulars before offering. A condition that the seller shall not be bound to furnish searches does not free him from his obligation to clear the record. "It only frees him from the expense of supplying the search. If the purchaser orders the search himself, and finds that the land is burdened, the seller must discharge the burden" (*Christie*, 1898, 25 R. 824, per Ld. Trayner, at 827).

Warranty of title is sometimes expressed, but more often implied, in the missive of sale embodying the contract. In *Christie*, 1898, 25 R. 824, the implied obligation was enforced against the seller, though the buyer had not only accepted a disposition, but had entered into natural possession and resold the subjects. It was contended that the buyer, having had an opportunity of examining the titles and the record, and of stating objections prior to settlement, had no remedy except that contained in the warrandice clause of the disposition. Even this he was not now in a position to vindicate, he having assigned all his rights, including the warrandice, to another under the second contract of sale. He was, nevertheless, held entitled to raise direct action against the seller, and the latter was held bound to disencumber. The remedy under implied warranty of title was thus extended beyond precedent. A decree, such as was given in this case, ordaining the seller to disencumber, is a different thing from a decree sustaining a claim for damages in respect of eviction founded on warrandice. In the event of default the former implies rescission of the contract in lieu of, or in addition to, damages; yet it may be questioned if the right of rescission can be maintained after delivery, for delivery is implement of the contract, and things are no longer entire (see *Wood*, 1886, 13 R. 1006). The true principle seems contained in the following remarks of Ld. M'Laren: "It will be found that there is no essential difference in the remedies which the law affords to purchasers for non-fulfilment of contract in the two cases of sales of personal and heritable property. So far as I know, there are only two remedies open to a purchaser which are known to jurisprudence. He has in the first place a right to rescind the contract, conditional on his rejecting the goods or heritable property, and to claim damages proportioned to the inconvenience to which he has been put by the non-fulfilment of the contract. His other remedy is the *actio quanti minoris*, the proper application of which is to the case of a latent infirmity, either in the title or the quality of the subjects sold, discovered when matters are no longer entire" (*Louttit's Trs.*, 1892, 19 R. 791, at 799). The foregoing remarks do not apply to an *express* condition that a valid and prescriptive progress will be given. The mere acceptance of a disposition without a prescriptive progress having been exhibited, does not in such case necessarily imply a waiver of the condition (*Bald*, 1841, 3 D. 564).

3. *To grant Warrandice.*—The term "warrandice" is used to denote a disponer's obligation that the subject conveyed shall not be evicted from the disponee by anyone as having a better right to it (Ersk. ii. 3. 25; Bell, *Prin.* s. 121). "The obligation of warrandice differs from all other obligations in this respect, that it is not intended that it should be performed immediately, or within a definite time, or even within what the law describes as a reasonable time. It remains latent until the conditions come into existence that give it force and effect" (*Welsh*, 1894, 21 R. 769, per Ld. M'Laren). Warrandice may be express or implied. Express warrandice is of three kinds: (1) *Simple*, where the grantor of a conveyance warrants that he will not by any future voluntary act render the deed ineffectual; (2) *Fact*

and Deed, where the grantor warrants the conveyance from his past as well as his future deeds; (3) *Absolute*, where the grantor warrants the subject "not only against his own acts, whether past or future, but against all defects in his right to it antecedently to the grant" (Ersk. ii. 3. 25). The warrandice to be implied, where not expressed, depends on the nature of the deed. In a sale for an adequate price, absolute warrandice is implied. By statute, the phrase "I grant warrandice," when contained in a disposition, "shall, unless specially qualified, be held to imply absolute warrandice as regards the lands and writs and evidents, and warrandice from fact and deed as regards the rents" (Titles Consol. Act, 1868, s. 8 and Sched. B). Warrandice differs from warranty of title in respect that no action lies upon it till the grantee is evicted, or is at least distressed with a view to eviction (Ersk. ii. 3. 30; Bell, *Prin.* s. 122). "It has also this peculiarity in common with other obligations of indemnity, that its extent is measured by the extent of the injury which the creditor in the obligation may sustain, because such obligations are designed to indemnify the purchaser not only against the consequences of complete eviction, but against the loss of the most inconsiderable fraction of the estate, or its diminution in value, by reason of the establishment of a burden of any kind" (*Welsh*, 1894, 21 R. 769, per Ld. M'Laren). The buyer's remedy is a claim for indemnity for loss sustained through eviction, and in an irredeemable conveyance, the warrandice as a general rule subjects the seller in payment of the value of the lands at the date of eviction (*Livingston*, 1777, 5 Br. Sup. 636; *Inglis*, 1771, Mor. 16633; Bell, *Prin.* s. 126; but see remarks of Ld. M'Laren in *Louttit's Trs.*, 1892, 19 R. 791, at 800).

The warrandice clause of a disposition, however strongly expressed, does not extend to a *damnum fatale* (*Dunipace*, 1636, Mor. 16581). In a case of partial eviction, the buyer is not entitled to obtain from the seller the value of the subjects on tendering a reconveyance (*Welsh*, 1894, 21 R. 769). Where part of a coal-field was evicted, the buyer was held entitled to repayment of a proportionate part of the price, though *res non integra* (*Bald*, 1847, 10 D. 289). In special circumstances, a purchaser who had been evicted, was held entitled to repayment of the price on his accounting for the rents, although the value of the subjects was less than at the date of the sale (*Cairns*, 1870, 9 M. 284). Reduction and restitution was also granted where the seller was under essential error induced by the buyer, or at least known to him, regarding the amount of the feu-duty, but a condition was attached that the seller should reimburse the buyer for outlays on permanent additions to, or improvements on, the property (*Stewart's Trs.*, 1875, 3 R. 192). On the other hand, reduction on the ground of alleged misrepresentation by the seller's agent regarding the nature of the tenure was refused, nothing conveyed by the dispositive clause of the disposition having been evicted (*Brownlie*, 1880, 7 R. H. L. 66). Where there was attached to the dispositive clause a qualification that the buyer was to stand in the seller's place, the warrandice clause, though in terms absolute, was held similarly qualified (*Leith Heritages Co.*, 1876, 3 R. 789). An obligation to free lands from debt, arising out of the warrandice clause, falls to be satisfied by the executor of the grantor of the disposition in a question between him and the heir (*Montrose*, 1887, 15 R. H. L. 19). See as to the nature of the warrandice falling to be granted by trustees, and the effect of expressed warrandice on their personal liability, *Forbes' Trs.*, 1822, 1 S. 497; *Read*, 1831, 9 S. 925; *Blair*, 1827, 6 S. 51; *Horsburgh's Trs.*, 1886, 14 R. 67.

The warrandice hitherto referred to is personal to the grantor and his

heirs, but real warrandice, though now comparatively rare, is still occasionally resorted to. Warrandice is real where lands, other than those directly disponed, are conveyed in security against eviction from the original lands (Ersk. ii. 3. 28). It is only valid where eviction might take place from infirmity of title or the existence of an incumbrance. A disposition, therefore, bearing to be in real warrandice of payment of surface damage from the working of minerals was held ineffectual because eviction was impossible (*Smith-Sligo*, 1885, 12 R. 907). Where the title to the original lands is reasonably secure (*e.g.* where prescription has intervened), the real warrandice does form such a burden on the warrandice lands as to justify a purchaser in requiring it to be discharged (*Durham's Trs.*, 1800, Mor. 16641). Warrandice is also real in excambions, so that a party evicted from exchanged lands has recourse against his original lands though in the hands of a singular successor (Ersk. ii. 3. 28).

Buyer's Obligations.

1. *To accept Delivery.*—This is the counterpart of the seller's obligation to give delivery, and the occasions on which performance will be excused have been considered above.

2. *To pay the Price.*—Where no term for payment of the price is fixed by the contract, the seller may demand payment immediately on his offering a valid disposition of the subject sold (see Pothier, *Vente*, No. 279). Where a term is specified for payment or consignation, the price must be paid or consigned accordingly, otherwise the sale may be declared null at the instance of the seller (*Black*, 1814, Hume, 699). Other conditions, *e.g.* finding security for the price, must be fulfilled in their terms, otherwise the seller will be entitled to sell to another (*Anderson*, 1759, 2 Pat. 22). Notwithstanding a condition that if two instalments of the price should run into a third unpaid, the seller might resume possession and sell, the buyer was allowed by the Court to pay up arrears (*Wilson*, 1824, 3 S. 1). The seller is not entitled to immediate decree for the price unless he at the same time tenders an unobjectionable title (*Howard & Wyndham*, 1890, 17 R. 990). This was held where an action had been necessary to clear the title, and was still subject to an appeal to the House of Lords (*Traill*, 1877, 5 R. 25). The price was allowed to be withheld till discharges of real burdens had not only been produced but placed on the record (*Cargill*, 1822, 1 Sh. App. 134). So also, part of the price was allowed to be retained against the widow's terce as a preferable burden (*Boyd*, 1805, Mor. 15874), and against debts allocated on the property though these were alleged to be prescribed (*Falconer*, 1821, 1 S. 214).

In heritable subjects yielding rents, the buyer is entitled to these from the date of the entry specified or implied in the contract notwithstanding delay in the settlement, but on the other hand the seller is entitled to interest on the price (*Speirs*, 1827, 5 S. 764). "From whatever cause non-payment may proceed, good conscience will not suffer the purchaser, at the same time that he enjoys the fruits of the lands, to enjoy also the profits or interest of the price. But if the purchaser, unwilling to retain the price, shall, on the seller's refusal to accept of it, consign it in a proper and legal way, it stops the currency of interest, since the price is no longer in his hands" (Ersk. iii. 3. 79). The price was ordered to be consigned to await the issue of a question as to the effect of the want of a deed forming part of the title (*Ferrier*, 1823, 2 S. 285); and where part of the price had been consigned to await the removal of objections to the title, only bank interest was found due on that part (*Dickson*, 1855, 17 D. 524). Deposit of

the price in bank in name of the buyer and a third person is not equivalent to consignation (*Grandison's Trs.*, 1895, 22 R. 925). Where settlement was delayed from causes for which neither party was responsible, and where the buyer had neither received possession nor paid the price, the Court fixed a new term for performance (*Strang*, 1758, Mor. 14188). Interest on the price in arrear is usually charged at the rate of five per cent. (*Grandison's Trs.*, 1895, 22 R. 925; *Dickson*, 1855, 17 D. 524), but it is not an inflexible rule (*Traill*, 1877, 5 R. 25; see also *Campbell's Exr.*, 1898, 25 R. 687; *Grant*, 1898, 25 R. 948). The price bears interest from Whitsunday or Martinmas although the tenants do not remove till a later date (*Stewart*, 21 Dec. 1811, F. C.).

The disposition is the usual evidence of payment of the price. Where it bore an unqualified receipt, its terms were held not to be qualified by a letter from one of the parties to the agent of the other (*Clark*, 1836, 14 S. 966; see also *Swan*, 1836, 15 S. 251).

IV. Remedies.

1. *Specific Implement.*—The law of Scotland, differing from that of England, allows this remedy both to seller and buyer. The seller, if he is in a position to perform his counterpart of the obligation, can sue for the full price, and is not confined to an action of damages in respect of the buyer's breach. So also the buyer can, as a rule, claim specific implement against the seller. "In England, the only legal right arising from a breach of contract is a claim of damages; specific performance is not a matter of legal right, but a purely equitable remedy, which the Court can withhold when there are sufficient reasons of conscience or expediency against it. But in Scotland, the breach of a contract for the sale of a specific subject, such as a landed estate, gives the party aggrieved a legal right to sue for implement; and although he may elect to do so, he cannot be compelled to resort to the alternative of an action of damages unless implement is shown to be impossible, in which case *loco facti subit damnum et interesse* (*Stewart*, 1890, 17 R. H. L. 1, per Ld. Watson, at 9).

2. *Damages.*—This remedy is intended to form pecuniary compensation for a breach of contract, and is open to both seller and buyer. The party aggrieved may in the same action sue alternatively for specific implement or damages, or he may sue for damages alone. Where specific implement is impossible, the claim is necessarily one of damages only (*Cocker*, 1893, 20 R. 954); and even where it is possible but difficult, or involving great expense to the party in default, it would seem to be in the power of the Court to decree damages instead of performance (*Moore*, 1881, 9 R. 337; *Winans*, 1883, 10 R. 941; *Christie*, 1898, 25 R. 824, per Ld. Young, at 827). It is said that a buyer of heritage is not entitled to keep the subjects and yet claim damages (*Wood*, 1886, 13 R. 1006, per Ld. Kinnear, at 1008; see also Inglis, L. P., at 1011); but this can only apply to an action prior to delivery, and founded on the seller's obligation to warrant the title. It cannot apply to warrandice, or to the exceptional cases in which the *actio quanti minoris* is allowed (see above, and also the *dicta* of Ld. M'Laren in *Louttit's Trs.*, 1892, 19 R. at 799). Opinions have been expressed that where a sale has been induced by the seller's fraud, the buyer has the option either of *restitutio in integrum* or of damages (*Dobbie*, 1872, 10 M. 810, per Ld. Kinloch; *Amaan*, 1865, 3 M. 526, *per* Ld. Kinloch; but see Glegg, *Reparation*, 212).

Damages may include incidental loss, *e.g.* where the seller, trusting to

receipt of the price, had incurred loss through having intimated repayment of a bond (*Mansfield*, 1836, 14 S. 585), or where the buyer had resold and incurred liability to the second buyer (*Little's Trs.*, 1830, 8 S. 418). The remedy was refused in *Grahame*, 1833, 11 S. 308, and in *Richmond*, 1850, 12 D. 1163. See further as to the extent of the claim under this remedy, DAMAGES, MEASURE OF.

3. *Suspension and Interdict.*—It may be necessary in certain circumstances to adopt one or both of these remedies, *e.g.* when a charge is given for the price, or where the party in possession proposes to deal with the subject of sale in a manner inconsistent with the rights of the other party (see INTERDICT; SUSPENSION). Where seller and buyer differed as to whether certain lands were included in an estate sold under a general name, the seller was held entitled to interdict in the Sheriff Court against the buyer entering into possession of the parts alleged not to have been sold. It was observed, however, that the substance of the dispute could only be cleared up by declarator (*Matheson*, 1872, 10 M. 704; see also *Lockhart*, 1742, Mor. 14176; *Boyd*, 1836, 14 S. 653; and Mackay, *Manual of Practice*, 420 *seq.*, 445 *seq.*).

III. SALE OF GOODS.

The law of the United Kingdom in regard to the sale of goods is now codified by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). This Act introduced important changes into the law of Scotland, particularly in the following respects: (1) the contract may now pass the property irrespective of delivery (ss. 17, 18); and (2) the *actio quanti minoris* is recognised to an extent previously unknown in Scotland (s. 11 (2)). The Act being intended to codify the leading features of the common law, its precise terms are incorporated below, with such explanations and references to the common law not codified (see sec. 61 (2)) as can be conveniently brought within the compass of this article.

The Act is divided into six parts, viz.: (1) Formation of the Contract; (2) Effects of the Contract; (3) Performance of the Contract; (4) Rights of Unpaid Seller; (5) Actions for Breach of the Contract; and (6) Supplementary.

1. FORMATION OF THE CONTRACT.

Contract of Sale.

1. [*Sale and Agreement to Sell.*] (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. [*Capacity to Buy and Sell.*] Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

The question of a general definition of sale has been already considered (*c.s.* p. 4). The definition in sec. 1 refers only to the sale of goods. It attaches special significance to the phrase "contract of sale," which, it will be observed, includes two things: (1) an "agreement to sell," *i.e.* sale as understood in Scotland before the passing of the Act, and (2) "sale," which means an actual transfer of the property in the goods to the buyer, irrespective of delivery. In Scotland, before the Act, sale was equivalent to the English "agreement to sell"; now, in so far as regards the sale of goods, it means sale together with passed property in the thing sold. Formerly the property could only pass by means of delivery, which was the implement of the contract technically known as sale; now the property may pass without delivery, in which case the contract is called a sale, as distinguished from an agreement to sell.

Capacity to contract continues to be regulated by the domicile of the person contracting. The introduction of the Scottish legal term "minor" into sec. 2 was unnecessary, and has a tendency to mislead. The proviso in which it first occurs in the section makes no change in the common law, but the explanation of the word "necessaries" in the last clause of the section is not applicable to Scotland. The words "suitable to the infant or minor's actual requirements at the time of the sale and delivery" imply that the seller must, as in England, take the risk of these requirements having been otherwise supplied (*Barnes*, 1884, 13 Q. B. D. 410); but in Scotland, if the goods sold are in their own nature suitable for the clothing, education, or maintenance of a minor according to his station in life, the seller is not put upon inquiry as to whether the minor is already furnished (Ersk. i. 7. 33; *Johnston*, 1782, Mor. 9036; *Scoffier*, 1783, Mor. 8936; *Wilkie*, 1834, 12 S. 506).

Formalities of the Contract.

3. [*Contract of Sale, how made.*] Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

4. [*Contract of Sale for Ten Pounds and upwards.*] (1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

These sections are practically declaratory of the law of Scotland and England. Sec. 4 is substantially a reproduction of sec. 17 of the English Statute of Frauds; but as the section does not apply to Scotland, it does not require further notice. Under sec. 3, it will be observed that the sale of goods differs from the sale of heritage in Scotland in being consensual, *i.e.* the contract may be proved either by writing or by parole testimony (see CONTRACT). If, however, the parties stipulate for writing, the contract is not complete without it (Ersk. iii. 2. 4; *Wallace*, 1766, Mor. 8475). There

may be difficulties as to form where heritage and moveables are sold under the same contract (see *Allan*, 1875, 2 R. 587). An informal writing (*i.e.*, in Scotland, a writing neither holograph nor tested) may be accepted as evidence of a sale of goods, but if challenged it will not be conclusive. By the Interpretation Act, 1889, "expressions in any Act referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing and reproducing words in a visible form" (52 & 53 Vict. c. 63, s. 20). It is often stated that writing is necessary to the sale of a ship (see CONTRACT; Bell, *Prin.* s. 1457); but if by this is meant that writing is necessary to the constitution of the contract, and that its absence will give *locus pœnitentiæ* to a verbal contractor, the proposition may be called in question. Formerly writing was necessary under the Merchant Shipping Acts, but the personal contract may now be constituted verbally, though writing is still necessary in connection with the registration of the transfer by which the buyer becomes the holder of a *jus in re* (cf. 34 Geo. III. c. 68, s. 14, and 3 & 4 Will. IV. c. 55, s. 32, with 57 & 58 Vict. c. 60; also *v.i.* p. 39). Writing was not necessary to the sale of a ship in Scotland prior to the statutory law on the subject (*Catheart*, 1681, Mor. 8471). The nature of shipping property is, however, so exceptional, that a verbal contract for the sale of a ship of such tonnage as to require registration would require proof more than usually clear in order to overcome the presumption arising from contrary usage.

Subject-Matter of Contract.

5. [*Existing or Future Goods.*] (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. [*Goods which have perished.*] Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7. [*Goods Perishing before Sale but after Agreement to Sell.*] Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The subject-matter of sale is here divided into (1) "existing goods" and (2) "future goods." Among future goods are those contracted to be manufactured. The English rule prior to the Act was that where the seller was a manufacturer, there was an implied condition that the goods furnished were of his own manufacture (*Johnson*, 1881, 7 Q. B. D. 438), but the Scottish rule had no such condition (*West Stockton Iron Co.*, 1880, 7 R. 1055; *Johnson*, 1881, 8 R. 437). Future goods may form the subject of an "*agreement to sell*," but they cannot be made the subject of a "*sale*" so as to pass the property. In this respect sec. 5 is merely declaratory of the common law of England (*Lunn*, 1845, 3 C. B. 379; *Langton*, 1859, 28 L. J. Ex. 252; *Moakes*, 1865, 19 C. B. N. S. 290), but as explained above, the agreement to sell was, prior to the Act, called a *sale* in Scotland, though it did not pass the property.

Sec. 6, referring to goods which have perished, is founded on the English case *Couturier*, 1856, 7 H. L. Cas. 673, where a sale of corn at sea was contracted in London, but it was afterwards found that the cargo,

having got heated, had been sold at a foreign port before the date of the contract. Ld. Chan. Cranworth, in giving judgment in the House of Lords, held that "what the parties contemplated was an existing something to be sold and bought." The case further shows that it is not essential to the application of the rule that the goods perish physically, if they cease to answer the description in the contract. The corn continued to be called by that name, but it was no longer the specific cargo intended by the parties. Where the goods sold have partially perished, the only question seems to be whether the subject of sale continues to answer the contract description. If not, it ceases to be the specific article sold. This may be deduced from the converse proposition that if the thing sold continues to answer the description, the sale is good (*Barr*, 1838, 3 M. & W. 390). A difficulty may be suggested where specific goods, subject to two or more contracts of sale, are found to have been partially destroyed. Analogy points to both contracts being void though each separately is capable of fulfilment. The further question, however, arises whether, in the case supposed, the goods are really specific so as to come within sec. 6.

Secs. 6 and 7 refer only to specific goods, *i.e.* to goods "identified and agreed upon at the time a contract of sale is made" (s. 62 (1)). In sec. 6 the goods are supposed to be the subject of a "*sale*," under which, had they not previously perished, both property and risk would have passed to the buyer: in sec. 7 the goods, though specific, are subject only to an "*agreement to sell*," which passes neither property nor risk. Sec. 7 is founded on *Howell*, 1874, 1 Q. B. D. 258. It applies to the cases specified in sec. 18, rules 2 and 3, and also to any case in which the parties have agreed to alter the *primâ facie* rule (s. 20) by postponing the passing of the risk.

The Price.

8. [*Ascertainment of Price.*] (1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9. [*Agreement to Sell at Valuation.*] (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

The price may be ascertained in three different ways: (1) fixed by the contract, (2) fixed in manner specified in the contract, or (3) determined by the course of dealing between the parties. Failing all of these, the buyer must pay a reasonable price. Sec. 18 is declaratory of the law of England (*Acebal*, 1834, 10 Bing. 376; *Hoadley*, 1834, 10 Bing. 482); but in so far as it admits of the fixing of a reasonable price, it seems to alter the common law of Scotland. Previous to the Act a fixed price was an essential of sale (*v.s.* p. 11). It is true that if the sale had been "executed," *i.e.* if delivery had taken place, the buyer was obliged to pay the market price of the goods actually received by him (*Leslie*, 1714, Mor. 14197; *Stuart*, 1885, 13 R. 221); but this was due not to agreement, but to the fact that something had followed on the supposed contract which could not be undone. The party receiving the benefit was in equity bound

to recompense the other at the market rate, but he had no obligation in regard to any part of the goods not delivered. The same principle held where there was mutual error regarding the price. The buyer was bound to pay the market value of the goods, but only in so far as *res non integræ* (*Sword*, 1771, Mor. 14241; *Stuart*, *v.s.*). Now, however, the law of Scotland has been assimilated to that of England. The "course of dealing between the parties" (s. 8 (1)) has no necessary connection with usage of trade. Trade usage may, however, be implied so as to fix the price or the mode of payment (*Stewart*, 1831, 9 S. 466; *Athya*, 1856, 18 D. 1299). In some trades a large proportion of the price, *e.g.* 20 or 30 per cent., is discounted in respect of settlement of the price when due. It depends, however, on the circumstances whether the allowance made is a "trade discount" or "a discount for prompt payment." In the former case the original agreement or course of dealing is not altered by a statement in the invoices sent out with the goods that accounts not paid within a certain period are not subject to discount. The discount must therefore be allowed although the period has expired (*Buchanan*, 1895, 23 R. 264). In the latter case the seller is under no obligation to allow the discount if he requires to raise action or to claim in the buyer's sequestration (*Duncan*, 1879, 6 R. 582). In English bankruptcy a discount for prompt payment must not exceed 5 per cent. (Bankruptcy Act, 1883, Sch. 3, r. 8; *Chambers*, 1897, 76 L. T. N. S., 780), but there is no corresponding rule in Scotland.

Mere inadequacy of price without fraud will not avoid the sale (Ersk. iii. 3. 4; *Fairie*, 1669, Mor. 14231; *Dawson*, 1851, 13 D. 843; *Latta*, 1865, 3 M. 508). The price must be in the form of money; and if required by the seller, payment must be made by a legal tender. In Scotland a legal tender is confined to coinage, viz. gold for a payment of any amount, silver for a payment not exceeding forty shillings, bronze for a payment not exceeding one shilling (33 Vict. c. 10, s. 4). Notes of Scotch banks are not a legal tender; and Bank of England notes, though a legal tender in England, are not so in Scotland (8 & 9 Vict. c. 38, s. 15). But an objection to tender of payment in any commonly recognised currency has been looked upon by the English Courts with disfavour (*Polglass*, 1831, 2 Cr. & J. 15; Benjamin, *Sale*, 423), and similar views would no doubt be held in regard to an offer of payment in Scotland by means of Scotch bank notes.

When payment is made under a condition either expressly or tacitly acquiesced in by the seller, the condition must receive effect. Thus where a cheque was enclosed in a letter requesting in return a guarantee in regard to delivery of the goods, the receiver, having cashed the cheque, but refused the guarantee, was held liable in repayment (*Semple*, 1889, 16 R. 790).

Proof of payment of the price differs in England and Scotland. In England parole evidence is allowed, but in Scotland written evidence only is permitted, except in ready-money transactions, or where the amount is under £8, 6s. 8d. The Mercantile Law Commission of 1855 recommended that the law of Scotland in this respect should be assimilated to that of England (2nd Rep. p. 7), but the recommendation did not receive statutory effect.

Sec. 9 deals with an agreement that the price should be fixed by the valuation of a third party. Failure on the part of the third party to make the valuation avoids the sale; but if this result arises from the fault of either seller or buyer, the injured party retains a right of damages. The common law of Scotland goes further than sec. 9, for it permits a reference of the amount of the price not merely to a third party, but to one

of the contracting parties themselves (*Steven*, 1760, Mor. 3158 (seller); *Montrose*, 1639, Mor. 14155 (buyer); *Lavaggi*, 1872, 10 M. 312 (buyer)). Scottish legal writers generally state or assume that the price so fixed is not absolute, but subject to correction by a judge (Ersk. iii. 3. 4; Bell, *Prin.* s. 92; M. P. Brown, *Sale*, 150); and Stair extends the same rule to any reference of the price to a third party (Stair, i. 14. 1). In either case it is difficult to see how a judge could interfere unless upon a formal reduction of the award. If an arbiter accept office, he cannot refuse to proceed to a final determination (*Ed. & Glas. Ry. Co.*, 1853, 15 D. 603); and in England a valuer who so refuses will be held liable in damages (*Jenkins*, 1854, 15 C. B. 189; *Cooper*, 1856, 25 L. J. Ex. 114). Although the agreement is made void under sec. 9, the buyer, if he has received and retained or used the goods, will be liable upon a *quantum meruit* (*Clarke*, 1856, 18 C. B. 765).

Conditions and Warranties.

10. [*Stipulations as to Time.*] (1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale "month" means *primâ facie* calendar month.

11. [*When Condition to be treated as Warranty.*] (1) In England or Ireland—

(*a*) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(*b*) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract:

(*c*) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

12. [*Implied Undertaking as to Title, etc.*] In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

(1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. [*Sale by Description.*] Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

14. [*Implied Conditions as to Quality or Fitness.*] Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to

the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose :

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed :

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Conditions in Scotland are divided into "suspensive" and "resolutive," corresponding to what are termed in England conditions "precedent" and "subsequent." A suspensive condition holds the sale in suspense until the condition is fulfilled. A resolutive condition implies that a sale has taken place, but that in a certain event the contract will be resolved or "dissolved," and the subject of sale become unsold, *res fit inempta* (Stair, i. 14. 3–5 ; Bell, *Com.* i. 256 *seq.* ; M. P. Brown, *Sale*, 32 *seq.*, 427 *seq.*). In the event of the sale being resolved, the rights of parties will be extricated according to agreement, or failing agreement, by restoring each party as nearly as possible to his former position. The rights of third parties are affected differently by the two kinds of conditions. A suspensive condition enables the seller to maintain the property as against third parties whose only right is derived from the buyer, and it is of no consequence that the buyer when he granted the supposed right had obtained delivery and was in possession of the goods. A resolutive condition, on the other hand, does not prevent the buyer from giving a title to others which will prevent the seller from reclaiming the property (Stair, i. 14. 4, 5 ; Ersk. iii. 3. 11, 12 ; and Ivory's note, p. 648 ; Pothier, *Oblig.* No. 224).

A suspensive condition or condition precedent takes two forms : (1) it may avoid the contract, leaving both parties free ; or (2) it may render the contract voidable in the option of one of the parties. In the former case the contract itself is conditional ; in the latter case the condition does not attach to the constitution of the contract, but to its performance, so that non-fulfilment by one of the parties constitutes a breach of contract and entitles the other party to sue for implement or damages. In sec. 1, "conditional," as opposed to "absolute," embraces both forms of condition, while secs. 6 and 7 are examples of conditions attaching to the constitution of the contract. In the sections immediately above quoted the reference is to conditions not voiding the contract, but rendering fulfilment imperative on one or other or both of the parties. The effect of such a condition is that in the event of non-fulfilment, the party not in fault has appropriate remedies against the other. There is, however, a third use of the words "suspensive condition," illustrated by the contract of hire-purchase, to which reference has already been made (*v.s.* p. 5). The condition in the case now referred to is suspensive not of the sale, but of the passing of the property. Strictly speaking, such a stipulation is not a condition, but a term of the contract. Questions arising from it do not involve a breach of any contractual obligation, but result from an assump-

tion by the buyer of a right of property which he does not possess. Such questions rarely arise between the seller and the buyer, or between the seller and anyone deriving *legal* right from the buyer (but see, *e.g.*, *Glasgow Furniture Co.*, 1898, 14 Sh. Ct. Rep. 356). For the most part they are consequent upon the buyer's fraud (*e.g. Murdoch*, 1889, 16 R. 396), and resolve themselves into a vindication of the property by the true owner (the original seller) as against a supposed right of property held by the deceived person (the second buyer).

The term "warranty" is used in the Act in a peculiarly English sense. It is defined, as regards England and Ireland, as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated" (s. 62 (1)). In Scotland, however, the word "warranty" is generally used in its natural sense of guarantee (*i.e.* condition), and it is practically so defined as to Scotland (s. 62 (1)). In England both condition and warranty are parts of the contract, but the former is fundamental and essential, while the latter is only collateral.

Sec. 10 deals with stipulations as to time, and, so far as regards time of payment, is founded on the English case, *Martindale*, 1841, 1 Q. B. 389. The law of Scotland is not changed (*Linn*, 1863, 2 M. 88). The mere fact that payment by draft forms a term of the contract, and that the buyer has not accepted the seller's draft, will not prevent the property passing unless a *jus disponendi* (see sec. 19) has either been reserved in the contract or is to be inferred from the circumstances (cf. *Clarke*, 1885, 12 R. 1035, with *Brandt*, 1876, 3 R. 375). Time of payment was, however, held to be of the essence of the contract in *Young*, 1785, Mor. 14191; *Hill*, 1785, Mor. 14200; affd. H. L., 1786, 3 Pat. 47; *Brodie*, 20 May 1814, F. C.; and (in a continuing contract) in *Turnbull*, 1874, 1 R. 730. Stipulations as to time, other than time of payment, are entirely matter of construction. The condition founded on was held not essential in *Raeburn*, 1832, 10 S. 761; *Forbes*, 1885, 12 R. 1065; *Paton*, 1897, H. L., 35 S. L. R. 112; but it was held otherwise in *Hannay*, 1788, Mor. 14194; *Robb*, 1840, 2 D. 988; *Colvin*, 1857, 19 D. 890; *M'Bride*, 1875, 2 R. 775.

Sec. 11 (2) introduced into Scotland an entirely new remedy in favour of the buyer. It gives the buyer in Scotland a right to keep the goods and claim damages, without restricting the right which he previously possessed of rejecting the goods and rescinding the contract. The buyer in Scotland has thus an alternative remedy, and is not only in a more advantageous position than formerly, but enjoys a privilege not known in England. The English law on the subject is expressed in sec. 11 (1), which, it will be observed, does not give the buyer an option of two remedies, but states the circumstances in which he may avail himself of the remedies under a condition or under a warranty in the English sense of the latter term.

The remedy of keeping the goods and yet claiming damages from the seller in respect of defective quantity or quality corresponds to the *actio quanti minoris* of the Roman law. The law of Scotland before the Act did not absolutely reject the *actio quanti minoris*, but confined its application to defects of title or quality discovered when matters were no longer entire (*Louttit's Trs.*, 1892, 19 R. 791, per Ld. M'Laren). Prior to the Act it was a prerequisite to the buyer's claim for relief that, immediately on the discovery of the defect, the goods should be restored to the seller. The buyer might then claim damages in respect of the seller's breach of contract: but if he refused or delayed to return the goods, he was held as

electing to waive the breach, and was obliged to pay the full contract price. If, however, restoration of the article sold was impossible in consequence of the defect not being discoverable until after consumption or use by the buyer, the seller was not obliged to return the price if it had been paid, and, on the other hand, the buyer was free to prove his damage. The remedy of rescission, thus qualified, is not impaired by the Act; but if a buyer rescinds, instead of taking advantage of the *actio quanti minoris* in the form now enacted for Scotland, he must conform to the old condition of rejection and timeous intimation to the seller. The section expressly provides that the remedy of rejection of the goods and rescission of the contract must be exercised within "a reasonable time." If the breach of contract is patent, the buyer must intimate the rejection immediately on delivery, and if latent, immediately on the defect being discovered. But such words as "immediately," "instantly," "without delay," etc., express no more than the "reasonable time" allowed by the section. Each case will largely depend on its own circumstances. Thus intimation of rejection *three* days after receipt of the goods was held timeous in *M'Bey*, 1858, 20 D. 1151; *five* days in *M'Carter*, 1877, 4 R. 890; and *seven* days in *Wallace*, 1885, 22 S. L. R. 830. On the other hand, three weeks' delay in intimating rejection was held fatal in *Stevenson*, 1808, Mor. App. "Sale," 5; so also one month's delay in *Pini*, 1895, 22 R. 699. The subject-matter of the contract has an important bearing on timeous or non-timeous rejection. Thus, in the case of seeds, the defect is generally latent, and cannot be ascertained till the product appears above ground, or till it reaches maturity, or even till its consumption. In these cases rejection is timeous when the fault is discovered, provided the buyer has not neglected reasonable opportunities for earlier discovery (*Adamson*, 1799, Mor. 14244; *Dickson*, 15 Dec. 1808, F. C.; *Hill*, 1827, 6 S. 229; *Wilson* 1894, 21 R. 732). Again, ordinary principles as to rejection do not apply to machinery: "You cannot tell whether it is sufficient till it has been tried, and that can be done only on the premises where it is intended to work; and, accordingly, it often happens that after machinery has been erected it goes well for a time, but afterwards shows defects, which the party who furnished it is bound to rectify" (per Ld. Pres. Inglis in *Pearce*, 1869, 7 M. 571). "The time which elapsed between delivery and rejection was about eleven months. That was a long period; but the mere lapse of that time, considering that this was a case about the rejection of machinery, does not in my opinion of itself bar rejection" (per Ld. Kincairney in *Morrison & Mason Ltd.*, 1898, 25 R. 427, at 434). See further as to machinery, *Fleming*, 1882, 9 R. 473; *Dick*, 1888, 16 R. 242; *Smith*, 1875, 2 R. 601; *Beesley*, 1884, 12 R. 384; *Bradley*, 1886, 13 R. 893; *Roberts*, 1896, 23 R. 855; *Electric Construction Co.*, 1897, 24 R. 312; *Paton*, 1897, H. L., 35 S. L. R. 112; *Morrison & Mason Ltd.* (*v.s.*). Several of the above cases are of date subsequent to the passing of the Act. In the *Electric Construction Co.'s* case (*v.s.*) the Court of Session admitted the buyer's right to reject a machine, but held that, by continued use after formal intimation of rejection, the right had been lost. The buyers then fell back upon the new alternative remedy of damages, but it was held that this also had been lost by the buyers having claimed a right to reject. In the words of Ld. Kinnear's dissentient opinion, it was held that "the buyers cannot reject the goods, because they have in effect elected to retain them; and at the same time they cannot claim damages, on the assumption of their retaining the goods, because they have elected to reject them" (24 R. at 324). The decision seems overruled by the subsequent judgment of the House of Lords in *Paton*,

(*v.s.*), where, although rejection, not having been timeously claimed, was denied, damages were admitted. The only difference was that in the *Electric* case a valid claim to reject had been made, but had been lost by retention of the article; while in *Paton* the right was not timeously claimed, and there was therefore nothing to lose. It seems opposed to principle that a buyer who by default has lost one of two alternative rights should be placed in a more favourable position than a buyer who has in turn established both rights, but by his conduct has waived one of them. It is also opposed to the law of England (*Parker*, 1821, 4 B. & Ald. 387).

Under the buyer's new alternative right, it is open to him to retain the goods and treat the breach as giving rise to a claim for damages "in diminution or extinction of the price" (s. 53). There is no express time limitation of this right. It is not provided that notice of the intention to claim damages must be given within a specified time, or within a "reasonable time," or, indeed, that any notice whatever is required. In England no notice is necessary where the breach is that of a warranty, but the want of notice raises a strong presumption that the complaint is not well founded (*Fielder*, 1788, 1 H. Bl. 17, per Ld. Loughborough, at 19). A similar presumption will probably be applied in Scotland.

The price, or the price with interest, may form the measure of the buyer's damage. If payment has been made, the buyer may claim repayment; if the price has not been paid, the buyer's obligation to pay is in this case extinguished (*Brown*, 1791, Mor. 14244; *Adamson*, 1799, Mor. 14244; *Wright*, 1833, 11 S. 722). The damage, however, in the general case will be less than the price, and thus form a diminution, not an extinction (s. 53). On the other hand, it may be greater than the price, as where a field is rendered useless for other crops by the sowing of bad seed, and time and labour are employed in unproductive cultivation (see sec. 53 (4), and *Wilson*, 1894, 21 R. 732; *Smith*, 1899, 15 T. L. R. 179; *Birnie*, 1800, 4 Pat. 144). Although the buyer who rejects goods is not entitled to retain them in respect of damages or expenses, he may do so (after due notice) in security of repayment of the price (*Padyett*, 1852, 15 D. 76; *Melville*, 1856, 18 D. 643; *Lainy*, 1858, 20 D. 519). On the other hand, as a check upon frivolous complaints and claims by the buyer, the Court in Scotland (*i.e.* the Court before which the action depends) may order him to consign the price, or give reasonable security for its due payment (s. 59).

In regard to conditions and warranties, the use of a particular word will not affect the substance of the thing intended. "A stipulation may be a condition though called a warranty in the contract" (s. 11 (1)); and even a representation, although usually without effect on the contract, may in certain circumstances amount to a warranty, or even, in Scotland, to a condition (see *Bentsen*, [1893] 2 Q. B., per Bowen, L. J., at 281). In sec. 12 (2) we have an exceptional use of the word "warranty" as applied to Scotland. As before stated, it usually means "condition," and non-fulfilment either means no contract, or rescission of the contract. Here, however, the word "warranty is used in the English sense, and is applied to Scotland as well as to England. A contract exists, and there is no rescission or option to rescind. The seller "warrants" that "the buyer shall have and enjoy quiet possession," but a breach of warranty means no more than a breach of the warrandice contained in a conveyance of heritable estate in Scotland (see *supra*, p. 20). The buyer is entitled to damages in the event of eviction, and corresponding to its extent, but the contract is not rescinded. The words "quiet possession" are taken from

the English law of real estate, which seems in this respect to correspond to the Scottish law of heritable estate. The use of "warranty" in the sense now mentioned is confined to the second subsection of sec. 12. In the third subsection it has, so far as regards Scotland, the usual meaning of a condition, and involves rescission of the contract, unless where the charge or incumbrance is not discovered till after possession and use by the buyer.

Sec. 13 deals with sale of goods by description. The word "description" has two different meanings in the Act. It is used in a generic sense to denote the intrinsic nature or quality of the article sold, as where the goods are said to be "of a description" (*i.e.* kind) "which it is in the course of the seller's business to supply" (s. 14 (1)), or where they are said to be "mixed with goods of a different description" (s. 30 (3)). It is also used, as in the section now referred to (s. 13), to signify a term of the contract expressing in written or spoken language the particular nature or quality which it is intended that the article should possess. In sec. 14 (2) we have the word used in each of these different applications. In the former case the word is applied to attributes generally; in the latter the meaning is restricted to the form of words by which certain particular attributes are expressed in the contract. Confining ourselves for the present to the second of these two meanings, viz. that intended by sec. 13, it is to be noted that although there is no implied warranty of *quality* or *fitness* except as in sec. 14, the seller is bound to furnish goods of the *description* specified in the contract. An adjective may express a description in this sense, *e.g. Ichaboe* guano (*Paterson*, 1850, 12 D. 502), or *flax* yarn (*Jaffé*, 1860, 23 D. 242), or *oxalic* acid (*Josling*, 1863, 13 C. B. N. S. 447), or *cluster* oats (*Carter*, 1885, 12 R. 1075). It is not even necessary that there should be a qualifying adjective. A single word may stand as the descriptive name of an article consisting of many separate but necessary parts, *e.g.* "ship," which includes all necessary sailing gear (*Armstrong*, 1875, 2 R. 339). In all these cases, delivery of an adulterated or imperfect article will not free the seller from his obligation. The thing delivered must meet the description, and if the name of the article indicates its purpose, it must be fit for that purpose (*Van Oppen*, 1855, 18 D. 113). "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it" (*Bowes*, 1877, 2 App. Ca. 455, per Ld. Blackburn, at 480). Failure to furnish according to description involves more than a breach of warranty in the English sense. It goes to the root of the contract itself, and is not merely a breach of a collateral agreement. Hence, even in England, it is a "condition" which, if not fulfilled, may, in the option of the buyer, annul the contract; it is not a mere "warranty" under which the buyer is bound to rest content with damages. The distinction may be illustrated by any of the above-cited instances. For example, the article furnished may be "flax yarn," thus answering the description, but it may be of inferior quality, in which case, in England (though not in Scotland), the buyer's only remedy is damages (s. 11 (1)). If, however, the article is not altogether flax, but has an admixture of jute, it ceases to answer the description, so that, both in England and Scotland, it may be rejected and the contract rescinded (see *Jaffé*, *v.s.*, and *Couston*, 1872, 10 M. H. L. 74, particularly the remarks of Ld. Chan. Hatherley in the latter case, at p. 80).

Sec. 14 embodies what remains of the rule *caveat emptor*, but the rule itself is now subordinated to the exceptions expressed in the subsections. Comparing the section with the law of Scotland immediately before the

passing of the Act, the following alterations may be noted: (1) An implied warranty may now be gathered from any circumstances tending to show knowledge by the seller of the purpose for which the goods are required. Thus the known occupation or trade of the buyer may be important, as where cork is sold to a cork-cutter, or flour to a baker, or smallwares to a retail dealer. Formerly, in Scotland, in the case of specific goods, there was no implied warranty unless the purpose was *expressly* stated (19 & 20 Vict. c. 60, s. 5). (2) Goods bought by description from a dealer must be of merchantable quality under that description. Formerly, in the case of specific goods, inferiority of quality gave no remedy by implication, unless there was at least a small percentage of adulteration to support a plea that the goods were not of the description stated in the contract (*Hardie*, 1870, 8 M. 798; *Hardie*, 1870, 42 Sc. Jur. 454). (3) An implied warranty may now be annexed by usage of trade. No exception of this nature was contained in the Mer. Law Amend. Act of 1856 (19 & 20 Vict. c. 60, s. 5). In regard to non-specific goods, *i.e.* goods not identified and agreed upon at the time of the contract (s. 62 (1)), the law of Scotland previous to the Act did not differ from that of England. "If an order was given in a contract of sale in either country for an article which was bespoken with a view to be applied to a particular purpose and the order was accepted, action would lie on that contract at the instance of the purchaser for implement or damages, just as in Scotland" (per Ld. J.-Cl. Patton in *Hutchison*, 1867, 6 M. 57, at 59).

Sale by Sample.

15. [*Sale by Sample.*] (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample—

(*a*) There is an implied condition that the bulk shall correspond with the sample in quality:

(*b*) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:

(*c*) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

A sample is a description wanting words. It is an appeal to the understanding in which objective illustration takes the place of, or supplements, written or spoken language. "The office of a sample is to present to the eye the real meaning and intention of the parties with regard to the subject-matter of the contract, which, owing to the imperfection of language, it may be difficult or impossible to express in words" (per Ld. Macnaghten in *Drummond*, 1887, 12 App. Ca. 284, at 287). In one respect, however, there is a marked difference between description and sample. Description, in the mercantile sense, usually refers to the name of a *genus* to which well-known attributes are attached. If the thing furnished includes these attributes, it corresponds with the description, although within the description itself there may be great diversity of quality. Sample, on the other hand, includes quality as well as the more general attributes. The section takes for granted that the goods correspond with the sample in *kind*, but it provides that they must also correspond with the sample in *quality*. When goods are sold both by sample and by description, sec. 14 (*c.s.*) provides that they must correspond with the description as well as with the sample. This illustrates a converse view of the relation of sample to description. The goods may agree with the sample in every respect, but may not correspond with some of those attributes included in the name or phrase by which the *genus* is described

(see *Mody*, 1868, 4 Ex. 49). In the case of *specific* goods (see sec. 62 (1)), this section appears to alter the previous law both of England and Scotland. A sample of specific goods is often given, and, before the Act, it reasonably inferred an undertaking that the bulk corresponded with the sample, but the seller did not undertake, nor did the law imply, any obligation as to merchantable quality (*Parkinson*, 1802, 2 East, 314). The section provides that to constitute a sale by sample, there must be a term in the contract to that effect. The exhibition of a sample does not necessarily make it a term of the contract, but, on the other hand, such a term may be implied from the circumstances without being expressed. Where a sample is made use of, it is often difficult to determine whether or not it enters into the constitution of the contract (*e.g. White*, 1891, 18 R. 972). As a term of the contract, care should be taken for the preservation and identification of the sample (*Cheap*, 1713, Mor. 14238). It is easy to suggest that a sample has been tampered with (*e.g. Watt*, 1829, 7 S. 372; *Lamb*, 1891, 9 Sh. Ct. Rep. 28).

II. Effects of the Contract.

Transfer of Property, Risk, and Title.

16. [*Goods must be ascertained.*] Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17. [*Property passes when intended to pass.*] (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. [*Rules for ascertaining Intention.*] Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer:—

(*a*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(*b*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5. (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the

right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19. [*Reservation of Right of Disposal.*] (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20. [*Risk primâ facie passes with Property.*] Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

21. [*Sale by Person not the Owner.*] (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Provided also that nothing in this Act shall affect—

(*a*) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof ;

(*b*) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a Court of competent jurisdiction.

22. [*Market Overt.*] (1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2) Nothing in this section shall affect the law relating to the sale of horses.

(3) The provisions of this section do not apply to Scotland.

23. [*Sale under Voidable Title.*] When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24. [*Revesting of Property in Stolen Goods on Conviction of Offender.*] (1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

25. [*Seller or Buyer in Possession after Sale.*] (1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving

the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

26. [*Effect of Writs of Execution.*] (1) A writ of *fieri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3) The provisions of this section do not apply to Scotland.

The general effect of the Act upon the law of Scotland in regard to the transfer of the property of goods has been already noticed (*supra*, pp. 4, 25). In the above sections the rules are detailed. Before a valid transfer can be made from seller to buyer, the goods must be "ascertained," *i.e. made* specific according to the definition of "specific" in sec. 62 (1). Non-specific goods are of two kinds: (1) they may be "future goods," *i.e.* "goods to be manufactured or acquired by the seller after the making of the contract of sale" (ss. 5 (1) and 62 (1)); or (2) they may be goods *in esse*, and belonging to the seller, but requiring to be selected from a larger number, or taken from bulk. The words "ascertained" and "unascertained" in secs. 16 and 17 refer chiefly, if not solely, to the latter kind of non-specific goods, while the term "appropriated" in sec. 18, rule 5, is applied to both. Rules 2 and 3 of sec 18 are examples of non-specific goods requiring to be "ascertained" before the property passes to the buyer. Possibly, in sec. 52, "ascertained" takes a wider meaning, being used as synonymous with specific, and therefore opposed to non-specific in both the senses above mentioned. "Executory agreement" is another form of words which may be applied to either kind of non-specific goods, but it is usually and properly associated with "future goods" rather than with "unascertained goods" in the narrower sense.

The essence of the change introduced by the Act into the law of Scotland, so far as regards transfer of property, is that while formerly the property in specific goods did not pass to the buyer until delivery, it now passes according to the intention of parties irrespective of delivery (ss. 17, 18). The former law of Scotland was based on the maxim that "the property of moveables is presumed from possession" (Bell, *Com.* i. 178). In the form, however, of reputed ownership, the law went a step further than a mere presumption, which may be overcome by contrary proof (Bell, *Prin.* s. 1314), and which can only be of importance as between competing parties, neither of whom has a valid independent title. Reputed ownership, where it was recognised, created a right in favour of the creditors of the possessor which was not affected by proof of a latent contrary right. But the strict theory of reputed ownership was subject to various modifications, and recent relaxations have induced the statement that the doctrine "is no longer of much importance" (per Ld. J.-Cl. Moncreiff in *Robertsons*, 1882, 9 R. 772, at 778). This result requires careful consideration in view of the extensive change in the

Scottish law of possession introduced by the present Act. Thus it may be doubted if, in consequence of the new doctrine of the passing of the property by the contract without change of possession, the just rights of the general creditors of an insolvent are sufficiently protected by the ordinary common law rules, or by the provisions of sec. 25 (2). The last-mentioned provisions form a partial return to the doctrine, but they only relate to the case of a particular purchaser or pledgee. It is for consideration whether it may not be expedient to extend to Scotland the *statutory* reputed ownership which for centuries has formed part of the English bankruptcy code (see 46 & 47 Vict. c. 52, s. 44; but on the other hand see objections to the English rule by Sir George Jessel in the debate in the House of Commons on the English Bankruptcy Bill of 1869, Hansard, 3rd ser. vol. 194, p. 793, and vol. 195, p. 148). It has been suggested (see POSSESSION) that general creditors are protected by the fact that reputed ownership may be attached to a *jus ad rem* as well as to a *jus in re* (*M'Bain*, 1881, 8 R. H. L. 106, per Ld. Blackburn), but a seller retaining possession of goods the property in which has passed to the buyer, has neither *jus ad rem* nor *jus in re*. He has no right whatever in or connected with the goods beyond a bare lien for the price if it happens to be unpaid.

A transfer of property without transfer of possession does not apply to "any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security" (s. 61 (4)). The law of Scotland as affecting a security in the form of a sale has been much disturbed of recent years and is not yet well settled. (See Brown, *Sale of Goods Act*, 276 *seq.*) But the above provision seems to remove the doubt suggested by the judgments in *M'Bain*, 1881, 8 R. H. L. 106, and *Liddell*, 1893, 20 R. 989. The result is that any transaction which is in substance a security though in form a sale, is invalid without actual delivery of the subject of the security (*Robertson*, 1896, 24 R. 120; *Kufeke*, 1898, 14 Sh. Ct. Rep. 277). In England, the property does not pass, in the case of a security, by the mere force of the contract without delivery, but the transaction may be made effectual under very stringent conditions by means of registration under the Bills of Sale Acts. These Acts, however, do not apply to Scotland, and there are no similar provisions in Scottish law. In this connection the case of unfinished ships is peculiar. In England, the property may pass to a pledgee without the ship being taken from the stocks of the builder, and without any other form of delivery or registration (*Hodykin*, 1875, 20 Eq. 746). The same was held to be the law of Scotland, upon the authority of the old case of *Simpson*, 1786, Mor. 14204, which was the basis of the Court of Session judgment in *M'Bain* (*v.s.*). But the House of Lords, in affirming *M'Bain*, founded their judgment upon the terms of the first section of the Scottish Mercantile Law Amendment Act, 1856, which is repealed by the present Act (s. 60). Doubts were cast on the alleged common law of Scotland and upon the case of *Simpson* (see *M'Bain*, per Ld. Chan. Selborne, 8 R. H. L., at 109, and Ld. Watson, at 116; also *Seath*, 1886, 13 R. H. L. 57, per Ld. Watson, at 64). If these doubts are justified, the result is that in Scotland ships are like other goods, so that since the repeal of the Act of 1856 no effectual security can be given over a ship on the stocks without actual change of possession. On this supposition a diversity is created by the present Act between the law of Scotland and that of England, and Scottish shipbuilders are placed in a different and perhaps less favourable position than their English brethren. There are, however, weighty reasons, which cannot be entered upon here,

tending to support the view of the *Scottish* Court in *M'Bain* (*v.s.*). It is submitted that the true principle of the common law both of Scotland and England in regard to ships and machinery in course of construction and practically immoveable, is that the property passes by means of constructive delivery, which takes effect upon payment of an instalment of the price in the case of a sale, and upon payment of an advance in the case of a security.

The law as to the passing of the risk is not altered by the Act (s. 20; Brown, *Sale of Goods Act*, 107 *seq.*). The circumstances which in Scotland, prior to the Act, sufficed to transfer the risk are identical with those which in England passed, and still continue to pass, the property (*Seath*, 1886, 13 R. H. L. 57). In this view the Scottish cases of *Hansen*, 1859, 21 D. 432; *Anderson*, 1870, 9 M. 122; and *Walker*, 1873, 11 M. 906, which related to the passing of the risk, may now be taken to illustrate also the passing of the property. *Hansen* (*v.s.*) formed a negative instance of rules 2 and 3 of sec. 18, it being found that nothing was wanting either to put the goods into a deliverable state or to ascertain the price. *Anderson* (*v.s.*) illustrates rule 2, the question being whether the goods were made specific and put into a deliverable state by separation from the bulk; while *Walker* (*v.s.*) illustrates rule 3, it being held that the price could not be ascertained until the subject was weighed on delivery.

The general effect of sec. 19, as to the reservation by the seller of a right of disposal, is to give statutory sanction to conditions suspensive of the passing of the property. In Scotland, before the Act, such conditions were necessarily attached to *delivery*, as it was only by delivery that the property passed; now, however, the conditions must, in many cases, be attached to the contract itself, otherwise, although the goods may not have left the seller's custody, the property in them may have passed to the buyer beyond recall. The second subsection restricts the ordinary effect of a bill of lading in passing the property, while the third lays down the rule in cases where a bill of lading and a bill of exchange for acceptance have been transmitted to the buyer at the same time. The rule referred to was established in Scotland before the Act (*Brandt*, 1876, 3 R. 375; but see *Clarke*, 1885, 12 R. 1035). The rule in England prior to the Act was not well established, and is not directly supported by *Shepherd*, 1871, 5 H. L. 116, where the circumstances were special. In *Shepherd*, the obligation to return the bill of exchange accepted by the buyer was rested rather upon direct contract than upon a condition precedent to the property vesting. In terms of the Act, the law of Scotland and that of England are now the same.

Secs. 21, 23, and 25 deal with transfer of title. No title can pass from the true owner of the goods without his consent, express or implied, but the law in certain circumstances implies the consent of the true owner to a sale by an apparent owner. Sec. 25 in its two subsections reproduces in almost identical terms secs. 8 and 9 of the Factors Act, 1889, made applicable to Scotland by the Factors (Scotland) Act, 1890. The section embodies a species of reputed ownership, but, as already suggested, it only protects special pledgees and sub-buyers, and affords no relief to the general creditors of the true owner of the goods. The second subsection is illustrated by cases of hire-purchase, to which reference has been already made (*supra*, pp. 5, 30). It does not confer a title on an indorsee of a bill of lading where the indorsation is in breach of sec. 19 (3) (*Cahn*, 1898, 79 L. T. N. S. 55). An opinion has been expressed in the Sheriff Court that the section does not apply where the subject is carried off by the diligence of the buyer's creditors (*Maxwell*, 1896, 12 Sh. Ct. Rep. 351), but the question

requires further consideration. It may be argued that one who by his conduct exposes property to the diligence of creditors, makes a "disposition thereof" in terms of the section; and that where the creditors sell to a person who buys in good faith and without notice, they exercise their debtor's rights, and, as his agents, give the buyer as good a title as the debtor himself could have conferred.

The effect of the transfer of property and title upon sub-sales is noticed in connection with delivery (*v.i.*).

III. Performance of the Contract.

27. [*Duties of Seller and Buyer.*] It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28. [*Payment and Delivery are Concurrent Conditions.*] Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29. [*Rules as to Delivery.*] (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30. [*Delivery of Wrong Quantity.*] (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31. [*Instalment Deliveries.*] (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32. [*Delivery to Carrier.*] (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is primâ facie deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. [*Risk where Goods are delivered at Distant Place.*] Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34. [*Buyer's Right of examining the Goods.*] (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35. [*Acceptance.*] The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36. [*Buyer not bound to return Rejected Goods.*] Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37. [*Liability of Buyer for neglecting or refusing Delivery of Goods.*] When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

The above sections relate to the seller's duty of delivery and the buyer's duty of acceptance and payment. "Delivery" means the voluntary transfer of possession from one person to another (s. 62 (1)). See DELIVERY OF MOVEABLES. The rules for effecting delivery are laid down in sec. 29. As to specific implement, see *Stewart*, 1890, 17 R. H. L. 1, and *supra*, p. 23. In certain circumstances the seller will be allowed a reasonable time to perform his obligation (*Forbes*, 1885, 12 R. 1065). If actual delivery is not contemplated and the contract is one for differences only, it may be treated as a wager not enforceable at law (*Heiman*, 1885, 12 R. 406; see also *Clark*, 1819, 6 Pat. 422, per Ld. Chan. Eldon, at 429). The rights of parties are often affected by the question whether credit, however short, was intended. If in a sale for ready money the buyer, by error or fraud, receives the goods without making payment of the price, no property passes to him (*Bishop*, 1819, 2 B. & Ald. 329 note; Bell, *Com.* i. 258; *Watt*, 1846, 8 D. 529); but if credit is once allowed, though obtained by misrepresentation or concealment, the goods are the property of the buyer and may be validly transferred by him to a third party, or taken possession of by his general creditors (*Richmond*, 1854, 16 D. 403). The delivery may, according to circumstances, be actual or constructive. "Where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that

which is tantamount, such as the delivery of the key of the warehouse in which the goods are lodged, or by the delivery of other *indicia* of property" (per Ld. Kenyon in *Chaplin*, 1800, 1 East, 192). But such delivery must be real, in the sense of giving the buyer "access to the actual possession of the subject and power over it, while the seller is excluded" (Bell, *Com.* i. 186). The law of Scotland has never favoured mere symbolical delivery of goods, and the Courts have denied effect to any writing or ceremony intended to transfer the property without change of custody. "A written instrument of possession will not pass the property of moveables" (per Ld. Neaves in *Anderson*, 1866, 4 M. 765, at 771, quoted and approved by Ld. Watson in *Seath*, 1886, 13 R. H. L. 57, at 67. See also *Corbet*, 1666, Mor. 10602: *Ker*, 1695, Mor. 9122; *Carse*, 1714, Mor. 9125; *Henry*, 1822, 1 S. 399; *Fraser*, 1830, 8 S. 982; *Stiven*, 1878, 15 S. L. R. 422).

Sec. 29 (3) deals with goods which at the time of the sale are in the possession of a third person, *e.g.* a warehouse-keeper. In addition to the intimation to the custodier, which by Scots law was always necessary to transfer the property where the custody itself was not changed, the section provides that there is no delivery unless and until the third person *acknowledges* to the buyer that he holds the goods on his behalf. The law of Scotland before the Act seems to have been satisfied with intimation to the custodier, irrespective of any consent on his part. Where delivery was duly given in this way, the seller was completely divested, and had not even a lien for the price in a question with a sub-buyer (*Tod*, 1 Feb. 1809, F. C.). See generally on the subject of delivery, DELIVERY OF MOVEABLES.

Goods in the hands of a third person may be the subject of a succession of sales without any actual change of custody. If actual or constructive delivery has been given to the buyer, a new sale by him to a second buyer is independent of the former sale; but if the first buyer has not obtained delivery, the transaction between him and the second buyer is a "sub-sale," and has different legal effects. The term "sub-sale" denotes any sale by a buyer to a third person of a subject (whether heritable or moveable) of which delivery has not yet been received from the original seller. Whether in a sub-sale of goods the property passes by the contract to the sub-buyer now depends upon (1) whether it was vested in the first buyer at the date of the sub-sale, and (2) assuming it to have been so vested, whether the parties to the sub-sale intended it to pass by the contract to the second buyer. If the property has passed by the sub-sale, a direct relation is established between the original seller and the second buyer, the former being obliged to deliver to the latter upon payment of the price, and without power to retain for any indebtedness either of the first or second buyer on general account (see sec. 47 as to unpaid seller's rights in competition with sub-sale or pledge by buyer). Under the former law of Scotland the question was one of delivery only; and where goods were in a warehouse, nothing but actual or constructive delivery to the first buyer, and similar actual or constructive delivery by the first to the second buyer, could pass the property. The point, therefore, in the case of goods in a warehouse, was as to the requisites of constructive delivery. Prior to 1849, where such delivery was denied, it was erroneously designated by the Court of Session "stoppage in transitu" (*e.g. Mathie's Tr.*, 1804, Mor. 14226; *Maxwell*, 1830, 8 S. 618); but in *M'Ewan* (6 Bell's App. 340) the House of Lords pointed out that stoppage in transitu was a special remedy involving previous delivery and passing of the property, whereas in the cases referred to there had been no delivery, and the property had not passed. In most cases, the question whether or not constructive delivery

of goods in a warehouse has been given depends upon the legal effect of a document of title. Sec. 29 (3) expressly reserves the effect of documents of title, and these documents are also specially favoured in secs. 25 and 47. The effect of documents of title upon stoppage *in transitu*, and upon the lien of an unpaid seller for the price, is expressed in the proviso attached to sec. 47; and their effect upon a sub-sale of goods in a warehouse, although in some degree left to inference, seems wider than the law of Scotland prior to the Act (see DOCUMENT OF TITLE; DELIVERY-ORDER). The statutory definition or explanation of "document of title" does not extend beyond the purposes of the two Acts in which it is expressed. In the Factors Act it is confined to the dealings of mercantile agents (*Inglis*, 1898, 25 R. H. L. 70), and in the Sale of Goods Act it does not apply to securities (s. 61 (4)). The effect of the definition upon the delivery of warehoused goods will therefore depend upon the purpose of the transfer. If the transfer is intended as a security, the rule expressed in *Anderson*, 1866, 4 M. 765, will probably be continued; but if it is an actual sale, the cases of *Mathieson*, 1854, 17 D. 274, and *Distillers Co.*, 1889, 16 R. 479, cannot now be relied on as authorities. It is to be observed that although "bill of lading" is included in the statutory definition of "document of title," such a document stands in a higher position than the others mentioned in the definition (Bills of Lading Act, 1855, s. 1; see also *Inglis*, 1898, 25 R. H. L. 70, per Ld. Watson, at 74).

The buyer's duties are acceptance and payment, but neither of these is obligatory if the seller fails to deliver in terms of the contract. Delivery of a wrong quantity gives the buyer a right of rejection, as expressed in sec. 30. So, also, delivery of an inferior quality permits the buyer to reject in terms of sec. 11 (2). In either case the buyer may waive his right, but the consequences are different. In regard to quantity the contract is upheld in its integrity, and the buyer, if he retain the goods, must pay the contract price (s. 30). In respect of quality, however, the buyer, if he retain the goods, may yet claim damages for a breach (s. 11 (2)), in diminution or extinction of the price (s. 53). As regards quality in Scotland, if the buyer's option of rejection is properly exercised, the seller is in no better position than if he had failed by non-delivery. He has failed to deliver the *contract* article, and therefore the buyer's remedy in damages falls under sec. 51, not sec. 53. Instalment deliveries (s. 31), in terms of what are called continuing contracts, are common in connection with supplies of iron and coal. See their effect discussed, Brown, *Sale of Goods Act*, 148 *seq.*

Sec. 32 embodies the old rule of the law of Scotland as well as of England, viz. that delivery to a carrier for the purpose of transmission to the buyer is *primâ facie* delivery to the buyer himself (*Prince*, 1680, Mor. 4932). But the passing of the property is sometimes determined by subsequent events. Thus if the carrier is to be proceeded against for breach of his contract of carriage, the buyer's refusal to accept may render it necessary that the action proceed in name of the seller. On the other hand, if the buyer accepts and trusts to the seller's responsibility for damages, the action should be at the instance of the buyer, as owner of the goods from the time when the transit commenced (see *Dawes*, 1799, 8 T. R. 330; *Dunlop*, 1839, 7 Cl. & Fin. 600; Benjamin, *Sale*, 164). The rule in sec. 32 (2) as to the seller's duty to make a contract with the carrier, though set forth by text-writers as the law of Scotland prior to the Act, is supported entirely by English authorities (Bell, *Sale*, 84, *Com.* i. 274, *Prin.* s. 118; M. P. Brown, *Sale*, 370). On the other hand, the rule in sec. 32 (3) as to insurance, is chiefly founded on Scottish authorities

(see *Hoog*, 1754, Mor. 10096; *Cooper*, 1791, Mor. 10100; *Hesseltines*, 1802, Mor. 10111; *Elton*, 13 Dec. 1808, F. C.; *Arnot*, 25 Nov. 1813, F. C.; affd. 1817, 5 Dow's App. 274; *Fleet*, 1854, 16 D. 1122; *Hastie*, 1857, 19 D. 557).

Sec. 33 deals with an incidental point in the law of risk. The general rule as to risk in transit depends on the passing of the property, which may or may not be coincident with delivery. If the rule of this section is a legal effect of the want of delivery, it is clearly exceptional in cases where the property has passed, but it may perhaps be taken as a qualification of warranty rather than a case of risk (see *Beer*, 1877, 46 L. J. C. P. 677).

The provision of sec. 34 as to the buyer's right to have the goods examined before acceptance, implies a *duty* to examine; but sec. 14 (2), giving the buyer the benefit of an implied condition, only excepts the case of *actual* examination, leaving it to be inferred that if the buyer accepts the goods without examination, it is still within his power at any time to found upon a breach of warranty. Acceptance implies such conduct on the part of the buyer as will preclude him from afterwards rejecting the goods as disconform to contract. Where it follows upon an "agreement to sell," it is practically the buyer's consent to the seller's appropriation of the goods to the contract (s. 18, rule 5). It is to be distinguished from "receipt" (see *Wilson*, 1896, 23 R. 714; *Morrison*, 1898, 25 R. 427), and also from "acceptance" in the sense of sec. 4, which does not apply to Scotland. The rule as to acceptance is contained in sec. 35. A buyer is not bound to accept goods tendered to him in closed casks which he is not allowed to open (*Isherwood*, 1843, 11 M. & W. 347), nor to attend at a particular place after sunset (*Startup*, 1843, 6 M. & G. 593), nor to select the contract goods out of a larger quantity, or a mixed lot sent him by the seller (s. 30). The buyer's right to reject, which is the negative of his duty to accept, may be affected by his Breaking Bulk (*q.v.*).

Sec. 36 makes it clear that there is no duty on the part of the buyer to return rejected goods to the seller. It is sufficient if his refusal to accept is intimated to the seller by notice, or by any unequivocal act signifying rejection, and made known to the seller (*Grimoldby*, 1875, 10 C. P. 391, per Brett, J., at 395). The former law of Scotland on this subject was not well defined, but its tendency was to impose a duty on the buyer of returning rejected goods to the seller, or at least offering to return them (see *e.g. Webster*, 1830, 8 S. 528). The institutional writers state that the goods must be "*offered back*" (Stair, i. 10. 15; Ersk. iii. 3. 10; Bank. i. 19. 2), but they do not suggest any further active steps on the part of the buyer (see also Bell, *Com.* i. 464, *Prin.* s. 99; M. P. Brown, *Sale*, 309). A rule, however, has been laid down, especially in sales of horses, that the buyer's duty does not end with mere notice, and that the seller, though in default, is entitled to impose upon the buyer the duties of an agent, and not merely those of an involuntary bailee (*M'Bey*, 1858, 20 D. 1151; *Caled. Ry. Co.*, 1882, 10 R. 63; *Malcolm*, 1898, 25 R. 1089). On the other hand, see *Couston*, 1872, 10 M. H. L. 74, where, according to Ld. Chelmsford, the buyer's duty is satisfied if he make a clear and distinct offer to return, or in fact return the goods, "*by stating to the vendor that the goods are at his risk.*" Horses are "goods" in the sense of the Act, and it is submitted that the rule referred to is not supported by sec. 36.

IV. Rights of Unpaid Seller against the Goods.

38. [*Unpaid Seller defined.*] (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

(*a*) When the whole of the price has not been paid or tendered;

(*b*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39. [*Unpaid Seller's Right.*] (1) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(*a*) A lien on the goods or right to retain them for the price while he is in possession of them ;

(*b*) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them ;

(*c*) A right of re-sale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

40. [*Attachment by Seller in Scotland.*] In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding ; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

Unpaid Seller's Lien.

41. [*Seller's Lien.*] (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

(*a*) Where the goods have been sold without any stipulation as to credit ;

(*b*) Where the goods have been sold on credit, but the term of credit has expired ;

(*c*) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. [*Part Delivery.*] Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

43. [*Termination of Lien.*] (1) The unpaid seller of goods loses his lien or right of retention thereon—

(*a*) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods ;

(*b*) When the buyer or his agent lawfully obtains possession of the goods ;

(*c*) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transitu.

44. [*Right of Stoppage in transitu.*] Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45. [*Duration of Transit.*] (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46. [*How Stoppage in transitu is effected.*] (1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

Re-sale by Buyer or Seller.

47. [*Effect of Sub-Sale or Pledge by Buyer.*] Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

48. [*Sale not generally rescinded by Lien or Stoppage in transitu.*] (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

These sections relate to the unpaid seller's rights of lien, stoppage in transitu, and resale. A definition is given (s. 38) of "unpaid seller," and the ordinary definition of "seller" (s. 62 (1)) is extended, as regards this part of the Act, so as to include persons in the position of a seller. The effect of sec. 38 (1) is that neither a partial payment nor a conditional payment operates to take the seller out of the category of an unpaid seller. Sec. 38 (2) expresses the rule established in regard to stoppage in transitu by *Feise*, 1802, 3 East, 93. The right to stop in transitu is not an adjunct of lien in the ordinary sense, but is a right peculiar to the seller of goods. Hence, though many other persons have liens over goods in their possession (see LIEN), none but a seller can follow the goods of another after the actual custody has been lost. But among sellers are classed consignors and agents

in the position of sellers. Thus in *Feise* (*v.s.*) the right was held to exist in favour of an agent who had bought goods on his own credit, but on the order of a principal to whom he consigned them, and who became bankrupt during the transit.

Sec. 39 (2) deals with the unpaid seller's rights where the property has not passed. It declares that, in *addition* to his other remedies, he has a right of withholding delivery similar to, and co-extensive with, his rights of lien and stoppage in transitu where the property has passed. But the whole ground would have been better covered by a simple statement that where the property or ownership has not passed, the seller remains owner and has all the rights of an owner. Among these rights is "retention," which in Scotland, before the Act, could be exercised by the seller up till the passing of the property by delivery, but subject to the restrictions introduced by the M. L. A. Act, 1856 (19 & 20 Vict. c. 60). The owner of an article is not bound to part with it; and if he has entered into a contract creating a *jus ad rem*, neither the creditor in that right, nor anyone deriving title through him, can enforce it so long as he is debtor to the seller in any other obligation. Hence, where the property has not passed, the seller can retain the thing sold not only for the price, but for any debt or general balance owing to him by the buyer. The M. L. A. Act, 1856, restricted this right to what was practically the English lien for the price, although technically, from the absence of delivery, the property had not passed. The provisions of the M. L. A. Act referred to are repealed by this Act, but in their place we have the English rule by which the property in specific goods may pass irrespective of delivery. Where the property passes before delivery, the seller is no longer owner, and he therefore loses his right of retention, but, on the other hand, he acquires the inferior right of a lien for the price, as that right previously existed, and still exists, in England. The provision in the section now under consideration was unnecessary. It in effect enacts that a right to the whole includes a right to some of the parts. The same imperfect view of the legal effect of passing the property led to the introduction into the Act of the words "or right to retain" in sec. 39 (1) (a) and the word "retention" in secs. 42, 43, 47, and 48. These additions were supposed to be necessary in order to adapt the English Bill to Scotland, but for the reasons above explained they are incorrectly applied, and therefore misleading. The same remark applies to the definition or explanation "lien in Scotland includes right of retention" (s. 62 (1)). The converse would have been more accurate; for retention being the unrestricted right of an owner, includes lien and much more. To treat the word "retention" as equivalent to a lien for the price is to give it an entirely new meaning in the law of Scotland (see *Harper's Crs.*, 1791, Bell's Oct. Ca. 440; *Brown*, 1844, 6 D. 1267; More, *Lectures*, i. 402); yet such is apparently done in sec. 39 (1) (a), where the words are "right to retain them *for the price*."

Sec. 41 explains the nature of the seller's lien. In common with all other liens, it is a right over the property of a person other than the person seeking to enforce it. But it is more extensive than an ordinary lien, which, while it would entitle the seller to retain for the price, would not enable him to confer any title on a third party either by way of re-sale or pledge. "It interferes not only with the purchaser's right of possession but also with his right of property" (Blackburn, *Sale*, 445). On the other hand, it does not amount to a resumption of the property by the seller so as to entitle him to treat the contract as rescinded or non-existent. For this purpose there must be a repassing of the property from the buyer to the

seller, as where the buyer obtains a decree for damages for failure to deliver, and the seller pays the amount. The buyer cannot keep both damages and property, and the latter, therefore, by operation of law, passes back to the seller. Sec. 43 (2) negatives a proposition which might have been put forward in England, but would have been unintelligible under the former law of Scotland. In Scotland, the ownership of goods could not have been changed by any mere personal decree against either seller or buyer, but now, as above explained, a decree, even in Scotland, may occasionally have this effect. The object of the provision is to secure that the mere obtaining of the decree or judgment will not affect the unpaid seller's remedies so long as the decree or judgment is not satisfied by payment.

Sec. 44 defines stoppage in transitu as a right to "resume possession of the goods so long as they are in course of transit," and to "retain them until payment or tender of the price." The governing principles of seller's lien and stoppage in transitu, though differing from the ordinary rules of contract, very nearly resemble each other. Both are seller's remedies against the goods, and have for their object the securing of the unpaid price. Both necessarily suppose the property to be in the buyer, but although the property must have passed, the possession remains with the seller or with a carrier. In both, the right ceases after the goods have been delivered into the actual or constructive custody of the buyer, or his agent other than a carrier conveying the goods towards the buyer or in terms of the contract. Lien exists so long as the unpaid seller retains actual or constructive possession, and ceases the moment possession is lost; stoppage begins where lien ends, and continues so long as the goods, though in a sense delivered to the buyer through his agent the carrier (s. 32), are still in course of transit. In one important respect, however, the rights differ. Lien can be exercised whether the buyer is insolvent or not; stoppage is only available when the buyer is insolvent according to the definition of insolvency given in sec. 62 (3) of this Act. If the seller stop in transitu before actual insolvency, he does so at his peril. If, when the goods arrive at their destination, the buyer continues solvent, the goods must be delivered, and the seller will be liable in any expenses incurred (*The Constantia*, 1807, 6 Rob. A. 321). In sec. 45 there is frequent reference to the agent of the buyer as being entitled to put an end to stoppage in transitu, but nowhere in the Act is it expressly stated that the *seller's* agent may enforce the stoppage where he has not a direct title as indorsee or is not personally interested as having paid or become responsible for the price. Such a right, however, on the part of an agent exercising either special or general authority is clearly implied. Sec. 61 (2) reserves the rules relating to the law of principal and agent, and in practice, the power of an agent in this respect is fully recognised (*e.g. Baxter*, 1807, Hume, 688; *Whitehead*, 1842, 2 M. & W. 518). A different question arises if one who has no authority whatever assumes to act on behalf of the seller. The rule in England appears to be that if the act of the party in stopping the goods is ratified before the transit is ended, by the party entitled to exercise the privilege, it will be effectual, but that ratification or adoption after the transit will be too late. A cautioner for the price is not entitled to stop in transitu (*Lowson*, 1842, 4 D. 1452; *Siffkin*, 1805, 6 East, 371); but if a cautioner has paid the price to the seller, he is entitled, according to the ordinary rule of the law of Scotland, to an assignment of the securities held by the creditor, including the right to stop the goods. An arrestment in the hands of the carrier by a creditor of the buyer will not defeat

the seller's right to stop the goods (*Neish*, 1807, Hume, 693; *Dunlop*, 22 Feb. 1814, F. C.), nor will a mere cash receipt granted by the buyer to a sub-buyer, not being a document of title (*Kemp*, 1882, 7 App. Ca. 573, per Ld. Blackburn, at 584). When there are cross accounts between seller and buyer, the right is not excluded by the fact that the seller has goods of the buyer in his hands unaccounted for, and the balance is uncertain (*Wood*, 1825, 7 D. & R. 726; but see the doubtful case, *Vertue*, 1814, 4 Camp. 31, and Benjamin, *Sale*, 849). The seller's right of stoppage in transitu will prevail against any lien claimed by the carrier on account of a general balance (*Oppenheim*, 1802, 3 B. & P. 42), but not for the carrier's special charges on the goods themselves. Details as to the duration of the transit and the mode of effecting stoppage are contained in secs. 45 and 46. See also STOPPAGE IN TRANSITU.

It has been shown that the unpaid seller's rights of lien and stoppage in transitu are only appropriate where, as an effect of the contract, the property has passed to the buyer. Where the property has not passed, the seller has no need of special remedies directed as against the property of other persons, since he himself continues owner. As proprietor, he has the higher right of retention if he is in possession, and an ordinary action for recovery, if the goods are wrongfully in the hands of others. If the exercise of the rights of lien or stoppage in transitu had the effect of rescinding the contract in virtue of which the property passed, the property would again become that of the seller, but the Act (s. 48 (1)) provides that this effect shall not follow. The seller has, nevertheless, certain special rights conferred upon him which place him in almost as favourable a position as if he had never been divested of the property. Among these is a right of re-sale, subject to certain notices as specified in sec. 48. In certain circumstances (also specified in the section) the original contract of sale is actually rescinded, but without prejudice to any claim the seller may have for damages. While the seller's rights are thus enlarged, the buyer's rights as owner of property which has passed to him are diminished. Thus, under sec. 47, the buyer cannot give a title to a third person which will interfere with the unpaid seller's remedies against the goods unless in the case of a transferee under a document of title who has taken the document in good faith and for valuable consideration. As to document of title, see above, p. 44.

Sec. 40 as to the seller's power of arrestment or poinding, is taken from sec. 3 of the Mercantile Law Amendment Act, Scotland, 1856, with the omission of certain particulars referring to the special procedure created by that Act. In consequence of the passing of the property to the buyer under the present Act, that which in the M. L. A. Act was a confusing anomaly (see, *e.g.*, *Wyper*, 1861, 23 D. 606) has now become an appropriate diligence. The section is declaratory of the common law and might have been omitted as mere matter of procedure but for a possible negative inference from the repeal of identical words in the old statute. Where the seller's right of lien or so-called retention is defeated, as by the transfer of a document of title under sec. 47, the right to arrest or poind is necessarily gone. The goods no longer belong to the seller's debtor. Where the goods are in the actual custody of the seller, it would seem that poinding and not arrestment is the proper diligence (*Lochhead*, 1883, 11 R. 201, per Ld. Kinnear, at 204; but see *Tillicoutry*, 1678, Fount. i. 10. See also *Harper's Crs.*, 1791, Bell's Oct. Ca. 440, per Ld. Dreghorn, at 465; *Wyper*, 1861, 23 D. 606, per Ld. Pres. M'Neill, at 618; *Browne*, 1893, 21 R. 173; Ross, *L. C. M. L.* ii. 740; More, *Lectures*, i. 402 *seq.*). Where

the goods are in the hands of a warehouseman or other neutral person, arrestment is of course the proper form of diligence.

V. Actions for Breach of the Contract.

Remedies of the Seller.

49. [*Action for Price.*] (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50. [*Damages for Non-Acceptance.*] (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is primâ facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

51. [*Damages for Non-Delivery.*] (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is primâ facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. [*Specific Performance.*] In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

53. [*Remedy for Breach of Warranty*]. (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or

(*b*) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is primâ facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

54. [*Interest and Special Damages.*] Nothing in this Act shall affect the right of the

buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

Under sections 49 and 50 the seller's remedies in Scotland are somewhat altered. Formerly, in the event of a breach by the buyer, the seller had in every case alternative remedies: (1) he might sue for the price, provided he continued in a position to offer the goods (Bell, *Com.* i. 472), or (2) he might retain the goods and claim damages, subject to an obligation to lessen the damage by a re-sale where a market was available. But under the Act, where the property has not passed and where the price is not payable upon a day certain irrespective of delivery, the seller is restricted to a claim of damages under sec. 50. Where the property has passed, the seller has the option of an action for the price under sec. 49 or an action for damages under sec. 50. The general rules of law in regard to damages will be found under DAMAGES, MEASURE OF.

Sec. 49 (3) reserves the seller's right in Scotland to recover interest on the price. In England, interest is not recoverable on the price of goods sold (Mayne, *Damages*, 5th ed., 162); but if the contract is in writing, and if the price is a "debt or sum certain payable at a certain time," interest may be allowed under 3 & 4 Will. IV. c. 42, s. 28 (see *Duncombe*, 1875, 10 Q. B. 371). In Scotland, the seller can, as a rule, sue for the price and interest from the date when the money should have been paid. This proceeds on implied agreement by the person in default to pay for the use of the money held by him in breach of his contract (M. P. Brown, *Sale*, 348; Bell, *Prin.* s. 32; Bell, *Com.* i. 692, 694; *Second Rep. Mer. Law Com.*, 1855, p. 47). "It has often been said, and I think it is a rule of law, that interest is only due where there is either a contract to pay interest, or a duty to invest, or in respect of *morata solutio*" (*Ross*, 1896, 23 R. 802, per Ld. M'Laren, at 805). The only damages for delay in the payment of money is the interest (*Roissard*, 1897, 24 R. 861). See generally on the subject of interest, INTEREST (OF MONEY).

Sec. 51 represents the buyer's remedy in damages for non-delivery, just as sec. 50 represents the seller's remedy in damages for non-acceptance. Where the damage arises not from non-delivery but from a breach by the seller of some condition of warranty not entitling the buyer to reject, the remedy is specified in sec. 53; but as the buyer in Scotland has a right of rejection not known in England, his remedy, where such right is exercised, falls under sec. 51. It is a case of non-delivery by the seller, of goods *answering to the contract*. As to the Scottish law of specific implement reserved by sec. 52, see *supra*, p. 23.

VI. SUPPLEMENTARY.

55. [*Exclusion of Implied Terms and Conditions.*] Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

56. [*Reasonable Time a Question of Fact.*] Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

57. [*Rights, etc., enforceable by Action.*] Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

58. [*Auction Sales.*] In the case of a sale by auction—

(1) Where goods are put up for sale by auction in lots, each lot is primâ facie deemed to be the subject of a separate contract of sale:

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:

(3) Where a sale by auction is not notified to be subject to a right to bid on behalf

of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer:

(4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

59. [*Payment into Court in Scotland when Breach of Warranty alleged.*] In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

60. [*Repeal*]. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61. [*Savings.*] (1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62. [*Interpretation of Terms.*] (1) In this Act, unless the context or subject matter otherwise requires,—

"Action" includes counterclaim and set off, and in Scotland condescendence and claim and compensation:

"Bailee" in Scotland includes custodier:

"Buyer" means a person who buys or agrees to buy goods:

"Contract of sale" includes an agreement to sell as well as a sale:

"Defendant" includes in Scotland defender, respondent, and claimant in a multiplepoinding:

"Delivery" means voluntary transfer of possession from one person to another:

"Document of title to goods" has the same meaning as it has in the Factors Acts:

"Factors Acts" mean the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same:

"Fault" means wrongful act or default:

"Future goods" mean goods to be manufactured or acquired by the seller after the making of the contract of sale:

"Goods" include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

"Lien" in Scotland includes right of retention:

"Plaintiff" includes pursuer, complainer, claimant in a multiplepoinding and defendant or defender counterclaiming:

"Property" means the general property in goods, and not merely a special property:

"Quality of goods" includes their state or condition:

"Sale" includes a bargain and sale as well as a sale and delivery:

"Seller" means a person who sells or agrees to sell goods:

"Specific goods" mean goods identified and agreed upon at the time a contract of sale is made:

"Warranty" as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. [*Commencement.*] This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

64. [*Short Title.*] This Act may be cited as the Sale of Goods Act, 1893.

SCHEDULE.

This schedule is to be read as referring to the revised edition of the statutes prepared under the direction of the Statute Law Committee.

ENACTMENTS REPEALED.

Session and Chapter.	Title of Act and Extent of Repeal.
1 Jac. I. c. 21 . .	An Act against brokers. The whole Act.
29 Cha. II. c. 3 . .	An Act for the prevention of frauds and perjuries. In part; that is to say, sections fifteen and sixteen.[1]
9 Geo. IV. c. 14 . .	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements. In part; that is to say, section seven.
19 & 20 Vict. c. 60 .	The Mercantile Law Amendment (Scotland) Act, 1856. In part; that is to say, sections one, two, three, four, and five.
19 & 20 Vict. c. 97 .	The Mercantile Law Amendment Act, 1856. In part; that is to say, sections one and two.

[1] Commonly cited as sections sixteen and seventeen.

These sections deal with a variety of subjects, particularly with implied terms and usage (s. 55), right of action (s. 57), and sales by auction (s. 58). Sec. 61 reserves the rules in bankruptcy and also the rules of the common law where not inconsistent with the Act. Among the common law rules thus saved, express mention is made of the law of principal and agent, and the effect of fraud, misrepresentation, coercion, and mistake. Securities are excepted from the operation of the Act (s. 61 (4)), and the landlord's hypothec or sequestration for rent in Scotland is reserved (s. 61 (5)).

The rule of sec. 55 as to implied terms, follows the maxim *Expressum facit cessare tacitum.* In a consensual contract such as sale of goods, all implications of law must give way to the agreement of parties where such agreement is not illegal. On the other hand, it is equally true that express agreement does not exclude implications of law in so far as these are not reached or affected by the agreement (*Smith,* 1842, 4 Beav. 503, per Ld. Langdale, M. R., at 505; *Douglas,* 1895, 23 R. 163). Among the implications of law set forth in the Act are implied conditions and warranties (ss. 12 to

15), the effect of the rules for ascertaining intention as to passing the property (s. 18), and the rights of the unpaid seller (s. 39). To render a seller liable in *express warranty* it is not necessary to use the words "I warrant." "It is quite enough, for example, that the purchaser says he wishes a horse for a particular purpose, and that the seller says the horse will suit for that purpose" (*Scott*, 1857, 20 D. 253, per Ld. Cowan, at 257; but see *Rose*, 1878, 5 R. 600, per Ld. J.-Cl. Moncreiff, at 603. In general illustration, see *Pasley*, 1789, 3 T. R. 51; *Stewart*, 1863, 1 M. 525; *Gardiner*, 1880, 7 R. 612; *Strange*, 1894, 11 Sh. Ct. Rep. 49).

In regard to course of dealing and usage (s. 55), the former, if between the parties, forms a case of particular as opposed to general usage, but it must be between the parties themselves (see *Ford*, 1841, 2 M. & G. 549; *Bourne*, 1844, 11 Cl. & Fin. 45; *Cumming*, 1860, 5 H. & N. 95). A mere practice of one of the parties to deal generally in the market in a certain manner will not negative or vary an implication of law (*Mackenzie*, 1856, 16 D. 129; affd. H. L., 3 Macq. 22). "General usage can only be proved by the multiplication of particular usages" (*Mackenzie, v.s.*, per Ld. Chan. Cranworth, 3 Macq. at 27; see also *Calder*, 1831, 9 S. 777; affd. 5 W. S. 410; *Gibson*, 1876, Guth. Sel. Ca. Shf. Ct. ii. 517). A proof of what generally happens is not, by itself, a proof of usage (*Brown*, 1876, 3 R. 788, per Ld. Gifford). Where evidence of usage is competent, it must be usage such as is generally understood and acted on. "The proof must be satisfactory and the usage proved must be sufficient, for proof of a divided usage will not sustain a judgment" (*Armstrong*, 1875, 2 R. 339, per Ld. Ardmillan, at 343). In terms of sec. 55, the usage must be "such as to bind both parties to the contract," *i.e.* it must either be actually within the knowledge of both parties, or such that the law will presume knowledge on the part of both (*Robinson*, 1875, 7 H. L. 802; *Kirchner*, 1859, 12 Moo. P. C. 361; *Holman*, 1878, 5 R. 657, per Ld. Pres. Inglis, at 671). Proof of usage may be of importance in questions regarding ready-money sales. Thus where a buyer was sued for the price of sheep and cattle bought at a public market and taken away by him, he was allowed proof of usage in order to establish a presumption in support of his averment of payment on delivery (*Stewart*, 1831, 9 S. 466; see also *Arnot*, 1825, 4 S. 4). But the plea was not allowed where the buyer first denied delivery, and after delivery was proved, pleaded the usage of public market (*Kidd*, 1828, 6 S. 825). A distinction is to be taken between usage which requires to be proved as a matter of fact, and usage which has been judicially recognised, and may be acted upon by the Courts without proof. "Where a trade has been long established, its customs become known to the law and are judicially taken notice of as a matter of law" (Blackburn, *Sale*, 80). See further as to the general effect of usage, *Lombe*, 1779, Mor. 5627; *M'Eachern*, 1824, 2 S. 724; *Burbidge*, 1832, 10 S. 520; *Wear*, 1873, Guth. Sel. Ca. Shf. Ct. i. 513; *Marston*, 1879, 6 R. 898.

Sec. 58 deals with sales by auction. For the general law of this subject, see AUCTION; AUCTIONEER; ARTICLES OF ROUP.

The provision as to payment into Court in Scotland (s. 59) is intended to guard against the abuse of the alternative remedy given to the buyer in Scotland by sec. 11 (2). Probably the section is declaratory of the previously existing law of Scotland, which seems to have differed from that of England in allowing the Court a discretion in every case to order consignation. But the law was not clear, and it was sometimes practically negatived, *e.g.* in *Findlay*, 1846, 5 Bell's App. 105, where the Court of Session ordered consignation but the House of Lords reversed.

The various branches of law saved or reserved by sec. 61 (1) (2) (3) are dealt with in separate articles. See BANKRUPTCY; AGENCY; PRINCIPAL AND AGENT; FRAUD; CIRCUMVENTION; EXTORTION; ERROR; BILL OF SALE.

The effect of the exclusion of securities (s. 61 (4)) has been incidentally dealt with throughout this article.

Sec. 61 (5), as to landlord's hypothec in Scotland, re-enacts sec. 4 (now repealed) of the Mer. Law Amend. Act, 1856. The original provision formed a qualification of the buyer's right under sec. 1 of that Act (also now repealed) to demand delivery as against the seller's creditors. An ordinary creditor of the seller could not prevent delivery to the buyer upon payment of the price, but the right of the landlord in virtue of his hypothec was superior to that of the buyer. Similarly, under this Act, though the property in goods sold has passed to the buyer, his right must yield to that of the seller's landlord where hypothec exists.

IV. Sale of Incorporeal Moveables.

The Sale of Goods Act does not apply to incorporeal moveables or money (see sec. 62 (1)), and therefore sales of incorporeal moveables, like sales of heritage, continue to be regulated without regard to the changes introduced by that Act. Incorporeal moveables are such non-tangible rights as do not relate directly to what is corporeally heritable (see HERITABLE AND MOVEABLE). They comprehend "all *jura ad res*, the *jus exigendi* in all obligations, and though incapable in one sense of possession, they are vested by the completion of the *jus exigendi*" (Bell, *Prin.* s. 1338). They include debts (Ersk. ii. 2. 9) and other rights of action (except real action); shares in a private partnership; shares or stock of a public company (Ersk. ii. 2. 8); and rights connected with patents, copyrights, and trade marks.

Formation of the Contract.—In regard to the constitution of the contract of sale, the writer has not observed any clear enunciation of a distinction between the principles applicable to different kinds of incorporeal moveables, yet such a distinction seems to exist. It is said that "writing is essential to the *transmission* of incorporeal rights although relating only to moveables" (Dickson, *Evidence*, s. 560); but this may mean either that a verbal contract for the transmission of an incorporeal moveable right by way of sale is altogether ineffectual even as between the parties themselves, or that an active or executive title vesting the buyer in the right cannot be effected without writing. In the former case, writing is necessary to the constitution of the contract, as in the sale of heritage. Without writing, the contract is void; there is *locus pœnitentiæ* to both parties, and either may resile without penalty. In the latter case, a personal contract may exist without writing, but the subject of sale is not transferred without delivery, which can only be effected by writing, with or without registration or intimation. A mere *jus exigendi*, such as a pecuniary debt or the prestations of an innominate contract, seems to belong to the former class, while incorporeal personal property, such as shares in a partnership or company, or rights in patents, copyrights, and trade marks, belongs to the latter class. An illustration may be taken from the history of shipping law, in which there has been a distinct advance from the one class to the other. Formerly, the statutory regulations were so strict that without writing there was no contract (*Spence*, 20 Jan. 1809, F. C.; *Leitch*, 20 May 1819, F. C.; *Calder*, 1824, 3 S. 253; *M'Arthur*, 1844, 6 D. 1174; *Ord*, 1846, 8 D. 1011). More recently, however, equitable interests have been recognised, and although no title can be completed without writing and registration,

there may be a valid personal contract, which, in terms of sec. 3 of the Sale of Goods Act, may be made in writing or by "word of mouth" (see Merchant Shipping Act, 1894, ss. 5 (ii.) and 57; *Duthie*, 1893, 20 R. 241). A further illustration, more to the point (the subject being an incorporeal moveable), is to be found in the statutory law of patents. Here, also, there has been a relaxation and an admission of equitable or beneficial interests (cf. 15 & 16 Vict. c. 83, s. 35, with 46 & 47 Vict. c. 57, s. 87; see PATENT). On the other hand, an innominate contract or mere *nomen debiti* is not only incapable of being transferred without a written assignation, but a verbal contract for its sale creates no legal obligation. There is a clear distinction between a sale of the *jus crediti* under an obligation of this nature, and a sub-sale of the *subject* of the obligation. The subject of sale, if tangible (*e.g.* grain), can be sold by a verbal contract of sale or sub-sale; but where the subject is a right to obtain delivery of grain, it cannot be effectually sold without writing. An attempted verbal sale of such a right, even if entered into in a formal manner by "joining hands across a table in presence of a company," does not exclude *locus pœnitentiæ* (*Clark*, 1819, 6 Pat. 422). It is, however, a matter of daily experience that valid personal contracts for the sale of shares in a joint-stock company may be entered into verbally, though the buyer obtains no vested right until a formal transfer has been executed and registered in the books of the company (*Drummond*, 1834, 12 S. 949; *Rait*, 1859, 21 D. 965; *Watson*, 1841, 3 D. 424; *Wilson*, 1856, 18 D. 673). The case of *Lawson*, 1699, Mor. 8402, is sometimes cited as a contrary instance (Dickson, *Evidence*, s. 560); but though there are loose expressions in the report, and the Court does not seem to have been guided by any distinct principle, the judgment itself amounts to no more than a denial of specific implement, which belongs to another branch of the law of sale. To decree repayment of earnest, as was done in the case referred to, is not inconsistent with a void contract, for it may have proceeded on the principle of *condictio indebiti* (Bell, *Prin.* ss. 531, 534); but the judgment went further, and awarded damages against the party failing to implement the bargain. Such an award implies a breach of contract, and therefore an existing contract capable of being broken. The phrase *locus pœnitentiæ*, freely used in connection with the case, is a misapplication of a well-known legal doctrine.

In other matters connected with the formation of the contract, the ordinary rules of law will hold. Thus where there was a *written* contract for the sale of a share of a testamentary succession, alleged verbal conditions were held incapable of proof, and the price was decerned for (*Pattinson*, 1846, 5 Bell's App. 259). No intimation is necessary (as in the case of a debt) to complete the transference to a buyer of a share in a partnership (*Russell*, 1831, 5 W. S. 256). Copyright is effectually transferred by an ordinary conveyance, provided the subsequent statutory requisites are observed (*Orr's Tr.*, 1870, 8 M. 936). Where the constitution of a joint-stock concern prescribes certain formalities as necessary to vest a buyer in the property of shares, these must be observed, but their absence does not void the contract as between the parties themselves (*Weatherly*, 1824, 3 S. 92; *East Lothian Bank*, 1824, 3 S. 95; *MacAndrew*, 1828, 6 S. 950). Further, the company may waive the condition so as to render the buyer liable in the obligations of a shareholder (*Bell*, 1835, 13 S. 920). In the case of a purchase of shares made through a broker, the usual rules of agency apply (*Dickson*, 1849, 12 D. 306; *Black*, 1851, 13 D. 1114, 15 D. 646; *Newton*, 1884, 11 R. 554). Where an incorporeal moveable is sold by auction, it is *jus tertii* for an unsuccessful bidder to found upon a

dispute between seller and buyer as to the terms of the contract (*Paton*, 1889, 17 R. 52). A right of pre-emption by a company of its shares is not discharged by implication from a correspondence; there must be a definite offer (*Gibson-Craig*, 1848, 10 D. 576). The ordinary rules of law as to the effect of fraudulent concealment, error, etc., apply to sales of incorporeal moveables (*Keith*, 1832, 10 S. 514, 824; *Brown*, 1834, 12 S. 536; *Graham*, 1852, 15 D. 165; *Gibbs*, 1875, 4 R. 630; *Phosphate Sewage Co.*, 1876, 3 R. H. L. 77). The sale of outstanding debts in a sequestration is regulated by the Bankruptcy Act, 1856, s. 136. See as to the sale of outstanding debts of a partnership, *Young*, 1830, 9 S. 59, and as to what are included under the term "book-debts," *Alexander*, 1896, 23 R. 724.

Performance of the Contract.—Under this head it is only necessary to remind the reader that incorporeal moveables do not fall under the Sale of Goods Act, and that sales are therefore not subject to the drastic changes in the law of Scotland introduced by that Act. Incidental reference has been made to the mode in which incorporeal moveables are transferred and the right of the buyer completed, but for fuller explanation, see ASSIGNATION; see also *Edinburgh Breweries Ltd.*, 1894, 21 R. H. L. 10, as to the title of a second buyer to sue a reduction of the original contract, and *Howie*, 1848, 10 D. 355, as to the measure of damages for breach of a contract for the sale of shares.

Sale of Food and Drugs Acts.—Prior to 1860, the efforts of the Legislature to protect the public against the offence of adulterating food were restricted to a few specific articles of food, *e.g.* bread, tea, and coffee. In that year an Act was passed which sought to deal comprehensively with the adulteration of all articles of food and drink; and in 1868 its provisions were extended to medicines. These statutes were repealed, and re-enacted in an improved form by the Sale of Food and Drugs Act, 1875, which, together with the Sale of Food and Drugs Act Amendment Act, 1879, is of universal application.

I. GENERAL PROVISIONS AGAINST ADULTERATION.

The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), as amended by the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), applies to every article used for food or drink, except drugs or water, and to every drug, which includes medicine for internal or external use (s. 2).

It does not apply to articles not themselves food, but which are used in the preparation of food, *e.g.* baking-powder (*James*, [1894] 1 Q. B. 304).

Appointment of Analysts.—The duty of appointing analysts for their respective districts is imposed, in counties, upon the County Council, and in burghs, *i.e.* royal or parliamentary burghs, upon the Commissioners or Boards of Police, or in their absence, upon the Town Council. Such appointment is imperative when required by the Secretary for Scotland, whose approval is necessary both in appointment and removal. The analyst, whose salary is matter of mutual agreement, may not be engaged in the sale of food or drugs within his district (ss. 10, 33 (6); L. G. Act, 1889, s. 11 (1); Secy. for Scotland Act, 1885, s. 5). A Town Council may appoint the analyst of a neighbouring burgh, or of the county in which their burgh is situate, during such time as they may think fit (s. 11).

The purchaser of any article of food or drug is entitled to have the

same analysed by the analyst of the district at a fee not exceeding 10s. 6d., or where there is no analyst, by the analyst of another district, for an agreed-on fee, and to receive a certificate of the result of such analysis (s. 12).

Offences.—(1) It is an offence to mix, colour, stain, or powder any article of food with any material, so as to render it injurious to health, with intent that it may be sold in that state; to order or permit such mixing, etc.; or to sell any article so mixed. The penalty for a first offence is £50; on subsequent conviction, six months' hard labour (s. 3).

The mixing, colouring, etc., of drugs, so as to affect injuriously their quality or potency (except for the purpose of compounding, as after mentioned), is forbidden in similar terms, and with like penalties (s. 4). But in both cases it is a good defence, that the respondent was ignorant, and could not with reasonable diligence have known of the adulteration (s. 5).

(2) It is an offence, punishable with a penalty of £20, to sell to the prejudice of the purchaser any food or drug which is not of the nature, substance, and quality demanded; but the following are defences open to the respondent: (1) That a non-injurious ingredient has been added which is necessary to prepare the article for carriage or consumption, and not fraudulently to increase its bulk, weight, or measure, or to conceal its inferior quality; (2) that the article is a proprietary or patent medicine, and is supplied according to the specification of the patent; (3) that it is compounded as mentioned in the Act; or (4) that it is unavoidably mixed with extraneous matter in the process of collection or preparation (s. 6). It is now settled by statute that it is no defence to a complaint under this section, that the purchaser, having bought only for analysis, was not prejudiced; nor that the article, though defective in nature or substance or quality, was not defective in all three respects (F. & D. Act, 1879, s. 2).

In prosecutions under sec. 6, the issue is usually whether the article complained of is "of the nature, substance, and quality" demanded. That is a question of fact for the judge, and not for the analyst, and his report must therefore contain not only his opinion that the article has been adulterated, but must state the grounds of his opinion. If, upon consideration of the report and other evidence (if any), the judge is of opinion that the article is not "of the nature, substance, and quality" demanded, he ought to convict (*Macleod*, 1882, 4 Coup. 629).

As prosecutions for adulteration of food are now most commonly brought under this section, it has frequently been the subject of judicial interpretation. The following points may be noted: The offence of selling an adulterated article to the prejudice of the purchaser is committed where the article is unadulterated but wholly different from that demanded (*Knight*, 1885, 14 Q. B. D. 845); or where the seller is unaware that the article is not of the nature, substance, and quality demanded (*Betts*, 1888, 20 Q. B. D. 771). A servant may be convicted (*Hotchin*, [1891] 2 Q. B. 181). Where there is no recognised standard of quality, it is not an offence to sell at a low price an inferior quality of the article demanded, undiluted with any foreign substance (*Morton*, 1881, 4 Coup. 457). (See also *Warnock*, 1881, 4 Coup. 509, and *Dargie*, 1884, 11 R. (J. C.) 37, in illustration of this section.)

The F. & D. Act, 1879, s. 2, legalises the dilution of spirits to the extent of 25 degrees under proof in the case of brandy, whisky, and rum, and 35 degrees in the case of gin. Where gin was sold with a larger admixture of water than here authorised, and the purchaser had notice of

the dilution, the defence that the sale was not "to the prejudice of the purchaser" was sustained (*Gage*, 1883, 10 Q. B. D. 518).

(3) It is an offence, punishable with a penalty of £20, to sell any compound article of food, or compounded drug, which is not composed according to the purchaser's demand (s. 7).

The sale of an article mixed with non-injurious matter, without intent fraudulently to increase its bulk, etc., or conceal its inferior quality, is not an offence, provided the seller inform the purchaser, by a label printed on or with the article, that the same is mixed (s. 8). Other means of informing the purchaser may be held sufficient, *e.g.* a notice-board (*Sandys*, 1878, 3 Q. B. D. 449).

Where the fact of an article having been sold in a mixed state is proved, the burden of proving any exception allowed by the Act rests upon the respondent (s. 24).

(4) It is an offence to abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, with intent that it may be sold without disclosure; or to sell any article so altered without disclosure (s. 9). The offence of selling an article so altered may be committed without the seller's guilty knowledge or intent (*Pain*, 1890, 24 Q. B. D. 353; *Dyke*, [1892] 1 Q. B. 220; *Spiers*, [1896] 2 Q. B. 65). Where in pursuance of a contract to supply a quantity of milk it was forwarded in separate vessels, a separate complaint and conviction under this section were held competent in respect of a sample taken from each vessel (*Fecitt*, [1891] 2 Q. B. 304).

In any prosecution under the Act, the respondent may prove as a defence that he purchased the article as the same in nature, substance, and quality as that demanded, and with a written warranty to that effect; that he had no reason to believe at the time of sale that the article was otherwise, and that he sold it unaltered: but he will be liable in costs unless he give notice of such defence (s. 25). An invoice in ordinary form is not a warranty (*Rook*, 1878, 3 Ex. D. 209). Nor is a contract for a daily supply of "good and pure milk" a warranty of the quality of the milk delivered on a particular day (*Harris*, 1883, 12 Q. B. D. 97). The defence allowed by this section is not pleadable by a servant, who is not himself the purchaser (*Hotchin*, *supra*).

(5) The crime of forging or uttering any certificate or warranty, knowing it to be forged for the purposes of the Act, is punishable with two years' imprisonment with hard labour; and the following are offences punishable with a penalty of £20: to wilfully apply to any article a certificate or warranty applying to any other article; to give, whether as principal or agent, a false warranty in writing in respect of any article sold; or to wilfully give a label falsely describing an article sold (s. 27). Ignorance that the warranty is false is a good defence (*Derbyshire*, [1897] 1 Q. B. 772).

Proceedings to Obtain Analysis.—Any medical officer, or other officer under directions of the local authority appointing him, or charged with execution of the Act, may procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to the Act, must submit it to the district analyst, or if there be none, to the analyst of another district. The analyst, on receiving payment as in sec. 12, must analyse the article, and give a certificate of the result thereof to the officer (s. 13). The purchase may be made by the officer's assistant (*Macaulay*, 1893, 3 White, 464).

The F. & D. Act, 1879 (s. 3), authorises such officer to procure

for analysis at the place of delivery any sample of milk in course of delivery to the purchaser under any contract, under the provisions of sec. 13 of the principal Act, and to recover the penalties thereunder. Refusal to sell to the officer the required quantity of milk, or of any article exposed for sale in shop or open street, is punishable with a penalty of £10 (s. 17; F. & D. Act, 1879, ss. 4, 5).

The purchaser must, after purchase, notify to the seller or his agent his intention to have the article analysed by the public analyst, and must offer to divide it into three parts, to be then and there separated and sealed up. If required, he must deliver one of the parts to the seller, retaining one part, and may submit the third for analysis.

These provisions apply whether the purchaser is a private person or a public officer (*Parsons*, 1882, 9 Q. B. D. 172); they must be observed, even if the seller admits the offence at the time (*Smart*, [1895] 1 Q. B. 219); and intimation that the purchaser intends to submit the sample "to the public analyst" is essential (*Barnes*, 1878, 3 Ex. D. 176). But they do not apply to a public officer obtaining a sample of milk under sec. 3 of the F. & D. Act, 1879, and he is not bound to notify his intention of submitting it for analysis (*Morton*, 1896, 2 A. 174). Nor is it necessary to submit the whole of the sample (*Rolfe*, [1892] 2 Q. B. 196).

If the seller do not accept the purchaser's offer to divide the article, the analyst must divide it into two parts, sealing up and giving one to the purchaser to be retained in case of further proceedings (s. 15). Where the analyst lives more than two miles from the purchaser's residence, the sample may be sent by post (s. 16).

The analyst's certificate must be in the form set forth in the schedule, or to the like effect (s. 18). It should state such facts as will enable the judge to determine whether the article has been adulterated, not merely his opinion to that effect (*Newby*, [1894] 1 Q. B. 478; *Fortune*, [1896] 1 Q. B. 202; *Bridge*, [1897] 1 Q. B. 80).

The certificate is declared to be sufficient evidence of the facts stated therein, unless the respondent require the analyst to be called as a witness (s. 21). But it is not necessarily conclusive, even where the respondent leads no rebutting evidence (*Fyfe*, [1894] 1 A. 484); still less, where he gives evidence on his own behalf (*Hewitt*, [1896] 1 Q. B. 287).

Every analyst must make a quarterly report to the local authority, for transmission to the Secretary for Scotland (s. 19).

Proceedings against Offenders.—Summary proceedings for recovery of penalties may be taken by the procurator-fiscal, or the person procuring the analysis, before the Sheriff of the county, or, in a place where the Sheriff sits as a police magistrate, in the police court. They are payable to the treasurer of the county general assessment or burgh police assessment (ss. 20, 33). Imprisonment, in terms of the Summary Procedure Acts, may follow failure to pay; but the public prosecutor cannot recover expenses (*Mackirdy*, [1897] 2 A. 435).

The complaint must be served within a reasonable time, and in the case of a perishable article, within twenty-eight days from the time of purchase. It must set forth particulars of the offence and the name of the prosecutor, and proceeds on not less than seven days' inducie (F. & D. Act, 1879, s. 10). The respondent, if brought sooner into Court, is not bound to accept an offer of adjournment (*Dunlop*, [1895] 1 A. 554). Where service was made on the twenty-eighth day from the day of purchase, it was held timeous (*Frew*, [1897] 2 A. 267).

A summons in the form provided by the Burgh Police Act, 1892, but

which did not bear to proceed under that Act, was held irrelevant, in respect the prosecutor's name was not set forth (*Burns*, [1897] 2 A. 308). Omission of particulars is not necessarily fatal to the complaint, but entitles the respondent to an adjournment (*Neal*, [1894] 1 Q. B. 544).

The parts of the articles retained by the purchaser must be produced at the trial (s. 21).

The Sheriff hearing any complaint, or the Court, on appeal, may, on request of either party, cause any article to be sent for analysis to the Commissioners of Inland Revenue (s. 22; see *Darvie, supra*).

Appeal.—Any conviction may be appealed to the High Court of Justiciary under 20 Geo. II. c. 43 (s. 33 (11)). But the mode now commonly adopted is by appeal on stated case, under the Summary Prosecutions Appeals Act, 1875.

Proceedings by indictment or otherwise, and contracts are not affected by the Act. In any action for breach of contract, the pursuer may recover the amount of penalty and costs incurred by him, if he prove that the article was sold to him as of the same nature, substance, and quality as that which was demanded of him, that he purchased it not knowing it to be otherwise, and sold it unaltered; but the defender may prove that the conviction was wrongful, or the amount of costs unreasonable (s. 28).

Examination of Tea.—All tea imported into the kingdom is liable to examination by the Customs officers, and samples may be taken for analysis. If found to be mixed with other substances, or exhausted tea (*i.e.* tea deprived of its proper strength), the sanction of the Commissioners of Customs is required for its delivery; if unfit for human food, it may be forfeited (ss. 30, 31).

The expenses of executing the Act fall, in counties, upon the county general assessment, and in burghs, upon the police assessment (s. 33 (7)).

II. Special Acts regarding Food.

Margarine.—The Margarine Act, 1887 (50 & 51 Vict. c. 29), which defines margarine (s. 3) as any substance, compound or otherwise, prepared in imitation of butter, whether mixed with butter or not, requires every package to be branded "Margarine" on the top, bottom, and sides in printed capitals three-quarters of an inch square. Every parcel exposed for retail sale must bear a label so marked in printed capitals one and a half inch square; and every retail quantity not sold in such package must be delivered with a paper wrapper labelled "Margarine" in letters a quarter of an inch square (s. 6). The article may be "exposed for sale" although wrapped in paper (*Wheat*, [1892] 1 Q. B. 418). Other matter may be printed on the wrapper, provided that is not done so as to evade the statute (*Fyfe*, [1893] 1 A. 74).

It is an offence to sell, or expose, or have for purpose of sale, margarine contrary to the Act; unless the respondent prove that he purchased the article as butter with a written warranty or invoice, that he had no reason to believe at the time of sale that it was other than butter, and that he sold it unaltered; but he will be liable in costs unless he gave notice of this defence (s. 7).

All margarine imported, or forwarded in any public conveyance, must be consigned as such; and any Customs or Revenue officer, or officer authorised under sec. 13 of the F. & D. Act, 1875, may procure samples for analysis from any package (s. 8). Any such officer, without going

through the form of purchase, but otherwise following the Act, may take samples of any butter, or substance purporting to be butter, exposed for sale, and not marked margarine; any such substance not so marked being presumed to be exposed as butter (s. 10).

Every margarine manufactory must be registered with the local authority under the F. & D. Act, 1875, as the Secretary for Scotland may direct, otherwise the owner or occupier is guilty of an offence (s. 9).

The penalty for a first offence under the Act is £20, a second offence £50, and a subsequent offence £100 (s. 4).

An employer charged with an offence may, upon information duly laid, have any other person whom he charges as the actual offender brought before the Court; and if after proof of the offence the employer prove that he used due diligence to enforce the Act, and that the other person committed the offence without his knowledge, the latter shall be convicted, and the employer exempt (s. 5).

The Court may direct part of any penalty to be paid to the person proceeding for the same (s. 11).

The procedure prescribed by secs. 12 to 28 of the F. & D. Act, 1875, save as varied by this Act, must be observed; and all officers under that Act are empowered and required to carry out the provisions of the Margarine Act (s. 12).

Beer.—By 48 & 49 Vict. c. 51, s. 8 (1), the adulteration of beer, or the addition of anything thereto, except finings for clarification, is punishable with a penalty of £50, and forfeiture.

Bread.—The Bread Act, 1836 (6 & 7 Will. IV. c. 37), forbids bread to be made of any but the following ingredients, namely, wheat, barley, rye, oats, buckwheat, Indian corn, peas, beans, rice, or potatoes, with salt, water, eggs, milk, barm, leaven, potato or other yeast, under a penalty of £10 (ss. 2, 8); and all non-wheaten bread must be marked "M," under a penalty of 10s. for each 1 lb. weight so made or sold (s. 10).

The following are offences: To adulterate flour, or sell flour of one sort of grain as that of another, the penalty being £20 (s. 9); to keep in a baker's or miller's premises any ingredient for adulteration, the penalty for a first, second, and subsequent offence being £10, £5, and £10 respectively (s. 12); or to obstruct a search authorised by magistrate's warrant, or anyone employed in execution of the Act, under a penalty of £10 (ss. 11, 16). The penalties are payable to the poor of the place (s. 27).

It is understood that prosecutions under this statute are now of very rare occurrence, the provisions of the F. & D. Acts affording a simpler remedy.

Coffee and Tea.—By the Adulteration of Coffee Act, 1718 (5 Geo. I. c. 11), the use of water, grease, butter, or other material to increase the weight, or prejudice the quality of coffee, is punishable with a fine of £20; and any trader knowingly buying or selling such coffee is liable in a similar fine—one half to go to the Crown, the other half to the informer (s. 23).

By the Adulteration of Tea and Coffee Act, 1724 (11 Geo. I. c. 30), the fine is increased to £100 (s. 9), and is further imposed upon anyone adulterating tea with any other substance (s. 5).

Further penalties were enacted by 4 Geo. II. c. 14, and 17 Geo. III. c. 29, against the fabrication of tea with the leaves of other plants, the staining of such leaves so as to resemble tea, or the possession of such dyed leaves, except for some lawful purpose.

To these may be added, that imitations of coffee and coffee mixtures

may not be sold except in ¼ lb. packets, labelled with a duty stamp, and a statement of the substances composing the mixture (45 & 46 Vict. c. 41, ss. 6, 7).

III. Special Provisions regarding Drugs.

Poisons.—By the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), it is unlawful to sell any poison unless the name thereof, the word "poison," and the name and address of the seller are upon the wrapper; or to sell any of the scheduled poisons to any person unknown to the seller, unless introduced by some person known to him.

The seller must enter in a book the date, the name and quantity of the poison, the name and address of the purchaser, and the purpose alleged by him for requiring it, to which entry the purchaser and his introducer, if any, must affix their signatures. The penalty for neglecting these regulations (the principal being liable for his assistant) is £5 for the first, and £10 for a subsequent offence. But they do not apply to wholesale dealers, nor to legally-qualified apothecaries supplying medicine to their patients, nor to the ingredients of any medicine dispensed by a registered chemist, provided such medicine be labelled, as above, with the name and address of the seller, and the ingredients be entered, with the purchaser's name, in a book kept by the seller (s. 17).

Arsenic.—By the Arsenic Act, 1851 (14 Vict. c. 13), similar precautions are enacted regarding the sale of arsenic, which includes all colourless poisonous preparations of arsenic (s. 6). In addition, arsenic before sale must be mixed with soot or indigo in the proportion of 1 oz. of soot or ½ oz. of indigo to 1 lb. of arsenic. Where the purchaser states that such admixture would render it unfit for his purpose, it may be sold unmixed, but in a quantity of not less than 10 lbs. (s. 3).

The penalty for selling arsenic contrary to the Act, or giving false information to the seller, or falsely signing as a person known to the purchaser, is £20 (s. 4). The Act does not apply to arsenic forming part of a medicine prescribed by a qualified practitioner, or to wholesale dealing upon written order (s. 5). See also Poison.

Sale of Horseflesh, etc., Regulation Act, 1889

(52 & 53 Vict. c. 11).—The sale of horseflesh for human food is placed by this statute under strict regulations, which are here summarised.

"Horseflesh" means the flesh of horses, asses, and mules, whether cooked or uncooked, or accompanied by or mixed with any other substance (s. 7).

Offences.—It is an offence to sell, offer, or expose for sale horseflesh for human food, except in a shop which exhibits a sign in letters four inches long intimating that horseflesh is sold (s. 1); and the onus of proving that any horseflesh exposed for sale otherwise than in such shop was not intended for human food, rests upon the respondent (s. 6).

It is likewise an offence to supply horseflesh to anyone who asks for other meat, or for any compound not ordinarily made of horseflesh (s. 2).

Penalties.—The penalty for an offence under the Act is £20, recoverable summarily before a justice or Sheriff, according to the procedure provided by sec. 33 of the Sale of Food and Drugs Act, 1875 (ss. 6, 9).

Inspection.—The medical officer, or other officer under direction of the local authority (*i.e.* the local authority under the Sale of Food and Drugs Act, 1875), may inspect any meat suspected to be horseflesh which is exposed for sale as human food in any place other than such shop; and if

it appear to be horseflesh, he may seize it, in order to have it dealt with by a justice or Sheriff (s. 3).

Warrant to enter any building other than such shop and seize any meat suspected to be horseflesh illegally concealed, may be granted by a justice on sworn complaint by the medical officer or other officer of the L. A. (s. 4). And obstruction of such officer is an offence (*ib.*). Such horseflesh may be disposed of as the justice may direct; and the offender is to be deemed guilty of an offence, unless he prove that it was not intended for human food (s. 5).

See SALE OF FOOD AND DRUGS ACTS.

Sale or Return.—See SALE.

Sale, Power of.—See POWER OF SALE (vol. ix. 374).

Salmon Fishing.—See FISHINGS (vol. vi. 3).

Salvage.—The word salvage is used in law in two senses. It means either (1) service performed by persons under no legal obligation, in saving (*a*) a ship or goods from destruction at sea, or from capture by an enemy, or (*b*) the lives of persons on board a ship, or (2) the reward given for such service.

Salvage reward forms one of the most natural burdens on property so saved or recovered: salvage service gives at once a remedy in Admiralty *in rem* and at common law by lien; and a personal action or claim against the owner to whom the property is restored (Bell, *Com.* i. 592). This compensation is now made by payment in money. In the infancy of commerce it was more frequently made by the delivery of some portion of the specific articles saved or recovered (Abbott, *Merchant Shipping*, 397). A claim for salvage reward arises independently of contract. It may be the subject of contract, but it is not necessarily so (*The Liffey*, 1887, 6 Asp. M. C. 255; *The Hestia*, L. R. [1895] P. 193; but see *The Solway Prince*, L. R. [1896] P. 120).

In its origin salvage is akin to service for which recompense is due under the legal title of *Negotiorum Gestio* (see *The Liffey*, *supra*). In England recompense for salvage services does not seem to be due at common law (*Palmer*, 1858, 3 H. & N. 505, opinion of Martin, B., at p. 509; opinion of Bowen, L. J., in *Falcke*, 1886, L. R. 34 Ch. D. 248; *The Gas Float Whitton No.* 2, L. R. [1895] P. 301; [1896] P. 42; [1897] A. C. 337; *The Solway Prince*, L. R. [1896] P. 120). It is thought that in Scotland the salvor has an undoubted right to recompense by the common law (Stair, i. 8. 3; Bankt. i. 8. 3 and 4; Bell, *Prin.* ss. 538–541; see also Kent, *Com.* (Editn. Barnes, 1884), ii. 617; Pothier, *Du Quasi-Contrat Negotiorum Gestorum*, s. 219). Salvage reward, however, goes beyond mere recompense *pro opere et labore*. It is granted on a liberal scale, as public policy requires that every inducement should be given to persons to volunteer their services for the saving of life and property in danger on the sea (see opinion Eyre, C. J., in *Nicholson*, 1793, 2 Bl. H. 254; Sir John Nicholl in *The Clifton* 1834, 3 Hag. Adm. 117, 120; Dr. Lushington in *The Fusilier*, 1865, Brown. & Lush. 341, 347).

Although the principles of the law of Scotland on the subject of salvage are definite (Bell, *Com.* i. 592), there are singularly few illustrations of their

application to be found in the reports. Accordingly, the bulk of authority for statements of the law of salvage is to be found in the practice of the Admiralty Court of England. "Maritime law," says Professor Bell, "partakes more of the character of international law than any other branch of jurisprudence; and in all the discussions on this subject in our Courts, the Continental collections and treatises on this subject, and the English books of reports, have been received as authority by our judges, where not unfitted for our adoption by any peculiarity which our practice does not recognise" (*Com.* i. 497). Moreover, the maritime law administered in the English Court of Admiralty has been recently stated on high authority to be the same as the maritime law administered by the Courts in Scotland (*Currie*, 1896, 24 R. (H. L.) 1). Professor Bell's caution, however, ought to be kept in mind, and in applying the decisions of the English Admiralty Court to Scottish practice it is necessary to remember the peculiarities of jurisdiction and procedure in that Court. The English Admiralty Court applied maritime law by methods of its own, while the Scottish Courts, administering the same law, have used and use the machinery provided for the vindication of rights by the common law of Scotland. The English Court almost invariably looks at maritime law from the point of view of a process *in rem*. Scottish law is not thus hampered, and wherever English practice suffers limitation on this account it ought to be disregarded.

The law of salvage has two branches.

I. Penals laws against depredation, and

II. Regulations for settling a fair and reasonable rate of salvage.

Another natural division of the subject nearly coincides with this, namely, the law relating to salvage of ships and goods wrecked or washed ashore, and the law relating to ships and goods saved at sea. The law of the former branch of the subject differs from the law of the latter, and will be dealt with separately *sub voce* Wreck. So that this article deals only with the salvage of property and life *at sea*.

The subject of salvage has been divided by text writers into Civil and Military Salvage—the latter dealing with the recapture of ships previously taken by an enemy during war. The distinction is not of much importance, as the principles applied are the same in both cases, except in so far as in the latter branch the rules of Prize of War modify the general law of salvage of property (M'Lachlan, *Merchant Shipping*, 673). By the common law the property in a British ship recaptured from the enemy does not revert to the owner, but vests in the Crown (*L'Actif*, 1810, Edw. 185). It is provided, however, by statute, that such a ship is to be restored by decree of a Prize Court to the owner on his paying as prize salvage one-eighth of the value or, if the recapture is made under circumstances of special difficulty or danger, such sum as the Prize Court awards, not exceeding one-fourth of the value (Naval Prize Act, 1865, 27 & 28 Vict. c. 25, s. 40). If a British ship is used by the enemy as a ship of war, this provision does not apply (*ib.*; and see *L'Actif*, *supra*).

The law of salvage will be most conveniently considered under the following heads:—

1. The Proper Subjects of Salvage.
2. Who are Entitled to Salvage.
3. For what Acts and in what Circumstances Salvage is Due.
4. Who are Liable for Salvage.
5. The Amount of Reward, and its
6. Apportionment.
7. Enforcement of Rights.

1. The Proper Subjects of Salvage.

(*a*) *Property.* (*b*) *Life.*

(*a*) *Property.*—As already indicated, the common law of Scotland allows recompense in certain circumstances to a person doing a benefit to another's property. This would appear to cover cases of salvage of any kind of property afloat or ashore. The reward, however, beyond recompense *pro opere et labore* which is granted to salvors of property at sea, and the peculiar remedies for the enforcement of the salvor's rights, would appear not to extend to the saving of everything that is in danger at sea, or that is washed ashore from the sea. The rule of the Admiralty Court of England is that the only proper subjects of salvage are *a ship, her apparel, and her cargo, including flotsam, jetsam, or lagan, each of them part of the cargo of a ship* (per Ld. Esher, M. R., in *The Gas Float Whitton No.* 2, L. R. [1896] P. 42, at p. 49; affd. H. L. [1897] A. C. 337). In this case a gas float shaped like a boat, but neither intended nor fitted to be navigated, was moored in tidal waters for purposes of navigation. This structure having broken adrift, was held not to be a proper subject of salvage. A ship, in the description of the proper subjects of salvage given above, includes any kind of vessel, and is not confined to sea-going ships (*The Mac*, 1882, L. R. 7 P. D. 38, 126). In this case a *hopper barge* was found to be a proper subject of salvage. Things, although adrift at sea or in tidal waters, which are not or have not been part of the cargo of a ship, are not subjects of salvage (*Nicolson*, 1793, 2 Bl. W. 254; *A Raft of Timber*, 1844, 2 Wm. Rob. 251; *Palmer*, 1858, 3 H. & N. 505; opinion Ld. Esher in *The Gas Float Whitton No.* 2, L. R. [1896] P. 42, 53). Whether under the denomination of cargo would be included goods that a vessel was engaged in transporting (*e.g.* a raft being towed), although never on board of the vessel, has not been decided. In *The Gas Float Whitton No.* 2 (*supra*), in the House of Lords, Ld. Herschell specially reserved his opinion upon that point.

Flotsam, jetsam, and lagan are proper subjects of salvage. (For the meaning of these terms, see *ante*, vol. vi. p. 32.)

(*b*) *Life Salvage.*—The general maritime law did not grant any recompense for the salvage of life. The Admiralty Court of England, however, was in the habit of granting a larger reward where both life and property were saved than when there was salvage of property alone (*The Fusilier*, 1865, Brown. & Lush. 341, 3 Moo. P. C. N. S. 51). This anomalous state of matters was remedied by statute, and the awarding of salvage for saving life was authorised by the Merchant Shipping Acts. The statutory rules are contained in the Merchant Shipping Act, 1894, s. 544. That section is as follows:—

(1) Where services are rendered wholly or in part within British waters in saving life from any British or foreign vessel, or elsewhere in saving life from any British vessel, there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved a reasonable amount of salvage, to be determined in case of dispute in manner hereinafter mentioned.

(2) Salvage in respect of the preservation of life, when payable by the owners of the vessel, shall be payable in priority to all other claims for salvage.

(3) Where the vessel, cargo, and apparel are destroyed, or the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage payable in respect of the preservation of life, the Board of Trade may, in their discretion, award to the salvor, out of

the Mercantile Marine Fund, such sum as they think fit in whole or part satisfaction of any amount of salvage so left unpaid.

Life salvage has thus priority over all other claims for salvage, and the "reasonable sum" due for it is to be paid whether or no there is anything left to pay for the salvage of property (*The Coromandel*, 1857, Swab. 205).

It is to be noticed that the section applies to the saving of life from a British ship anywhere, but in the case of foreign vessels only when they are in British waters (*The Willem III.*, 1871, L. R. 3 A. & E. 487).

If *part* of the service is performed in British waters, as, *e.g.*, landing the passengers and crew at a British port, life salvage is due (*The Pacific*, L. R. [1898] P. 170).

By sec. 545 the Queen is empowered to direct, by Order in Council, that the provisions of the Act with reference to life salvage be extended to the ships of any particular country when beyond British jurisdiction. This as yet has only been applied to ships belonging to Prussia (Order in Council, 7th April 1864).

The wording of the section makes it plain that nothing is due for life salvage beyond the value of what is saved of the ship and cargo (see opinion of Baggallay, L. J., in *Cargo ex Schiller*, 1877, 2 P. D. 145, at p. 157, on corresponding section of the M. S. A., 1854). It is due by the person who was owner of the ship or cargo at the time the services were rendered, although the property has subsequently changed hands (*The Governor Maclean*, 1865, 13 W. R. 728; *Five Steel Barges*, 1890, L. R. 15 P. D. 142).

When freight or passage money has been earned, the owner of the ship is due salvage out of these (*The Eastern Monarch*, 1860, Lush. 81; *The Medina*, 1876, L. R. 1 P. D. 272, 2 P. D. 5).

When nothing is saved, no life salvage is due (*The Renpor*, 1883, 8 P. D. 115; *The Annie*, 1886, 12 P. D. 50), and the only reward a salvor can then get is out of the Mercantile Marine Fund, at the discretion of the Board of Trade.

When any portion of the ship or cargo is saved, life salvage is due by the owner of such portion. He whose property is lost pays nothing (*Cargo ex Schiller*, 1876, L. R. 1 P. D. 473, 2 P. D. 145; *Cargo ex Sarpedon*, 1877, 3 P. D. 28). Even if the saving of the property is by different persons at a different time, and under totally different circumstances from the saving of life, the owner of the property has to pay (*Cargo ex Schiller*, *supra*). The *Schiller* was wrecked on the Scilly Islands, and a few lives saved by some boatmen at considerable risk. No part of the ship or cargo was saved at the time. Afterwards the owners of some specie which was part of the cargo succeeded, by diving operations and other means, at their own expense, in securing their property to the value of £40,000. The Court held the owners of the specie liable for the life salvage of the passengers, and assessed it at £500. For life salvage to be due, the lives of the crew and passengers must be in danger (*The Mariposa*, L. R. [1896] P. 273; *The Cairo*, 1874, L. R. 4 A. & E. 184; *Cargo ex Woosung*, 1875, 3 Asp. M. C. 50, also reported, but not on this point, L. R. 1 P. D. 260; with *Cargo ex Woosung* contrast *The Medina*, 1876, L. R. 1. P. D. 272, 2 P. D. 5).

2. Who are Entitled to Salvage.

Only those who are under no obligation to render salvage services are entitled to reward. "What is a salvor?" asks Ld. Stowell, and thus answers—"A person who, without any particular relation to a ship in

distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship" (*The Neptune*, 1824, 1 Hag. Adm. 227, 236). The first persons naturally excluded from the category of salvors are the MASTER AND CREW of the vessel saved. They have no claim for salvage, however extraordinary their exertions of courage or of labour; for already, by their contract with the owners, their interest and exertions are engaged in the service of the ship and cargo (Bell, *Com.* i. 593). (The contract may extend to compel the performance of work on board another vessel belonging to the same owner, and salvage claims thus be barred (*The Maria Jane*, 1850, 14 Jur. 857).) But whenever the contract between the shipowner and the crew is at an end, by abandonment of the ship or otherwise, members of the crew may become salvors (*The Florence*, 1852, 16 Jur. 572; *The Warrior*, 1862, Lush. 476; *Le Jonet*, 1872, L. R. 3 A. & E. 556; and an American case, *Mason* v. *Ship Blaireau*, 1804, 1 Curtis, 479).

Abandonment of the ship will not be lightly presumed. It must be at sea, and not upon a coast. It must be *sine spe revertendi aut recuperandi* (per Dr. Lushington in *The Florence*, *supra*), and by the authority of the master or person in command. If the crew are discharged by the master, even when the ship is wrecked upon the shore, the agreement is at an end and the crew are entitled to become salvors (*The Warrior*, *supra*).

The agreement is also at an end when the ship is captured by an enemy (Bell, *Com.* i. 593; *The Two Friends*, 1 Rob. A. 271; *The Beaver*, 1810, 3 Rob. A. 292; *The Governor Raffles*, 1815, 2 Dod. 14). "The moment the capture is effected, the crew are discharged from their duty to their employers. The contract between the parties is at an end. The seamen no longer constitute the crew of the vessel, but become prisoners of war" (per Ld. Stowell in *The Governor Raffles*, *ut supra*, at p. 17). Some doubt has been thrown on this doctrine by some expressions of Ld. Alvanley, C. J., C. P., in *Beale* (1803, 3 B. & P. 405), and of Dr. Lushington in *The Florence* (1852, 16 Jur. 572). Ld. Alvanley seems to hold that capture followed by recapture does not put an end to the contract, but only leaves it in abeyance. Dr. Lushington, mentioning this judgment of Ld. Alvanley's, reserves his opinion. It is submitted, however, that Ld. Stowell's doctrine is correct: it is in itself consistent with sound principle; it is affirmed by Ld. Stowell three times and approved by Prof. Bell (*Com.* i. 593); Ld. Alvanley's opinion relates to a question of wages and not salvage, and the opinion of Dr. Lushington in *The Florence*, if examined carefully, will be found more in favour of the doctrine than against it.

Capture by pirates would have the same effect as capture by an enemy, but the rescue of a ship from mutineers by the crew is not the same. Such service does not entitle to salvage (Bell, *Com.* i. 593; *The Governor Raffles*, 1815, 2 Dod. 14). "It is the bounden duty of the crew to give every assistance in their power to prevent or quell a mutiny, and to use their utmost exertions to preserve or recover the possession of the vessel and goods of their employers" (per Ld. Stowell in *The Governor Raffles*, at p. 17).

In ordinary cases a PILOT is not entitled to salvage (*The Joseph Harvey*, 1799, 1 Rob. A. 306; *The Æolus*, 1873, L. R. 4 A. & E. 29). "It would be extremely dangerous to allow the general rule that pilots cannot claim as salvors to be too easily violated: the exceptions to this rule should be few and clearly defined. It ought to be well understood that the services of a pilot are not slightly to be converted into salvage services" (per Sir Robert Phillimore in *The Æolus*, *supra*). In special circumstances a pilot

is entitled to salvage reward. If a vessel is in distress, a pilot is not bound to go on board to render ordinary salvage services; he is entitled, if he takes charge of a vessel in distress, to salvage remuneration (*The Frederiek*, 1838, 1 Wm. Rob. 16; *The Elizabeth*, 1844, 8 Jur. 365; *The Hebe*, 1844, 2 Wm. Rob. 246; *The Hedwig*, 1853, 1 Spinks E. & A. 19; *The Bomarsund*, 1860, Lush. 77; *The Anders Knape*, 1879, L. R. 4 P. D. 213; *Akerbloom*, 1881, L. R. 7 Q. B. D. 129). In order to entitle a pilot to salvage reward he must show "not only that the ship was in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward" (per Ld. Esher, M. R., in *Akerbloom*, *supra*, at p. 135).

What was in its inception a pilotage service may become salvage by circumstances of extraordinary difficulty and danger emerging. "On certain emergencies occurring which require extraordinary service, a pilot is bound to stay by the ship, but becomes entitled to salvage remuneration, and not a mere pilotage fee" (per Dr. Lushington in *The Saratoga*, 1861, Lush. 318, 321. See also *The Galatea*, 1858, Swab. 349; *The Æolus*, 1873, L. R. 4 A. & E. 29, 32). "The rates of pilotage have been settled upon the calculation of what will be an adequate reward for ordinary pilot services, but not for other services" (per Dr. Lushington in *The Elizabeth*, 1844, 8 Jur. 365). Slight acts of assistance by pilots or pilot boats will not be easily interpreted as salvage services (*The Jonge Andries*, 1857, Swab. 226, 303).

Passengers, so long as they remain on board the ship, are in ordinary circumstances excluded from the category of those who are entitled to salvage reward. While on board the ship they are bound to labour for the common safety (Bell, *Com.* i. 593; *The Branston*, 1826, 2 Hag. Adm. 3), and are not entitled to salvage unless their services have been of an extraordinarily meritorious description. In *The Two Friends* (1799, 1 Rob. A. 271, at p. 285) a passenger was found entitled to salvage reward in a case of recapture from an enemy. A shipwrecked crew, taken on board another vessel, rendering salvage service were found entitled to reward in *The Salacia* (1829, 2 Hag. Adm. 262, 269). In *Newman* v. *Walters* (1804, 3 Bos. & Pul. 612) the Court of Common Pleas found a shipmaster, who was a passenger on board a vessel, entitled to salvage in the following circumstances. The ship was ashore, the master and three of the crew made off in a boat, the pilot was drunk, and the mate and the crew requested this person to take command of the ship. He did so, his first act being to prevent an improper order given by the pilot being executed, and brought the ship to a place of safety. A little doubt is thrown upon the authority of this case by an expression of Dr. Lushington in *The Vrede* (1861, Lush. 322, 325), but in principle it seems thoroughly well founded. The services could not be described as ordinary, and the responsibility assumed was great. In a very interesting American case, *Towle* v. *The Great Eastern*, reported 2 Maritime Law Reports (Aspinall), 148, *Newman* v. *Walters* was approved, and a passenger found entitled to salvage for services rendered to the steamer *Great Eastern*. This ship, having disabled her paddle wheels and broken her rudder shaft in a gale, lay in the trough of the sea for about thirty-six hours, during which time the officers of the ship had endeavoured in vain to repair the damage. A passenger, who was a civil and mechanical engineer regularly educated for his profession, then, with consent of the captain, undertook to put in execution a plan which he had devised for steering the ship, superintended the work, and succeeded in his endeavour,

so that the vessel was able to be steered. The U.S. District Court of Admiralty for the Southern District of New York awarded this person $15,000, the ship being valued at $500,000.

Passengers are not bound to remain on board the ship when there is a chance of escape (Abbott, *Merchant Shipping*, 401; Bell, *Com.* i. 594; *The Branston*, 1826, 2 Hag. Adm. 3). If they do, for the purpose of helping to save the ship and cargo, it is submitted that they are clearly entitled to salvage (Bell, *Com. ut supra*). This doctrine was rejected by Dr. Lushington in *The Vrede* (1861, Lush. 322), and passengers who voluntarily remained on board a vessel injured by collision, and who assisted to keep her afloat by working at the pumps, were not allowed any salvage reward. It is difficult to reconcile this case with principle, or with the cases where the crew of a ship have been found entitled to salvage by reason of the contract of service being held to be at an end. As to *passengers on board the salving vessel*, see *infra*, p. 84.

The position of the Officers and Men of the Royal Navy requires attention. By statute they cannot successfully prosecute a claim for salvage without the consent of the Admiralty (M. S. A., 1894, s. 557). They are not, as a general rule, entitled to reward for services which may be described as coming within the scope of their official duty as the police of the seas. Unless for services of an exceptionally meritorious nature, they are not entitled to reward for quelling mutiny on board a merchant ship, for rescuing a ship from an enemy, or for protecting a ship and cargo from being looted (*The Belle*, 1809, Edw. 66; *The Francis and Eliza*, 1816, 2 Dod. 115). For rescue from pirates by Her Majesty's ships, see 13 & 14 Vict. c. 26. Even in the case of ordinary perils of the sea it is the duty of Her Majesty's ships to render assistance to all British ships in distress, and for ordinary salvage services they are not entitled to reward (*The Rapid*, 1838, 3 Hag. Adm. 419). But if there has been extra labour, or risk, or danger to the officers and men, they are entitled to reward (*The Louisa*, 1813, 1 Dod. 317; *The Charlotte Wylie*, 1846, 2 Wm. Rob. 495). An instructive application of these principles, into which it is unnecessary to enter more fully, will be found in the case of *The Cargo ex Ulysses* (1888, L. R. 13 P. D. 205). Differing from the rule in Naval Prize Law, no person is entitled to share in a salvage award on account solely of his rank or command (*The Vine*, 1825, 2 Hag. Adm. 1; *The Calypso*, 1828, 2 Hag. Adm. 209; *The Thetis*, 1833, 3 Hag. Adm. 14, 58). But if any action of an individual has contributed to the service, he is entitled to share (*The Thetis, ut supra*; affd. P. C., 1834, 2 Kn. 390; *The Nile*, 1875, L. R. 4 A. & E. 449). It may here be observed that no claim is allowed for any loss, damage, or risk caused to any of Her Majesty's ships, or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect these services, or for any other expense or loss sustained by Her Majesty by reason of that service (M. S. A., 1894, s. 557). As to what is a Queen's ship within the meaning of this section and in relation to salvage generally, see *The Lord Hobart*, 1815, 2 Dod. 100; *The Nile*, 1875, L. R. 4 A. & E. 449; *Cargo ex Woosung*, 1876, L. R. 1 P. D. 260, 3 Asp. M. C. 50; *The Dalhousie*, 1876, L. R. 1 P. D. 271; *The Cybele*, 1878, L. R. 3 P. D. 8; *The Bertie*, 1886, 6 Asp. M. C. 26.

All Official Personages acting within the scope of their duty are of course excluded from claiming salvage by the rule that it is only persons under no legal obligation who are entitled to salvage reward. This applies to Magistrates in cases of shipwreck (*The Aquila*, 1798, 1 Rob. A. 37); to Revenue Officers (*The Clifton*, 1834, 3 Hag. Adm. 117; *The Queen Mab*,

1835, 3 Hag. Adm. 242). The rule, however, is not strictly construed in regard to the latter, and a small reward has been given on several occasions by the English Admiralty Court to revenue officers who have given assistance to vessels in distress (*The Queen Mab*, *The Clifton*, *supra*; *The Carlotta*, 1831, 2 Hag. Adm. 361; *The Silver Bullion*, 2 Spinks E. & A. 70; Pritchard's *Admiralty Digest*, 1814). If such officers form part of the crew of a Queen's ship, they require the consent of the Admiralty before they can obtain salvage (M. S. A., 1894, s. 557). It is a question how far services rendered in the case of a collision by the innocent vessel to the wrong-doer are entitled to salvage reward. There is a statutory duty upon a vessel which has been in collision to save the other vessel from any danger caused by the collision (M. S. A., 1894, s. 422). Is such a service *voluntary*? (see *The Hannibal*, 1867, L. R. 2 A. & E. 53; *The Beta*, 1884, 5 Asp. 276, opinion of Butt, J., at. p. 277).

Besides the rule requiring that services, to be rewarded as salvage, must be *voluntary*, there is another necessary ingredient in salvage services, viz. they must be *personally performed* (*The Vine*, 1825, 2 Hag. Adm. 1; *The Charlotte*, 1848, 3 Wm. Rob. 68). It is the people by whose actual exertions the property is saved who are entitled to reward. But in the case of salvage service performed by part of the crew of a salving ship, this rule does not exclude from participation in the award those who remain on board the salving ship (*The Sarah Jane*, 1843, 2 Wm. Rob. 110; *The Charles*, 1872, L. R. 3 A. & E. 536; *The Coriolanus*, 1890, L. R. 15 P. D. 103; but see *The Emma*, 1850, 3 Wm. Rob. 151), provided they had not refused to volunteer as salvors (*The Baltimore*, 1817, 2 Dod. 132). They may not all receive an equal amount of salvage reward (see *infra*, *Apportionment of Reward*, p. 84).

The requirement of personal performance of salvage services has an apparent exception in the rule entitling the *owners* of a salving ship to rank as salvors. This exception is only apparent, because the ship herself is always personified in Maritime Law and Practice, and the reward is given for her services. If the services of a ship are not such as to entitle her to rank as a salvor, the owner gets *equitable compensation* or *recompense* for the use of his property (*The Charlotte*, 1848, 3 Wm. Rob. 68). In the case of a vessel on charter, if nothing is said about salvage, and the charter is an ordinary one, salvage reward goes to the owner of the ship (*The Waterloo*, 1820, 2 Dod. 433; *The Alfen*, 1857, Swab. 189). The charterer might have a claim against the owner for delay and loss incurred (*The Alfen*, *supra*). If the charter amounts to a lease of the ship to the charterer, if the crew are his servants, and he manages and controls the ship, then it would seem that salvage reward would go to the charterer (*The Maria Jane*, 1850, 14 Jur. 857; *The Scout*, 1872, L. R. 3 A. & E. 512; for an example of a charter (in a different question) not amounting to a lease of the ship, see *Park*, 1898, 25 R. 528). When the owner of the salving ship is the same person as the owner of the salved ship, he has a claim for salvage against the owners of the cargo on board the salved ship (*Cargo ex Laertes*, 1887, L. R. 12 P. D. 187), except in cases where he would have been responsible to the cargo-owner if the cargo had been lost (*The Glenfruin*, 1885, L. R. 10 P. D. 103; and compare *Cargo ex Capella*, 1867, L. R. 1 A. & E. 356, and *Duncan*, 1878, 5 R. 742). This does not affect the crew (*The Glenfruin*, *supra*; *The Sappho*, 1871, L. R. 3 P. C. 690).

A real exception to the rule that service must be personal has been made by the Court of Admiralty in England in the case of a person who is employed for the purpose of securing the services of salvors, acting in this capacity as agent for the ship. Salvage reward has been repeatedly

given to a person who has organised the salvage operations, although he has not run any personal risk or danger. This, although an exception to the general rule laid down, seems sound in principle, especially where the person claiming salvage has made no bargain, and runs the risk of getting no remuneration at all in the event of non-success. But the line between what is mere agency and what is salvage is difficult to draw, and the cases are not easily reconcilable. Cases in which an agent's claim has been refused are: *The Watt*, 1843, 2 Wm. Rob. 70; *The Lively*, 1848, 3 Wm. Rob. 64. An agent's claim for salvage has been admitted in *The Happy Return*, 1828, 2 Hag. Adm. 198; *The Favorite*, 1844, 2 Wm. Rob. 255; *The Purissima Concepcion*, 1849, 3 Wm. Rob. 181; *The Cargo ex Honor*, 1866, L. R. 1 A. & E. 87; *The Kate B. Jones*, [1892] P. 366.

3. For what Acts and in what Circumstances Salvage is Due.

No purpose is served by an enumeration of the different ways in which salvage service may be rendered to a ship, or by making a catalogue of the cases in which salvage has been awarded. The general rule governing all questions of salvage is thus stated by Dr. Lushington: "All services rendered at sea to a vessel in danger or distress are salvage services. It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent or absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered" (*The Charlotte*, 1848, 3 Wm. Rob. 71; approved P. C. in *The Strathnaver*, 1875, L. R. 1 App. Ca. 58). Danger or risk to the salvors is not an essential element in salvage, but it is of importance in determining the amount of salvage reward (*The Pericles*, 1863, B. & L. 80). All services to a ship are salvage services, but the different kinds and qualities of salvage services are infinitely various, and salvage reward varies accordingly.

There is no distinction between river salvage and sea salvage (*The Carrier Dove*, 1863, 2 Moo. P. C. N. S. 243).

A necessity of salvage service is success. The fundamental rule is that if nothing is saved, no salvage is due, however meritorious may have been the efforts of the salvors (*The Zephyrus*, 1842, 1 Wm. Rob. 329; *The Renpor*, 1883, L. R. 8 P. D. 115). (This does not apply when an agreement is made for service whether successful or not: *The Alfred*, 1884, 5 Asp. M. C. 214.) But a claimant is not debarred from salvage reward because his own efforts have not succeeded in bringing the ship or cargo to a place of safety. It is sufficient if his efforts have contributed to the successful issue (*The Jonge Bastiaan*, 1804, 5 Rob. A. 322; *Robinson*, 1851, 13 D. 592; *The E. U.*, 1853, 1 Spinks. E. & A. 63; *The Atlas*, 1862, Lush. 518; *The Aztec*, 1870, 3 M. L. Rep. 326; *The Melpomene*, 1873, L. R. 4 A. & E. 129; *The Camellia*, 1883, L. R. 9 P. D. 27). But if the services result in leaving the vessel in no better position than she was in previous to their commencement, no salvage is due (*The India*, 1842, 1 Wm. Rob. 406; *The Edward Hawkins*, 1862, Lush. 515; *The Cheerful*, 1885, L. R. 11 P. D. 3; *The Benlarig*, 1888, L. R. 14 P. D. 3). Although salvage proper is not due, recompense for services actually rendered may in some circumstances be given (*The Benlarig (supra)*; *The Lepanto*, [1892] P. 122; *The Hestia*, [1895] P. 193). No salvage is due if the salvors desert the vessel in distress (*The Killeena*, 1881, L. R. 6 P. D. 193). In one case a steamer, after towing a ship in distress for twelve hours, and standing by her for six more, left the ship under the

impression that her services were no longer required. The ship arrived safely at a home port by her own exertions. Sir Robert Phillimore found the steamer entitled to salvage reward (*The Nellie*, 1873, 2 Asp. M. C. 142).

Towage or Salvage.—It is sometimes a question of difficulty to determine whether services rendered by one vessel to another are salvage services or merely towage. Dr. Lushington thus distinguishes towage from salvage: "Without attempting any definition which may be universally applied, a towage service may be described as the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress" (*The Princess Alice*, 1849, 3 Wm. Rob. 138, 139). In another case: "Mere towage service is confined to vessels that have received no injury or damage, and mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident" (*The Reward*, 1841, 1 W. Rob. 174, 177). So if a vessel is not in a situation of actual or imminent probable danger, service rendered by a steamer to her may only be towage (*The Strathnaver*, 1875, L. R. 1 App. Ca. 58). But if the vessel towed is in the least danger, the service is salvage, even although the service is not attended with any danger to the salvors (*The Ellora*, 1862, Lush. 550; *The Jubilee*, 1879, 4 Asp. M. C. 275; *The Berlin*, 1882, 9 R. 1057; *The Thomas Allen*, 1886, L. R. 12 App. Ca. 118; *The Werra*, 1886, L. R. 12 P. D. 52; *Bennet*, 1887, 24 S. L. R. 625). When the service is rendered by a tug steamer whose business is towage, salvage is not so easily presumed. For cases in which salvage has been allowed, see *The Reward*, 1841, 1 Wm. Rob. 174; *The Medora*, 1853, 1 Spinks E. & A. 17; *Robinson*, 1851, 13 D. 592. Cases in which the services of the tug have been regarded as simply towage are: *The Princess Alice*, 1849, 3 Wm. Rob. 138; *The Harbinger*, 1852, 16 Jur. 729. In the only Scottish case on this subject the Court did not determine whether the services rendered were salvage or towage. In approaching a port which had a very narrow entrance a steamer ran upon a bank composed of loose stones and mud. In answer to signals of distress a tug passing outside with a sailing vessel in tow, cast the vessel off, and at some risk and some damage to herself hauled the steamer off the bank. The Court held that "the services of the tug were of a very different kind from ordinary towage services," and granted a reward much in excess of ordinary towing rates (*Lawson*, 1888, 15 R. 753). It is submitted that the services here were really salvage services, although rendered by a tug. A vessel ashore is in distress, and a tug is not bound to render her service at towage rates. The granting of extra remuneration shows that the service is really salvage, whatever it may be called. A very instructive case on the border between towage and salvage, where the towed vessel was disabled, but the services were really towage although nominally salvage, the vessel being towed not to the nearest port, but at her request to one a long distance off, is *The Batavier* (1853, 1 Spinks E. & A. 169). In this case remuneration for something more than towage services, but much less than for proper salvage, was given by Dr. Lushington. The services of a tug under a contract of tow may be turned into salvage by circumstances of danger and extra difficulty supervening.

"If by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum

stipulated to be paid for mere towage" (per Ld. Kingsdown in *The Minnehaha*, 1861, Lush. 335, 347). "When, from the state of the wind and weather, the performance of the service originally contracted for is prevented, a steam-tug is not at liberty to abandon the ship she has engaged to tow, but it is her duty to render all the assistance in her power in bringing the ship to a place of safety, and for so doing she is entitled to a salvage remuneration" (per Dr. Lushington in *The Galatea*, 1858, Swab. 349; see also *The White Star*, 1866, L. R. 1 A. & E. 68; *The Madras*, L. R. [1898] P. 90). It is not necessary, in order to turn towage services into salvage, that the supervening danger should be of such a character as to actually put an end to the towage contract. It is sufficient if the services rendered are beyond what can be reasonably supposed to have been contemplated by the parties entering into the contract, and that is a question of circumstances in each case (*Five Steel Barges*, 1890, L. R. 15 P. D. 142, opinion of Sir James Hannen, at p. 144). To convert towage into salvage, the tow must be in danger, but the tug need not be (*The Pericles*, 1863, Br. & Lush. 80). But whatever the danger to the tow, if the service rendered by the tug comes under her proper contract of towage, the tug is not entitled to salvage (*The Annapolis, The Golden Light and the H.M. Hayes*, 1861, Lush. 355). For cases, other than those already quoted, where the tug was found entitled to salvage, see *The Albion*, 1861, Lush. 282; *The Saratoga*, 1861, Lush. 318; *The I. C. Potter*, 1870, L. R. 3 A. & E. 292. Cases, besides those already referred to, where the tug has been refused salvage reward are: *The Lady Egidia*, 1862, Lush. 513; *The Liverpool*, L. R. [1893] P. 154. If the danger to the tow has been occasioned through the fault or negligence of the tug, the latter is not entitled to salvage (*The Robert Dixon*, 1879, L. R. 5 P. D. 54; *The Altair*, L. R. [1897] P. 105).

Services rendered under a contract of towage may be found to be salvage services owing to concealment by the master and crew of the disabled state of the vessel towed (*The Kingalock*, 1854, 1 Spinks E. & A. 263; *The Canova*, 1866, L. R. 1 A. & E. 54).

The GIVING OF ADVICE which, being followed, is the means of saving a ship, has been held to be salvage service, entitling to reward (*The Eliza*, 1862, Lush. 536); CONVEYING INFORMATION so as to enable another vessel to perform salvage service entitles to reward (*The Sarah*, 1878, L. R. 3 P. D. 39).

Where there is an obligation by custom or by contract to give mutual support and assistance, salvage is not due. This applies to the crew of the salving vessel as well as to the owners (*The Zephyr*, 1827, 2 Hag. Adm. 43; *The Harriot*, 1842, 1 Wm. Rob. 439; *The Maria Jane*, 1850, 14 Jur. 857).

Where a person renders services in the nature of salvage to a vessel which he at the time *bonâ fide* believes to be his own by purchase or otherwise, he is not precluded from recovering salvage reward in respect of such services because it turns out, in fact, that the vessel was not his property (*The Liffey*, 1887, 6 Asp. M. C. 255).

Where vessels and their cargoes, having been *taken by pirates*, are recaptured by any of Her Majesty's ships, one-eighth of the value is to be paid in lieu of salvage (13 & 14 Vict. c. 26, s. 5).

Salvage of *Fishing Boats* and their gear in the North Sea and the seas between France and the United Kingdom is specially dealt with in the Fisheries Acts. See especially 6 & 7 Vict. c. 79, s. 15; 31 & 32 Vict. c. 45, ss. 6, 21, Sched. 1, art. xxii.; 46 & 47 Vict. c. 22, s. 2, Sched. 1, art. xxv. For a proper understanding of the provisions of these Acts reference

must be made to the Acts and to the various Orders in Council bringing them into force. The substance of these enactments, however, is that all fishing boats and their gear picked up at sea are to be handed over to the collector of customs or receiver of wrecks, who may fix the amount of salvage.

Salvage reward is not due where the necessity for the salvage service arises from the fault of the salving vessel (*Cargo ex Capella*, 1867, L. R. 1 A. & E. 356).

The right to salvage may be lost by the misconduct of the salvors. Any misconduct will effect a reduction of the salvage award (see *infra*, p. 82): to deprive the salvor altogether of his right the misconduct must be wilful (*The Atlas*, 1862, Lush. 518, 528), or at anyrate so great that the vessel is placed in a position of as great or greater danger than she was in when the salvage service commenced (*The Duke of Manchester*, 1846, 2 Wm. Rob. 470, 1847, 6 Moo. P. C. 90; *The Neptune*, 1842, 1 Wm. Rob. 297; *The Lockwoods*, 1845, 9 Jur. 1017; *The Yan-Yean*, 1883, L. R. 8 P. D. 147). Salvage reward has been forfeited:—where the property salved was improperly retained by the salvors under circumstances of suspicion of collusion with the owner's agent (*The Lady Worsley*, Pritchard's *Adm. Dig.* 1860, 2 Spinks E. & A. 253), where the authority of the owners was forcibly resisted by the salvors (*The Barefoot*, 1850, 14 Jur. 841), where the master of the salving vessel abstracted goods from a derelict with the evident intention of not restoring them (*The Scindia*, 1865, 2 Mar. Law Rep. 232, decided by the Vice-Admiralty Court of Cape Town; see also *The Florence*, 1852, 16 Jur. 572), where boatmen having boarded a vessel in distress, resisted the subsequent employment of a steamer (*The Martha*, 1859, Swab. 489). For a case of gross misconduct by lifeboat-men, see *The Capella*, L. R. [1892] P. 70. Persons improperly intruding themselves in a salvage service and dispossessing the first salvors are not entitled to any reward (*The Blenden Hall*, 1814, 1 Dod. 414; *The Fleece*, 1850, 3 Wm. Rob. 278). Persons assuming the character of salvors when more competent persons are at hand are entitled to no indulgence, and if they run the vessel into danger will be deprived of reward (*The Dygden*, 1841, 1 Notes of Cases, 115). An agreement to salve the ship and not the cargo would be regarded as misconduct on the part of the salvor, disentitling him to salvage (per Dr. Lushington in *The Westminster*, 1841, 1 Wm. Rob. 229). A vessel attempting to salve another, but through negligent navigation sinking her instead, is liable in damages (*The Thetis*, 1869, L. R. 2 A. & E. 365).

4. Who are Liable for Salvage.

The general rule is: The reward must be given by those who receive benefit, and who would have suffered the loss from which the exertions of the salvors have saved them (Bell, *Com.* i. 597). Accordingly, salvage is payable by ship, cargo, and freight at risk. Where no benefit accrues, no salvage is due; so in a case where, by recapture, both ship and cargo were saved, but in so far as the cargo-owner was concerned to no better effect than to make him liable for freight in consequence of the ship's arrival, while the goods were not worth the freight, the cargo-owner was freed from contribution and the shipowner alone held liable in respect of the ship and freight (*Cox*, 1815, 4 Maule & Selwyn, 151). Persons having an interest, though not the owners, would seem liable (*Five Steel Barges*, 1890, L. R. 15 P. D. 142). The personal effects of the master and crew (Kennedy, *Civil Salvage*, 52) and the wearing apparel of passengers (*The Willem III.*,

1871, L. R. 3 A. & E. 487) do not contribute. The private property of an allied sovereign on board a British ship recaptured from an enemy was freed by Ld. Stowell from contribution (*Alexander*, 1815, 2 Dod. 37). The lender upon bottomry or respondentia does not contribute (Kennedy, *Civil Salvage*, 179, quoting Park, *Marine Insurance*, 897–899, and cases there; Pritchard's *Admiralty Digest*, 1786). The shipowner must bear the whole burden of the payment of salvage where the need of the salvage service has arisen from his fault or the fault of those for whom he is responsible, and when he is not protected from liability by the terms of the contract of affreightment (*Duncan*, 1878, 5 R. 742; *The Ettrick*, 1881, L. R. 6 P. D. 127; *Park*, 1898, 25 R. 528; cf. on general average loss generally, *Schloss*, 1863, 14 C. B. (N. S.) 59, and *Strang, Steel, & Co.*, 1889, L. R. 14 App. Ca. 601).

The ship, cargo, and freight contribute each according to its value. Each is liable for its own share only (*Duncan*, 1878, 5 R. 742; *The Raisby*, 1885, L. R. 10 P. D. 114). "In practice the shipowner frequently pays the whole of the salvage. He can do so safely, if either the cargo remains in his possession, and he can therefore enforce his lien for the proportion of the salvage payable by the owner of the cargo, or he gets from the owner of the cargo proper security for the payment of that proportion" (Kennedy, *Civil Salvage*, 186). Where the master of the salved ship has entered into an agreement with the salvors for a specified sum, and the agreement is a reasonable one, the owners of the salved ship are liable in the first instance for payment of the whole amount (*The Cumbrian*, 1887, 6 Asp. M. C. 151; *The Prinz Heinrich*, 1888, L. R. 13 P. D. 31).

The proper rule for valuing the cargo for salvage contribution is to calculate it at the place where the *salvage services terminate* (*The George Dean*, 1857, Swab. 290; *The Norma*, 1860, Lush. 124), "but in practice the cargo contributes to the salvage as part of the general average at the end of the voyage, upon its value then. This seems to be contrary to sound principles, but it is convenient" (Carver, *Carriage by Sea*, 352; cf. remarks by Dr. Lushington in *The Norma*, *ut supra*, at p. 127).

Freight of course only contributes if it is *at risk*, *i.e.* if it has not been paid in advance and is not due whether the cargo is delivered or not. The value of the freight should be calculated in a similar manner to the value of the cargo as at the place where the salvage services terminate *pro rata itineris peracti* "and the other equities of the case" (*The Norma*, 1860, Lush. 124); "in practice it is made to contribute to salvage, as to general average, upon the state of facts at the end of the voyage" (Carver, *Carriage by Sea*, 351).

Although frequently treated in the same manner as General Average expenditure, salvage is not necessarily General Average (see AVERAGE, *ante*, i. 365). Whether it is or is not, when it approaches General Average or when it is to be treated as such or not, are questions too complicated to be dealt with here. For a full discussion of them see Carver, *Carriage by Sea*, ss. 393–401; Lowndes, *General Average*, p. 149 and pp. 157–181; and the cases of *Kemp*, 1866, 6 B. & S. 723; *Job*, 1856, 6 E. & B. 779; *Moran*, 1857, 7 E. & B. 523; *Walthew*, 1870, L. R. 5 Exch. 116; *Schuster*, 1878, L. R. 3 Q. B. D. 418; *Anderson*, 1884, L. R. 10 App. Ca. 107.

The cost of litigation respecting salvage is contributed by the ship, cargo, and freight according to their values (*Hick*, 1895, 1 Com. Cas. 244).

Insurers are liable to recoup owners of ship and cargo for salvage claims paid by them for rescuing the subjects insured from *perils insured against*. It has been held that a claim for life salvage is not insured against under the ordinary (Lloyd's) form of insurance policy (*Nourse*,

L. R. [1896] 2 Q. B. 16). When the circumstances rendering salvage necessary are caused by the original unseaworthiness of the ship, a claim is not good against insurers (*Ballantyne*, L. R. [1896] 2 Q. B. 455; cf. *Park*, 1898, 25 R. 528). If the salvage charges, when added to the other losses, would make the total sum payable by the insurers greater than the sum insured, the excess must be borne by the insured, *i.e.* charges for salvage do not come under the *Sue and Labour Clause* of a policy of insurance (*Aitchison*, 1879, L. R. 4 App. Ca. 755). This decision has been much canvassed (see *ante*, vol. viii. p. 231, and M'Lachlan, *Merchant Shipping*, 679).

5. Amount of Reward.

(*a*) *In the Case of an Agreement.*—An agreement between those in charge of a ship in distress and salvors, as to the amount of salvage reward, will in general be upheld by the Court (Bankt. i. 9. 40; *Mulgrave*, 1827, 2 Hag. Adm. 77; *The Henry*, 1851, 15 Jur. 183; *The Arthur*, 1862, 6 L. T. N. S. 556). It may, however, be disregarded if in the opinion of the Court it would be inequitable to enforce it. It can, of course, be set aside on the ordinary grounds of *fraud* (*The Theodore*, 1858, Swab. 351; *The Crus. V.*, 1862, Lush. 583; *The Generous*, 1868, L. R. 2 A. & E. 57; *Highley* v. *Smart*, 1874, in the Supreme Consular Court of Constantinople, Pritchard's *Adm. Dig.* 1876), or *concealment of material facts* (*The Kingalock*, 1854, Spinks E. & A. 263; but see *The Jonge Andries*, 1857, Swab. 226, 303). The Courts also disregard an agreement where it would be inequitable to enforce it. They will not enforce an agreement if it be manifestly unfair and unjust (*Akerbloom*, 1881, L. R. 7 Q. B. D. 129, opinion of Brett, L. J., at p. 133; *The Strathgarry*, L. R. [1895] P. 264, 270). "It is the province of the Court of Admiralty in Scotland to regulate the rate of salvage, on a due consideration of the danger and exertion; repressing any oppressive promises which in the moment of anxiety, alarm, and danger those in hazard may be induced to give" (Bell, *Com.* i. 596). In *Buchanan* (1867, 5 Macph. 973), an action was raised for £2000 in name of salvage. The defence was that the service was rendered under a contract for £50. The issue tried was—whether the services were rendered under contract, and whether the contract was just and reasonable.

What is an inequitable agreement? "On this point two ingredients are commonly referred to. First, the parties contracting must be shown not to have contracted on equal terms. I am inclined to think that, in general, in the case of salvage services contracted for and about to be performed, the parties are on unequal terms, and, therefore, the mere fact of their standing in such a position will not invalidate the agreement. If, however, contracting on unequal terms—that is to say, the master of the salved ship being at a disadvantage—it further appears that the sum insisted upon is exorbitant, then the two ingredients exist which will induce the Court not to uphold the agreement" (per Butt, J., in *The Rialto*, L. R. [1891] P. 175, 178). For examples of salvage agreements set aside, besides the cases already cited, see *Cargo ex Woosung*, 1875, 3 Asp. M. C. 50; rev. C. A. L R. 1 P. D. 260; *The Medina*, 1876, L. R. 1 P. D. 272, 2 P. D. 5; *The Silesia*, 1880, L. R. 5 P. D. 177; *The Mark Lane*, 1890, L. R. 15 P. D. 135; *The Altair*, L. R. [1897] P. 105. But a bargain for salvage, though stipulating for a large reward, that is to say, a bargain, though a *hard bargain*, will be upheld if the stipulated reward is not exorbitant (*The Firefly*, 1857, Swab. 240; *The Helen and George*, 1858, Swab. 368). So, on the other hand, an agreement will not be set aside

at the instance of the salvors because the execution of it has turned out more difficult than was anticipated (*The Jonge Andries*, 1857, Swab. 226, 303; *The Waverley*, 1871, L. R. 3 A. & E. 369). But if circumstances supervene which make the services rendered of a different character from what was contemplated by the agreement, the agreement will be disregarded (*The Westbourne*, 1889, L. R. 14 P. D. 132).

While dealing with salvage agreements it must be kept in mind that "a salvage agreement fixes the amount to be paid for salvage, but leaves untouched all the other conditions necessary to support a salvage award, one of which is the preservation of some part at least of the *res*, that is, ship, cargo, or freight" (Kennedy, *Civil Salvage*, 42, approved in *The Hestia*, L. R. [1895] P. D. 193, 199; *The Renpor*, 1883, L. R. 8 P. D. 115). This rule may be elided by the terms of agreement, as in *The Alfred*, 1884, 5 Asp. M. C. 214, where remuneration for work done by the salving vessel was given in terms of the agreement, although the attempt at salvage failed and the vessel in distress became a total loss.

An agreement, to be binding, must be made by a person who has authority (*The Enchantress*, 1860, 30 L. J. Adm. 15; *The Inchmaree*, Feb. 15, 1899, W. N. 22). An agreement with insurers to raise a sunken vessel has been held not to bind the owners (*The Solway Prince*, L. R. [1896] 120). The master of a ship has, in general, power to bind the owners of the ship (*The True Blue*, 1843, 2 Wm. Rob. 176; *The Elise*, 1859, Swab. 436; *The Arthur*, 1862, 6 L. T. N. S. 556; *The Cumbrian*, 1887, 6 Asp. M. C. 151; and see opinion of Brett, M. R., in *The Renpor*, 1883, L. R. 8 P. D. 115; for a case where the owners were not bound, see *The Mariposa*, L. R. [1896] P. 273), but not the owners of the cargo (*Anderson*, 1884, L. R. 10 App. Ca. 107). The owners of the cargo are only bound if the agreement is a reasonable one. The shipowner, in the case of an agreement, is liable in the first instance to the salvors for the whole amount of the stipulated reward (see *supra*, p. 77). It is not quite clear whether the master of a salving ship can bind *his own officers and crew* as to the amount of reward. The better opinion seems to be that he can when the agreement is made *before* the performance of the salvage services (see Kennedy, *Civil Salvage*, pp. 222–224; and *The Elise*, 1859, Swab. 436: *The Nasmyth*, 1885, L. R. 10 P. D. 41; *The Britain*, 1839, 1 Wm. Rob. 40; *The Sarah Jane*, 1843, 2 Wm. Rob. 110; *The Inchmaree*, *supra*).

The master may cancel an agreement entered into, and the shipowner cannot then set it up (*The Africa*, 1854, 1 Spinks E. & A. 299).

The opinion has been expressed that the captain of a Queen's ship performing salvage services cannot make an agreement as to the amount of reward (*Cargo ex Woosung*, 1876, L. R. 1 P. D. 260).

(*b*) *Where there is no Agreement.*—The jurisdiction of the Court is untrammelled in considering the *quantum meruit*. The great principle on which these determinations ought to be conducted, as repeatedly laid down by Ld. Stowell, is to give a liberal remuneration, looking not merely to the exact *quantum* of service performed, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature (Bell, *Com.* i. 598). "The amount of salvage reward due is not to be determined by any rules; it is a matter of discretion, and probably . . . no two tribunals would agree" (per Dr. Lushington in *The Cuba*, 1860, Lush. 14). A history of the decided cases is not any more useful than a collection of arbiters' awards. Reference may, however, be made to the following cases in which salvage reward was considered in the Court of Session: *Davidson*, 1844, 6 D. 765; *Robinson*, 1851, 13 D. 592; *Otis*, 1862, 24 D. 419; *Duncan*,

1878, 5 R. 742; *The Berlin*, 1882, 9 R. 1057; *Bennet*, 1887, 24 S. L. R. 625; *Lawson*, 1888, 15 R. 753; *The Queen*, 1892, 19 R. 386. In Pritchard's *Admiralty Digest* (pp. 1920–2118) there is collected an enormous number of awards made by Courts in all parts of the world, and ranging in amount from £29,000 to £50. These are admirably arranged and digested, and should be consulted if examples are desired. There are, however, some definite principles to be observed and several distinct rules to be applied in determining the amount of a salvage award. "Salvage is not governed by the ordinary rules which prevail in mercantile transactions on shore. Salvage is governed by a due regard to benefit received, combined with a just regard for the general interests of ships and marine commerce" (per Dr. Lushington in *The Fusilier*, 1865, Brown. & Lush. 341, 347). Principles of public policy dictate not only the propriety, but even the absolute necessity of establishing a liberal recompense for the encouragement of those who engage in salvage (opinion of Eyre, C. J., in *Nicholson*, 1793, 2 Bl. H. 257). It is important so to remunerate salvors as to make it worth their while to succour ships in distress (per Lindley, L. J., in *The City of Chester*, 1884, L. R. 9 P. D. 182, 203).

In estimating the amount of salvage reward there are *four elements* to be taken into account: (1) the enterprise of the salvors and the risk they run; (2) the degree of peril encountered by the salved ship; (3) the degree of labour and skill which the salvors incur and display, and the time occupied; (4) the value of the ship salved (*The Clifton*, 1834, 3 Hag. Adm. 117, opinion of Sir John Nicholl, at p. 121; *The Glenduror*, 1871, L. R. 3 P. C. 589, 593; *The Berlin*, 1882, 9 R. 1057, opinion of Ld. Deas, at p. 1062; see also *The William Beckford*, 1800, 3 Rob. A. 355). There seems to be a slight difference of opinion as to which of these elements is to be considered in the first place, *i.e.* whether a salvage service is to be considered from the point of view of the salvor or the point of view of the salved ship (see Kennedy, *Civil Salvage*, 119 *et seq.*; opinions of Sir John Nicholl in *The Traveller*, 1837, 3 Hag. Adm. 370, and *The London Merchant*, 1837, 3 Hag. Adm. 394, and of Sir James Hannen in *The Werra*, 1886, L. R. 12 P. D. 52, that the property in jeopardy and its value is the first consideration; opinion *contra*, by Ld. Chelmsford in *The Fusilier*, 1865, Brown. & Lush. 341, 350, and by Lindley, L. J., in *The City of Chester*, 1884, L. R. 9 P. D. 182, 202). The proper course would seem to be to consider all the elements together. "It is obvious that whilst a small percentage on a very large value might be an ample remuneration in one case, a very large percentage on a small value might be a very inadequate remuneration in another case" (per Lindley, L. J., in *The City of Chester, ut supra*). The element of danger both to the salved ship and to the salvors is of the greatest importance. "A salvage service which hardly exceeds ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction" (per Lindley, L. J., *ut supra*. See also as to the peril of the salved ship: *The Werra*, 1886, L. R. 12 P. D. 52; *The Edenmore*, L. R. [1893] P. 79; *The Glengyle*, L. R. [1898] P. 97, A. C. 519). But the value of the property saved must also be a determining factor in the amount of the award. Remuneration is more liberally allotted in cases of large value (*The Salacia*, 1829, 2 Hag. Adm. 262; *The Earl of Eglinton*, 1855, Swab. 7). But the large value of the property salved must not be allowed to raise the *quantum* to an amount altogether out of proportion to the services actually rendered (*The Amérique*, 1874, L. R. 6 P. C. 468). The most liberal award is given in cases of derelict. (As to what is a derelict, see *The Capella*, L. R. [1892] P. 70.) The ancient rule used to be to give

salvors of derelict one-half of the value of the property rescued. This rule is no longer in observance (*The Aquila*, 1798, 1 Rob. A. 37; *The True Blue*, 1866, L. R. 1 P. C. 250; *The Janet Court*, L. R. [1897] P. 59). Where the owner of the salved property appears, more than a half is never given, and as a general rule the reward is less (Kennedy, *Civil Salvage*, 115; *The Scindia*, 1866, L. R. 1 P. C. 241; *The Amérique*, 1874, L. R. 6 P. C. 468; *The Cleopatra*, 1878, L. R. 3 P. D. 145). Where the owners do not appear, a larger proportion than a half may be given (*The Rasche*, 1873, L. R. 4 A. & E. 127; *The Anne Helena*, 1883, 5 Asp. M. C. 142; *Boiler ex Elephant*, 1891, W. N. 52, where a derelict boiler realised £58, and the Court of Admiralty granted the salvors £50 and costs).

Where vessels are specially fitted out for the purpose of rendering salvage services, the award will be large (*The Jubilee*, 1826, 3 Hag. Adm. 43 (*note*); *The Glengyle*, L. R. [1898] P. 97, A. C. 519). *The Glengyle* was rescued from a situation of imminent peril, after a collision with another vessel, by two steamers specially built, maintained, and equipped, with steam up night and day, for salvage services. *The Glengyle* with her freight and cargo was valued at £76,596, the salving steamers were worth £22,000 and £20,000 respectively. Gorell Barnes, J., awarded £19,000 for the service, and this award the Court of Appeal and the House of Lords refused to disturb.

Services rendered to vessels carrying passengers are highly remunerated (Kennedy, *Civil Salvage*, 118; *The Ardincaple*, 1834, 3 Hag. Adm. 151).

Loss, delay, and damage to the salving vessel will be considered in fixing the amount of award (*The Salacia*, 1829, 2 Hag. Adm. 262, 270; *The Jane*, 1831, 2 Hag. Adm. 338; *The Sunniside*, 1883, L. R. 8 P. D. 137; *The De Bay*, 1883, L. R. 8 App. Ca. 559; *The City of Chester*, 1884, L. R. 9 P. D. 182; *The Edenmore*, L. R. [1893] P. 79). Expenses properly incurred are to be allowed for (M. S. A., 1894, s. 510; *The Edenmore*, *supra*; *The Sunniside*, *supra*). Risk of forfeiture of a policy of insurance, or of liability to owners of cargo, on account of *deviation* by the salving vessel must be taken into account (*The Farnley Hall*, 1881, 4 Asp. M. C. 499). Deviation for the purpose of saving life does not operate as a forfeiture of an insurance policy, or subject the shipowner to damages in a question with owners of cargo, but in the absence of express agreement, deviation for the purpose of saving property alone has these effects (see GENERAL SHIP, *ante*, vol. vi. p. 120; *Scaramanga*, 1880, L. R. 5 C. P. D. 295). In *The Silesia* (1880, L. R. 5 P. D. 177), Sir Robert Phillimore granted a mail steamer performing salvage services, in addition to an ordinary award, a sum sufficient to cover penalties payable for deviation.

The serious responsibility undertaken by the master of a mail steamer, or the captain of one of H.M.'s ships, in delaying his ship to perform salvage service was considered, and an enhanced award on that account given, in *The Martin Luther* (1857, Swab. 287) and *The Ewell Grove* (1835, 3 Hag. Adm. 209, 225).

Another circumstance which has to be taken into consideration in determining the amount of award, is the risk salvors always run of getting nothing at all by reason of the failure of their efforts to save (*The City of Chester*, 1884, L. R. 9 P. D. 182, 202).

If there is an agreement for payment even in the event of non-success, that will operate as a consideration for reducing the reward (*The Edenmore*, L. R. [1893] P. 79). The reward will also be reduced if there is a customary obligation of mutual support (*The Collier*, 1866, L. R. 1 A. & E. 83, 86; and cf. *supra*, p. 75). Where bounties were granted by the

Government for the rescue of vessels in the Arctic regions, these were taken into consideration in a question of salvage (*The Swan*, 1839, 1 Wm. Rob. 68).

Misconduct of the salvors, where not so great as to forfeit all title to reward (see *supra*, p. 76), will operate as a consideration for reduction (*The Dantzig Packet*, 1837, 3 Hag. Adm. 383; *The Glascow Packet*, 1844, 2 Wm. Rob. 306; *The Dossitei*, 1846, 10 Jur. 865; *The Clarisse*, 1856, Swab. 129). A display of ignorance or want of skill, resulting in damage to the vessel salved, has the same effect. Knowledge and skill are to be expected from salvors according to their stations in life (*The Lockwoods*, 1845, 9 Jur. 1017; *The Cape Packet*, 1848, 3 Wm. Rob. 122; *The Rosalie*, 1853, 1 Spinks E. & A. 188; *The Perla*, 1857, Swab. 230; *The Magdalen*, 1861, 31 L. J. Adm. 22; *The Cheerful*, 1885, L. R. 11 P. D. 3; *The Dwina*, L. R. [1892] P. 58).

When the officers and crew of a Queen's ship are salvors, the fact that they do not risk private property will be taken into account in fixing the amount of the award (*The Iodine*, 1844, 3 Notes of Cases, 140; *The Earl of Eglinton*, 1855, Swab. 7).

Recapture.—For award in cases of recapture by Her Majesty's ships, see *supra*, p. 66.

6. Apportionment of the Award.

The apportionment of the award among the salvors is, like the determination of the amount of the award itself, a question of circumstances. Some definite rules are, however, observed.

Where there are Two or More Sets of Salvors.—Where the different sets of salvors, whether rendering their services contemporaneously or not, are not rivals, the reward will be apportioned amongst them according to the value of their services (*The Jonge Bastiaan*, 1804, 5 Rob. A. 322; *The Nicolaas Witzen*, 1837, 3 Hag. Adm. 369; *The Amérique*, 1874, L. R. 6 P. C. 468). Where the services are not contemporaneous, special favour is shown to the first set of salvors (*The E. U.*, 1853, 1 Spinks E. & A. 63; *The Santiporc*, 1854, 1 Spinks E. & A. 231; *The Magdalen*, 1861, 31 L. J. 22; *The Livictta*, 1883, L. R. 8 P. D. 24). A second set of salvors unwarrantably and unnecessarily dispossessing the first set will receive nothing (*supra*, p. 76); if they are acting *in bonâ fide*, they may get a small reward (*The Maria*, 1809, Edw. 175); if their interference is justifiable and necessary, they will get the larger share of the reward (*The Pickwick*, 1852, 16 Jur. 669).

Apportionment among Owners, Master, and Crew of Salving Vessel.—In earlier days, when salvage service was chiefly performed by the personal exertions of the master and crew of the salving ship, the claim of *the owners* to share in the reward, unless in special circumstances, was regarded as slight (*The Jane*, 1831, 2 Hag. Adm. 338, 343; *The Nicolina*, 1843, 2 Wm. Rob. 175). "In later times the introduction of steam-power has effected a considerable change in the practice of the Court (of Admiralty), and no doubt reasonably, for a steamer is now most frequently the principal salvor. It is equitable in such cases that the owners, on whom the chief risk and all the expense fall, should be rewarded in a much higher proportion than owners were formerly, and the Court has acted accordingly" (per Dr. Lushington in *The Enchantress*, 1860, 30 L. J. Adm. 15; see also *The Palmyra*, 1872, 1 Asp. M. C. 182). Time is nowadays of much greater value, and the delay involved in the performance of salvage service subjects the owner of a steamer to loss. The risk of damage to a steamer towing another is considerable, and the other risks enumerated above (p. 81) have to be regarded. All these considerations have led the English Court

of Admiralty, when the steamer herself is the principal salvor, to award to the owners a major portion of the salvage reward. This proportion has, in ordinary cases, been steadily growing. Dr. Lushington never gave to the owners more than one-half of the sum awarded; Sir Robert Phillimore gave usually two-thirds; Sir Charles Parker Butt, three-fourths (Kennedy, *Civil Salvage*, 153; Williams and Bruce, *Admiralty Practice*, 160); while Sir John Gorell Barnes, in the most recent reported cases, has exceeded this amount. In *The Edenmore* (L. R. [1893] P. 79), out of an award of £5350 the owners received £4225, equal to ·79, or nearly four-fifths of the whole. In *The Spree* (L. R. [1893] P. 147), out of £12,000 the owners' share was £9200, or ·76 of the award. In the only recent Scots case, *Bennet* (1887, 24 S. L. R. 625), Ld. Fraser gave two-thirds to the owners.

Apart from the specialties of towage by steamers, the owners of a ship are always entitled to some reward (*The Watt*, 1843, 2 Wm. Rob. 70; *The Nicolina*, 1843, 2 Wm. Rob. 175; *The Charles*, 1872, L. R. 3 A. & E. 536; *The Charlotte*, 1848, 3 Wm. Rob. 68) when she has assisted the salvage service or supplied the salvors (see *The Two Friends*, 1844, 8 Jur. 1011). The owners of *fishing vessels* performing salvage service have always been held entitled to a large portion of the award (*The Louisa*, 1843, 2 Wm. Rob. 22, 26).

The *master* of the salving vessel is entitled to a large share. On his shoulders in all cases lies the burden of responsibility for the whole undertaking, and frequently a big part of the actual work. The other *officers and crew* are usually allotted shares in the award according to their ratings on the portage bill. Following are some selected examples of apportionment—one being salvage by a fishing smack; three by sailing vessels; three by steamers, two of these the latest reported cases of apportionment in the English Admiralty Court, and one the latest in the Court of Session. (For a large collection of examples of apportionment, see Pritchard, *Adm. Dig.* 2119–2123.)

	Owners.	Master.	Mate.	Crew.	Total Award.
The Albion (salvage by a fishing smack) (1837, 3 Hag. Adm. 254)	£350 = ·35	£230 = ·23	£120 = ·12	£300 (3 seamen £90 each, 3 boys £10 each) = ·3	£1,000
The Nicolina (1843, 2 Wm. Rob. 175)	£100 = ·18	£100 = ·18	£100 = ·18	£250 = ·45	£550
The Caroline (1843, 7 Jur. 660)	£600 = ·33	£400 = ·22	£250 = ·14	£550 = ·3	£1,800
The Palmyra (1872, 1 Asp. M. C. 182)	£500 = ·33	£350 = ·23	£650 = ·43		£1,500
The Edenmore (L. R. [1893] P. 79	£4225 = ·79	£375 = ·07	£750 = ·14		£5,350
The Spree (L. R. [1893] P. 147)	£9200 = ·77	£800 = ·07	£2000 = ·17		£12,000
The Arabia (1887, 21 S. L. R. 628)	£666 13 4 = ·67	£66 13 4 = ·07	£266 13 4 = ·27		£1,000

The *non-navigating members of the crew* do not usually receive a full share. In *The Spree* (*supra*), Gorell Barnes, J., allowed only a half share each, according to his rating, to the surgeon, stewards, stewardess, cooks, baker, and cabin boys. In *The Arabia* (*supra*), Ld. Fraser allowed nothing at all to several Lascars employed as cooks and stewards. Cattlemen nominally on the ship's books, but really in the employment of the owner of

the cargo, were not allowed to participate in a salvage award in *The Coriolanus*, 1890, L. R. 15 P. D. 103. For apportionment to *apprentices and boys*, see *The Beulah* (1842, 1 Wm. Rob. 477), *The Caroline* (1843, 7 Jur. 660), *The George Dean* (1857, Swab. 290), *The Rasche* (1873, L. R. 4 A. & E. 127); to *passengers*, see *The Salacia* (1829, 2 Hag. Adm. 262, 269), *The Agamemnon* (1864, Pritchard, *Adm. Dig.* 1806), *The Hope* (1838, 3 Hag. Adm. 423), *The Perla* (1857, Swab. 230) (see also *supra*, pp. 70, 71).

Extra reward is given to those who do the most of the work, or are exposed to the greatest hardship. For examples of this special apportionment, see *The Jane* (1831, 2 Hag. Adm. 338), *The Watt* (1843, 2 Wm. Rob. 70), *The Nicolina* (1843, 2 Wm. Rob. 175), *The St. Nicholas* (1860, Lush. 29), *The Golondrina* (1867, L. R. 1 A. & E. 334), *The Palmyra* (1872, 1 Asp. M. C. 182), *The Rasche* (1873, L. R. 4 A. & E. 127), *The Skibladner* (1877, L. R. 3 P. D. 24), also the cases referred to *supra*, p. 72.

Agreements whereby seamen abandon their right to salvage are void (M. S. A., 1894, s. 156 (1); *Bennet*, 1887, 24 S. L. R. 625), except in the case of vessels which, according to the terms of the agreement, are to be employed on salvage services (*ib.*, s. 156 (2); see *The Wilhelm Tell*, L. R. [1892] P. 337). Assignments or sales of salvage made prior to the accruing thereof are not binding (M. S. A., 1894, s. 212). These provisions apply to an assignment for a valuable consideration, whether before or after the salvage service (*The Rosario*, 1876, L. R. 2 P. D. 41), but do not apply to agreements as to *apportionment* of salvage (*The Afrika*, 1880, L. R. 5 P. D. 192; *The Wilhelm Tell*, L. R. [1892] P. 337). Such agreements may be upheld by the Court if they are equitable (*The Wilhelm Tell*). The Court of Admiralty in England has always asserted the right to enforce agreements, or not to enforce them, according as it thinks them equitable or inequitable (*The Wilhelm Tell* and cases there, pp. 347–348); and this right of control extends to agreements by seamen belonging to vessels engaged on salvage services, it being held that the Act only makes such agreements *not illegal* (*The Ganges*, 1869, L. R. 2 A. & E. 370). The provision of the statute as to agreements (s. 156) does not apply to masters, pilots, or apprentices (s. 742); the provision as to sales and assignments (s. 212) applies to apprentices, but not to masters and pilots. Apprentices, however, will be protected by the Court. Their shares do not belong to the shipowner (*The Two Friends*, 1844, 8 Jur. 1011), even when an agreement is made to that effect (*The Columbine*, 1843, 2 Wm. Rob. 186).

Recapture.—Salvage award granted by a Prize Court for recapture of a British ship from the enemy (see *supra*, p. 66) does not vest as of right in the officers and crews of Her Majesty's ships. They are only allowed such interest (if any) as may be from time to time granted to them by the Crown (27 & 28 Vict. c. 25, s. 55). Such apportionment is usually made by proclamation by the Queen in Council. The proclamation at present in force is dated 3rd August 1886 (*Statutory Rules and Orders Revised*, vol v. p. 101).

7. Enforcement of Rights.

As a general rule, ship and cargo are liable each for its own share of salvage reward, and proceedings must be taken against the shipowner and each cargo-owner. For exceptions, see *supra*, p. 77. The salvors have a personal action against the persons liable to pay salvage (*Duncan*, 1878, 5 R. 742). Any one or more persons entitled to salvage may raise an action, whether other salvors concur with them or not (*Bennet*, 1887, 24 S. L. R. 625). The Court will determine the amount of salvage due, and award the

pursuers their share (*Bennet, supra*). An action for payment of salvage, when raised by all the parties entitled to salvage, may contain conclusions for apportionment (*Juridical Styles*, iii. 175). An action for payment of salvage may also take the form of a multiplepoinding (*Robinson*, 1851, 13 D. 592). Where the amount of salvage is agreed upon, the Court of Session or the Sheriff Court may apportion it, and may appoint some person to carry the apportionment into effect (M. S. A., s. 556). If the amount is under £200, the Receiver of Wrecks may apportion it (s. 555).

Where the value of the property saved does not exceed £1000, or the amount claimed does not exceed £300, questions of salvage must be determined *summarily* in the Sheriff Court (M. S. A., 1894, s. 547). The Sheriff Court in this section means the Court having jurisdiction at the place where the vessel is first brought after the occurrence by reason whereof the claim of salvage arises (s. 548; *Summers*, 1891, 18 R. 879). The procedure would appear to be the same as in other civil causes (11 Geo. IV. and 1 Will. IV. c. 69, s. 23), including the right of appeal (*ib.* and M. S. A., 1894, s. 549), though what is the meaning and effect of the word "summarily" is not easily determined (see M. S. A., ss. 702–710; Dove Wilson, *Sheriff Court Practice* (4th ed.), 367; *Sinclair*, 1883, 10 R. 1077). Where appeal is competent, a record of the evidence must be kept (*Sinclair, supra*).

If a claimant raises an action for salvage in the Court of Session and does not recover more than £300, he is not entitled to expenses, unless the Court certifies the case as a fit one to be tried otherwise than summarily (M. S. A., s. 547, subs. (2); *Lawson*, 1888, 15 R. 753).

A Court of appeal, in questions of salvage, will not interfere with the *amount* of award granted by the judge who heard the evidence, unless it appears that the principles of law which are recognised and settled have not been satisfactorily and truly and properly applied (*The Amérique*, 1874, L. R. 6 P. C. 468; *The Glengyle*, [1898] A. C. 519; *The Berlin*, 1882, 9 R. 1057, opinion of Ld. Shand, p. 1062; *The Queen*, 1892, 19 R. 386).

In cases of dispute, the Receiver of Wrecks for the district where the property is, may, on the application of either party, appoint a valuer to value it (M. S. A., s. 551).

"Where salvage is due to any person *under the M. S. A.*," the Receiver of Wrecks has power to detain the ship and cargo until security is given to his satisfaction, or, if the claim is for more than £200, to the satisfaction of the Court of Session, with power of sale in default of payment or security (ss. 552, 553; *The Lady Katherine Barham*, 1861, Lush. 404; *Otis*, 1862, 24 D. 419). The procedure in the Court of Session is by petition (*Otis*). The meaning and effect of the words "due under the Act" in sec. 552 are not clear. It has recently been held that, in respect of the jurisdiction conferred upon the Courts by the Act (s. 565), the receiver's powers extend to any salvage claims whatever (*The Fulham*, [1898] P. 206). This judgment seems very doubtful. The point apparently was not raised in the case of *Otis* (*supra*).

Some special provisions are enacted by the M. S. A. for salvage by Her Majesty's ships (ss. 544, 557–564).

The salvor, besides his personal action against the owners of the ship and cargo, can proceed for his reward *in rem*, *i.e.* against the ship and cargo themselves (Bell, *Com.* i. 592, ii. 103). If the property is in the salvor's possession, he has a proper right of retention or lien over it until he is paid his due. If the property salved is not in the salvor's possession, the law of England and other maritime countries gives him a right, which in England

is called maritime *lien*, but which ought properly to be styled *hypothec*. This right differs from lien proper in that it does not require possession, and that it travels with the *res* and may be enforced against it, no matter into whosesoever hands the *res* may come. (See the *Bold Buccleugh*, 1851, 7 Moo. P. C. C. 267; *The Ripon City*, L. R. [1897] 226, op. Barnes, J., 234 *et seq.*). There is little trace of this hypothec for payment of salvage in Scottish law, but it is well recognised for similar obligations, and is approved in general terms by our institutional writers (Ersk. *Inst.* iii. 1. 34; Bell, *Com.* i. 533, ii. 26, 40, *Prin.* ss. 1397–1401). It may now be taken to be established in the law of Scotland (Bell, *Prin.* s. 1397; Ersk. *Prin.* (19th ed.) 275; *Currie*, 1896, 24 R. (H. L.) 1). The question of ranking of maritime liens may be of importance to salvors (see Abbott, *Merchant Ships*, Part V. chap. ii., and M'Lachlan, *Merchant Shipping*, chap. xv.). Salvage liens rank among themselves in the inverse order of their attachment to the *res*. The last lien in time is thus first in payment. A salvage lien ranks *before* prior bottomry and respondentia liens (*Cargo ex Galam*, 1863, Br. & Lush. 167, 181), and before liens for wages earned before the salvage service was rendered (*The Selina*, 1842, 2 Notes of Cases, 18), and probably before any lien for damages by collision (Marsden, *Collisions*, 91, 92). It ranks *after* a subsequent bottomry or respondentia lien and liens for wages subsequently earned (*The Selina, supra*). Salvage lien ranks before a claim on the part of the Crown for forfeiture of the property for an offence against the revenue laws (*Att.-Gen.* v. *Norstedt*, 1816, 3 Price, 97).

Queen's ships are free from arrest (Williams and Bruce, *Adm. Practice*, 250, note (k)). There seems, however, nothing in the principles of the law of Scotland to forbid an action against the Crown for services rendered to Her Majesty's ships. (For what is a Queen's ship, see *supra*, p. 71.)

The Courts of this country have no jurisdiction over vessels belonging to a foreign sovereign, so that in the case of salvage services rendered to such ships a remedy is not available in this country (*The Constitution*, 1879, L. R. 4 P. D. 39; *The Parlement Belge*, 1879, L. R. 4 P. D. 129; 1880, L. R. 5 P. D. 197; see also an American case, *The Schooner Exchange*, 1812, 2 Curtis, 478; and cf. *Alexander*, 1815, 2 Dod. 37), unless with the consent of the foreign Power (*The Prins Frederik*, 1820, 2 Dod. 451).

[Kennedy, *Civil Salvage*; Bell, *Com.* III. iv. 3. 3.; Abbott, *Merchant Ships*, Part III. chap. x.; M'Lachlan, *Merchant Shipping*, chap. xiii.; Arnould, *Marine Insurance*; Lowndes, *General Average*; Carver, *Carriage by Sea*; Temperley, *Merchant Shipping Act*, 1894.]

Sanctuary, Privilege of; Abbey of Holyrood.—From a very remote period the precincts of Holyrood, as the site of a royal residence, formed a sanctuary within which debtors might obtain protection for their persons from the diligence of the law. The privilege of sanctuary was formerly enjoyed by a number of other places throughout the country, chiefly of a religious character. At the Reformation the privilege was abolished in the case of all religious establishments; and thereafter it fell into desuetude elsewhere, except in the case of Holyrood, where it still continued in force, and was frequently taken advantage of up till the abolition of imprisonment for debt by the Debtors Act, 1880 (43 & 44 Vict. c. 34), when it became practically obsolete in the case of all ordinary debtors. The area over which the privilege extends covers a circuit of about four miles and a quarter, including Arthur's Seat and Salisbury Crags, and is under the control of a bailie appointed by the Duke of Hamilton as

Keeper of Holyrood House, with jurisdiction in all civil debts contracted within the precincts. The right of sanctuary affords protection to civil debtors only, and does not extend to debtors of the king, or to criminals (including fraudulent bankrupts), or to persons under diligence for performance of a fact within their own power. By passing within the limits of the sanctuary a debtor is protected for twenty-four hours only; but he may obtain immunity, so long as he remains there, by having his name entered in the record of the Abbey Court, whereby he becomes entitled to a certificate of protection, and is then under the protection of the baron bailie. The concurrence of the bailie is necessary to the execution of all warrants within the sanctuary. The immunity is not lost by voluntary absence for a shorter period than suffices to raise a presumption of its abandonment, nor by absence brought about by force or by fraud on the part of the creditor. It does not extend to debts contracted within the sanctuary itself, in respect of which debtors may be imprisoned in the Abbey prison; where also persons *in meditatione fugæ*, who fled within the precincts, are liable to be confined until they find bail. Persons seeking refuge in the sanctuary, but not entitled to its privileges, may be seized with concurrence of the bailie of the Abbey. The privilege of sanctuary does not extend to alimentary debtors committed to prison by warrant of a Sheriff under 45 & 46 Vict. c. 42, s. 4.

Effect of Retiral to Sanctuary in Bankruptcy.—By the Act 1696, c. 5, it was declared that if an insolvent debtor under diligence by horning and caption should retire to the Abbey or any other privileged place for his personal security, he should be holden and repute to be a notour bankrupt. By the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 7, it was enacted that notour bankruptcy should be constituted *inter alia* by insolvency concurring with a duly executed charge for payment, followed, where imprisonment is competent, by the debtor's retreat to the sanctuary for twenty-four hours. Since the Debtors Act, 1880, this mode of constituting notour bankruptcy has become practically obsolete in the case of all ordinary debtors; but it remains applicable to such debtors, other than Crown debtors, as are still liable to imprisonment under the provisions of that Act.

[Bell's *Com.* ii. 461; Ersk. iv. 3. 25; Bankton, iii. 14; Ross's *Lect.* i. 331; Bell's *Prin.* s. 2315; Mackenzie's *Observations*, p. 69.]

Sasine.—See INFEFTMENT; REGISTRATION.

Sasine Propriis Manibus.—Reference will be found under "Feu Charter" to the early practice of the granter of the feu giving sasine by his own hands. Practically, the only modern or recent survival of this custom is in the form of infeftment given by a husband to his wife, usually for her liferent after his death in the event of her surviving him. Prior to 1845 such infeftment was usually incorporated in the husband's sasine. It might proceed with or without a warrant. In the latter case, the husband required to sign the instrument, which was not necessary in the former case. This subsidiary infeftment might be grafted on the husband's sasine, whether his title was being made up by confirmation or by resignation, but it is to be observed that even in the latter case the wife would not be entered with the superior. It would have made no difference in this respect whether the superior's charter of resignation was or was not assignable, for the idea of sasine *propriis manibus* was not a qualified transmission of

the existing warrant, but, on the contrary, the prior exhaustion of that warrant by the husband's plenary infeftment, and then that he, being thus *in titulo*, granted a separate warrant, express or implied, in favour of his wife. The Act of 1845 did not apply to infeftments *propriis manibus*, as indeed is obvious, for that Act directs sasine to be given by a notary, which could not at the same time be *ex propriis manibus* of the granter of the conveyance. It does not, however, appear that there would have been anything incompetent in recording in one instrument the husband's infeftment in the form of the Act of 1845 and the wife's infeftment *propriis manibus* of her husband in the old form, though such procedure and instrument would have been inconvenient. When sasine was superseded in 1858, no machinery was introduced to adapt infeftments *propriis manibus* to the altered procedure. But the Consolidation Act, 1868 (s. 15), contains a provision intended to revive the practice, as to which see INFEFTMENT.

As regards burgage property, sasine *propriis manibus* was somewhat of a misnomer, inasmuch as the grant contained no precept of sasine, and the sasine was the act, not of the granter, but of the magistrates. What is meant under the expression is, that the resignation of the husband, on which the wife received sasine from the bailie, was made *propriis manibus*.

Sasines *propriis manibus* did not enjoy the immunity from challenge on the ground of erasures, introduced by 6 & 7 Will. IV. c. 33.

Savings Banks.—The law in regard to savings banks is chiefly statutory, and the various statutes show a desire on the part of the Legislature to encourage such institutions by conferring on them certain benefits, such as exemption from stamp duties, and a ready and inexpensive method of settling questions arising out of the administration of their affairs. There are several classes of savings banks, and these are regulated by separate series of statutes. The term generally applies to (1) Trustee Savings Banks, and (2) Post Office Savings Banks. Besides these, there are: (3) Military, (4) Naval, and (5) Seamen's Savings Banks.

I. TRUSTEE SAVINGS BANKS.—The principal Act is 26 & 27 Vict. c. 87, which consolidated and amended previous Acts, and has itself been amended by 43 & 44 Vict. c. 36; 50 & 51 Vict. c. 40; 50 & 51 Vict. c. 47; 54 & 55 Vict. c. 21; and 56 & 57 Vict. c. 69. The provisions of 59 Geo. III. c. 62 still apply to saving banks established under it, unless and until they choose to bring themselves under the later Acts.

Constitution and Description.—A Trustee Savings Bank is a society formed by any number of persons "for the purpose of establishing any institution in the nature of a bank" to receive deposits for the benefit of the depositors, and to "accumulate the produce of so much thereof as shall not be required by the depositors, their executors or administrators, at compound interest," returning such deposits and the produce thereof to the depositors, their executors or administrators, deducting therefrom the amount required for the necessary expenses attending the management of the institution, but "deriving no benefit whatsoever from any such deposit or the produce thereof" (26 & 27 Vict. c. 87, s. 2). Such a society seems, therefore, to be constituted by trustees and managers. A Trustee Savings Bank may not bear any other title than that of "Savings Bank certified under the Act of 1863," with the addition of the local name required, and may not be described in any manner importing that the

Government is responsible or liable to the depositors for the deposits (54 & 55 Vict. c. 21, s. 1).

To entitle savings banks to the benefits of these Acts, certain regulations require to be complied with. Thus the sanction of the National Debt Commissioners to their formation is necessary (1863 Act, c. 87, s. 2). The Savings Banks Act, 1891 (54 & 55 Vict. c. 21), set up a new body, viz. an Inspection Committee. This body does not take away the control formerly vested in the National Debt Commissioners, but they are given certain duties and powers, subject to the approval of the latter (s. 3). Certain powers are also conferred on the National Debt Commissioners, *e.g.* power, on a report by the Inspection Committee, to close the account of the trustees of the bank (s. 3 (3) and s. 5).

Rules and Alterations of Rules.—The rules and alterations of rules (which are not prohibited) require to be entered in a book open to the inspection of depositors (1863 Act, c. 87, s. 3). Two written or printed copies of rules and alterations of rules have to be sent to the Registrar of Friendly Societies (formerly to the revising barrister), in order that he may certify their conformity with law (s. 4).

The rules must provide *inter alia*—

(1) That while salaries and remuneration of other officers may be charged, no treasurer, trustee, or manager shall derive benefit from any deposit beyond his actual expenses.

(2) The presence, at every transaction of deposit and repayment, of not less than two trustees, managers, or paid officers.

(3) The production of the depositor's book once a year.

(4) No money to be received or paid except at the office or branch office and during usual business hours.

(5) Public accounting and audit not less than once every half-year.

(6) Trustees to hold meetings once every half-year and keep minutes (s. 6). The treasurer and other officers intrusted with the receipt or custody of money must give security (s. 8, and 54 & 55 Vict. c. 21, s. 9).

The Trustees.

(*a*) *Vesting of Property.*—The effects of savings banks are vested in the trustees for the time being, and no conveyance is necessary as to succeeding trustees (s. 10).

(*b*) *In Legal Proceedings.*—The trustees for the time being, in their own names as trustees, are the proper persons to sue or be sued, prosecute or be prosecuted, in any action, civil or criminal, concerning the property, right, or claim of any savings bank; and no action or prosecution shall be affected by the death or removal of any of the said trustees (s. 10).

(*c*) *Liability.*—No trustee or manager is personally liable except—

(1) For moneys actually received and not paid over by him in accordance with the rules.

(2) Neglect to comply with the regulations, which, as stated above, require by statute to be set forth in the rules.

(3) Neglect in taking security from officers (s. 11).

The office of a trustee may become vacant by his absence from all meetings for one year, and his neglect to perform his duties, unless a satisfactory explanation be given to the Committee of Inspection. Money, when invested by the trustees, must be invested in the Bank of England or Bank of Ireland in the names of the National Debt Commissioners, but the trustees may receive money from depositors to be invested in some other manner permitted by the rules (ss. 15 and 16). Such are termed "special investments," and are subject to certain restrictions under 54 &

55 Vict. c. 21, s. 10. The trustees are required to make up annually, and to transmit to the National Debt Commissioners, an account exhibiting the balance due to the depositors; and to affix publicly in the office of the bank a duplicate thereof, along with a list of the trustees and managers (ss. 55 *et seq.* of 26 & 27 Vict. c. 87). Where funds belonging to a savings bank are in the possession of an insolvent officer of the bank, it has a claim preferable to other creditors (s. 14).

Depositors.—Every depositor, on making a first deposit, must make a declaration in prescribed form that the person or persons on whose behalf the deposit is made is or are not entitled to (*a*) any deposit or subsequent benefit from the funds of any other savings bank; or (*b*) any other funds in the same bank. A false declaration involves the penalty of forfeiture of the deposit to the National Debt Commissioners (26 & 27 Vict. c. 87, s. 38; 54 & 55 Vict. c. 21, s. 12; *Queen* v. *Littledale*, 1882, 10 L. R. Ir. 78, and 12 L. R. Ir. 97).

Deposits may be made by minors (1863 Act, c. 87, s. 30), by persons acting as trustees on behalf of others (s. 37), and by married women. The husband of a married woman may prevent the money being paid to her by notice in writing to the trustees of his marriage, and requiring payment to be made to himself (s. 31). Since the Married Women's Property Act, 1881, it is thought this provision would not apply to money deposited which is her own separate estate.

The funds of registered Friendly Societies, Building Societies, Charitable or Provident Institutions, and Penny Savings Banks may be invested in any savings bank (ss. 32, 33; Building Societies Act, 1874, s. 25).

A depositor may not deposit at any time within any one savings bank year any sum exceeding £50, nor more than £200 altogether. The whole account of Government Stock at a depositor's credit may not exceed £500. Unless the depositor otherwise directs, all sums in excess of £200 shall be invested in Government Stock for his benefit (26 & 27 Vict. c. 87, s. 39; partly repealed by 56 & 57 Vict. c. 69, ss. 1, 2, 3). As to interest, see 43 & 44 Vict. c. 36, s. 2; 54 & 55 Vict. c. 21, s. 14.

By 50 & 51 Vict. c. 40, repealing 26 & 27 Vict. c. 87, ss. 43, 44, 45, and 46, certain regulations are made by the Treasury for *inter alia*—

(1) Payment or transfer of sums belonging to minors or lunatics, or persons supposed to be dead.

(2) Determination of evidence to be accepted in any such matter.

The Treasury may also provide regulations as to—

Deposits of Deceased Depositors by (1) power of nomination by a depositor not under sixteen years of age of any sum not exceeding £100; (2) power, where the sum in bank does not exceed £100, to dispense with confirmation or other proof of the title of the personal representative, and to pay such sum to "the persons appearing to be beneficially entitled whether under such nomination of such deceased person as is allowed by the regulations, or by law, or as next of kin, or as creditors, or otherwise, or to or among any one or more of such persons, exclusively of the others, or in case of any illegitimacy of the deceased person or his children, to or among such person or persons as may be directed by the said regulations, and the person making such payment shall be discharged from all liability in respect of the sum paid in accordance with the said regulations" (50 & 51 Vict. c. 40, s. 3 (2); see also sec. 47 of 26 & 27 Vict. c. 87; *Bennett*, 1898, 15 T. L. R. 25; *Caddick*, 1899, 15 T. L. R. 182). Certain exemptions from stamp duty are conferred by 26 & 27 Vict. c. 87, ss. 41 and 42, 43, 50.

Disputes.—All disputes between the trustees and a depositor, or his or her representative, must be referred to the Registrar of Friendly Societies, and his decision is binding and conclusive on all parties, and final to all intents and purposes without any appeal (26 & 27 Vict. c. 87, s. 48; 39 & 40 Vict. c. 52, s. 2 (1)).

So where an action was raised by a depositor for payment by the bank of £50 alleged to have been paid by the bank upon a forged order to another person, it was held that the action, being founded upon a contract of deposit, involved a question between the bank and depositor which fell within the arbitration clause of the 48th section of the statute (*Melrose*, 1897, 24 R. 483, 34 S. L. R. 346; see *Crisp*, 1832, 8 Bing. 394). The Registrar is not bound to hear a dispute where the depositors have been acting illegally and in wilful contravention of the statute, as, for example, by making deposits in fictitious names (*R.* v. *Littledale*, 1882, 10 L. R. Ir. 79, 12 L. R. Ir. 97). See FRIENDLY SOCIETIES (*Disputes*).

Inspection and Closing.—As stated above, an Inspection Committee of Savings Banks was created by 54 & 55 Vict. c. 21.

By 50 & 51 Vict. c. 47, s. 2, the Treasury has power, on a representation by a sufficient number of depositors or by the National Debt Commissioners, to apply, in Scotland, to the Court of Session for the appointment of a Commissioner (being an advocate or W.S. of not less than five years' standing) to hold a local inquiry into the affairs of any savings bank.

The National Debt Commissioners have power to close any bank reported by the Inspection Committee to have failed to observe the statutory requirements, or may report to the Treasury with a view to a local inquiry by a Commissioner as mentioned above.

A Trustee Savings Bank is by 50 & 51 Vict. c. 47, s. 3, expressly stated to be an "unregistered association" which may be wound up under the Companies Act, 1862, and the Acts amending the same, and a petition for winding up may be presented by any person authorised under these Acts, or by the National Debt Commissioners, or by a Commissioner appointed in terms of the 1887 Act.

By 26 Vict. c. 14, ss. 2, 3, and 54 & 55 Vict. c. 21, s. 6, various regulations are made as to procedure on the closing of a savings bank, including notification by the trustees to the National Debt Commissioners, and the paying over to them of any sum realised by the sale of property. They must also give one month's notice to depositors, and inform them as to the facilities for transferring deposits to Post-Office Savings Banks.

II. POST-OFFICE SAVINGS BANKS.—The principal Act is 24 Vict. c. 14, which has been amended by various statutes, the latest being 56 & 57 Vict. c. 69, which is also applicable to Trustee Savings Banks.

By the Act 1861, the Post Office was made available for the deposit of small savings, and direct security given by the State to every depositor for repayment of his deposit and interest thereon; the Postmaster-General being authorised through his officers to receive deposits under such regulations as he, with the concurrence of the Commissioners of Her Majesty's Treasury, may prescribe.

The law is almost entirely statutory, and is, with the necessary variations, substantially the same as that regulating Trustee Savings Banks, with the exceptions that—

(1) There are no statutory checks on officers, the State itself being security.

(2) The rate of interest on deposits is lower, being £2, 10s. per cent.

(3) The Postmaster-General determines questions arising out of

payments on death of a depositor, and exercises a wider discretionary power.

III. Railway Savings Banks are governed by special Acts of Parliament, under which the Registrar of Friendly Societies exercises functions varying with the terms of the respective Acts.

IV. Military, Naval, and Seamen's Savings Banks.—These are regulated by statute, but stand in a different category from the others, inasmuch as the Registrar of Friendly Societies has no control over them.

(*a*) *Military Savings Banks.*—These are regulated by 22 & 23 Vict. c. 20, repealing 5 & 6 Vict. c. 71, and 8 & 9 Vict. c. 27, but deposits made before repeal in banks established under these statutes are not to be affected.

The purpose of 22 & 23 Vict. c. 20 is to establish Military or Regimental Savings Banks for non-commissioned officers and soldiers in Her Majesty's service, either in the United Kingdom or upon foreign service, with the exception of India.

The regulations for such are made by the Secretary of State for War, with the concurrence of the Commander-in-Chief and the Commissioners of Her Majesty's Treasury (22 & 23 Vict. c. 20, s. 3, and 26 & 27 Vict. c. 12).

Receipts by infants are a sufficient discharge, and payments by married women are valid despite their disability in law (s. 5).

Officers of such savings banks are not liable except for their own acts (s. 12).

Accounts have to be laid before Parliament every year (s. 13).

(*b*) *Naval Savings Banks.*—These are established and regulated by the Admiralty under 29 & 30 Vict. c. 43, and are for the purpose of receiving deposits of money from petty officers and seamen, and from non-commissioned officers and privates in the marines, of the Royal Navy. The regulations are made by an Order in Council, and prescribe the rate of interest (not exceeding £3, 15s. per cent. per annum) and the terms and conditions of deposits being received and paid.

A Naval Savings Bank is not one within the meaning of sec. 38 of 26 & 27 Vict. c. 87.

Deposits may be transferred to other savings banks (s. 9). Provision is made, as with Military Savings Banks, for investment of deposits and sale of stocks (s. 9 and 10), and annual accounts have to be submitted to Parliament (s. 11).

(*c*) *Seamen's Savings Banks.*—These are regulated by secs. 148 to 154 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), under which it is provided that the Board of Trade may maintain a central bank in London, and establish branch seamen's savings banks to receive deposits from seamen (whether of the Royal Navy, merchant, or other sea service), or of the wives, widows, and children of such seamen. The Board of Trade may constitute any mercantile marine office a branch savings bank, and may make regulations as to all matters incidental to carrying out the statutory provisions.

The National Debt Commissioners may receive, if asked, from the Board of Trade, and repay to their account, the sums paid as deposits, and shall invest such money and pay interest as in the case of Trustee Savings Banks. The accounts have to be laid annually before Parliament.

The Board of Trade and superintendents and officers employed in such banks are exempt from legal proceedings, except in cases of fraud or wilful

misconduct. Any person guilty of forgery of documents, etc., for the purpose of obtaining money in Seamen's Savings Banks, shall be liable to penal servitude for five years, or to imprisonment for two years with or without hard labour, or on summary conviction to six months' imprisonment with or without hard labour.

See FRIENDLY SOCIETIES; REGISTRAR OF FRIENDLY SOCIETIES.

Scattald.—See UDAL LAW.

School.—See EDUCATION.

School Board.—See EDUCATION; SCHOOL BOARD ELECTIONS.

School Board Elections, Procedure at, under 35 & 36 Vict. c. 62, and 41 & 42 Vict. c. 78.—The election of members to serve as a School Board is by ballot, and therefore the general principles of the Ballot Act apply to the management of the election, subject to such modifications as are imposed by the Education Acts or General Orders of the Education Department. The sections of the Acts bearing on elections are secs. 12 (last clause only), 13, 14, 15, 16, Sched. B Act of 1872, and sec. 21 Act of 1878. Elections are further regulated by a General Order issued from time to time by the Scotch Education Department, the last Order being dated 2nd Oct. 1893.

The *number of members* in each School Board is determined by the Department, according to the requirements of the school district, and there must be not less than five nor more than fifteen members (Sched. B, Act 1872; Rule 2, Order 1893). Any person may be a member, provided such person is not a teacher in a public or State-aided school, or does not hold an office of profit under the Board (s. 12, Act 1872; s. 21, Act 1878: Rule 8, Order 1893). Women are eligible; and as there is no qualification as to age, sex, residence or ownership, the same person may, if elected, sit on two or more Boards. The conditions, however, "of full age" and "not subject to any legal incapacity" are interpolated by Rule 8, Order 1893. An inspector of poor is not a suitable person (1 R. 261). Married women living with their husbands have been elected and have acted. Members remain in office until a new election takes place (Rule 1, Order 1893); and casual vacancies are filled up by the School Board itself (s. 13, Act 1872), and so are vacancies caused by resignation (s. 15, Act 1878); absence for six months without cause vacates the seat (s. 16, Act 1878). If the number nominated is less than the number to be elected, or if no election at all has taken place, the Department may (1) order a new election, (2) allow the existing Board to remain in office, or (3) themselves nominate a new Board (s. 13, Act 1872). Vacancies caused by an invalid election, and where no one has been declared elected, are filled up by the Board itself, provided there is a quorum, *i.e.* three members (s. 15, Act 1872).

A member of a School Board may resign on giving to the Board one month's previous notice in writing of his intention so to do. The vacancy so caused is filled up by a new nomination made by the School Board; and if the Board fail for eight weeks to fill up the vacancy, the Scotch Education Department may proceed to do so (s. 15, Act 1878). An opinion was

expressed in the *School Board of Cabrach* v. *Macdonald*, 1896, 23 R. 541, that the power of a School Board to nominate a person to fill up a vacancy caused by the resignation of a member did not *ipso facto* cease on the lapse of eight weeks from the date of the resignation. A person nominated by the Board is entitled to decline office, and if he does so, he never becomes a member of the Board, and does not require to resign (*Cabrach* case, *supra*).

The Electorate consists of all persons, male and female, and under no 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, and who are owners or occupiers of lands of the yearly value of £4 and upwards situated in the parish or burgh (Sched. B (2), Act 1878; R. 5, Order 1893). Married women under the curatory of their husbands are generally allowed to vote; but see Graham, *Sellar's Manual Education Acts*, 9th ed., pp. 86, 181–83. Electors are not disqualified by non-payment of rates, and "service" voters appear entitled to the School Board franchise in counties, but not in burghs (*ib.* p. 86).

Returning Officer.—The election takes place triennially, and the returning officer is the chairman of the School Board, or failing him, some person appointed by the Board. No candidate for election may act as returning officer (R. 4, Order 1893). He appoints presiding officers and clerks if necessary (Rule 16), and these do not require any professional qualification (Rule 18 (*a*)).

The Day of Election is fixed by the School Board, and is a convenient day not more than ten clear days before or twenty clear days after the same day as that which was fixed for the first election of the School Board (Rule 3, Order 1893).

The following provisions require to be observed after the day of election has been fixed:—

Eighteen clear days before day fixed for election	*Notice of Election* to be given by returning officer in form of Sched. A of Order (rr. 6 and 7).
Fourteen clear days before day of election	Nominations close, and must be received not later than 8 p.m. of the last day (rr. 8 and 9). If the last day is a Sunday, then the nominations must be made on Saturday before 12 o'clock (r. 27).
Eleven clear days before day of election .	Notice of names, abodes, designations of candidates must be given by returning officer (r. 10).
Eight clear days before day of election .	Time for withdrawing nominations closes at 8 p.m. of last day. If a Sunday, these must be made on the Saturday previous, before 12 o'clock (r. 27).
	Immediately after time for withdrawing nominations closes, *Notice of persons* nominated, if there is to be a contest, and the date of the poll.

Three clear days before day of election .	Notice of number and situation of polling-places to be given by returning officer (r. 14).
Day of election	
Counting of votes as soon as possible thereafter	Notice of result, notice to successful candidates. Returns to clerk of School Board, and to Scotch Education Department (rr. 19, 20, 23).
Nor later than fourteen clear days after day of election	First meeting of School Board (fixed by School Board previously) (r. 23).

Nomination Papers are subscribed by five electors, and state the Christian name and surname, abode, and designation of each subscriber, as well as of the candidate. Intimation of the nomination is sent to the candidate by the returning officer. He decides as to the validity of a nomination paper, and his decision is final (r. 9). Mere acceptance of a nomination paper by the returning officer does not constitute a decision as to its validity (*Hodge*, 1898 (O. H.), 35 S. L. R. 634). In that case the returning officer rejected a nomination paper two days after he had accepted it. The notice of withdrawal is signed by the candidate, or by the five electors who nominated him, and sent to the returning officer (r. 11; see cases on nomination, Graham's edition of *Sellar's Manual*, pp. 189–193).

The Poll.—Notice of poll must forthwith be given by the returning officer if there is a contest (r. 13); and publication of the situation of the polling-places not less than three clear days before the day of election. No public-house shall be used as a polling-place, or for the purpose of an election (r. 14). Each voter is entitled to give as many votes as there are members to be elected, and he may distribute his votes as he pleases (Sched. B (6), Act 1872). The papers may be marked in figures or in crosses; but where more than one vote may be given, a single cross given to any one candidate cannot be taken to mean a cumulative vote. It counts one only (4 S. L. T. p. 237). As to good or bad votes, see Graham's edition of *Sellar's Manual*, cases 39–48, pp. 200 *et seq.*

The poll shall be open

(*a*) *in a burgh*, during the hours prescribed for municipal elections.

(*b*) *in a parish*, during not less than six nor more than twelve hours from such hour, not later than twelve o'clock noon, to such hour, not later than eight p.m., as the School Board may fix (r. 17).

The distinction between a parish and a burgh School Board election has given rise to some difficulty. By Rule 18 (*a*) *burgh* School Board elections are to be carried out in like manner as a poll at a contested municipal election under the Ballot Act, 1872, and (*b*) *parish* School Board elections in the manner prescribed in Sched. B annexed to Order of 1893. The object of the distinction seems to be to make the election in a parish as simple as possible, thus rendering several of the formalities of the Ballot Act unnecessary. Ballot papers apparently ought not to be numbered in a parish election (r. 8, Sched. B, Order 1893; see cases in Graham's edition of *Sellar's Manual*, pp. 195, 196). This leads, if sound, to a curious result.

If the papers are unnumbered, it becomes impossible on a scrutiny to know how a voter has voted, which might be of considerable importance in an election petition. They required to be marked with a private official mark (Sched. B, r. 1), although the want of it is not expressly declared to render the paper invalid (Sched. B, r. 8). This appears to be a question for the returning officer to determine, and, so far as can be discovered, there is no authority upon the point. The practice, however, is invariably to stamp the papers. The only persons entitled to be present in the polling station, both in burgh and parish elections, are the returning officer, presiding officers, clerks, and candidates, or the persons (one each) authorised in writing by them (r. 18 (*a*), Sched. B, r. 2, Order 1893).

No declaration of inability to read is taken from a blind or illiterate voter in a parish election. The vote is marked by the presiding officer and put into the box, and the circumstances recorded and entered on the "list of votes marked" by him (Sched. B, r. 6). No provision is made for declarations of identity and tendered votes; but as personation is a crime and offence at all elections, they would appear to be necessary, and ought to be supplied. In the case of an equality of votes the returning officer determines which candidate is to be elected (s. 14, Act 1872).

The result of the election is published by the returning officer (r. 19), notice given to each successful candidate (r. 23), and returns sent to the clerk of the School Board, and to the Scotch Education Department (r. 20). The first meeting of the School Board must be not later than fourteen clear days after the election (r. 23). This date, and the date of the election, are fixed by the Board before they go out of office.

Notices are published, (*a*) *in a burgh*, in one or more newspapers circulating in the locality, or in such other manner as public notices are usually published; (*b*) *in a parish*, by being fixed to the doors of the parish churches and other places of worship, and public and State-aided schools within the parish (r. 25).

Documents, at the close of the poll, are sealed up and delivered to the clerk of the School Board, to be kept among the records of the Board, subject to the direction of the Scotch Education Department (Sched. B, r. 9).

Petitions or Disputes.—Any question or dispute regarding the election of a candidate is to be summarily determined by the Sheriff, on the petition of any person having a legal title or interest to raise such question; and the Sheriff's decision is final. As to the meaning of "summarily," see *Bone*, 1886, 13 R. 768. If the Sheriff-Substitute decides the question, there is no appeal to the Sheriff (*ib.*). Pending the decision, the Board is deemed to consist of the members declared by returning officer to have been elected, and there is no penalty if a member who has acted is subsequently declared not to have been duly elected (s. 14, Act 1872).

[See EDUCATION; Graham's edition of *Sellar's Education Manual.*]

Schoolmaster.—See TEACHER and EDUCATION.

Scienter—A term adopted from English pleading in actions of reparation for injuries caused by vicious animals. To keep such an animal after knowledge of its disposition has been obtained implies liability. See ANIMALS, LIABILITY FOR DAMAGE CAUSED BY.

Scots Money.—In the older Acts of Parliament, sums of money are expressed in *Money Scots*. The latter bears, approximately, the proportion of $\frac{1}{12}$ of sterling money of the same denomination.

A doyt or penny is	£0	0	$0\frac{1}{12}$
A bodle or twopence is	0	0	$0\frac{1}{6}$
A plack, or groat, or fourpence is	0	0	$0\frac{1}{3}$
A shilling or three placks is	0	0	1
A merk, or 13s. 4d. ($\frac{2}{3}$ of a pound) is	0	1	$1\frac{1}{3}$
A pound is	0	1	8

[See Tait's *Justice of Peace, h.t.*; Barclay's *Justice's Digest, voce* "Money Scots."]

Sea; Seashore.—By the common consent of nations the sea is now recognised as common to all the world and incapable of appropriation by any single nation or individual. The history of the origin and growth of this principle will be found in the leading works on international law (see Wheaton, Hall, Kent's *Com.*, etc.). It is sufficient to state here the result. Upon this open sea, commonly called the high seas, the ships of all nations have equal right to sail; and when States are at war, hostilities on the high seas between belligerents do not constitute an interference with the rights of neutrals. The high seas, as such, are subject to the jurisdiction of no nation; but, to prevent the consequences of anarchy, the ships which sail on them continue subject to the law and to the tribunals of the country to which they belong, *i.e.* to the law of the flag; and hence the importance of registration and the stringency of the rules regarding it. This jurisdiction of the tribunals of the country in which the ship is registered extends over civil and criminal matters, and over both the State's own subjects and foreigners on board—at least to the extent to which foreigners would be subject to the jurisdiction of the State if they were on its soil. Further, each State has the right to protect vessels registered as belonging to it from all interference on the high seas on the part of any other Power, except in three cases, viz.: (1) if the ship or those on board of her commit an act of hostility against a friendly State; (2) if, while there is a war between other nations, the ship commits a breach of neutrality, as by carrying contraband of war; or (3) if, before the ship had quitted the territorial waters of the foreign State on her present voyage, the law of that State was broken by the ship or someone on board her (Hall, *International Law*, 2nd ed., p. 229).

A ship while in the territorial waters of a foreign State may do with impunity an act sanctioned by the laws of that State, though obnoxious to the laws of her own State (*Dobree*, 2 Bing. N. C. 781). But if the act be continued after the ship has reached the high seas, the law of her own State at once reasserts itself. Thus the master of an English ship, having under a contract with the Chilian Government brought certain banished Chilian subjects over to England against their will, was convicted of false imprisonment, the offence being held to have commenced as soon as the ship quitted the Chilian waters (*Lesley*, Bell, C. C. 220).

By the Declaration of Paris, 1856, it is agreed that in time of war one belligerent Power may not seize goods belonging to the enemy (other than contraband of war) on board a neutral ship. And it is usual to restore to neutrals goods belonging to them carried on board a ship belonging to one of the belligerents which has been captured by the other (Hall, 638).

When a collision occurs on the high seas between two ships of different

nations, it is competent for the owners of either (or the passengers or cargo-owners) to take action against the other ship (*in rem*) wherever she may be found; and such action does not prevent the pursuers, if their claims are not paid in full by the amount recovered from the ship, from suing a further action against the owners of the ship which they allege to be in fault in the Courts of the country to which she belongs (*The Crathie*, [1897] P. 178). It was laid down in one of the articles of the Antwerp Congress of 1885, that in the case of a claim for damages for injury received on the high seas (as by collision) there must be a concurrence between the law of both parties, the person injured being entitled only to such damages as he would have been entitled to under the laws of his own country, and the person in fault being bound to pay no more than he would by the laws of his own country have been bound to pay. This rule was approved in the case of *Kendrick and Others* (25 R. 82, at p. 91). See SHIP.

The universally recognised exception to the exterritoriality of the sea is the principle that the territory of every maritime State extends so far seawards as is necessary for its defence and protection. This extension is held to include (1) the ports, harbours, bays, straits, mouths of rivers and adjacent parts of the sea enclosed by headlands belonging to the same State, all which is concisely expressed as all the water *inter fauces terræ*; and (2) the distance of a marine league (three marine miles) from low-water mark on the coast into the open sea, or so far as a cannon shot will reach from the shore (Wheaton, s. 177; Kent, *Com.* vol. i. p. 29). A marine league was fixed on as the measure of this distance at a time when that was regarded as synonymous with a cannon shot; that is to say, as far as the State could make its rule effective, and as far as was necessary for the security of the inhabitants of a neutral State in the event of a naval engagement being fought off its shores. Now that the range of modern artillery has so greatly increased, it is questioned whether a corresponding increase in the territorial jurisdiction should not be made; but the question will doubtless remain unsettled till the next European war.

The expression "the narrow seas" is frequently used to denote the sea within the territorial limits, including all the estuaries, bays, inlets, etc., *inter fauces terræ*; but as it is used with equal frequency to mean all the seas surrounding Britain (which in former times Britain claimed as her territory) the use of the expression is somewhat misleading (per Ld. Kyllachy in the *Ld. Advocate*, 19 R. 174). Within the three-mile limit and the seas and channels *inter fauces terræ*, the Crown's right is one of property, subject to the public rights of fishing and navigation. "There is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the shore" (per. Ld. Kyllachy, *ut supra.*) Accordingly, the Crown has a right to prevent dredgings being deposited in the sea and lochs *inter fauces terræ*, or any use being made of the water other than the recognised public uses, and that without alleging injury (*Ld. Advocate*, 19 R. 174). One undisputed effect of this extension of the territories of a State seaward is that no hostilities may take place in time of war within the territorial waters of a neutral State, and it follows that any prizes taken by belligerents from belligerents within the territorial waters of a neutral State must be restored (*The Twee Gebrœders*, 3 C. Rob. 162). The jurisdiction of the State over its own subjects within these waters has likewise never been disputed; but a question arose as to the jurisdiction over foreigners in foreign ships within these waters. In the Court for Crown Cases Reserved in England, it was decided by a bare majority that there was no jurisdiction to try a

foreigner for manslaughter committed on the sea within three miles of the English coast (*The Franconia*, L. R. 2 Exchequer Div. 63). This led to the passing of the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73). The speech of Ld. Chan. Cairns in introducing the Bill in the House of Lords on 14th Feb. 1878, reported in Hansard, 3rd Series, vol. 237, col. 1601, is most instructive as to the then existing state of the law. The leading clause of this Act (s. 2) provides: "An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board, or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly." The next section provides that no proceedings shall be taken against a foreigner without written consent certifying that it is expedient, by one of the Principal Secretaries of State if in the United Kingdom, or by the Governor if in any of Her Majesty's dominions outside the United Kingdom. The Act contains provisions regulating the procedure, etc. The "jurisdiction of the Admiral" was formerly exercised by the Court of Admiralty in Scotland. This Court was abolished and its civil jurisdiction transferred to the Court of Session and Sheriff Courts, and its criminal jurisdiction transferred to the High Court of Justiciary and Sheriff Courts, by 11 Geo. IV. and 1 Will. IV. c. 69, ss. 21 *et seq.* Exclusive jurisdiction to try and condemn prizes taken in war was vested in the High Court of Admiralty in England (now the Probate, Divorce, and Admiralty Division of the High Court of Justice) by 6 Geo. IV. c. 120, s. 57. See INTERNATIONAL LAW.

Coming now to municipal law, the rights which all subjects have in the territorial waters of Scotland are two,—navigation, which is shared by all the world, and fishing. In England it has been decided that anchoring is incident to navigation, and that the proprietor (lord of the manor) cannot charge an anchorage due unless he gives a *quid pro quo*. But he may claim for damage done by the anchor, as, *e.g.*, to an oyster bed (*Gann*, 11 H. L. C. 192). The point does not appear to have been raised in Scotland. The Government of the country is of course entitled, if not bound, to issue rules for the regulation of navigation within its waters. By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 418), "Her Majesty may, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, make regulations for the prevention of collisions at sea, and may thereby regulate the lights to be carried and exhibited, the fog-signals to be carried and used, and the steering and sailing rules to be observed by ships, and those regulations shall have effect as if enacted in this Act." The following subsection enacts that these regulations shall be observed by all foreign ships within British jurisdiction. See SHIP. The subject's right of fishing is limited to white fishing; the right of fishing for salmon and the right to oyster beds and mussel scalps being vested in the Crown and its grantees; oysters and mussels are considered as *partes soli*, and are therefore the property of the owner of the *solum* (per Ld. Neaves, *Ds. of Sutherland*, 6 M. at p. 213; *Lindsay*, 5 M. 864; *D. of Portland*, 11 S. 14; *Grant*, Mor. 12801). Herring fisheries are the subject of special legislation. The right to salmon fishings can only be obtained by an express grant from the Crown, or by prescriptive possession on a barony title *cum piscationibus*. See FISHINGS.

The minerals underlying the sea *inter fauces terræ* and within the three-mile limit belong to the Crown in absolute property (per Ld. Wellwood in *Cuninghame*, 22 R. 596; see also the awards of Sir John Patteson and Sir

John Coleridge in the reference between *Her Majesty* and *The Duke of Cornwall*, mentioned in *The Franconia* (*Reg.* v. *Keyn*), L. R. 2 Ex. Div. 63, at pp. 155 and 200; 21 & 22 Vict. c. 109, s. 2). The Crown may therefore convey these minerals to a subject either on lease or in property by a grant, which may take the form either of an express grant or of a Crown title, especially a barony title, not restricted by a fixed boundary but interpreted by prescriptive possession (*Wemyss' Trs.*, 24 R. 216; *Ld. Advocate and the Clyde Trs.*, 6 R. (H. L.) 72). Possession by open working of the submarine minerals *ex adverso* of one barony will not avail to explain the extent of an adjoining barony belonging to the same proprietor, although both baronies formerly were included in one united barony (*Wemyss' Trs., cit.*[1]). Further, the right to submarine minerals is excluded by a grant of lands adjoining the seashore with the privilege of working the minerals *infra fluxum maris*, that phrase being interpreted to mean the minerals beneath the foreshore, and therefore to have the restrictive effect of a bounding title (*Wemyss' Trs., cit.*[1]).

One who works submarine minerals under a lease from the Crown is barred by his acceptance of the lease from objecting to the entry in the valuation roll of the rent paid by him under the lease; and such entry is properly made in the valuation roll of the adjoining parish (*Cuninghame*, 22 R. 596).

The seashore, or, in more technical language, the foreshore, is the strip of land lying between high-water mark and low-water mark at the ordinary spring tides. This has in practice been adopted in Scotland as the extent of the foreshore, after some attempt to include the land covered by the equinoctial tides; but there is no authoritative Scotch decision (*Bowie*, 14 R. 649, per Ld. Trayner, Ordinary, at p. 661; *Dalrymple*, 13 R. (J. C.) 34; interlocutor in *Agnew*, 11 M. 309, at p. 311; *Nicol*, 22 D. 335, per Ld. J.-Cl. Inglis, at p. 342; *Officers of State*, 8 D. 711, at pp. 719 and 721; affd. 6 Bell's App. 487, at pp. 495–500). In England, on the other hand, the landward limit of the foreshore is settled as "the average of the medium tides in each quarter of a lunar revolution during the year" (*Chambers*, 4 De G., M. & G. 206). See Rankine on *Landownership*, p. 229; Stair, ii. 1. 5; Ersk. ii. 6. 17.

The public have certain inalienable rights to the foreshore, and of these the Crown is trustee and therefore the proper vindicator (*Agnew*, 11 M. 309; *Cameron*, 10 D. 446; *Officers of State*, 8 D. 711; affd. 6 Bell's App. 487; *Paterson*, 8 D. 752). But the Crown's right is not now regarded as exclusive of private pursuers (*Aiton*, 2 R. 470; affd. 3 R. (H. L.) 4). The Crown department formerly charged with the protection of these rights was the Commission of Woods and Forests, but is now the Board of Trade (29 & 30 Vict. c. 62, s. 7).

These public rights include all uses of the shore incident to navigation, such as anchoring or drawing boats up on shore (Stair, ii. 1. 5; Ersk. ii. 1. 6, and ii. 6. 17; Bell, *Prin.* s. 645), but not the right to take away sand for ballast (*Carswell*, 6 R. 60; see under SHIP and RIVER); all rights incident to fishing, such as landing, beaching boats, and drying nets (Stair, *loc. cit.*; see FISHINGS); and in practice the right of using the shore in connection with bathing, walking, and similar recreation. In regard, however, to the rights last mentioned, usually called *jus spatiandi*, there is no Scots decision of general application, as all the cases in which the rights of the public were sustained contained averments of immemorial usage, on which the

[1] The case of *Wemyss' Trs.* has been appealed to the House of Lords, who have not yet given judgment.

Courts preferred to found their decision (*Officers of State*, 8 D. 711; affd. 6 Bell's App. 487; *Magistrates of Dundee*, 14 R. 191).

Except for the purpose of navigation or fishing, the public have no right to remove anything from the seashore (*Pirie*, 11 R. 490; *Ld. Saltoun*, 20 D. 89; *Paterson*, 8 D. 752; *Macalister*, 15 S. 490; *Innes*, Hume, 552). Those employed in the white herring fishery may use any waste or uncultivated land lying within 100 yards of high-water mark for landing their stores, curing their fish, and drying their nets, and may erect huts or tents for these purposes (11 Geo. III. c. 31). Whether the land sought to be used in this way is "waste or uncultivated" is a question of fact, and very little is needed to withdraw it from that category (*Scott*, 15 R. 27). Similar rights were conferred on all those engaged in white fishing by 29 Geo. II. c. 23, but the right, except as regards herring fishers, was abolished by the Fisheries Act, 1868 (31 & 32 Vict. c. 45, s. 71).

The proprietor of an estate bounded by the sea may not derogate from the rights of the public by building on or enclosing the foreshore (*Officers of State*, 8 D. 711; affd. 6 Bell's App. 487; *D. of Roxburghe*, Mor. 10883). The prescriptive possession of the seashore as property was held to be sufficient to interpret a charter in the case of *Young*, 14 R. (H. L.) 53. In the opinion of Ld. Watson, who gave the leading judgment, there is a passage in apparent conflict with the rule just stated. He there quotes with approval a dictum of Ld. Glenlee in *Campbell*, 18 Nov. 1813, F. C.: "When a landholder is bounded by the sea, it is true he has a bounding charter. But it is a boundary moveable and fluctuating *suâ naturâ*, and when the sea recedes he must be entitled still to preserve it as his boundary. The shore is indeed still *publici juris*, but when the sea goes back the shore advances, and the proprietor is entitled to follow the water to the point to which it may naturally retire *or be artificially embanked*." In *Young's* case one of the incidents of possession on which he founded was the building of a retaining wall, whereby a large portion of the foreshore had been reclaimed. It is suggested that the cases may be reconciled on this principle, viz., that so long as the ground is *de facto* covered by water when the tide is in, the public may prevent any interference with their rights by building or otherwise: but that once the sea is efficiently excluded at all stages of the tide, the ground ceases to be shore and the time for the public's interference has passed. This explanation seems to have been in Ld. Neaves' mind when he said that no title of absolute property would entitle a proprietor "to exclude the public from the shore *so long as it remained a shore*" (*Hagart*, 9 M. 127; cf. the statements in *Officers of State*, 8 D. 711, particularly on p. 713: "*While the wall was being built*, the officers of State brought a process of suspension and interdict." The facts, however, turned out to be such that the judgment throws no light on this point).

If the proprietor of the foreshore builds a pier or harbour without the express sanction of the Crown, such pier may be used by the public without payment of any dues (*Earl of Stair*, 8 R. 183). On the other hand, if the Crown gives permission to the proprietor of the foreshore to erect a pier opposite his own property, such pier will be the property of its erector, and he may exact payments as a condition of allowing others to use it (*Colquhoun*, 21 D. 996). Usually the maximum dues which may be charged are inserted in the Crown's permission to erect the pier. An Act of Parliament empowering the navigation trustees of a certain tidal river to deepen the channel, obliged them *inter alia* to lengthen the privately owned piers in the river if their operations rendered it necessary. The House of Lords held

that this imported no obligation on the trustees to uphold and repair the altered piers thereafter (*Clyde Navigation Trs.*, 20 R. (H. L.) 64). The power conferred on Sheriffs by the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55, s. 11), of extending the boundaries of burghs within their sheriffdoms has been held to enable them to include within such extended boundaries the portion of a privately owned pier lying below low-water mark (*Dunoon Commrs.*, 22 R. 379). See PORTS AND HARBOURS and RIVER.

The public rights, of which the Crown is trustee, form part of the *regalia majora*, which are inalienable by the Crown (*Agnew*, 11 M. 309; see REGALIA). But the Crown has likewise a patrimonial interest in the foreshore as in the *solum* of the territorial waters (Stair, ii. 1. 5; Ersk. ii. 1. 6; Bell, *Prin.* 639); and this the Crown may convey to individual subjects by grant. In former times grants of the Crown's right to collect wreckage from the shore were frequently given to the seaboard proprietors, but in modern times this right is of little value. See REGALIA. The same may be said of the right to collect sea-ware for manuring lands and making kelp. This not being a use connected with navigation or fishing, the public have no right to exercise it. When the right is *de facto* exercised by the proprietor of the adjoining lands, the Courts will not put him to prove his title at the suit of anyone who does not set forth an *ex facie* good title in himself (*Piric*, 11 R. 490; *Ld. Saltoun*, 20 D. 89; *Paterson*, 8 D. 752).

The rights of fishing and of making piers and harbours have been already glanced at, and are dealt with more fully under FISHINGS and PORTS AND HARBOURS respectively. In *Bruce* (17 R. 1000) the Court negatived the existence of a right of heritors in Shetland to share in the value of a school of caaing whales stranded *ex adverso* of their lands and captured by the people of the district.

As to acquisition of property in the foreshore, three propositions were stated as settled law by Ld. Mure and indorsed by Ld. Blackburn (*Lord Advocate and the Clyde Trs.*, 6 R. (H. L.) p. 72, at pp. 75 and 84). "The first is that property in the foreshore is capable of being transferred by the Crown to a private proprietor. Secondly, that such property can only be alienated by the Crown subject to and under reservation of any rights of navigation or other rights which the Crown, as representing the public, may have over it. Thirdly, that a Crown title, and more especially a barony title, to property along the seashore or a tidal navigable river, when followed by possession of the foreshore, is sufficient to constitute a valid right of property in the foreshore although the title does not contain any express grant of the shore, or any such specific and definite boundary as is by itself sufficient to instruct that the shore was intended to be conveyed" (see also *Buchanan*, 9 R. 1218; *Agnew*, 11 M. 309). When, however, the title gives a boundary to the grant which excludes the shore (as, *e.g.*, "flood mark" or "sea flood," or *fluxum maris*, which are equivalent to "high-water mark"), no amount of possession will give the possessor a property in the foreshore (*Berry*, 3 D. 205). The sea itself being a fluctuating boundary, the proprietor is entitled to follow it to low-water mark (Ld. Watson in *Young*, 14 R. (H. L.) 53 *cit.*).

The possession founded on must in each case be exclusive possession, and it is competent to any party opposing a claim of this sort to prove adverse possession by the public. But the weight to be given to such evidence will vary with the importance, frequency, and publicity of the use proved (*Young, cit.*; *Buchanan & Geils*, 9 R. 1218; *M. of Ailsa*, 8 D. 752; *Macalister*, 15 S. 490).

Where a subject, having right to the foreshore, grants the land bounded

by the sea to another, the granter cannot thereafter interpose himself between his grantee and the sea; and consequently he cannot dispute his grantee's right to ground added to the original property *alluvione, i.e.* by gradual and imperceptible deposit on shore (*Magistrates of Montrose*, 13 R. 947; *Hunter*, 7 M. 899). As to boundaries, see *Laird*, 9 M. 699.

Unless in special circumstances, the right to the foreshore includes right to the minerals underneath; but there are no peculiarities making it necessary to treat the subject in this place. See MINES AND MINERALS.

Seal of Cause.—A seal of cause is the grant by the magistrates of certain royal burghs (who have this power as delegates from the Crown) constituting crafts or manufacturing corporations within burgh, and prescribing their privileges and powers.

[See Bell, *Dictionary, h.t.*; Bell, *Prin.* s. 2183; Ersk. i. 7. s. 64; *Crooks*, 1776, Mor. 2007; *Mowat*, 1827, 4 S. 52.] See INCORPORATION.

Seals.—In Scotland the use of seals is now wholly unnecessary in the execution of private deeds (M. Bell's *Lectures on Conveyancing*, 1. 30; Ersk. iii. 2. 7; and see Titles to Land Act, 1868, s. 78). The public seals in use are: (1) *The Great Seal*, having the same effect as the ancient Great Seal of Scotland; (2) *The Privy Seal*; (3) *The Quarter Seal*; and (4) *The Signet*.—[Ersk. ii. 5. 82; iii. 2. 7; Stair, iv. 42. 5; Mackay's *Practice*, i. 159.]

Seamen.—1. *Definition, etc.*—A seaman is defined in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 742), as including "every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship." There is no requirement that any seaman or any proportion of the crew of a British ship shall be British. Officers require to obtain certificates of competency, granted by Local Marine Boards after examination (M. S. A., 1894, ss. 92–104); and seamen may obtain the rating of A.B. after serving four years before the mast, or one year in a trading vessel in addition to three years in a decked fishing vessel registered under the Merchant Shipping Acts (M. S. A., 1894, s. 126). The masters and crews of two ships belonging to the same owners are not necessarily in common employment, so as to disentitle the master and crew of one to claim for damage due to the negligence of the master and crew of the other (*The Petrel*, [1893] P. 320); but the master and the crew of a ship are in common employment, and the seamen cannot recover for loss due to the negligence of the master (*Leddy*, 1873, 11 M. 304; *Hedley*, [1894] App. Ca. 222). Neither the Employers' Liability Act, 1880 (43 & 44 Vict. c. 12), nor the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), applies to seamen.

2. *Mercantile Marine Offices, etc.*—The Board of Trade is empowered by statute to establish Local Marine Boards throughout the kingdom (M. S. A., 1894, ss. 244–245); and there are Mercantile Marine Offices at the principal seaports, under the control of superintendents, whose duties are to keep registries for seamen, to facilitate their engagement and discharge, and provide means for securing their presence on board at the proper times (M. S. A., 1894, ss. 246–250). There is a General Register and Record Office of Seamen in London, at which a register of all persons who serve on ships under the Merchant Shipping Acts is kept; and obligations are

imposed on shipmasters, superintendents, and officers of customs to make returns, etc., to the Registrar-General (M. S. A., 1894, ss. 251–256).

3. *Hiring of Seamen.*—The engagement of seamen in the United Kingdom can only be done by the master, owner, or mate, or by a servant of the owner, or a superintendent, or by a person licensed by the Board of Trade (M. S. A., 1894, ss. 110–112); and this applies to hiring seamen for foreign as well as for British ships (*Hart*, 1898, 6 S. L. T. 250). The master is required, except in the case of ships of less than eighty tons registered tonnage exclusively employed in trading in the United Kingdom, to enter into an agreement in accordance with the Merchant Shipping Acts with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom (M. S. A., 1894, s. 113). This agreement must be in a form approved by the Board of Trade, and must be signed by the master before a seaman signs. It must state the nature and duration of the engagement, the number and description of the crew, the time at which each seaman is to be on board, the capacity in which he is to serve, his wages (and this word is defined in sec. 742 to include emoluments), a scale of provisions to be furnished to him, and any regulations as to conduct and punishment for misconduct. The nature of the engagement is not invalidly stated by making the voyage to one place or alternatively another, or for a voyage or alternatively for a period of time (*Frazer*, 1857, 2 C. B. N. S. 512), but it cannot be stated in indefinite terms, *e.g.* to any port or ports in Europe (M'Lachlan on *Shipping*, p. 221). A master of a ship registered at a port outside the United Kingdom may engage single seamen in the United Kingdom by them signing an agreement, already made with the crew, according to the law of the port where she is registered or where her crew was engaged (M. S. A., 1894, s. 114). Special provisions are made with respect to the agreement with the crew of a foreign-going ship, notably that which requires each seaman to sign in presence of a superintendent. If such an agreement be a running agreement, it is not to extend beyond the following 30th June or 31st December, or the first arrival of the ship at her port of destination in the United Kingdom after that date, or the discharge of her cargo thereafter (M. S. A., 1894, s. 115). And, similarly, special provisions are made with respect to agreements with crews of home-trade ships. In this case the agreement may be for service in two or more ships belonging to the same owner, and an agreement for such service may be made with the owner instead of with the master. Agreements are limited in time in the same way as running agreements in foreign-going ships, but an exception is admitted in the case of individual seamen engaged in forms sanctioned by the Board of Trade (M. S. A., 1894, s. 116). Regulations are also made for reporting changes in the crews of foreign-going ships, and for obtaining certificates as to agreements with crews of both foreign-going and home-trade ships (M. S. A., 1894, ss. 117–119). At the commencement of every voyage or engagement a copy of the agreement with the crew must be posted up in some part of the ship which is accessible to the crew (M. S. A., 1894, s. 120). When the master of a ship engages a seaman in any British possession abroad other than that in which the ship is registered, or at a port at which there is a British consular officer, the engagement must be before a superintendent or an officer of customs, and certain other modifications are made in the provisions with respect to the engagement of a crew (M. S. A., 1894, s. 124). In any legal or other proceeding a seaman may prove the contents of an agreement with the crew without producing it (M. S. A., 1894, s. 123), and a Court of law may rescind the con-

tract of service if it think it just to do so (M. S. A., 1894, s. 168). The signing of the agreement between master and seaman is not an essential in entering into the contract of service. That contract is made in any form, and may exist although the written agreement required by the statute to be made before proceeding to sea is never made (*Thomson*, 1890, 18 R. (J. C.) 3; *Austin*, 1868, L. R. 3 Q. B. 208).

4. *Wages.*—Wages may be made payable by the time or voyage, and may be stipulated to be paid in money at a certain rate, or, as is customary in the whale fishery, in a proportion of the profits. But the old rule that freight is the mother of wages, by which wages were held to depend on the earning of freight, has been abolished by statute (M. S. A., 1894, s. 157). If wages are agreed to be so much per month, they will vest at the end of each month, even although they may not be payable until the vessel has reached home (*Button*, 1869, L. R. 4 C. P. 330; and see M. S. A., 1894, s. 155). But when an agreement was made with a mate for so much for the voyage "provided he proceeds, continues, and does his duty in the said ship from hence to the port of Liverpool," and he died on the voyage, it was held that no part of the wages was due at all (*Cutter*, 1795, 2 Smith's *L. C.* 1, 3 R. R. 185, 6 T. R. 320). A seaman cannot abandon his right to wages in case of the loss of the ship, nor can he abandon any right to salvage (M. S. A., 1894, ss. 156, 212).

Every seaman is bound to exert himself to the utmost in the service of the ship, whether in the ordinary course of navigation or in exceptional peril. This obligation, already incumbent on the seaman, has prevented him enforcing a contract with the master, entered into during the voyage, for extra remuneration in consideration of extraordinary exertion (*Harris*, 1854, 3 El. & Bl. 559, 23 L. J. Q. B. 295). But this decision was based on the rule of English common law, whereby a mere promise without consideration is void. On the other hand, when a seaman voluntarily undertook, in consideration of special payment, to perform extra services which his duty did not already bind him to do, the agreement was held valid (*Hartley*, 1857, 26 L. J. Q. B. 322; *Hanson*, 1867, L. R. 3 C. P. 47). In all cases of wreck or loss of the ship it is provided by statute that proof that a seaman has not exerted himself to the utmost to save the ship, cargo, and stores shall bar his claim to wages (M. S. A., 1894, s. 157).

A seaman's wages may be lost or forfeited (Abbott on *Shipping*, 13th ed., p. 789). He may be deprived of his wages owing to no fault of his own, or he may forfeit them through misconduct. If a seaman is not able to perform his duties during part of the voyage, and if this inability is caused by accident on board the ship or by illness, he is nevertheless entitled to wages during the period of his inability (Abbott, 13th ed., p. 778). When the service of a seaman terminates prematurely owing to loss of the ship, or to his being left on shore abroad under a certificate of unfitness or inability to proceed, he is entitled to wages up to the time of such termination, but subsequent wages are lost (M. S. A., 1894, s. 158). In one case a jury found that a second mate had been guilty of drunkenness and abusive conduct subversive of discipline, but did not find to what extent and degree that misconduct prevailed, nor whether it was habitual or such as to endanger the safety or discipline of the ship. The Court held that this finding did not at common law cause a forfeiture of wages (see M. S. A., 1894, ss. 220, 702). The seaman in this case had been left on shore abroad, before the completion of the voyage, owing to his own negligence, and the Court held that although he lost all right to wages for the subsequent portion of the engagement, he had suffered no forfeiture under the special terms of his

agreement (*Button*, 1869, L. R. 4 C. P. 330). When an agreement for wages is terminated through no fault on the part of either contracting party,—*e.g.* a seaman was detained at a port by the British consul, who sent him home to be a witness at the trial of the captain for a criminal offence, and he was thus unable to continue to perform his part of the agreement,—there will be no forfeiture of wages previously earned, but there will be a loss of subsequent wages (*Melville*, 1855, 24 L. J. Q. B. 200). A seaman is not entitled to wages for any period during which he unlawfully refuses or neglects to work when required, or is imprisoned for an offence (M. S. A., 1894, s. 159), or is, by reason of illness caused by his own wilful act or default, incapable of performing his duty (M. S. A., 1894, s. 160). Among other penalties of desertion is forfeiture of wages earned at the time of desertion, and also, if the desertion takes place abroad, of the wages the deserter may earn in any other ship in which he may be employed until his next return to the United Kingdom (M. S. A., 1894, s. 221 (*a*)); and these are to be employed in reimbursing expenses caused by the desertion (M. S. A., 1894, s. 232; see *The Parkdale*, [1897] P. 53). Absence from the ship, however, due to the power of a foreign country is not desertion if there is no fault on the part of the seaman, and entering into the naval service of the Queen is not counted desertion (M. S. A., 1894, s. 195 (1)). Indeed, the Merchant Shipping Act, 1894, by sec. 195 (2), expressly forbids the introduction into any agreement of a stipulation whereby a seaman incurs a forfeiture or loss in case he enters the naval service of Her Majesty. To say whether abandonment of the ship is desertion is in many cases a difficult question. No complete definition can be given of the word: it is often a question of intention, not easily deducible from particular facts. "To constitute desertion in such a case as this," said Dr. Lushington in *The Westmorland* (1841, 1 W. Rob. 216), "there must be a complete abandonment of duty without justification on the part of the mariners, and such abandonment must, moreover, be by quitting the ship." And in another case he said: "If there be an absence from the vessel *animo revertendi*, whatever be its duration, it would not be a desertion forfeiting the whole of the wages" (*The Two Sisters*, 1843, 2 W. Rob. 125, at 138; cf. *Seward*, 1884, 12 R. 222). There is no desertion if the seaman leaves the ship on account of a breach of his agreement on the part of the master, *e.g.* a captain employed the ship in a manner inconsistent with the neutrality laws after having agreed with the seamen to go on a peaceable voyage (*Burton*, 1867, L. R. 2 Ex. 340; *O'Neil*, [1895] 2 Q. B. 418); or if he leaves the ship on account of the master's unreasonable and unnecessary cruelty to the seamen (*Prince Edward*, 1854, 24 L. J. Q. B. 9). A seaman agreed to serve on board a Japanese man-of-war for the voyage from England, where the ship had been built, to Japan. During the voyage war was declared between Japan and China. It was held that the seaman was justified, on account of the increased risk, in abandoning the ship when he became aware of the war, and was entitled to claim wages although they were agreed to be for the whole voyage. The failure in completing the voyage was due to fault on the part of the owners of the vessel (*O'Neil*, [1895] 2 Q. B. 418). Absence without leave not amounting to desertion, or not treated as such by the master, is punishable by forfeiture of part of the offender's wages (M. S. A., 1894, s. 221 (*b*)); and various offences against discipline, etc., are similarly punished (M. S. A., 1894, ss. 161, 225, 232 (3)). But these forfeitures do not exclude the common law right of the owners to set off against a claim for wages the amount of any damage suffered by them owing to the seaman's conduct (*Sharp*, 1884, 11 R. 745). When a seaman has contracted for wages

by the voyage or run, or in the form of a share of profits, the amount of any forfeiture incurred under the Act is a proportion of the whole sum agreed on, corresponding to the ratio which the period of forfeiture bears to the whole time spent on the voyage (M. S. A., 1894, s. 234). No forfeiture of wages follows acts of drunkenness or disorderly conduct as a general rule, but such conduct may be so gross and habitual as to incapacitate the offender from performing his duty, in which case he will forfeit his whole wages (*The M'Leod*, and cases there referred to, 1880, 5 P. D. 254). Provisions are made by statute with respect to the payment of wages (M. S. A., 1894, ss. 131–136, 139, 195–197), the settlement of disputes as to the amount thereof (M. S. A., 1894, ss. 137, 138), and any advance or allotment of wages (M. S. A., 1894, ss. 140–144). Certain privileges, such as freedom from arrestment, are conferred on seamen's wages (M. S. A., 1894, s. 163), and facilities are given for their recovery (M. S. A., 1894, ss. 164–166 *a*).

5. *Seamen's Lien.*—Every seaman has by the common law a lien over the ship and freight in security of his wages. And a similar lien is given by statute to the master (see SHIPMASTER). This lien secures not merely the remuneration stated in his agreement for services on the voyage, but wages for all services, whether rendered in port or at sea, and whether the seaman has entered into a written agreement with the master or serves under a verbal contract (*re The Great Eastern S. S. Co.*, 1885, 5 Asp. Mar. Law Cas. N. S. 511). And it has been held that a person who, with leave of the Court, advances money to pay the wages of the crew, has the same lien as the crew would have had for their wages (*The Fair Haven*, 1866, 1 A. & E. 67). It covers not only freight due from the shipper to the owner or charterer, but also freight due from a sub-charterer to a charterer (*The Andalina*, 1886, 12 P. D. 1). There was some doubt whether the law of maritime lien recognised in England applied to Scotland, but this has been set at rest by *Currie* ([1897] App. Ca. 97, 24 R. (H. L.) 1), in which it was decided that in maritime causes which exclusively belonged to the jurisdiction of the Admiralty Courts in Scotland and England the law applicable was neither English nor Scottish, but British law, and therefore one and the same code (see *S.S. "Blairmore" Co. Ld.*, [1898] App. Cas. 593). The exact nature of this right was described by Sir J. Jervis, C. J., in 1852, as follows:—

"A maritime lien does not include or require possession. The word is used in maritime law not in the strict legal sense in which we understand it in Courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the civil law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of the civil law, a maritime lien is well defined by Ld. Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only Court competent to enforce it" (*The Bold Buccleugh*, 1852, 7 Moore's P. C. Cas. 267, at 284).

It is not necessary to the constitution of a maritime lien that the person claiming it should have a personal claim against the owner of the thing covered by it (see BOTTOMRY). "Such a lien is a privileged claim upon a vessel in respect of service done to it, or injury caused by it, to be carried

into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property in the owner in the thing. The right must therefore in some way have been derived from the owner, either directly or through the acts of persons deriving their authority from the owners" (per Gorell Barnes, J., in *The Ripon City*, [1897] P. 226); and *The Edwin* (1864, B. & L. 281) is explained by Gorell Barnes, J. (*The Ripon City, supra*, at p. 236), in accordance with this statement. In that case the master of a ship, appointed by persons who had obtained fraudulent possession from the owners, was held entitled to enforce a lien for his wages and disbursements.

A maritime lien is not lost by private sale or transfer of the subjects covered by it to another owner. "It is not necessary," said Sir J. Jervis (*The Bold Buccleugh, supra*, at p. 285), "to say that the lien is indelible, and may not be lost by negligence or delay where the rights of other parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced into whosesoever possession the thing may come." All liens do not rank equally. A lien for damage, it is said, is preferred to one arising *ex contractu* (Abbott, 13th ed., 872). In the case of a foreign vessel it was held that a lien for damage by collision takes precedence of one for wages, whether these wages are earned before or after the collision; the reason being, that the mariners, although deprived of their full claim against the vessel, can nevertheless proceed against the owners personally (*The Elin*, 1882, 8 P. D. 39, 129). But the master's and seamen's lien for wages prevails over the possessory lien of a shipwright, for example, who has obtained possession of the ship to put work on it; the extent to which the seamen's lien is preferred being for wages earned before the shipwright obtained possession, together with subsistence thereafter and cost of returning home if they are abroad (*The Immacolata Concezione*, 1883, 9 P. D. 39; *The Gustaf*, 1862, 31 L. J. Ad. 207; as to the meaning of "home," see M. S. A., 1894, s. 186, and *Edwards*, [1897] 2 Q. B. 327; *Purvis*, 1898, 15 T. L. R. 15). The seaman, in virtue of his lien, has a priority over claims for towage and light dues (*The Andalina*, 1886, 12 P. D. 1); and a lien for wages is preferred to the rights of a mortgagee (*The Feronia*, 1867, L. R. 2 Ad. & Eccl. 65).

A maritime lien is extinguished by payment of the debt; and it has been held in England that release of arrestment, on bail or caution, releases the lien (*The Christiansborg*, 1885, 10 P. D. 141). Inordinate delay, which has led to prejudice by inducing persons to act on the belief that no lien existed, or at least that it had been waived, will also form a defence to its enforcement. But this is a question of circumstances in each case. In one case a collision in 1878 gave rise to a lien. The action against the ship was not brought until 1889, when it was pleaded that the right was extinguished by laches, neglect, and delay on the part of the plaintiffs; but this defence was repelled (*The Kong Magnus*, [1891] P. 223). In another case a lien arose early in 1880. No action was taken till November 1881; and meanwhile, in October 1881, the vessel had changed hands. But in the circumstances it was held that the right of lien had not been lost (*The Fairport*, 1882, 8 P. D. 48).

6. *Discharge of Seamen.*—A seaman serving in a British foreign-going ship must, if discharged in the United Kingdom, be discharged in presence of a superintendent (M. S. A., 1894, s. 127); and the statute provides for the granting of certificates to discharged seamen, and reports as to their character being made by the master (M. S. A., 1894, ss. 128–130, 186 (1)). Seamen

discharged otherwise than in terms of their agreement with the master are entitled to compensation (M. S. A., 1894, s. 162). When the discharge takes place abroad the master must also provide for the seamen's return home (M. S. A., 1894, s. 186); and "home" in this section means the port at which the seaman was shipped, or any other port in the United Kingdom agreed on by the seaman (*Edwards*, [1897] 2 Q. B. 327; *Purvis*, 1898, 15 T. L. R. 15). Conditions are also placed upon the master's power of leaving or discharging seamen abroad (M. S. A., 1894, ss. 187–189).

[Abbott on *Shipping*; Maude and Pollock on *Shipping*; M'Lachlan on *Shipping*; Kay on *Shipmasters and Seamen*.]

See SALVAGE; SEAWORTHINESS; SHIP.

Searches; Search for Incumbrances.

1. Definition and Purpose.
2. Duties of Agents in the Matter.
3. Official and Non-Official Searches.
4. The Registers Searched.
5. The Method of Searching.
6. The Period of Search.
7. Form of Memorandum for Search.
8. Miscellaneous Observations.
9. Incumbrances not disclosed by a Search.

I. Definition and Purpose.

A search may be defined, *primarily*, as an investigation of the Property and Personal Registers with a view to ascertaining the state of the title of a particular heritable property, and, *secondarily*, as a certificate or report of such an investigation, made by an official or a professional searcher of records, giving an abridged description in chronological order of all writs relating to the property in question, and of all entries affecting its successive proprietors, appearing in the Property and Personal Registers respectively within the period which the search embraces. The object of a search is to provide the intending purchaser or feuar of a property, or the intending lender on the security thereof, with satisfactory evidence that no undischarged incumbrances or diligences appear on record affecting the seller's, superior's, or borrower's title other than such, if any, as have been disclosed by the seller, superior, or borrower, and that no prior recorded rights are in existence by which the right which the intending purchaser, feuar, or lender proposes to acquire would be liable to be defeated.

II. Duties of Agents in the Matter.

In the absence of any conventional arrangement to the contrary, the seller of a heritable property (the word "seller" being taken, for the purpose of this article, to include also a superior feuing out his lands, or a proprietor borrowing on the security thereof, and the word "purchaser" to include also a feuar or lender) is bound to produce a prescriptive search showing the record to be clear within the period covered by it of all incumbrances affecting the property other than such, if any, as he may have himself disclosed; and it is the duty of the purchaser's agent to see that such a search is produced and is in order. Should the search reveal any undischarged incumbrances, the seller must purge the record of them, and the

price may be retained until this is done (*Dryburgh*, 24 R. 1; *Christie*, 25 R. 824; Bell, *Lect.*, 3rd ed., pp. 712, 1179; Menzies, *Lect.*, 3rd ed., pp. 886–7; Duff, *Feudal Conveyancing*, p. 186). On the other hand, should there be an agreement that the seller is not to furnish a search, this nevertheless does not relieve the purchaser's agent from responsibility in the matter; in such a case he should obtain a search at his client's expense, as a protective measure, or should only omit to do so on his client, after being fully informed of the risk involved, instructing him specifically, and preferably in writing, to dispense with a search. If in any transaction the agent omits to obtain a search without his client's express direction to that effect, he becomes liable to his client, on the ground of professional negligence, for any loss which may arise from an incumbrance being subsequently discovered to have existed at the time of the transaction which a search would have disclosed, even although his instructions extended only to the preparation of the conveyance in his client's favour, or the completion of his client's title (*Graham*, 9 S. 543; *Fea*, 24 S. L. R. 628; *Fearn*, 20 R. 352; *Cooper*, 21 L. J. N. S. Q B. 292; Elphinstone and Clark on *Searches*, p. 4). A stipulation that the seller is not to be bound to supply a search does not, of course, free him from his obligation to clear the record, but only frees him from the expense of supplying the search (*Christie*, *cit.*).

III. Official and Non-Official Searches.

There are two classes of searches, viz. (1) those prepared by official Government searchers and (2) those prepared by professional but non-official searchers. The official searchers, four in number, are salaried civil servants appointed under a Treasury Minute of 27th September 1853, and sec. 19 of the Land Registers (Scotland) Act, 1868; while the professional but non-official searchers are parties who have devoted themselves, independently, to the business of searching the records. The question has been raised, but has not been judicially decided, whether a purchaser can insist upon receiving a search made by the official searchers, Professor Bell's view being that he can so insist (*Lectures on Conveyancing*, 3rd. ed., p. 715). In a case, however, in which the seller had undertaken to deliver a "valid search" and had tendered one made by a well-known firm of non-official searchers, an opinion was given by eminent counsel that the seller had implemented his obligation, and a similar opinion was given in 1879 by the Right Hon. J. B. Balfour, then Lord Advocate (Millar and Bryce's *Handbook of Records*, p. 16). The non-official professional searchers are, as a matter of fact, largely employed, and it may be noted that they accept responsibility for the accuracy of the searches which they issue. The registers are, of course, under statute, "patent to the lieges," and may be searched by anyone on his own behalf on payment of the requisite fees; but in practice all searches are obtained either from the official or from the non-official searchers, whose experience renders them less likely to make oversights in carrying out the complicated and highly technical work of investigating the records. Official searches, in the absence of instructions to the contrary, are prepared, as regards the Property Registers, from an official compilation called the Search Sheet, so far as it exists, and by means of the Minutes and Indexes for periods not embraced by the Search Sheet, while non-official searches, on the other hand, are prepared from the Minutes and Indexes alone (Treasury Minutes of 6th August 1877 and 27th March 1881). The fees for inspection of the registers are regulated under sec. 25 of the Land Registers (Scotland) Act, 1868.

IV. The Registers Searched.

The following is a list of the registers available for the purpose of searching:—

A. The Property Registers.

I. *The Feudal Registers.*—(1) *The General Register of Sasines, etc.*, for the whole of Scotland, kept at Edinburgh, instituted by the Statute 1617, c. 16, after a previous attempt to institute a satisfactory register on somewhat different lines had failed. This register was terminated at 31st December 1868 under the Land Registers (Scotland) Act of that year.

(2) *The Particular Registers of Sasines, etc.*, for the various districts or shires of Scotland, kept at a town in each district or shire. These registers were instituted, along with the General Register, by the Statute 1617, c. 16. Under sec. 8 of the Land Registers (Scotland) Act, 1868, the 21 Particular Registers then in existence were brought to a close at various dates between 6th February 1869 and 31st December 1871. (See table appended to the article on Registration.) They all now lie in H.M. General Register House, Edinburgh.

(3) *The Current General Register of Sasines*, instituted by the Land Registers (Scotland) Act, 1868, and commencing on 1st January 1869. It comprises a separate division for each county, the stewartry of Kirkcudbright and the barony and regality of Glasgow as defined by the Statute 34 & 35 Vict. c. 68, forming each a separate registration county, and the counties of Orkney and Shetland, after the passing of the Registration of Certain Writs (Scotland) Act, 1891, having a division between them.

II. *The Current Burgh Registers of Sasines* for lands formerly held under the now abolished burgage tenure. These registers were instituted by the Act 1681, c. 11 (see also A. S., 22nd February 1681), and exist in 64 out of the 72 royal burghs in Scotland (the recently created royal burgh of Coatbridge not being included in this number); they are kept by the respective town clerks.

III. *The Current Register of Booking* for lands in Paisley held by this peculiar tenure, and kept by the town clerk of Paisley. The origin of this system is very obscure, but is said to be traceable to the period when the lands on which the town is built belonged to the ancient monastery of Paisley (see *Chalmers* v. *The Magistrates of Paisley*, 7 S. 718).

B. The Personal Registers.

I. *The Register of Abbreviates of Adjudications*, established by the Statute 1672, c. 19, superseding the previous Register of Apprisings or Comprisings (see 1661, c. 31). By sec. 17 of the Land Registers (Scotland) Act, 1868, this register was conjoined with the General Register of Inhibitions to form the current combined Register of Inhibitions and Adjudications.

II. *The Inhibition Registers*, established by the Statute 1581, c. 119 (see also 1597, cc. 268 and 269; 1600, c. 13; and 1672, c. 16, s. 32), viz:—

(1) *The General Register of Inhibitions and Interdictions*, kept at Edinburgh, for the whole of Scotland.

(2) *The Particular Registers of Inhibitions and Interdictions* for the

various counties of Scotland, kept at the respective county towns.

These registers ceased to form a separate system on 31st December 1868, when the Particular Registers were abolished, and the General Register was conjoined with the Register of Abbreviates of Adjudications to form

III. *The Current combined Register of Inhibitions and Adjudications*, commencing on 1st January 1869, in which are registrable all diligences, executions, and other writings formerly appropriate to the registers enumerated under I. and II.

The two following registers are also available:—

I. *The Current Register of Tailzies or Entails*, instituted by the Statute 1685, c. 22.

II. *The Register of Interruptions of Prescriptions*, established by the Statute 1696, c. 19, for the publication of all summonses and executions thereof which should be made use of for interruption of prescription of real rights, and all instruments of interruption. By sec. 15 of the Land Registers (Scotland) Act, 1868, this register was merged in the General Register of Sasines.

In addition to the registers themselves, there exist the following aids and materials at the disposal of the public for facilitating the prosecution of searches and ensuring their completeness:—

I. In the case of the Feudal Registers there are, for each county:—

(1) A printed Index of Persons from 1781 to date, containing the names of the granters and grantees of all recorded writs (see 1 & 2 Geo. IV. c. 38, s. 27; A. S., 10th July 1811, No. II.).

(2) A printed Index of Places from 1781 to 1830, and from 1871 to date, giving the names of the subjects affected by the recorded writs.

(3) A manuscript Minute Book of all writs recorded down to 31st December 1871 (see 1672, c. 16, s. 32; A. S., 15th July 1692; 1693, c. 14; A. S., 10th July 1811, No. II.).

(4) A printed Book of Abridgments from 1781 to 31st December 1871.

(5) A printed Minute Book from 1st January 1872 to date.

Note.—Prior to the passing of the Land Registers Act of 1868, the entries made in the MS. Minute Book differed from those in the printed Abridgment Book, which latter were prepared separately and gave rather fuller information than the Minutes. The Minutes, however, as now framed, answer all the purposes of the former Abridgments, and it is accordingly the Minute Book itself that is now printed. See the Land Registers Act of 1868, s. 9.

(6) A Presentment Book, in which is entered a short memorandum of every deed as it is handed in for registration.

II. In the case of the Burgh Registers, Minute Books are enjoined by statute to be kept (1681, c. 11; A. S., 10th July 1811, No. II.). Indexes exist for some of the registers.

III. In the case of the Personal Registers there are:—

(1) A manuscript Minute Book (see 1672, c. 16, s. 32; 1693, c. 14; A. S., 10th July 1811, Nos. III. and IV.).

(2) A corresponding manuscript Index from 1781 to date, only partly alphabetical.

(3) A printed Minute Book of the current combined Register of

Inhibitions and Adjudications from 1881 to date (see the Land Registers Act, 1868, s. 17), which is, however, of little practical use, as the "markings" which are used to indicate the recall, restriction, or discharge of diligences are only entered in the manuscript Minute Book. This is likely to be reformed shortly by the abolition of "markings" and the substitution of brief chronological minutes. There is also a corresponding printed Index.

The writs awaiting minuting and engrossment are also in all cases available for examination.

There is, further, a compilation, at the disposal of the official searchers only, known as the Search Sheet, with its relative Indexes of Persons and Places, which has been the subject of considerable controversy. It is an application to land transactions of the ledger system employed in ordinary business affairs; a separate folio is set apart for each separate estate, in which short entries are made of all writs affecting that estate as they are recorded in the Sasine Register, the object being to show at a glance the precise history and present position upon record of each estate, and thereby to facilitate searching. The entries made in the Search Sheet are not transcriptions of the Minutes, but are shorter memoranda. This system was first suggested in 1863, and experimentally introduced in 1871; it was extended to the whole Sasine Registers between 1874 and 1876. The Search Sheet is still more or less upon its trial, but the system is said to prove sufficiently satisfactory in its working, and to be capable of surmounting the obstacles which the peculiarities of Scots feudalism might seem to place in its way. A very full discussion of its merits and defects, as well as much other valuable information regarding the registers in general, is to be found in the Report of the Committee appointed by the Secretary for Scotland on 31st January 1896 to inquire into the present system of Land Registration in Scotland, issued as a Blue Book in March 1898. (See also, as to the practical working of the system of registration, the Report of the Commissioners on the Public Records, 1800–1819, and the Extract from the Report of the Departmental Committee appointed by the Treasury to inquire into the Register House Departments in Edinburgh relating to the system of Registration and Searching in the Register of Sasines; Parliamentary Papers, 1882.)

V. The Method of Searching.

A search is set about in ordinary practice, in the case of the Property Registers, by looking up in the first place the name of the last-registered proprietor of the subjects in question in the Index of Persons for the county in which the lands are situated; there the numbers of all entries relating to him which appear in the printed Abridgment or Minute Books are to be found. These numbers are next turned up, and those of the entries which affect the particular subjects in question are selected and transcribed into the certificate of search. The Index of Places may be employed, where it exists, as a guide and as a check in searching. The names of all the previous proprietors can be obtained from an examination of the Abridgment or Minute Books, and they are searched against in turn, so far as necessary, in similar fashion. The registers themselves, in which the deeds are recorded *ad longum*, are only referred to in very rare cases. The Presentment Book is of course down to date and ahead of the Minute Book, but it is not often referred to, owing to the brevity and incompleteness of the particulars given in it; nor are the writs awaiting minuting and engrossment gone over, except

in very special circumstances. The Minute Book is usually behind the Presentment Book by from ten days to six weeks, according to the number of writs presented, the greatest pressure being of course at the Whitsunday and Martinmas terms. Again, the annual printed Indexes of Persons are necessarily not published up to date; to obviate the inconvenience thence arising, the non-official searchers frame a current index for their own use from the printed Minutes as they are issued. It is expected, however, that access to the current manuscript Index compiled by the Register House officials will before long be granted to the public. The official searchers, in employing the Search Sheet, reach the appropriate folio by the aid of its Indexes of Persons and Places, and thence obtain references to the Minutes, which must be transcribed into the certificate of search.

In the case of the Personal Registers the method of searching is similar to that pursued in the case of the Property Registers: the parties to be searched against are looked up in the Indexes, and the corresponding entries in the Manuscript Minute Book transcribed.

VI. The Period of Search.

The period over which a prescriptive search must extend depends upon the laws of prescription applicable to the various classes of writs appearing in the different registers. As all the registers contain more than one class of writs, it is clear that the period of a prescriptive search in each register must be determined by that class of writs appearing in it whose term of prescription is the longest. A short examination of the writs recorded in the various registers, and of the laws of prescription respectively applicable to them, is accordingly necessary in order to the deduction of the form of a complete prescriptive search.

I. The Property Registers.—In these registers are recorded not only all property writs, such as feu-charters, dispositions, notarial instruments, and the like, but also writs constituting real burdens and incumbrances, such as bonds and dispositions in security, with relative deeds of restriction and discharge. The shortening by the Conveyancing Act of 1874 of the period of positive prescription has not had the effect of reducing the extent of a prescriptive search in these registers, for the reason that while it secures a party who has possessed an estate in land on an *ex facie* valid irredeemable recorded title for the space of twenty years (or, where minority or legal disability can be pleaded, thirty years), continually and together, peaceably and without lawful interruption, against eviction by any claimant founding on a prior right, yet it does not secure him against burdens and incumbrances affecting his property which date from any time within the last forty years, such incumbrances being still only cut down by the long negative prescription of forty years under the Statute 1617, c. 12 (*Brodie*, 11 R. 925). Thus if property writs alone appeared in the Sasine Registers, a twenty years' search in them would be sufficient, for such a search would disclose the whole prescriptive progress (unless, of course, it were necessary, as indeed it generally is, to go somewhat further back in order to reach the first writ forming the foundation of the prescriptive progress); but as incumbrances are also recorded in the Sasine Registers, and as it is precisely against these that a purchaser or lender chiefly desires to be safeguarded, it follows that the search in the Property Registers must extend back for forty years from the date at which the proposed transaction is to be closed.

II. The Personal Registers.—The view now generally accepted as to

the period over which a prescriptive search in the Personal Registers must extend is arrived at by combining the effect of the shortened positive prescription under the Conveyancing Act of 1874 with the rules of prescription applicable to the various diligences which appear in these registers. The writs there recorded are chiefly as follows :—

(1) In the now superseded General and Particular Registers of Inhibitions :—
  (*a*) Inhibitions proper, with Restrictions and Discharges thereof.
  (*b*) Interdictions and Discharges thereof.
  (*c*) Abbreviates of Petitions for Sequestration, with Deliverances thereon, Interlocutors recalling Sequestrations, Judgments declaring Sequestrations to be at an end, Abbreviates of Petitions by Trustees in sequestrations of estates of deceased persons whose successors have made up a title to their heritable estate, for transference of such estate, with Deliverances thereon, and Abbreviates of Bankrupts' Discharges.

(2) In the now superseded Register of Abbreviates of Adjudications :—
  (*a*) Abbreviates of Adjudications proper and Discharges thereof.
  (*b*) Abbreviates of the Confirmations of Trustees in Sequestrations, Abbreviates of Adjudications in favour of Trustees in Sequestrations, from successors who have made up a title to the heritable estate of a deceased person whose estates have been sequestrated, and Abbreviates of Bankrupts' Discharges.

(3) In the current combined Register of Inhibitions and Adjudications :—
  (*a*) All writs enumerated under (1) and (2).
  (*b*) Notices of Litigiosity, Discharges thereof, and Extract Decrees of Absolvitor.
  (*c*) Notices of Inhibitions
  (*d*) Memoranda of Renewals of Inhibitions.

The considerations to be noted, from the searcher's point of view, with regard to the diligences just enumerated may here be summarised.

I. *Inhibitions.*—Inhibitions used formerly to take effect not from the date of their registration, but from the date of their execution against the lieges by publication at the market cross of the head burgh of the jurisdiction of the debtor's domicile, or if the debtor were furth of Scotland, at the head burgh of his domicile, or at the market cross of Edinburgh and pier or shore of Leith (subsequently at the office of the Keeper of Edictal Citations). As registration did not require to follow on this publication till forty days thereafter, there was thus an interval of forty days during which an effective inhibition might be in existence without an intending purchaser of the subjects affected having any warning thereof from the record (*Cruickshanks*, 1676, Mor. 8393). The inconvenient but sole protection against this contingency (apart from a retention of the price for forty days) consisted in making a search in the Signet Office, through which all letters of inhibition pass,—such letters being the only form in which inhibitions were obtainable prior to 15th October 1868,—for a year and forty days prior to the close of the proposed transaction, seeing that the warrant to charge was good for a year, and the letters might not have been executed till close on the expiry of the year. All necessity for searching the Signet Office for inhibitions was done away with by sec. 155 of the Titles to Land Consolidation (Scotland) Act, 1868, which provides that no inhibition shall take effect except from the date of its registration, or from the date of the registration

of a notice thereof, provided the executed inhibition be itself recorded within twenty-one days thereafter.

Again, whereas formerly inhibitions affected *acquirenda* as well as *acquisita*, sec. 157 of the same Act provides that no inhibition shall affect *acquirenda* after the date of recording it or a notice thereof, unless the property were destined to the party inhibited under an indefeasible title at the date of recording the inhibition or notice thereof. In the general case it is thus unnecessary to search for inhibitions against a party prior to the date of his acquiring the subjects in question. Lastly, sec. 42 of the Conveyancing (Scotland) Act, 1874, enacted that all inhibitions should prescribe after the lapse of five years from the date of their taking effect, unless renewed within that period by registration of a minute of renewal. The result is that a search for inhibitions *alone* need not extend back for a longer period than five years prior to the date when the proposed transaction is to be closed, but this five years' search must be made against all the proprietors within the last twenty years, for inhibitions might still be extant and pleadable against such proprietors through having been renewed by minutes of renewal from time to time. (See Campbell on *Citation and Diligence*, pp. 297 *seq.*; Begg, *Conveyancing Code*, pp. 284 *seq.*, 387; Graham Stewart on *Diligence*, pp. 538–41, 574, 575.)

Interdictions.—In the case of interdictions, as in that of inhibitions, there might formerly be an interval of forty days between publication and registration, during which an intending purchaser could get no warning from the records of the existence of this impediment. Since 1st January 1869, however, interdictions are published by being registered in the Register of Inhibitions and Adjudications (the Land Registers Act, 1868, s. 16). Interdictions are not subject to the quinquennial prescription applicable to inhibitions, and a forty years' search for them is necessary. (See Bell, *Lectures*, pp. 140–2.)

Litigiosity.—Prior to 1st January 1869 no notice appeared on record of this serious barrier to a valid disposition. In the case of an action of adjudication, litigiosity affected the lands in question from the date of citation (*Creditors of Menzies*, 1682, Mor. 8376); in the case of an action of declarator or reduction, litigiosity probably arose from the date of calling the action in Court. In either case, during the whole course of such actions the lands affected were rendered litigious, and no indication of the dependence of the action was given on record. This unsatisfactory state of matters was brought to a close by sec. 159 of the Titles to Land Consolidation (Scotland) Act, 1868, which introduced the new form of a notice of litigiosity, and provided that such a notice must be registered, in the case of actions of reduction, in the Register of Inhibitions, and in the case of actions of adjudication, or adjudication and constitution combined, in the Register of Abbreviates of Adjudications, in order to render the lands in question litigious. The effect of this provision, together with that of sec. 155 of the same Act, which provides for the proper registration of inhibitions, is that, since 1st January 1869, litigiosity, whether arising from diligence or from action, can no longer affect lands without intimation thereof appearing on record. It has been questioned whether the quinquennial prescription is applicable to notices of litigiosity; the better opinion is that it is not applicable to them, and that such a notice can be cut down only by the running of the positive prescription (see Begg, *Conveyancing Code*, p. 387, marginal note).

Adjudications.—When lands have been adjudged, the decree of adjudication is made public by the recording within sixty days of an abbreviate

thereof in the Register of Abbreviates of Adjudications, or by the creditor taking infeftment on his decree. The litigiosity caused by the raising of an action of adjudication subsists for a reasonable time after decree in the creditor's favour, in order to protect him until his right is made public; but if the right is not made public within a reasonable time, the litigiosity expires, and the voluntary deeds of the debtor receive effect (Duff, *Feudal Conveyaneing*, p. 184; Graham Stewart on *Diligence*, p. 619). Under the old law a proposing purchaser had, of course, no warning of the existence of a valid but still unpublished decree of adjudication, any more than he had of the litigiosity occasioned by the raising of the action; but he is now protected by the registration of the notice of litigiosity, which indicates to him that an action of adjudication has been raised, and puts him on his inquiry as to its subsequent course. When not followed by possession, an adjudication, even although infeftment has been taken upon it, is extinguished by the long negative prescription (*Anderson*, 1788, Mor. 10676; Graham Stewart on *Diligence*, p. 631; see, however, *Mitchell's Trs.*, 1827, 6 S. 125).

Sequestration.—The first writ appearing on record in the process of a sequestration is the abbreviate of the petition for sequestration and deliverance thereon, which, when recorded, has the effect of an inhibition and citation in an adjudication of the estate of the debtor at the instance of the creditors afterwards ranked on the estate. This abbreviate must be presented for registration in the Register of Inhibitions before the expiration of the second lawful day after the first deliverance, if given by the Lord Ordinary, or presented or transmitted by post for registration before the expiration of the second lawful day after the first deliverance, if given by the Sheriff. Immediate warning of a sequestration is thus given on record to the lieges. If the abbreviate be not so recorded, it has no effect as an inhibition or citation. The abbreviate of the confirmation declaring the transference of the debtor's property to the trustee must be recorded in the Register of Adjudications within twenty-one days of its being granted. If an error be made through not recording an abbreviate of the petition or of the confirmation timeously, the Court may, on petition, authorise subsequent registration, but such warrant is only granted *periculo petentis* and reserving the rights of third parties (see Goudy on *Bankruptcy*, 2nd ed., p. 157). A sequestration will subsist for forty years, unless it be recalled or the bankrupt be discharged before the expiry of that time.

It will have been observed from the foregoing observations, that in each of the Personal Registers there are writs recorded which are only elided by the long negative prescription of forty years; it thus follows that the search in the Personal Registers must begin at a date forty years prior to the date of closing the proposed transaction. But the effect of the shortening to twenty years of the period of positive prescription by the Conveyancing Act of 1874 is to render it unnecessary to search against any proprietor of earlier date than the proprietor who held the subjects twenty years ago. In other words, it is unnecessary to search against any proprietor of earlier date than the proprietor with whom the prescriptive progress begins. The reason of this is that any action founded on a still unprescribed diligence affecting any earlier proprietor would be sufficiently met by the production of a twenty years' prescriptive title and proof of the necessary possession following thereon; while, on the other hand, the production of an unprescribed diligence affecting any of the proprietors *within* the prescriptive period would be effectual to cut down the title. The result is that it is sufficient to search in the Personal Registers against all the proprietors who

have held the subjects during the last twenty years, beginning the search against each of such proprietors at a date forty years prior to the date of the closing of the proposed transaction, and terminating the search against each at the date on which he was divested in favour of his successor in the title. Of course, if any such proprietor was born less than forty years ago, the search against him should only be from the date of his birth.

A record of sequestration proceedings prior to 1st January 1869 will, if the proceedings have been duly carried through, appear both in the old Register of Abbreviates of Adjudications and in the old Register of Inhibitions. It has accordingly been the practice with some conveyancers to search for such sequestrations only in the old Register of Inhibitions, in which appeared the first writ recorded in the proceedings. If this course be adopted, there only remain adjudications proper to be searched for in the old Register of Abbreviates of Adjudications. But an adjudication has no effect unless brought against a proprietor during the period of his proprietorship, and it is unnecessary to search for adjudications against any proprietor before the date of his acquisition of the subjects. Thus, as only proprietors during the last twenty years have to be searched against, and as the old Register of Abbreviates of Adjudications was abolished in 1868, now more than twenty years ago, it is now unnecessary, if the course supposed be adopted, to search that register at all, unless the date of the infeftment of the proprietor with whom the prescriptive progress begins be prior to 1st January 1869. The Form of Memorandum of Search given below can be altered so as to give effect to this view if desired, by omitting the direction to search the Register of Abbreviates of Adjudications from the first part of the personal search.

VII. Form of Memorandum for Search.

In all cases the agent furnishes the searcher with instructions as to the search which is to be made. These instructions are framed from the titles or inventory of writs, and are embodied in what is termed a memorandum for search. An outline form of such a memorandum, based on the foregoing considerations, is here given.

Assume the transaction to be a sale of feudal subjects by A. B. to C. D., to be settled at Martinmas 1898; the memorandum will run as follows:—

Memorandum for Search for Incumbrances affecting

All and Whole [*describe the lands fully, taking description preferably from original charter, and carefully noting any alterations in the description occurring in the progress*].

Search—

I. The Particular Register of Sasines, etc., for (the district or shire in which the lands are situated).

II. The General Register of Sasines, etc., from 11th November 1858 to close of registers.

Search—

The Division of the General Register of Sasines applicable to (the county in which the lands are situated), from 1st January 1869 to 11th November 1898 (*or*, and better, to show that no prejudicial writ has been recorded between settlement and registration of the disposition to *C. D.*) to date of certificate (*i.e.* as far as the printed Minute Book has been brought down when the searcher issues his search), to include disposition to *C. D.*

Search—

I. The Register of Abbreviates of Adjudications,

II. The Particular Register of Inhibitions for (the county in which the lands are situated),

III. The General Register of Inhibitions,

against (*take in list of successive proprietors during last twenty years, noting any*

alterations in their names or designations in the course of the progress) from 11th November 1858 to close of registers.

Search—

The Register of Inhibitions and Adjudications from 1st January 1869 against (*take in successively each proprietor during the last twenty years*), to (*in each case the respective date at which he was divested in favour of his successor*).

VIII. Miscellaneous Observations.

1. *The Particular and General Registers.*—The necessity for searching both the Particular Register of Sasines, etc., for the district or shire in which the lands are situated and the General Register of Sasines, etc., arises from the fact that writs might be recorded alternatively and with equal validity in either. Similarly with the Particular and General Registers of Inhibitions; but although when it was elected to record an inhibition in the Particular Register it was essential, in order to its being effectual, that it should be registered in both the Particular Register for the shire in which the proprietor dwelt and made his residence and the Particular Register for the shire in which the lands lay, should these be different, yet it is not necessary in such cases to search both Particular Registers, seeing that a search in one will disclose the existence of any effectual inhibition. Inhibitions registered in a Particular Register only affected heritable property within the shire to which that Particular Register was applicable.

2. *Future Simplification of Form of Search.*—From and after 1st January 1909 the form given above will be considerably simplified, as a personal search will then fall to be made only in the current combined Register of Inhibitions and Adjudications, which will by that time have been forty years in existence, and by 1st January 1912 no property search will require to be made in any register save the current Divisional Register, the last Particular Register having come to a close on 31st December 1871.

3. *Burgage and Booking.*—The Burgh Registers are in general searched by the town clerks who have charge of them, and a search for forty years is usually made. The town clerks are, however, under no obligation to act as searchers, and in some cases refuse to undertake the work, which must then be done by the party himself or his agent. The search for personal diligences affecting proprietors of burgage subjects is made in the same registers as are searched for diligences affecting feudal proprietors. The same remarks apply to the Register of Booking in Paisley, searches in which are undertaken by the town clerk. Owing to the diversity of practice which has prevailed in the matter of the recording of feu-rights of burgage subjects, and of deeds transmitting such rights, and to the ambiguity of the provision on the subject contained in sec. 25 of the Conveyancing Act of 1874, the most prudent course in all transactions relating to burgage subjects is to search against them both in the Burgh Register and in the Feudal Registers. See article Burgage, in which this subject is fully discussed.

4. *Leases.*—With regard to searches against leasehold property, the title to which has been registered under the Registration of Leases (Scotland) Act, 1857, it is safer not to trust to the direction in sec. 1 of that Act having been observed, viz., that assignations, assignations in security, and translations should be recorded in the same register as that in which the original lease appears; and it is accordingly advisable to search both in the old Particular Register and in the old General Register, no matter in which of the two the original lease may have been recorded.

5. *No Title recorded within Forty Years.*—When a search extending over forty years in the Sasine Registers discloses no property writ relating to the

lands in question, there having been no registered transmission of the subjects during that time, the search must of course be extended back until the last recorded title is reached, which forms the foundation of the prescriptive right.

6. *Continuation of Search.*—Where a search against the subjects is already in existence but requires to be brought down to date, it is returned to the searcher with instructions for its continuation embodied in a memorandum for continuation of search similar in form to the original memorandum given above.

7. *New Feu.*—In the case of a new estate which has been constituted by the giving off of a feu at any date within the last forty years, the practice is to search against the new estate for the period from the date of its constitution, and to borrow the superiority searches for the balance of the forty years.

8. *Lands lying in more than one County.*—Writs relating to lands lying in more than one district or shire used formerly to be recorded either in the General Register of Sasines, etc., or in each of the appropriate Particular Registers, and in the case of such lands search falls to be made in all these registers. Since the passing of the Land Registers (Scotland) Act, 1868, writs relating to such lands are recorded at length in the division of the General Register of Sasines applicable to one of the appropriate counties and by memorandum in the other appropriate divisions; search should be made in the divisions applicable to all the different counties in which the lands are situated. A similar remark applies to the case of inhibitions prior to 1st January 1869, which should be searched for in the Particular Registers of Inhibitions applicable to each of the counties in which the lands lie.

9. *Alteration of County Boundaries.* — The Boundary Commissioners appointed under the Local Government (Scotland) Act, 1889, have very considerably altered the boundaries of the parishes and counties in Scotland, and this must be kept carefully in view in ordering searches. (See a convenient summary of the Orders of the Boundary Commissioners in the Parliament House Book.) By the Registration of Certain Writs (Scotland) Act, 1891, it is provided that the orders of the Commissioners shall, for the purpose of regulating the registration of writs in the appropriate divisions of the General Register of Sasines, and for that purpose only, come into operation on, but not before, 15th May 1892. In the case of lands which have, by the Commissioners' orders, been transferred from one county to another, it is accordingly necessary to search in the register of the former county down to 15th May 1892, and in the register of the latter county since that date. The keeper of the General Register has recommended that, to ensure accurate and valid registration, titles dealing with subjects affected by the new boundaries should contain a reference to both the former and the present county, thus:—"formerly in the county of A., and now in the county of B.," and it would be well that any parochial alterations should also be noted. (See Hay Shennan's *Boundaries of Counties and Parishes in Scotland*, Introduction, pp. xxxv–vi). Reference is made to the Act 34 & 35 Vict. c. 68, defining the boundaries of the barony and regality of Glasgow and the counties of Renfrew and Lanark, to the Inverness and Elgin Boundaries Act (33 & 34 Vict. c. 16), and to the Act 30 & 31 Vict. c. 85, declaring the whole burgh of Galashiels to form part of the county of Selkirk, which should be had in mind when searches applicable to these particular districts are ordered.

10. *Trustees.*—Trustees are of course only searched against from the date

of their assuming office. In the case of a trustee in a sequestration, the search should commence against him from the date of his act and warrant, and in the case of a trustee under a voluntary trust deed for behoof of creditors, from the date thereof; in the case of trustees under a *mortis causa* trust, the date of the commencement of the trust is not always readily ascertainable, and a convenient practice is to search against such trustees from the date of the registration of the trust disposition and settlement under which they act. From the practical point of view of the searcher, however, it is not of consequence when the search against the bankrupt or trustee is made to terminate and the search against the trustees to commence, for the reason that trustees are always indexed and searched against under the constituent's name, and the continuity of the search is thus ensured. The individual trustees need not be named in the memorandum for search; it is sufficient to instruct a search against 'the trustees of X." In the case of trustees in sequestrations or under voluntary trust deeds, the search against the bankrupt should be continued until the trustee makes up and registers his title or sells the subjects. This is a particular instance of the rule that a party should be searched against so long as he remains upon record as the last registered proprietor.

11. *Liferenters.*—A liferenter need not be searched against unless he has a power of disposal or a power to burden.

12. *Married Women.*—A married woman must of course be searched against under her maiden name prior to her marriage, and under her married name thereafter. Where there is a disposition *inter vivos* by a married woman, her husband, unless his right of administration has been excluded, will be a consenter to the deed, and ought also to be searched against.

13. *Pupils and Minors.*—In the case of a disposition of subjects belonging to a pupil, both he and his tutors will be searched against, although he himself is legally incapable of granting any deed; minors without curators will be themselves searched against, while in the case of minors with curators, search will be made against both the minor and his curators, whose consent is required to his deeds.

14. *Consenters.*—When any writ in the progress is granted by the disponer with the consent of some other party, the consenter should in general be searched against as fully as the principal disponer, for the deed may be invalid through the consenter not being in a position to give a valid consent; and further, it may turn out that the consenter was in reality the true *dominus*, and his consent to the conveyance the really operative part of the deed.

15. *Bondholders.*—A full search must of course be made against a bondholder selling under his bond. But it is not necessary to search against the creditors in any discharged bonds which may be among the titles. The doubt which formerly existed on this subject was set at rest by the Act of Sederunt of 19th February 1680, which required the inhibiter of the creditor in a bond and disposition in security to make notarial intimation of the inhibition to the debtor if he desired to prevent the creditor from discharging the bond and disencumbering the subjects on payment by the debtor of the amount contained in the bond. An inhibition used against the creditor in a bond and disposition in security does not preclude him from demanding payment of the debt, and, on receiving payment, from granting an assignation of the bond in favour of a third party at the request of the debtor; thus a search against the assigner of a bond and disposition in security is in such circumstances unnecessary

for the protection of the assignee. It might be different if the creditor went into the market and assigned his security to an independent purchaser, and a search against him would in this case be prudent. (See *Mackintosh's Trs.*, 25 R. 554, in which case the provisions of the Act of Sederunt of 19th February 1680 were discussed.)

16. Ex facie *Absolute Disposition.*—Where a disposition of lands *ex facie* absolute but really in security has been granted and registered, with or without a back-letter, and where the subjects have been subsequently either reconveyed to the original proprietor or disponed to a third party by the *ex facie* absolute disponee with consent of the original proprietor, or by the latter with the former's consent, search should be made throughout the period of the *ex facie* absolute disponee's tenure against both the original proprietor, in whom the radical right remained, and the *ex facie* absolute disponee; for although the original proprietor, after the registration of the *ex facie* absolute disposition, ceases to be the feudal proprietor and has only a personal right to have the subjects reconveyed to him on repayment of the advances which he has received, still a purchaser of the subjects, either from the original proprietor with consent of the *ex facie* absolute disponee or from the latter with consent of the former, would, it appears, be entitled to have the record cleared of any incumbrances affecting the original proprietor, even after he had granted the *ex facie* absolute disposition. (See *Dryburgh*, 24 R. 1, in which case the Lord Ordinary (Kincairney) expressed the opinion that an inhibition might affect a heritable right in the person of one who did not hold it by feudalised title.)

17. *Entails.*—There is no prescriptive limit to the period over which a search in the Register of Entails should extend; and if there is reason to suspect the existence of an entail affecting the lands in question, the search should be carried back so as to cover the date when the suspected entail is thought to have been constituted.

18. *Interruptions of Prescription.*—No interruption of prescription, whether by summons or instrument, is pleadable against a singular successor unless recorded within sixty days (formerly in the Register of Interruptions of Prescription, now) in the General Register of Sasines; and if the interruption be *viâ facti*, an instrument must be taken upon it and recorded as above in order to be effectual against third parties. Interruption by citation requires renewal every seven years unless followed by an action (see 1669, c. 10, and 1696, c. 19). The now abolished register for recording writs interrupting prescription is a very small one, and searches are seldom, if ever, made in it. Seeing that it is now more than twenty years since the register was merged in the Register of Sasines, on 1st January 1869, it would not appear to be any longer necessary to search it at all, the ordinary search in the Register of Sasines providing a sufficient protection against such writs.

IX. Incumbrances not disclosed by a Prescriptive Search.

The security against the existence of burdens and prior rights afforded to a purchaser by the production of a prescriptive search is by no means absolute. It is obvious that it can give no higher protection than is afforded by the records themselves and by the laws of prescription on which it proceeds. Thus it is no security against, *first*, burdens which do not or need not enter the record at all; and, *second*, burdens which, although registered, are for some reason outside the operation of the ordinary rules

of prescription. Again, there are burdens which, while they appear in the body of the property writs, and so enter the register in which these writs are recorded *ad longum*, are yet not disclosed by a certificate of search: such burdens, for example, as feu-duties, real burdens constituted incidentally in dispositions or other writs, building restrictions, etc., against which a careful examination of the title deeds and full inquiry of the seller's agent are the best safeguards. Where a party, in disponing a portion of his lands, creates by the disposition burdens or restrictions over the lands which he retains in favour of the lands which he has disponed, a search against the retained lands will not reveal the existence of these burdens or restrictions affecting them. It is a question, however, whether real burdens can be effectually imposed in this manner (see *Morier*, 1895, 23 R. 67, and *Muirhead*, 1893, 10 S. L. Rev. 164).

The following burdens do not or need not enter the record at all, viz:—

1. *Terce and Courtesy*, which being measured by the infeftment of the husband or wife respectively at the date of his or her death, constitute burdens exigible as against a purchaser of the husband's or wife's lands who has not taken infeftment before the dissolution of the marriage.

2. *Servitudes*, both positive and negative, may be effectual against a singular successor without appearing on record, either in the form of a separate writ or in the titles of either the dominant or the servient tenement. See article SERVITUDES.

3. *Leases.*—No warning is given by a search of the existence of leases, with the burdens which may be imposed by them, except in the case of leases recorded under the Registration of Leases (Scotland) Act, 1857 (20 & 21 Vict. c. 26).

4. *Succession Duty.*—The duty imposed by the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), is declared by sec. 42 of the Act to be a first charge on the interest of the successor, and of all persons claiming in his right, in all the real property in respect whereof such duty shall be assessed, and is given a priority over all charges and interests created by the successor. The liability of a purchaser for valuable consideration or a bondholder is limited, however, in its duration by secs. 12–14 of the Customs and Inland Revenue Act, 1889 (52 Vict. c. 7), to a period of six or twelve years, as the case may be, to be computed as directed by that Act.

5. *Estate Duty.*—The Finance Act, 1894 (57 & 58 Vict. c. 30), provides by sec. 8 (4) that every person in whom heritable property is vested by alienation or other derivative title shall be accountable for the estate duty thereon where the property has passed on the death of its proprietor after 1st August 1894. This provision is qualified, however, by the declaration in sec. 8 (18) that nothing in sec. 8 shall render liable to or accountable for duty a *bonâ fide* purchaser for valuable consideration without notice; and by sec. 9 (1), which declares that property shall not be chargeable, as against a *bonâ fide* purchaser thereof for valuable consideration without notice, with the estate duty which is otherwise to be a first charge on the property in respect of which duty is leviable. The limitation of liability introduced in the case of succession duty by secs. 12–14 of the Customs and Inland Revenue Act, 1889, is also made applicable to estate duty by sec. 8 (2) of the Finance Act, 1894. A certificate granted by the Commissioners under sec. 9 (2) of the estate duty paid in respect of the property is by sec. 9 (3) declared to be conclusive evidence that the amount of duty named therein is a first charge on the lands or other subjects of property. Sec. 9 (6) entitles a limited owner who has paid estate duty on a property out of his

own money to the same charge on the lands as if he had raised the estate duty by means of a mortgage, and an entirely novel burden may apparently be constituted in this manner; but such a person will in general, it is thought, raise the money by an ordinary bond and disposition in security (see *Lauric*, 1898, 25 R. 636). Provision is made by sec. 11 for the granting by the Commissioners of certificates of discharge of estate duty.

6. *Claims of Ancestor's Creditors.*—The Statute 1661, c. 24, gives a preference to a deceased's creditors over his heritage entitling them to reduce a conveyance, even although for onerous consideration, granted by the heir to their prejudice within a year of his ancestor's death; and has been held to give the ancestor's creditors who have done diligence within three years the right to defeat a conveyance by the heir to one of his own general creditors (see *Bellenden*, 1685, 2 Br. Sup. 93, and *McAlpine*, 1885, 12 R. 604).

7. *Conjunction and Confidence.*—Deeds granted gratuitously by a party, to the prejudice of his creditors, in favour of persons standing in the relation of conjunction and confidence to the disponer are reducible by the disponer's creditors under the Statute 1621, c. 18; but they cannot follow the lands when they have passed onerously to a *bonâ fide* third party, unless perhaps the title show *ex facie* the gratuitous character of the conveyance and the relationship of the parties, so as to put the third party on his inquiry.

8. *Forgery.*—This ground of challenge is pleadable, even against an onerous *bonâ fide* third party, under the Statute 1617, c. 12; but not fraud (*Forsyth*, 1863, 1 M. 1054).

9. *Minority and* Non valens agere cum effectu.—The running of prescription is suspended as against persons under these disabilities during the periods for which they are affected by them; but the provision in the Conveyancing Act of 1874, that a thirty years' prescriptive title shall exclude all claims for deductions under these heads, greatly reduces the risk of such objections being taken.

10. *Jedge and Warrant.*—Where the Dean of Guild has granted authority, known as a jedge and warrant, to a party having interest in subjects within burgh, either as a part proprietor thereof, or as a proprietor with an imperfect title, or as a heritable creditor in possession, to have such subjects repaired on account of the ruinous condition into which they have fallen, the expenses so incurred are declared by the Dean of Guild to be a preferable burden on the tenement, and the recording of his decree in the Dean of Guild Court Books is held to be legal notice thereof. A search in the Dean of Guild Court Books would accordingly reveal the existence of such a burden, but the risk is so small as to be negligible, especially as this procedure by jedge and warrant is now practically obsolete, having been superseded by the provisions of the Burgh Police Act, 1892, and of the special Police Acts applicable to various burghs. [Irons' *Law and Practice of the Dean of Guild Court*, pp. 314 *seq.*; Miller's *Edinburgh Dean of Guild Court*, pp. 35–7].

11. *Real Warrandice.*—Real warrandice rights are not redeemable, and prescription on an infeftment in real warrandice only runs from the date when eviction from the principal subject has taken place. This burden is "worked off by the operation of the positive prescription in fortifying the title to the principal subject" (Duff, *Feudal Conveyancing*, p. 91; *Durham's Trs.*, 1800, Mor. 16641).

12. *Deathbed.*—Challenge or reduction of deeds, instruments, or writings *ex capite lecti* was abolished in 1871 by the Act 34 & 35 Vict. c. 81, in the case of all persons dying after the passing of that Act.

The following, though they enter the record, will not be disclosed by a forty years' search, viz:—

1. Heritable securities registered more than forty years ago, but kept up within the period of the long negative prescription by the payment of interest or partial payment of the principal sum. This is a case in which prescription may be interrupted without any indication of the interruption appearing on record.

2. Infeftment on a decree of adjudication more than forty years ago, followed by possession for forty years after the expiry of the legal, gives the adjudger an absolute right of property.

[*General Authorities.*—Duff, *Feudal Conveyancing*, pp. 180 *seq.*; Bell, *Lectures on Conveyancing*, 3rd ed., pp. 712 *seq.*; Bell on *Titles*, 2nd ed., chap. v.; *The Juridical Styles*, vol. i., 5th ed., pp. 489, 490; Menzies, *Conveyancing*, 3rd ed., pp. 885–888; Hendry, *Manual of Conveyancing*, 4th ed., pp. 330–332; Millar and Bryce, *Handbook of Records*, Edinburgh, 1885; Report of Committee appointed by Secretary for Scotland to inquire into the present system of Land Registration in Scotland, issued as a Blue Book in March 1898; also the Report of the Commissioners on the Public Records, 1800–1819, and Report of Register House Committee, 1882; Elphinstone and Clark on *Searches*. See article REGISTRATION.]

Search-Warrant.—A search-warrant is the authority granted by a competent magistrate to officers of law to break open and search the places mentioned in the warrant in order to recover the articles or documents specified in the warrant. Authority to search is usually asked when the warrant to arrest is applied for, and, if granted then, is embodied in the warrant to arrest. It is competent, however, to crave and to receive a special search-warrant. It is essential that a search-warrant should specify the places which it is proposed to search, and the articles whose seizure is desired. A warrant to "break or force open all shut and lockfast places" was held to be illegal (*Webster*, 1857, 2 Irv. 596). It is competent to grant a search-warrant to examine the repositories of a person charged with a crime for articles or documents tending to establish his guilt of the charge. If documents are recovered under this warrant and used at the trial, the prosecutor is not bound to produce the search-warrant nor to prove the manner in which the documents were recovered (*Porteous*, 1867, 5 Irv. 456). It was held to be illegal to grant a search-warrant to search the repositories of persons who had not been charged with a crime "for written documents, and all other articles tending to establish guilt or participation in said crimes," for these reasons: (1) that no charge had been made against the persons whose repositories were proposed to be searched; (2) that no limitation of kind or quantity was placed upon the documents proposed to be recovered; (3) that the result of such a search under such a warrant would be that ordinary sheriff-officers and their assistants would seize and examine the whole papers of the persons whose repositories were ordered to be searched for the purpose of finding traces or proofs of guilt either against the owners and possessors of the papers, or against some other person or persons (*Bell*, 1865, 5 Irv. 57).

The Prevention of Crime Act (34 & 35 Vict. c. 112) provides (s. 16) that any chief officer of police may give authority to search for stolen property, when the premises to be searched (1) are or have been within the preceding twelve months in the occupation of any person who has been convicted of reset or of harbouring thieves, or (2) are in the occupation of

any person who has been convicted of any offence involving fraud or dishonesty, and punishable by penal servitude or imprisonment; and he may do so without specifying any particular property, if he has reason to believe generally that the premises are being made a receptacle for stolen goods; and any constable, with such authority in writing from the chief constable, may enter any shop, warehouse, yard, or other premises, and search and seize and secure any property he may believe to have been stolen, as if he had a search-warrant applicable to the property seized; and the person on whose premises the property is when seized, or the person from whom it is taken if other than the person on whose premises it is, shall, unless previously charged with resetting the same, be summoned before a Court of summary jurisdiction to account for his possession of such property; and the Court may make such order as to the disposal of the property, and may award such costs, as the justice of the case may require.

In executing a search-warrant the officer should state the substance of the warrant. He should proceed to break open doors only after admission has been asked and refused. The officer should show the warrant, if requested to do so, especially if he is only acting as an officer *pro hac vice*, or is beyond his ordinary bounds.

[Hume, ii. 78; Alison, ii. 145; Macdonald, 287; Anderson, *Crim. Law*, 195.]

Seats in Churches.—In modern times no church would be considered suitable for public worship unless furnished with pews, and the duty of providing them therefore falls upon those charged with the building, or repairing and maintaining, of the church (*Maclcod*, 1830, 8 S. 470; Duncan, 202). The width of a pew should be twenty-nine inches, and the breadth of each sitting eighteen inches (Connell, *Par. Sup.* 72; *Harlaw*, 1802, 4 Pat. 356; *Hamilton*, 1827, 6 S. 47). Formerly worshippers seem either to have stood, or else brought moveable seats with them, placed them on any part of the area which they happened to find unoccupied, and removed them at the close of the service; while such persons as desired fixed seats, having first obtained leave of the kirk session, required to erect them at their own expense. It is stated by Dunlop (p. 45), on the authority of Erskine, ii. 6. 11, that if a heritor have erected a seat at his own expense, he may deal with the materials of which it is composed as he pleases. This statement in Erskine seems to refer to the period when it was the universal custom for seats to be erected at the cost of private individuals; and it is probable that a heritor, who had erected a seat at his own expense, would not now be entitled to dispose of the materials, except in very special cases, since seats appear to be regarded by law as an integral part of the building (Duncan, 229; Rankine, *L. O.* 170). If a heritor furnishes his pew with cushions or carpets, they remain his property, and he may deal with them as he pleases. Formerly they were included among heirship moveables (Ersk. iii. 8. 18). The circumstances in which a person becomes entitled to a seat in a parish church, and the rules regarding the allocation, letting, or selling of seats differ according as the church is the church of a Landward, Landward-Burghal, Burghal, or *Quoad Sacra* parish, or is a Highland church erected under the provisions of 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90. The subject may therefore be divided into these heads.

(1) *Landward Parish Church.*—Except in very special cases, the area and the pews erected thereon are the common property of the heritors. But so long as the church is used as such, they are regarded not as absolute

proprietors, but rather as trustees for behoof of the general body of parishioners, for whose suitable and orderly accommodation at divine worship they are bound to provide. In virtue of his share in the common property, every heritor is entitled to have a portion of the area allotted to him, proportionate to the value of his lands, he in turn becoming trustee for the parishioners residing on his estate (*Ure*, 1828, 6 S. 917, per Ld. Cringletie; *Duke of Roxburghe*, 1875, 2 R. 715; 1876, 3 R. 728; revd. 1877, 4 R. H. L. 76). This right to a portion of the area is so closely connected with ownership of land in the parish, that in a grant of lands it passes *sub silentio* as part and pertinent thereof; and if a heritor sells a part only of his lands, the grant carries with it a portion of the area originally allotted to the heritor. Not even by special agreement can a heritor sell his land and yet retain his seat, nor can he sell the seat and retain the land (Ersk. ii. 6. 11; Bankt. ii. 8. 192; *Lithgow*, 1697, Mor. 9637; *Duff*, 1769, Mor. 9644; *Peden*, 1770, Mor. 9644; *Ure*, *supra*; *St. Clair*, 1776, 2 Hailes, 720, per Ld. Monboddo; *Duke of Roxburghe*, *supra*, per Ld. Deas; *Stephen*, 1887, 15 R. 72). It will be seen that the necessity for an allocation of seats may arise (1) when it is necessary to apportion the whole area among the heritors, and (2) when an estate, in virtue of which an allocation has been made, comes to be divided. A general allocation ought to be made whenever a new church has been built, or an old one enlarged (Duncan, 221). The division may be made extrajudicially by the heritors themselves, or judicially on the petition of any heritor. Formerly the presbytery and kirk session seem to have claimed a right to allocate the seats, but it is now settled that they have no right to interfere in the matter (*Heritors of Falkland*, 1739, Mor. 7916; *Edinburgh Ecclesiastical Commissioners*, 1888, 15 R. 961, per Ld. Young). Division by agreement can only take place when the heritors can come to a unanimous decision as to the portion to be allotted to each, since a dissentient heritor or heritors can always apply for a judicial division (*Earl of Marchmont*, 1776, Mor. 7924, and App. "Kirk," No. 2, and 5 B. Sup. 558). The agreement should be in writing, signed by all the heritors, probative, and registered for preservation, in case the fact of a valid division having been made should ever come to be questioned. It is stated by Duncan (p. 220) that judicial approval of the agreement may be obtained "at the suit of those having interest, such as an heritor or his tenants." The case of *Skirving*, 1796, Mor. 7930, quoted by Duncan in support of this statement, does not seem to have much bearing on the point; and it is thought that a petition at the instance of a tenant would be incompetent, since tenants have only a right to demand sitting accommodation in the portion of the area assigned to their landlord, and no right to interfere in the general allocation of the area among the heritors (*Duke of Roxburghe*, *supra*). A judicial allocation becomes necessary whenever the heritors cannot come to an agreement; and is perhaps always the most advisable, especially when the number of heritors is large. The proceedings may take place either before the Sheriff or in the Court of Session. In the usual case, a petition craving for an allocation of seats is presented by one or more of the heritors to the Sheriff. The Sheriff appoints a diet at which parties having an interest may appear, notice thereof being given by advertisement, and intimation from the church pulpit. After parties have been heard, a remit is made to a man of skill to prepare a scheme of allocation. At a subsequent diet, notice thereof being given as before, objections to the scheme are considered, and it is either approved or amended (Black, 66; *Committee of Heritors of Govan Parish*, 1890, 6 Sh. Ct. 198). The Sheriff's judgment is subject to review in the ordinary way. If a valid allocation has once

been made, it will not be disturbed so long as the structure remains, even though the church should have to be reseated (*Stiven*, 1878, 6 R. 174; *Mitchell*, 3 Sh. Ct. Rep. 297). But if a valid division has never been made, no amount of delay in presenting an application for allocation will, as a rule, be fatal (*Smith*, 1826, 4 S. 738), even though a particular state of possession has existed for more than forty years, since mere possession cannot found a right (*Wemyss*, 1838, 16 S. 332; *Myles*, 6 Sh. Ct. Rep. 698).

In the case of *Sinclair*, 1761, Mor. 7918, however, the Court refused to disturb a state of possession which had existed for eighty years, assuming that a valid allocation must have at one time been made, though no agreement or decree was produced. When a particular state of possession has existed for the prescriptive period, and also where a seat is claimed in virtue of land, the title to which is in dispute, action must be taken in the Court of Session, and not before the Sheriff (*Smith, supra*; *Mags. of Hamilton*, 1846, 8 D. 844; affd. 1850, 7 B. App. 1), unless the value of the subject be less than £1000, or £50 per annum (40 & 41 Vict. c. 54, s. 38). Whether the allocation be made judicially or by agreement, the principle of division will be the same. By custom every heritor is entitled to choose a family pew, sufficient for the accommodation of his family and guests (*Earl of Marchmont, supra*; *Walker*, 1848, 10 D. 1383). The heritor having the largest valued rent in the parish is entitled to first choice, the second next, and so on, down to the lowest (*Sinclair, supra*; *Feuars of Crieff*, 1781, 2 Hailes, 892; *Dundas*, 2 Hailes, 802). The size of pew to which each heritor is entitled is not proportionate to his valuation. But a heritor with a large valuation is entitled to have a more commodious pew than one with a less, because, being presumably a richer man, he will be able to entertain more guests (*Walker, supra*). After the family pews and seats for the minister, the elders, and the poor (Dunlop, 41) have been set aside, the remainder of the area is divided among the heritors, for the accommodation of their servants and tenants. In calculating the amount assignable to each heritor, the portion assigned him as a family pew must be taken into account, so that the whole divisible area of the church may be divided amongst the heritors in proportion to their valued rent (*Earl of Marchmont, supra*). The real, and not the valued, rent would probably be held to determine the order of choice and the amount to be assigned to each, if the burden of rebuilding or repairing and maintaining the church has been apportioned in accordance with it (*Stephen*, 1887, 15 R. 72; Dunlop, 36; Rankine, *Landownership*, 168). Tenants are entitled to obtain sittings in the portion of area assigned to their landlord for their accommodation, and the allocation among them is made by him. No tenant can demand a particular seat, nor insist on occupying that of his predecessor, but the landlord should have regard to the amount of rent payable by his tenants, and must make the division fairly, and so as to exclude none (*Earl of Marchmont, supra*; *Ure, supra*; *Skirving, supra*; *Kinnaird*, 1802, 4 Pat. 429). Any tenant who feels himself aggrieved may apply to the Sheriff, and have the allotment subjected to judicial control (*Skirving, supra*). Before the abolition of patronage (37 & 38 Vict. c. 82) the patron, at all events if a heritor in the parish, was entitled to a family pew, and first choice, no matter how small his valued rent. Probably he has now no such right. It has been decided (*Torphichen*, 1765, Mor. 9386, and 2 Hailes, 802) that mere ownership of a right of superiority in the parish does not entitle the holder to a seat in the church. "The superior," says Ld. Braxfield, "is not entitled to set his foot within the church, or even within the parish." It has not been definitely settled whether a heritor

whose lands have been included in a *quoad sacra* parish is entitled to retain a seat in his old parish church on a fresh allocation taking place, but the question was discussed in *Duke of Roxburghe, supra*, and the balance of judicial opinion was against his right.

A special allocation of sittings takes place, without the general allocation being in any way interfered with, if the land in virtue of which they have been assigned, comes to be owned by several different proprietors. Each of these will be entitled to a portion of the original allotment proportionate to his holding. If they cannot agree among themselves, possession must be in common until a judicial allocation can be made (*St. Clair*, 1776, Mor. App. "Kirk," No. 1; Rankine, *Landownership*, 168). It does not seem to be settled whether the family pew is to be regarded as a pertinent of the mansion-house, or whether it goes to the proprietor of the bulk of the lands. Probably it would be regarded as a pertinent of the mansion-house (*Lithgow, supra*).

It is clear, as has been already stated, that a heritor cannot sell his seat apart from his lands, but the question whether he can let it is more doubtful. Formerly it seems to have been thought that a heritor was entitled to let his family seat, at all events to another heritor or parishioner, and possibly also a part of the portion assigned to him for his tenants, if not required for their accommodation, provided the rents obtained were applied to the relief of the poor, or other pious use within the parish (*Farie*, 2 Feb. 1813, F. C.; *Gavin*, 2 June 1825, F. C.; Dunlop, p. 45, s. 80; Duncan, p. 224). More recently, judges have given expression to opinions indicating that it is illegal for heritors, either as a body or as individuals, to let their seats (see opinions of judges, *Clapperton*, 1840, 2 D. 1385). In the case of the *Duke of Abercorn* v. *Presbytery of Edinburgh*, 1870, 8 M. 733, it was observed by Ld. Manor (p. 736) that "the letting of seats in a country parish church, whether for the purpose of maintaining the fabric or for raising a revenue for parochial purposes generally, is altogether illegal, and cannot be supported by custom or usage, however long continued"; and it was said by Ld. Pres. Inglis in *Duke of Roxburghe, supra*: "The portion of area that is assigned to each heritor is given to him, not to be occupied exclusively by himself and his family,—not to be shut up, for that is illegal—not to be hired out for money, for that is equally illegal—but to be used for the benefit of the parishioners who are resident upon his estate." On the other hand, it was said by Ld. Young, in *Edinburgh Ecclesiastical Commissioners, supra*: "The areas of the churches—churches having been built by the heritors—are apportioned among the various heritors who contribute to the cost of building and maintaining them. They make bargains about their seats, and, at anyrate, they may give to others gratuitously, or upon such terms as they think fit, the right of using the seats allocated to themselves." In the event of a seat-holder not occupying his pew, it is unanimously agreed, although the point has never been decided, that he cannot exclude other parishioners, where there is a deficiency of accommodation. Possibly a person who has a right to a seat, and finds the entrance barred by a locked door, may be entitled to remove the obstruction *brevi manu* (*M'Crone*, 1826, 5 S. 42). It is competent to bring an action of interdict against the actual erector of the obstruction, *e.g.* the locksmith, although he is acting for a disclosed principal (*Dobbie*, 1863, 1 M. 532).

The ordinary rules of law may be modified by special agreement between private parties and the heritors, at the time the church is being rebuilt or

enlarged. In the case of *Smith, supra,* the heritors had agreed with the proprietor of an aisle in the old church that he should have an equivalent area allotted to him in the new, on condition of his allowing them to use the materials of the aisle, and paying a sum of money towards the erection of the new church: he was found entitled to this amount of space, and his right to sell it recognised. In connection with the proposed rebuilding of Kilbarchan Church, partly by voluntary subscription, it is proposed that certain subscribers should have a right to a seat for themselves and their families so long as they remain in the district. A similar arrangement seems to have been made and given effect to in the landward-burghal parish of Brechin (*Mackay,* 1889, 17 R. 38).

II. *Landward-Burghal Parish Church.*—Formerly the first step in the division of the area was to set aside one portion for the heritors of the landward part of the parish, and another for the magistrates of the town or burgh, as representing the inhabitants. The size of the portion assigned to each was determined by the population of the respective districts, since each district had to bear a share of the expense of erecting the church proportionate to its population (*Duke of Argyle,* 1775, Mor. 7921; *Heritors of Crieff,* 1781, Mor. 7924; *Ure,* 1793, Mor. 7929). Since the date of the cases cited, it has been decided that the expense of rebuilding a landward-burghal church must be borne by all the owners of land in the parish in proportion to their real rent (*Harlaw,* 1802, 4 Pat. 356; *Boswell,* 1837, 15 S. 1148); and it is therefore competent, when the assessments have been levied on them as individuals, to allocate the sittings among them, without making any distinction between landward and burghal heritors, in proportion to their real rent, and in accordance with the rules applicable to landward parishes (*Stephen,* 1887, 15 R. 72). The old method would still have to be followed if the burgh were treated as a single heritor, and bore a share of the expense proportionate to the rental of the property in the burgh, but the parts assigned to the heritors of the landward district and the corporation respectively would be proportionate to the rental instead of to the population of the respective districts (Dunlop, 37; *Duke of Abercorn,* 1870, 8 M. 742, per Ld. Cowan). The share allocated to the landward district falls to be divided among the heritors in accordance with the rules applicable to landward parish. With regard to the town share, the magistrates may use their discretion in subdividing it amongst the inhabitants (*Stephen, supra,* per Ld. Pres. Inglis), and have probably a right to charge rents for the seats (*Clapperton,* 1840, 2 D. 1385). As in the case of landward parishes, special agreements in regard to building the church may modify the ordinary rules (*M'Intosh,* 1825, 3 S. 508; *Mags. of Hamilton,* 1846, 8 D. 44; affd. 1850, 7 B. App. 1; *Mackay,* 1889, 17 R. 38).

III. *Burghal Churches.*—"There being no statute declaratory of the rule of law that is applicable to burghal churches, nor any distinct *dictum* in any of our institutional writers regarding it, we must look for it, in established usage and practice, either general or special, in particular cases, and in the decisions that have been pronounced by the Court" (*Clapperton,* 1840, 2 D. 1406, per L. J. C. Boyle).

In practice we find that burghal churches are generally built and fitted up by the magistrates at the expense of the community. Where this is the case, they may raise a fund sufficient to provide for the repayment of the original outlay, the maintaining and repairing of the church and the expense of providing what is necessary for the decent celebration of divine worship, by levying reasonable seat rents (*Mags. of Greenock,* 1822, 2 S. 44; *Clapperton, supra*). Where there are several churches in a burgh, it is not

necessary to limit the amount raised in any one of them to the expenses incurred in connection with that particular church, for the seat rents derived from all the churches may be massed in a common fund, and used to meet the expense of the whole ecclesiastical establishment of the burgh (*Clapperton, supra*). They cannot be used for the general purposes of the burgh, since the levying of seat rents for any purpose other than ecclesiastical is illegal (*Clapperton, supra*). It may be noticed that since the case of *Clapperton*, which was raised in connection with Edinburgh churches, was decided, the management of the churches in that city, and in Montrose, has been transferred by 23 & 24 Vict. c. 50, and 33 & 34 Vict. c. 87, to a specially constituted body of Ecclesiastical Commissioners, and it is directed that the seats in the several churches shall be let at the sight of the kirk sessions, and that the money received by them shall be paid to the Commissioners. Several cases have arisen in connection with the working of these Acts (*Edinburgh Ecclesiastical Commissioners*, 1888, 15 R. 952, and *Montrose Kirk Session*, 6 S. L. T. 125). It is sometimes stated, on the authority of the case of *Watson*, 1760, M. 5431 and 7917, that magistrates have a right not only to let, but also to sell seats. The point, however, cannot be regarded as decided, as the question before the Court was really one of succession, and no attempt was made to reduce the sale which had been made by the magistrates. No particular rules are observed in allocating seats in a burgh church, but seats are generally set aside for the magistrates, and for the poor, and in the event of there being a deficiency of accommodation, a preference should be given to parishioners desiring to take seats over non-parishioners.

III. *Quoad Sacra Church.*—The distribution of seats is regulated by 7 & 8 Vict. c. 44, s. 9. One pew is to be set aside, rent free, for the minister and his family, and another for the officiating elders. With regard to the rest of the sittings, it is provided that a portion of the sittings, to be determined by the Sheriff of the county, and not exceeding one-tenth of the whole number, shall be set apart as free seats; another portion, not exceeding one-fifth of the whole sittings, shall be let at rents not exceeding a rate to be fixed by the presbytery of the bounds; and the remaining portion may be let in such manner as shall be agreed upon by the minister for the time being and the person or persons liable for the repair of the church and for the stipend of the minister, or, in case of their not agreeing, then in such manner as shall be determined by the Sheriff of the county. The rents may be applied for the purpose of defraying the necessary expenses of a precentor, beadle or kirk officer, and other expenses necessarily incurred in dispensing the ordinances of religion therein, and for the upkeep of the church and manse, or for the relief of any person liable to uphold the same, or liable for the endowment or stipend provided to the minister, provided that the sum received by any such person shall not in any year exceed the sum paid or expended by him in the same year by reason of such liability.

IV. *Highland Church* (4 Geo. IV. c. 79, and 5 Geo. IV. c. 90).—The regulations regarding the allocation of pews are to be found in 5 Geo. IV. c. 90, ss. 18 to 22. Shortly stated, they are as follows:—One-third part of the church is to be set aside as free sittings, and free pews are to be provided for the heritor who undertakes wholly, or principally, the liability for the repair of the church, the minister's family, and the officiating elders. The remaining sittings may be let at a rent not exceeding 2s. 6d. per annum for each sitting, payable in advance. The proceeds are to be devoted to the repair and upkeep of the church and manse; and in the event of a greater

sum than £20 accumulating in the hands of the ministers and elders, they are required to pay it into the Bank of Scotland or other chartered bank in the name of any two of themselves appointed for that purpose. The manner of letting the pews is that agreed upon by the heritor, or heritors, undertaking liability for the repair of the building, and the minister for the time being. In the event of their not agreeing, they must bring the matter before the Sheriff, who reports to the Commissioners appointed under the Act, and they settle the manner of letting the seats.

V. *Succession to Church Seats.*—Where a person is entitled to a seat in church in virtue of ownership of land in the parish, his right necessarily passes on his death to his successor in the lands. With regard to burghal churches, where seats are held in virtue of contract and not of ownership of land, and seats held in virtue of an anomalous title, the succession will be regulated by the nature of the title. "If the right be one of occupation merely, in favour or for behoof of a family, this may tend to impress the right with the character of one in favour of the executors, as opposed to the heir. On the other hand, when the right is one of property in, as opposed to the mere use and temporary occupancy of, the seat, then, as constituting a right of ownership in a heritable subject, it descends to the heir, and not to the executors" (*Telfer*, 1810, Hume, 192; *Watson*, 1760, M. 5431 and 7917; *Milne*, 1869, 7 M. 406; Duncan, 229).

[Connell, *Parishes Supplement*; Dunlop, *Parochial Law*; Duncan, *Ecclesiastical Law*; Rankine, *Landownership*; Black, *Ecclesiastical Law.*]

Seaworthiness.—It is the first duty of the owners and master of a ship, under every contract relating to its employment, to provide a seaworthy vessel. By the term "seaworthy" it is meant that the ship is "tight and staunch and strong, furnished with all necessary tackle and apparel, and manned with a sufficient crew" (Maclachlan on *Shipping*, p. 426). It is a relative term, varying according to the nature of the use to which the ship is put. "There is no positive condition of the vessel recognised by the law to satisfy the warranty of seaworthiness" (per Watson, B., in *Knill*, 1857, 26 L. J. Ex. 377, at p. 379). "The question whether a vessel is seaworthy," said Blackburn, J., "is from its nature one that in practice must almost always be determined by a jury on the evidence, with only a general direction from the presiding judge; and consequently we find in the reported cases only general definitions of seaworthiness, not rendered precise by being made referable to particular facts" (*Burges*, 1863, 33 L. J. Q. B. 17, at p. 25). The principal circumstances relevant to the determination of this question are: the position in which the vessel is placed (Arnould, *Marine Insurance*, p. 7; *Burges*, *supra*, per Cockburn, C. J., at p. 23; *The Undaunted*, 1886, 11 P. D. 46, case of a tug undertaking towing services); the projected voyage, its probable duration and nature, as affected among other things by the time of year at which it is made (*Daniells*, 1874, L. R. 10 C. P. 1; *Steel*, 1877, 3 App. Ca. 72, 4 R. (H. L.) 103); the age (*Watson*, 1813, 1 Dow, 336, 3 S. R. R. (H. L.) 85) or structure of the particular vessel with reference to which the contract was made (*Burges*, *supra*); the nature of the cargo to be carried (*Stanton*, 1872, L. R. 7 C. P. 421; 1874, L. R. 9 C. P. 390; *Tattersall*, 1884, 12 Q. B. D. 297); and the manner in which it is stowed (*Daniells*, 1874, L. R. 10 C. P. 1; *Kopitoff*, 1876, 1 Q. B. D. 355; *Steel & Craig*, 1877, 3 App. Ca. 72, 4 R. (H. L.) 103). The word "seaworthy" includes the manning of the ship with a competent master and an adequate crew; and also having on board such provisions as may be required. When

a statutory obligation is laid upon the owners and master of a ship with the view of providing for the safety of the vessel and crew, *e.g.* that certain officers must hold certificates from the Board of Trade, failure to comply with such obligation will be considered as constituting unseaworthiness to the prejudice of any person privy to the illegal act (*Cunard*, 1858, 27 L. J. Q. B. 408; 1859, 29 L. J. Q. B. 6; *Wilson*, 1865, 34 L. J. Q. B. 62).

There is no condition of any vessel which can be stated as perfect for all employments to which it may be put. "By seaworthiness," said Ld. Chan. Cairns, "I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind and laden in that way may be fairly expected to encounter in crossing the Atlantic" (*Steel & Craig*, 1877, 3 App. Ca. 72, at p. 77, 4 R. (H. L.) 103). "Seaworthiness is well understood to mean that measure of fitness which the particular voyage or the particular stage of the voyage requires. A vessel seaworthy for port, and even for loading in port, may be, without any breach of the warranty whilst in port, unseaworthy for the voyage" (per Field, J., delivering the judgment of the Court in *Cohn*, 1877, 2 Q. B. D. 455, at p. 461). "There is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases for some definite well-recognised and distinctly separate stage of the voyage" (*Quebec Mar. Insur. Co.*, 1870, L. R. 3 P. C. 234, per Ld. Penzance, at p. 241; Arnould, *Marine Insurance*, p. 664). "As the ship may be insured to lie in port, to navigate rivers, or to sail the ocean, seaworthiness . . . is necessarily a relative term capable of a meaning suitable to whichever of these intentions may be expressed in the policy. A different state of the hull, rigging, and stores, a different state of the crew, is signified by the term as it becomes applicable to a contemplated difference of circumstances affecting the ship" (Arnould, pp. 7, 8). The seaworthiness required in each case is that degree of seaworthiness suitable to the position of the ship, or the voyage or stage of the voyage upon which it is entering (*Dixon*, 1839, 5 M. & W. 405; *Quebec Mar. Insur. Co., supra*). If a vessel is chartered for the purpose of carrying cargo of a specified nature, it must be reasonably fit to carry any reasonable cargo offered in terms of the charter (*Stanton*, 1872, L. R. 7 C. P. 421; 1874, L. R. 9 C. P. 390; *Tattersall*, 1884, 12 Q. B. D. 297); the term "seaworthy," in the circumstances, being used not in any abstract sense, but with special reference to the particular contract. Thus a ship chartered to convey cattle was held to be unseaworthy in respect it had not been cleansed since carrying another cargo of cattle, some of whom had suffered from foot-and-mouth disease (*Tattersall, supra*). An agreement made by bill of lading, headed "Refrigerator Bill," to carry frozen meat from Australia to this country was held to have an implied term that the ship would be fitted with a proper refrigerator in good condition at the beginning of the voyage, and the fact that the refrigerator was not then in good condition was held to constitute unseaworthiness (*Maori King*, [1895] 2 Q. B. 550). "A ship, before setting out on the voyage, is seaworthy if it is fit in the degree which a prudent owner, uninsured, would require to meet the perils of the service it is then engaged in, and would continue so during the voyage unless it meet with extraordinary damage" (*Gibson*, 1853, 4 H. L. C. 353, per Earle, J., at p. 384). The question whether stowing cargo on deck makes a ship unseaworthy depends on whether the effect of such stowage is to render the ship unsafe on an ordinary voyage at that time of year. If it is a danger to the ship on an ordinary voyage, or if, in order to save the ship from ordinary perils, it is contemplated that there may be a destruction of the cargo, the vessel is rendered unseaworthy and the con-

dition is not fulfilled (*Daniells*, 1874, L. R. 10 C. P. 1). Unseaworthiness may be caused by a defective hull (*Watt*, 1813, 1 Dow, 32, 3 S. R. R (H. L.) 7; *Douglas*, 1816, 4 Dow, 269, 3 S. R. R. (H. L.) 319), or a defect in the propelling power (*Seville Sulphur Co.*, 1888, 15 R. 616; cf. *Cunningham*, 1888, 16 R. 295), such as machinery (*The Glenfruin*, 1885, 10 P. D. 103) and sails (*Cook*, 1843, 5 D. 1379), or insufficient coal (*The Undaunted*, 1886, 11 P. D. 46; *Thin*, [1892] 2 Q. B. 141; *Park*, 1898, 25 R. 528), by her equipment being insufficient (*Maori King, supra*, refrigerator case), *e.g.* if she have not proper anchors (*Wilkie*, 1815, 3 Dow, 57, 3 S. R. R. (H. L.) 253). But the want of such articles as towing ropes will not constitute unseaworthiness if there is no evidence that they are required (*Stone*, 1849, 11 D. 1041). If there is a duty on the master to have a pilot at the commencement of the voyage, the failure to take such a precaution will constitute unseaworthiness (Abbott, 13th ed., p. 388).

The time at which the obligation is laid upon the owners and master of a vessel to provide one tight, staunch, and strong, with all necessary equipment, is, according to circumstances, the commencement of loading or of setting sail upon her voyage, or at the moment when the risk attaches. If a ship is seaworthy at that time, it does not matter how soon thereafter she becomes unseaworthy, the obligation is fulfilled; but if she show herself to be unseaworthy soon after sailing, the presumption will be that she was unseaworthy at the commencement (*Watson, supra*; *Parker, supra*). But this does not depend on any question of time alone: it is an inference from facts. Of course the longer the time which elapses between setting sail and showing inability to proceed, the less strong will be the inference; but the matter of time is only one element for consideration, and not by any means the most important (*Pickup*, 1878, 3 Q. B. D. 594). A ship may, however, start from port in such a condition that it would be reckoned to have been unseaworthy if it were allowed to remain so during the voyage, *e.g.* a port may have been left unfastened (*Steel & Craig*, 1877, 3 App. Ca. 72, 4 R. (H. L.) 103; *Dobell*, [1895] 2 Q. B. 408), or a hatchway open, or a pipe may have been left uncased which ought to have been cased (*Gilroy Sons & Co.*, 1892, 20 R. (H. L.) 1; [1893] App. Ca. 56). But it will not thereby be rendered unseaworthy, provided that can easily be remedied after starting, and before the defect can cause injury. Such a case was *Cunningham* (1888, 16 R 295; cf. *Seville Sulphur Co.*, 1888, 15 R. 616), where the ship started with muddy water in the boiler, which could have been blown off when she got out to sea. But if the defect cannot be remedied without removing the cargo, the condition is held not to have been complied with (*Steel & Craig, supra*; *Gilroy Sons & Co., supra*).

By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 457), it is declared a misdemeanour for any person to send or attempt to send a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered. But it is a defence to prove either that the person charged used all reasonable means to ensure her being sent in a seaworthy state, or that her going in an unseaworthy state was, in the circumstances, reasonable and justifiable. The Board of Trade has power to detain any British ship which is unsafe by reason of the defective condition of her hull, equipments, or machinery, or by reason of undermanning or overloading or improper loading (M. S. A., 1894, ss. 459–461; M. S. A., 1897, 60 & 61 Vict. c. 59, s. 1 (1)). When a foreign ship has taken on board any part of her cargo at a port in the United Kingdom, she may similarly be detained on the ground of safety by reason of overloading, improper loading, or undermanning (M. S. A., 1894, s. 462; M. S. A., 1897, s. 1 (2)).

Questions as to the seaworthiness of a ship may arise with (1) members of the crew, (2) charterers or cargo-owners, or (3) insurers of ship, goods, freight, or salvage.

(1) *The Crew.*—In every contract of service between the owner of a ship and the shipmaster or one of the crew, and in every instrument of apprenticeship to sea, there is implied an obligation on the owner that he, and every agent employed by him in preparing the ship for sea, or sending her to sea, shall use all reasonable means to ensure her seaworthiness at the commencement, and keep her so during the voyage. This obligation towards every master or seaman cannot be waived; but it may be pleaded that the sending the ship to sea in an unseaworthy state was reasonable and justifiable (M. S. A., 1894, s. 458). But a ship is not held unseaworthy at the commencement of the voyage if she leave port with something undone which requires to be done to make her seaworthy, provided the defect can easily be remedied before any danger arise therefrom (see *supra*). And it is not a breach of the owner's obligation to use all reasonable means to keep the ship seaworthy, that owing to neglect on the part of the master the defect has not been timeously rectified (*Hedley*, [1894] App. Ca. 222). It is a defence to a charge of desertion or absence without leave, that a certain number of the crew allege that the ship is by reason of unseaworthiness not in a fit condition to proceed to sea (M. S. A., 1894, s. 463).

(2) *Charterers and Cargo-owners.*—In every contract for the carriage of goods, however it may be made, whether by charter-party or bill of lading, there is implied an undertaking on the part of the carrier that the vessel shall be fit to carry out the contract, *i.e.*, in the case of a ship, that she shall be seaworthy (*Kopitoff*, 1876, 1 Q. B. D. 355). This rule depends in England on the common law of that country with respect to bailment, but the same result follows in Scotland from the adoption of the civil law rule expressed in the edict, *nautæ, caupones, stabularii, etc.* The rule does not apply to the carriage of passengers (*Readhead*, 1869, L. R. 4 Q. B. 379); although the seaworthiness of passenger steamers is required by statute (M. S. A., 1894, ss. 271–274). Its effect is a warranty on the part of the shipowner against all perils excepting the acts of God and the Queen's enemies, even against latent defects (Abbott, 13th ed., p. 386; *The Glenfruin*, 1885, 10 P. D. 103). Seaworthiness means not merely that the person providing the ship will do his best to make the ship fit, but warrants that the ship will really be fit (*Steel & Craig*, 1877, 3 App. Ca. 72, per Ld. Blackburn, at p. 86, 4 R. (H. L.) 103; *Douglas*, 1816, 4 Dow, 269, 3 S. R. R. (H. L.) 319; *The Glenfruin*, *supra*). The warranty is that the vessel will be seaworthy for loading purposes at the time of loading (*Stanton*, 1872, L. R. 7 C. P. 421; 1874, L. R. 9 C. P. 390), and for the voyage at the time of commencing the voyage (*Cohn*, 1877, 2 Q. B. D. 455; *Maori King*, [1895] 2 Q. B. 550; *Park*, 1898, 25 R. 528). If there are several stages in the voyage, she must be seaworthy at the time of starting on each stage (*Thin*, [1892] 2 Q. B. 141; *Quebec Mar. Insur. Co.*, 1870, L. R. 3 P. C. 234). And in particular, she must be seaworthy at the commencement of each cargo-voyage (*Cunningham*, 1888, 16 R. 295, per Ld. Shand, at p. 314; Carver on *Carriage by Sea*, s. 144). This applies in the case of a time charter, there being no demise of the vessel. In such a case it has been laid down that she must be seaworthy "on leaving each place where the master has an opportunity to refit or refurnish" her (*Park*, 1898, 25 R. 528, per Ld. Moncreiff, at p. 548). Although the ship may be seaworthy at the commencement of the voyage, she may afterwards become unseaworthy. In that event it is the duty of the master, if he has opportunity, to have

the defect repaired (*Worms*, 1855, L. J. Ex. 1; *Thin*, [1892] 2 Q. B. 141). The warranty of seaworthiness in a contract of carriage is only of importance as it enables the owner to implement his obligation to carry safely. If the goods are carried without injury, it is of no account that the vessel was unseaworthy on sailing, and only accomplished the voyage owing to fortunate circumstances. On the other hand, if the goods are lost or injured solely through some other cause than the unseaworthiness of the ship, that other cause alone can be considered in placing the liability; and the owner's neglect of duty, which did not conduce to the damage actually suffered, cannot render him liable for the loss (*Cunningham*, 1888, 16 R. 295, per Ld. Shand, at p. 311).

If a cargo suffers damage, the onus lies on the shipowner to show what was the cause of the damage, and he is held liable for the loss unless he proves a cause for which he is not to blame (*Luke & Co.*, 1897, 4 S. L. T. 452; *Cunningham, supra*, per Ld. Shand, p. 311).

It is competent to parties to the contract to limit the liability of the carrier, but a clear expression of intention is necessary to exempt him from this implied warranty. If the obligation to provide a seaworthy vessel is discharged provided the owner uses all reasonable means to make the ship seaworthy, this constitutes an obligation that the owner, through his agents, will use such reasonable means, and negligence on the part of one of the crew causing unseaworthiness will make the owner liable. The effect of such a limitation is to exempt the owner from liability for latent defects (*Dobell & Co.*, [1895] 2 Q. B. 408). An exception which exempts the owner from liability for accidents or perils of the sea, or for fault, negligence, or error in navigation or in the management of the vessel, is read as applying to such accidents, perils, faults, or errors after the voyage has been commenced, unless it is otherwise stated in the agreement; it has no reference to the seaworthiness of the vessel at the time of sailing (*Dobell & Co., supra*; *Maori King*, [1895] 2 Q. B. 550; *Park*, 1898, 25 R. 528; *Gilroy Sons & Co.*, 1892, 20 R. (H. L.) 1; [1893] App. Ca. 56; *The Glenfruin*, 1885, 10 P. D. 103). It will not relieve the owner from liability where negligence on the part of the master or crew has caused unseaworthiness at the beginning of the voyage; and if a peril of the sea cause damage which would not have been caused but for the unseaworthiness of the ship at the time of sailing, the exception will not benefit him (*Steel & Craig*, 1877, 3 App. Ca. 72, 4 R. (H. L.) 103). Notice that the carrier will not be liable for any damage unless it should happen from want of care or diligence on the part of the master or crew in which case his liability is stated to be at a certain rate, will only limit his responsibility where the law would make him answer to the full for the neglect of others, and leave him liable as before for loss occasioned through his own neglect in not providing a seaworthy vessel (*Lyon*, 1804, 5 East, 428, 17 R. R. 726; *Tattersall*, 1884, 12 Q. B. D. 297). Exceptions which have for their object the exemption of owners from liability for unseaworthiness are effectual to the extent they state when they provide that the ship shall be seaworthy only so far as ordinary care can make her; or as far as due care in the selection of agents, pilots, master, and crew can ensure it; or that the owners shall not be liable for damage arising from latent defect in the machinery (*Cargo ex Laertes*, 1887, 12 P. D. 187).

If the ship provided for a cargo is not seaworthy, the cargo-owner may refuse to put his cargo on board (*Stanton*, 1872, L. R. 7 C. P. 421; 1874, L. R. 9 C. P. 390).

(3) *Insurers.*—"There is nothing," said Ld. Eldon, "in matters of

insurance of more importance than the implied warranty that a ship is seaworthy when she sails on the voyage insured" (*Douglas*, 1816, 4 Dow, 269, at p. 276, 3 S. R. R. (H. L.) 319). This warranty, the extent of which is the same as in a question with the owner of cargo (see *supra*), is implied in every marine insurance policy, whether on the ship (*Watson*, 1813, 1 Dow, 336, 3 S. R. R. (H. L.) 85), freight (*Pickup*, 1878, 3 Q. B. D. 594), cargo (*Daniells*, 1874, L. R. 10 C. P. 1), or salvage (*Knill*, 1857, 26 L. J. Ex. 377), with the exception of a time policy. There is no warranty of seaworthiness implied in any time policy, although such a condition may be inserted therein (*Gibson*, 1853, 4 H. L. C. 353; *Dudgeon*, 1877, L. R. 2 App. Ca. 284; *Kenneth & Co.*, 1883, 10 R. 547). It is not necessary to disclose anything to the underwriters as to the seaworthiness of the vessel, since that is an implied warranty (*Baker*, 1856, 18 D. 691). It is a condition precedent to the contract, and if it is not complied with it does not matter whether any loss was caused by unseaworthiness or not, the underwriters escape liability (*Cook*, 1843, 5 D. 1379). The ship must, in order that the warranty may be complied with, be seaworthy at the time when the risk begins (*Redman*, 1845, 14 M. & W. 476). If she is so, the policy attaches, and the insured cannot afterwards claim return of the premium on the ground that, owing to subsequent unseaworthiness, the risk was never run (Arnould on *Marine Insurance*, 665). But different stages of a voyage require different conditions of the ship to satisfy the obligation (see *supra*). It is enough to attach the policy, that the ship be seaworthy for the current or commencing stage. If the policy be on a ship "at and from" a port, the policy attaches if, while at the port, she is seaworthy for the port. But when she sails, she must also be seaworthy for the voyage. This is implied in the contract. If a ship is insured "at and from" a port, and while "at" the port is seaworthy for the purposes of the port, but not for the voyage, and thereafter starts on her voyage without being rendered seaworthy for it, the warranty is not fulfilled (*Parker*, 1815, 3 Dow, 23, 3. S. R. R. (H. L.) 250; *Quebec Mar. Insur. Co.*, 1870, L. R. 3 P. C. 234). The seaworthiness of the ship at the commencement of the voyage is presumed (*Watson*, 1813, 1 Dow, 336, 3 S. R. R. (H. L.) 85; *Parker*, *supra*; *Pickup*, 1878, 3 Q. B. D. 594); but if she become unseaworthy, shortly after sailing, without any apparent cause, the presumption will be altered, and the onus thrown on the owners of proving her seaworthiness at starting (*Pickup*, *supra*). If the warranty is not complied with, the insured has no action on the policy, and it is no answer to a defence of unseaworthiness to say that the defect was remedied after sailing and before the occurrence of the loss (*Quebec Mar. Insur. Co.*, *supra*). It is of course competent for parties to the contract to dispense with the warranty either before or after its breach, or to limit it in any manner they may please, or for the underwriters to admit the seaworthiness (*Quebec Mar. Insur. Co.*, *supra*). But any exception in this respect must be stated in very express and clear terms (see *supra*).

The defence of unseaworthiness to an action on the policy must be stated specifically in order to entitle the defender to a proof of it (*Baker*, 1855, 17 D. 417).

[Abbott on *Shipping*; Carver on *Carriage by Sea*; Arnould, *Marine Insurance*.] See Marine Insurance.

Secondary Creditors. — See Catholic and Secondary Creditors.

Secretary for Scotland.—The office of Secretary for Scotland was created by the Secretary for Scotland Act, 1885, and his duties and powers defined by the Secretary for Scotland Acts, 1885 and 1887.

Sec. 2 of the former Act provides that "it shall be lawful for Her Majesty to appoint a Secretary for Scotland, . . . who shall hold office during Her Majesty's pleasure." A salary of £2000 a year is given, and power to appoint "such permanent secretaries, inspectors, clerks, and other officers as he may, with the sanction of the Treasury, determine" (s. 2). He may sit in Parliament (s. 3), and is entitled to an Official Seal, and to the style and title of "the Secretary for Scotland" (s. 4); and "a rule, order, or regulation made by the Secretary shall be valid if it is made under the seal of the secretary and signed by him, or by any secretary or other officer appointed by him for that purpose" (*ib.*).

Powers and Duties of Secretaries for Scotland under the Acts of 1885 *and* 1887.—The powers and duties transferred to the Secretary for Scotland are conferred on him mainly by sec. 5 of the Act of 1885—a schedule at the end of the Act containing a detailed list of such powers and duties. Thus "all powers and duties vested in or imposed on one of Her Majesty's principal Secretaries of State by the enactments specified in Part I. of the Schedule to this Act, and . . . in relation to the universities of Scotland," are transferred to him (s. 5, subs. 1). All the powers and duties vested in or imposed on the Privy Council, the Commissioners of Her Majesty's Treasury, or the Local Government Board for England, so far as such duties and powers relate to Scotland in virtue of the Acts specified in Parts II., III., IV., of the Schedule, are likewise transferred (*ib.*, subs. and 2, 3). These powers were extended by the Secretary for Scotland Act, 1887, by which the whole other powers and duties of the Secretary of State, "so far as such powers and duties relate to Scotland" (s. 2, subs. 1), were transferred to the Secretary for Scotland, along with (subs. 2) the powers and duties imposed on the Commissioners of Her Majesty's Treasury under the Valuation of Lands (Scotland) Act, 1854, and (subs. 3) the powers and duties vested in and imposed upon the Board of Trade "relating to provisional orders dealing with any of the subjects transferred to the Fishery Board, Scotland, by sec. 11 of the Sea Fisheries (Scotland) Amendment Act, 1885. Further, by sec. 6 of the Act of 1885, the Secretary is appointed Vice-President of the Scotch Educational Department, whose powers, constituted under the Education (Scotland) Act, 1872, are transferred, vested in, and imposed on the Scotch Educational Department constituted under this Act (s. 7). He is also appointed Keeper of the Great Seal (s. 8).

Under the Local Government Acts, 1889 and 1894.—Under the Local Government Act of 1889, the Secretary has important powers and duties conferred on him in regard to—*First,* the constitution and powers of the County Councils created by that Act. Thus he has (s. 5) power to determine the number of councillors to be elected to a County Council, and to apportion them between the county and each of the burghs entitled under the Act to be represented on the Council. Further, by provisional order he may (s. 15, subs. 1) transfer to the County Council such powers, duties, and liabilities of any Government Department or public body "as are conferred by or in pursuance of any statute," and "appear to relate to matters arising within the county." The provisional orders, however, must (subs. 2) be approved by the Government Department or public body in question, and "shall be of no effect until it is confirmed by Parliament." *Second,* In regard to the financial relations between the Exchequer and the county, he has (s. 22) under his direction the application of all sums paid to the Local

Taxation (Scotland) Account; and (s. 24, subs. 2) if in any year the moneys standing to such account are insufficient to meet the sums he may consider proper to pay thereout, he is empowered under certain restrictions to borrow such sums as he requires to meet the deficiency.

Various other powers are conferred on him relative to the election of County Councils (s. 36); in connection with the Boundary Commissioners (s. 49, subs. 4 and 5, and s. 51) as amended by sec. 46 of the Local Government Act, 1894; in regard to the powers of County Councils to enforce the provisions of the Rivers Pollution Prevention Act, 1876 (s. 55, subs. 3 and 4), and to make by-laws (s. 57, subs. 4 and 6); and in regard to their powers of borrowing and the auditing of their expenditure (ss. 67, 69, and 70, subs. 5, 6, 7, 8, 9).

Further, by sec. 4 of the Local Government (Scotland) Act, 1894, the Secretary for Scotland is appointed the President of the Local Government Board.

Cases in which the provisional orders issued by the Secretary for Scotland in virtue of the powers conferred on him by the various Acts have been reviewed by the Court, are few in number. In the case of the Eastern District Committee of Dumbartonshire County Council Police Commissioners of Clydebank (1893, 21 R. 12), a determination of the Secretary under sec. 81, subsec. 2, of the Local Government Act, 1889, was held to be *ultra vires*, and reduced. Again, in Seaton parish council of Arbroath and St. Vigeans (1896, 23 R. 763), an order of the Secretary for Scotland under sec. 51 of the Local Government Act, 1889, and of secs. 46 and 51 of the Local Government (Scotland) Act, 1894, which united the parishes of Arbroath and St. Vigeans and declared that the former parish councils should cease, was held to validly transfer the inspectors of the pre-existing parishes to the new parish council.

Securities.—The methods of constituting a security over particular subjects, and the forms of impignoration which are recognised by the law of Scotland, are dealt with in other parts of this work. Reference may be made to the following articles:—Absolute Disposition with Back-Bond; Assignation; Bill of Lading; Blank Transfers; Bond and Disposition in Security; Document of Title; Heritable Securities; Hypothec; Lien; Negotiable Instruments; Pledge; Retention; Wadset. In the following pages an attempt is made to state the general principles applicable to all security-contracts, in so far as these are independent of the particular subject conveyed, or the particular form employed. This is dealt with in the following order:—

Definition of a right in security.
Real and personal rights.
Incomplete securities.
Competent forms.
Securities by *ex facie* absolute and *ex facie* qualified title.
Subjects which may form a right in security.
Rights of creditor and debtor.
Securities in competition with diligence.
Securities in bankruptcy.
Valuation and deduction of securities.

Definition.—Under the general phrase "right in security" may be included any right of a creditor for the recovery of his debt in addition to the rights which he possesses in common with the general body of creditors.

Such a right may consist in a real right over a subject of property conveyed to the creditor, or in a *nexus* obtained by the use of diligence, or in the personal obligation of a third party, undertaken as a cautionary obligation or guarantee. In all these cases the secured creditor is placed in a position of advantage over the general creditors of his debtor, if such exist, and has a means of recovering his debt in addition to the ordinary rights of action and of diligence which are open to all alike. The position of a secured creditor may be obtained by express contract, whereby a security is directly conveyed or a cautionary obligation undertaken; it may arise from contract implied by law, when circumstances admit of a plea of retention, lien, or hypothec; or it may arise by the use of diligence, whereby a particular subject is attached by an individual creditor, or by a particular body of creditors, in security of his or their debt.

The variety and complexity of rights in security make it difficult to fix any characteristics as distinguishing all such rights, except the point above remarked, that they are rights giving a particular creditor a position of advantage over the general body of creditors, and the further point that a right in security is of its essence a subsidiary or accessory right, and requires for its existence a principal obligation. A security cannot exist unless there is a debt, or other obligation, to be secured. Thus one criterion by which a cautionary may be distinguished from an independent and separate obligation is the existence of an obligation by a principal debtor (*Lakeman*, 1874, L. R. 7 H. L. 17); and the extinction of that obligation, even although it is merely exchanged for another debt, relieves the cautioner from liability (Ersk. iii. 3. 66; *Commercial Bank*, [1893] App. Ca. 313). Similarly, a heritable security, though duly constituted a burden on land, falls to the ground as soon as the debt for which it is constituted is paid, and a plea that such a security is extinguished by compensation of the debt may be stated in a question with the assignee to whom the security has been transferred, provided that the *concursus crediti et debiti* arose before the original debtor was divested, and the title of the assignee completed, by infeftment on the assignation (*Ranken*, 1680, 2 Ross' *L. C.* 707; *Shiells*, 1876, 4 R. 250; *MacCutcheon*, 1876, 3 R. 565). It would seem to follow that a real burden on lands, in cases where no personal obligation is undertaken, is not, strictly speaking, a security, but an independent, though subordinate, estate in land. But an absolute conveyance of property, subject to an obligation to reconvey, may be in effect though not in form a security even although there is no debt on which the creditor could sue (*Robertson*, 1896, 24 R. 120).

A Personal Obligation is not a Security.—The meaning of a security, as indicated above, is at variance with the popular usage of the word, by which such documents as a personal bond, a promissory note, or an I. O. U. are spoken of as securities. It is, however, obvious that such documents, while they are acknowledgments, and may be evidence of a debt, are not securities for it. They infer no special or preferential right: nothing but a right to payment from the debtor, which every creditor has. Thus it was held that a creditor claiming in a sequestration, and bound, as a condition of his claim, to specify all securities held by him, was not bound to specify among such securities a promissory note granted to him by the debtor (*Bowe*, 1 June 1811, F. C.). Again, an obligation on the part of a debtor to pay his debt in a particular way, or out of a particular fund, or in priority to other creditors, is only a personal obligation of the debtor, and not a security, and therefore gives the apparently favoured creditor no preference whatever in any distribution of the debtor's assets (*Graham & Co.*,

1895, 23 R. 84). A personal bond or promissory note, however, is obviously a security if another person besides the debtor is thereby bound, and, even without such accessory obligation, may be the subject of a security if the person to whom it is granted transfers it to a creditor of his own.

Subjects assignable in Security.—The subject of a security may be the obligation of a third party, or it may be a subject of property. Any property, corporeal or incorporeal, may be conveyed in security or attached by diligence so as to give the person to whom it is conveyed, or the creditor who has used the diligence, a preferential right, provided that it is alienable or assignable. Certain subjects of property, for instance, buildings dedicated to public purposes, and certain incorporeal rights, such as an alimentary fund or a contract involving the element of *delectus personæ*, are not transferable. Such subjects cannot be attached by diligence; and if a security is constituted over them it would not confer on the party in whose favour it was granted any preferential right (*Christie*, 1862, 24 D. 1182; *Greenock Harbour Trs.*, 1888, 15 R. 343). Thus "the composite heritage called a railway is not liable to be attached by adjudication for debt" (per Ld. Pres. Inglis in *Glover's Trs.*, 1869, 7 M. 338). And where bonds issued by a statutory body incorporated to carry on a harbour contained an assignation of the "harbour and works," it was held that the assignation was entirely ineffectual, that it did not give the bondholder any available rights over the harbour, and that bonds which contained it had no preference over bonds which did not (*Greenock Harbour Trs., supra*). But a subject may be assigned in security even although it is not in existence at the time of the assignation, and the right of the creditor, if duly completed, will be effectual when it comes into existence (*Black*, 1867, 6 M. 136; *Tailby*, 1888, App. Ca. 523). Thus in an English case it was held that an assignation of "all the book debts due and owing, or which may during the continuance of the security become due and owing . . . to the said mortgagor," was a good security, and gave the assignee a right over future book debts, on his intimating his claim to the persons who were under obligation to pay them, which was preferable to the right of the Official Receiver in the debtor's bankruptcy (*Tailby, supra*).

Elements in Constitution of a Security.—The constitution of a voluntary right in security over property requires, except in a few special instances, two elements: the personal contract to give a security (either express, or in some instances, implied by law), and the transfer to the creditor of a real right in the subject, by some method recognised by law as appropriate for the constitution of real rights in that particular class of property. Thus in the case of heritable property, a security requires infeftment; in the case of corporeal moveables, delivery of the subject; in the case of incorporeal rights, intimation; in the case of negotiable instruments, transfer of the instrument. If the appropriate form of transfer is not adopted, the security, though possibly good in a question with the debtor or his representatives (a question which can rarely be of much practical importance), is of no effect in a question with other creditors. The law of Scotland does not admit of the constitution of real rights over property by mere contract. Thus Ld. Stair, after stating the rules of the civil law with regard to express and tacit hypothecs, proceeds as follows: "Our custom hath taken away express hypothecations of all, or part, of the debtor's goods, without delivery, and of the tacit legal hypothecations hath only allowed a few, allowing ordinarily parties to be preferred according to the priority of their legal diligence, that commerce may be the more sure, and every one may more easily know his condition with whom he contracts" (Stair, i. 13. 14.

The same principle is laid down by Erskine, iii. 1. 34, and Bell, *Prin.* p. 1385; *Com.* ii. 26). This principle was illustrated when it was held that debentures issued by a company, and framed as a kind of floating security over the company's assets, without any completed conveyance of specific property to a trustee for the debenture-holders, was of no use as a security, and left the debenture-holders simply in the position of ordinary creditors in a question with the liquidator of the company (*Clark*, 1882, 9 R. 1017).

Distinctions between Personal Obligation and Incomplete Security.—Though a creditor does not obtain a completed security unless he is invested with a real right to the subject conveyed, there is a distinction between (1) a mere obligation to give a security, (2) an obligation to give a specific subject in security, and (3) a security duly given by the debtor, but not completed by the creditor. The distinction is of importance mainly in questions relating to securities completed within the period of constructive bankruptcy established by the Act 1696, c. 5, and (in relation to deceased debtors) by sec. 110 of the Bankruptcy Act, 1856 (see BANKRUPTCY). It is thought that a mere obligation to give security for a debt can only be completed while the debtor is solvent, and will be reducible if completed by the conveyance of a particular subject within sixty days of the debtor's bankruptcy (Bell, *Com.* ii. 211; *Rose*, 1868, 6 M. 960; *Stiven*, 1871, 9 M 923; *Gourlay*, 1875, 2 R. 738). On the other hand, if the debtor has done all that lies in his power to complete the security before the sixty days, the security will not be reducible because the creditor has delayed taking the formal steps for its completion till within that period (*Scottish Provident Inst.*, 1888, 16 R. 112; *Guild* (*Kettle's Tr.*), 1884, 22 S. L. R. 520). The case which presents difficulties is that where an obligation to give a specific subject in security has been undertaken, but has not been carried out by the debtor till within sixty days of his bankruptcy. The rule has been stated by Professor Bell in the following terms: "Wherever money is paid or advanced, or property made over, in consideration of a general promise of security not over a specific subject, the distinction is sanctioned between the debt and the security subsequently granted; and in its true intention and meaning the rule of the statute (*i.e.* of the Act 1696, c. 5) is understood to apply to the security, when it comes to be granted, as being truly in security for a previous debt. But it has also been held that wherever there is stipulated a specific security over a particular subject, in consideration or on the faith of which an advance of money or a transfer of goods is made, the completion of that security, though after an interval of time, and after the term of constructive bankruptcy has begun, is not within the intent and meaning of the Act." While there are undoubtedly cases in which the security was reduced which are very difficult to reconcile with the principle expressed in this passage (*Inglis*, 1833, 11 S. 813; affd. 1 S. & M. 204; *Moncreiff*, 1851, 14 D. 200; *Gourlay*, 1887, 14 R. 403), it is in accord with what may be regarded as the leading case on the subject (*Taylor*, 1855, 17 D. 639), and with the most recent decision (*Cowdenbeath Coal Co.*, 1895, 22 R. 682).

Recognised Methods of Conveyance must be followed.—Again, as particular methods have been recognised as appropriate for the transference of particular kinds of property, a security cannot be effectually constituted except by the use of such method. Thus where it was attempted to make a security over moveables, without delivery, by taking sasine in the hands of a notary, on the model of the form then appropriate for the conveyance of heritable property, it was held that no real right or security had been constituted (*Stiven* (*Watson's Tr.*), 1878, 15 S. L. R. 422). And where an attempt was

made to create an equitable mortgage over land by depositing the title deeds with a creditor, it was held not only that no right to the land could be acquired in this way, but that the depositary could not assert any right to retain the title deeds in a question with a purchaser of the lands (*Christie*, 1862, 24 D. 1182). A very strong illustration of this principle is found in a case where the magistrates of a burgh, in granting a burgage holding, stipulated for an annual payment in name of feu-duty. It was held (1) that a feu-duty could not be created in a burgage holding, and (2) that the words did not make the obligation a real burden. Consequently it was held that the deed, though inferring a personal obligation, did not create any real security for it (*Magistrates of Arbroath*, 1872, 10 M. 630).

Statutory Forms are not Obligatory.—In regard to certain subjects the Legislature has provided forms by which a security may be constituted. These forms, however, are not exclusive of other methods, and although, in order to avoid question, they should invariably be followed, yet securities in other forms, provided that they are sufficient and appropriate at common law to confer upon a creditor a real right over the subject in question, will be effectual. Thus although a heritable security, as above stated, cannot be constituted by mere deposit of the title deeds (*Christie, supra*), yet it can be constituted or transferred by deeds which do not follow the ordinary or the statutory model (*MacCutcheon*, 1876, 3 R. 565). And although forms for the mortgage of ships, and a register for such mortgages, have been established by the Merchant Shipping Act, 1894, and the statutes which preceded it, yet it has been held that a security by an ordinary assignation, followed by possession, though it was not, and indeed could not, be registered, was nevertheless a valid security (*Watson*, 1879, 6 R. 1247).

Securities not requiring Possession.—To the rule that a security over property must be constituted by some method by which a real right may be transferred, there are certain exceptions. In a few cases the law of Scotland admits of a hypothec, or security without possession of the subject. These cases have been already dealt with in the article on HYPOTHEC. Also, where a statute expressly authorises a company or a corporation to borrow money in a particular way, and to grant securities for it in a special form, these securities may be good even although their form would not, at common law, vest a real right to any subject in the creditor. For in the case of securities of this kind the criterion of validity is not whether a real right over a particular subject has been granted to the creditor, but whether the forms prescribed by the particular statute have been observed. If they have, the security confers upon its holder a statutory preference (*Clark*, 1882, 9 R. 1017; *Greenock Harbour Trs.*, 1888, 15 R. 343). Securities of this kind are usually issued either by companies incorporated under the Companies Clauses Acts, or by corporations or local authorities having express statutory powers.

The particular methods applicable to the constitution of securities over particular subjects of property have already been dealt with in a variety of articles, a reference to which is given at the commencement of this article. It is not therefore proposed to treat in the present article of the specialties either in regard to the constitution of the security, or in regard to the rights of the parties, which result from the particular character of the subject conveyed. It is rather proposed to deal with those points which are regulated, not by the particular subject conveyed, but by the measure of the right over the subject, of whatever nature it may be, given to the creditor.

Conveyance ex facie *Absolute and in Security.*—The result of a conveyance

or assignation intended to form a security may either be to invest the creditor with a title of property in a subject, or merely with a right of possession. In other words, it may take the form either of an *ex facie* absolute conveyance or transfer, subject to an obligation to reconvey, or of a conveyance or transfer expressly in security. Thus in the case of securities over heritable property, the wadset in the older form of conveyancing, and the absolute disposition with back-bond in the modern form, confer upon the creditor an *ex facie* absolute title to the subject conveyed in security, whereas the bond of annualrent, and the bond and disposition in security, only confer on the creditor a title of possession. The same distinction may be observed in the conveyance in security of such incorporeal subjects as a policy of insurance. In the case of subjects, such as moveable goods, which are not transferred by written title, the distinction is less obvious, but may in certain cases be of importance. Thus in the ordinary case of pledge of moveables, only a right of possession and not of property is given; but where a security was constituted by transferring the document of title to goods, and intimating the right of the transferee to the keeper of the warehouse in which the goods were, it was held that the result of this procedure was to vest in the transferee not merely a right of pledge, but an absolute title of property (*Hamilton*, 1856, 19 D. 152).

Scope of Security depends on Title.—This distinction is not merely formal, but has important practical effects. Of these perhaps the most important is the scope of the security with regard to debts not expressly stated to be secured by it. It may be taken as the general rule that in the absence of an express contract, a security which confers only a right of pledge will only cover, in a question with other creditors, or with third parties who have acquired real rights in the subject, the debts in security of which it was expressly granted. In the case of heritable securities this principle is arrived at on the ground that there cannot be an indefinite burden upon lands (*Stein's Creditors*, 1789, Mor. 1158 and 1236; 1793, Mor. 14127; affd. 3 Pat. 345; Menzies, *Conveyancing*, p. 842). In securities over subjects not heritable, the same result has been arrived at, on grounds which may be explained in the words of Ld. Justice-Clerk Inglis, as follows: "Now, in every case of retention, the first and most important query is, what is the title on which the party has attained the possession which he proposes to hold till his debt is paid, for this title of possession furnishes the precise measure of the right of retention? If the title of possession be unlimited, as a title of property, the party is entitled to retain till every debt due by the party demanding delivery of the subject is paid. If his title be limited, he can retain only for the payment of that particular debt which is secured by his possession. This is very well settled law" (*National Bank*, 1858, 21 D. 79, at p. 85). When an absolute title of property is conferred on the security-holder, and there is no direct restriction as to the debts thereby secured, the holder may retain for all debts incurred after he obtained the security (*Hamilton*, 1856, 19 D. 152; *Nelson*, 1874, 1 R. 1093). Debts incurred before the security was granted are, it is thought, not covered; at least, if the security is constituted by a disposition with a written back-bond, and an already existing debt is not mentioned therein, there is a strong presumption that the security was not intended to cover that debt (*Robertson*, 1840, 2 D. 279). Further discussion of this subject will be found in the article on RETENTION.

Right to Realise.—A further distinction between a security which confers a title of property, and a security which confers only a title of possession, is found in the authority given to the holder to realise the

subject of his security. A party to whom an absolute conveyance has been granted, has an apparent authority to sell which will validate any sale by him if the purchaser took in good faith and without notice of any back-bond or back-letter (*Redfearn*, 1805, Mor. App. *v.* "Pers. and Real," No. 3; rev. 1813, 5 Pat. 707; *Heritable Reversionary Co.*, 1891, 18 R. 1116; rev. 1892, 19 R. (H. L.) 43; *Baillie*, 1884, 12 R. 199; *Duncan*, 1893, 21 R. 37). If the sale is in fact a violation of his contract with the party who granted the security, the seller is liable in damages, but the sale cannot be reduced (*Duncan, supra*). On the other hand, if a security confers only a right of pledge, the creditor can only realise either in virtue and in terms of an express power of sale, or by obtaining the authority of a competent Court (Bell, *Prin.* s. 207).

What Subjects may be conveyed in Security.—Before entering into the further consideration of the rights of the parties to a security, when duly constituted, *inter se*, and in questions with third parties, it is proposed to indicate certain points which should be noted by the conveyancer when called upon to consider whether a particular subject is capable of being conveniently assigned in security. In such cases, assuming that there is no doubt that the party proposing to borrow has a good title to the subject he offers as security, there are two questions to be considered: (*a*) whether the subject is assignable, and (*b*) assuming that it is, whether the form of the law of Scotland admits of its being assigned in a manner which will accomplish the objects of the parties, and will not involve the lender in any extraneous liability. The answer to the first question is dealt with in the article on ASSIGNATION; a few remarks on the second may be offered here. In considering the question it is assumed that, although occasionally a risky security may be taken in the absence of any other, it is as a rule not the desire of the lender of money to involve himself in an action with the trustee in the borrower's bankruptcy in order to vindicate his security, even although the result of that action might be to solve some point of law as yet undecided, or though the existing authorities might lead his advisers to conclude that the action would probably be successful.

The points which must be considered when a cautionary obligation, or a heritable security, is proposed, have already been dealt with, and need not be repeated here. See CAUTIONARY OBLIGATIONS; BOND AND DISPOSITION IN SECURITY.

Moveables—Furniture, Machinery.—In dealing with securities over moveable property no difficulty arises where the subject can be transferred into the actual possession of the creditor. When, however, a man desires to borrow money on such subjects as his furniture, the moveable machinery in a mill, the stock-in-trade of a shop, or the stocking of a farm, without depriving himself of the use of the subject by actually transferring it to the creditor, great difficulty is experienced in devising any form which will give the creditor an available security. It is believed that in such cases no form of security can be devised which will secure the creditor against the risk of the debtor proceeding to sell the subjects. He could not compete with a *bonâ fide* purchaser (*Liq. of Brechin Auction Mart Co.*, 1895, 22 R. 711). Such a sale, however, would imply a fraud upon the part of the debtor, and it has been remarked that in practice a man in taking a security desires to protect himself against the risk of his debtor's insolvency, and not against the risk of his fraud; and therefore a security which would give the creditor a preference in the event of his debtor's bankruptcy might serve all practical purposes, even although it left the creditor exposed to the risk of losing his security by a fraudulent sale. In constituting securities

of this nature advantage could until recently have been taken of the provisions of sec. 1 of the Mercantile Law Amendment (Scotland) Act, 1856, by which it was declared that where goods were sold but not delivered they should no longer be open to the diligence of the seller's creditors, or pass to his trustee on bankruptcy. These provisions did not apply to securities, but they left it open to a borrower, while the section was in force, to attain the object of giving a security by a sale with a reserved power of re-purchase. In the case of *M'Bain* opinions were expressed in the House of Lords that this section was applicable even if the sale were entered into for the purpose of creating a security, and even although there was an obligation on the part of the nominal purchaser to account to the seller for any profits he might make on a re-sale (*M'Bain*, 1881, 8 R. 360; affd. 8 R. (H. L.) 106). Following on these expressions of opinion, the device of an *ex facie* sale was tried in several cases, with varying success (*Allan & Co.'s Tr.*, 1883, 10 R. 997; *Darling*, 1887, 15 R. 180; *Seath & Co.*, 1884, 12 R. 260; affd. 1886, 13 R. (H. L.) 57; *Pattison's Tr.*, 1893, 20 R. 806; *Liddell's Tr.*, 1893, 20 R. 989). It is probably unnecessary now to enter into any discussion of these cases, because the section mainly at issue, sec. 1 of the Mercantile Law Amendment Act, 1856, has been repealed by the Sale of Goods Act, 1893. The provisions of the latter Act, by which the property in goods sold may pass to the purchaser without delivery, are declared not to extend "to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security" (s. 61, subs. 4). On this section it has been held that an *ex facie* sale, not followed by delivery, and proved to have been intended to operate as a security, did not give the nominal purchaser any right to the goods on the bankruptcy of the seller (*Robertson*, 1896, 24 R. 120). It would therefore appear that securities in the form of a sale cannot now be completed without delivery of the subject, and therefore that a man cannot now pledge the furniture in his house, and yet remain in possession of it. A similar result may be arrived at with regard to the stock-in-trade of a shop (*Rhind's Tr.*, 1891, 18 R. 623; *Paterson's Tr.*, 1891, 29 S. L. R. 87), or the stocking of a farm (*Johnston*, 1814, Hume, 448; *M'Gavin*, 1891, 18 R. 576). Moveable machinery in the actual possession of the owner or lessee of a mill is probably in the same legal position (*Heritable Securities Investment Assoc.*, 1880, 7 R. 1094). But if a man proposes to purchase a mill and machinery, and desires to raise money on both, it is submitted, though with great doubt, that a security may be obtained by the lender taking an absolute disposition of the mill and machinery from the seller, granting (*a*) a back-bond declaring the transaction to be merely a security, and undertaking to convey the mill to the borrower on the loan being paid; and (*b*) a lease to the borrower. The borrower will then on entering into possession of the mill, possess on the title given him by the contract of lease, and his natural possession will complete the right of the lender, by whom the lease is granted. The security would therefore appear to be good (*Union Bank*, 1865, 3 M. 765; *Duncanson*, 1881, 8 R. 563).

Trade Fixtures.—Trade fixtures (see FIXTURES) are in an exceptional position, and may be conveyed in security without change of possession, because the property in such fixtures, during the currency of the lease, is in the landlord, subject to the right of the tenant to remove them at the end of the lease. The right of the tenant is therefore a *jus crediti*, and may be transferred in security by an assignation intimated to the party who is debtor in that *jus crediti*, *i.e.* the landlord (*Miller*, 1894, 21 R. 658).

Goods in Warehouse.—Goods in a store may be transferred in security,

provided that the storekeeper is an independent person, and not the transferor, or a servant of his, by giving the creditor a delivery-order, or indorsing to him a dock warrant or other certificate, followed by intimation to the storekeeper (*Inglis*, 1848, 24 R. 758; affd. 35 S. L. R. 963; where the earlier authorities are reviewed). The result of this procedure is not a pledge of the goods in question, but an *ex facie* absolute transfer of the property thereof (*Hamilton*, 1856, 19 D. 152); but this is of little importance, as a security by an *ex facie* absolute transfer is in most cases as convenient as an ordinary pledge. Intimation to the store or warehouse keeper is indispensable, otherwise the goods remain open to the diligence of the creditors of the borrower (*Inglis, supra*). The principle upon which the right of the security-holder is held to be complete on intimation being made, is that from that time the storekeeper holds as his agent instead of as the agent of the granter of the security, and the goods are therefore transferred, by constructive delivery, into his possession (Bell, *Com.* i. 198, note; *Pochin & Co.*, 1869, 7 M. 622; *Distillers Co.*, 1889, 16 R. 479). But although a security can thus be completed by constructive delivery by an order on a warehouse-keeper, a man cannot effect delivery by an order on himself, or on his servant, or by an entry in his own books. Therefore if a manufacturer keeps goods in his own private store, or in a store kept by a manager in his own employment, these goods cannot be used as a security without actually transferring them into the hands of the person proposing to advance the money. The granting or indorsement of a delivery-order, in such circumstances, and its intimation at the store or warehouse, really amounts to nothing more than an entry in the books of the borrower, and this is not sufficient to complete the security. The goods remain open to the diligence of the borrower's creditors, and pass to his trustee in sequestration: in other words, the security is quite inoperative (*Melrose*, 1851, 13 D. 880; *Lindsay*, 1862, 24 D. 821; *Anderson*, 1866, 4 M. 765; see *contra*, per Ld. Young in *Browne & Co.*, 1893, 21 R. 173). The difficulty is not surmounted even if the warehouse is under the charge of an officer of excise, and the transfer is entered in his books, because such an officer's duties are confined to securing the interests of the revenue, and he cannot be regarded as a custodier of the goods, or as agent for either party (*Rhind's Tr.*, 1891, 18 R. 623). See further on this subject, Bill of Lading; Document of Title; Delivery-Order.

Subjects involving Creditor in Liability—Leases.—Certain subjects of property are unsuited for securities, because the procedure necessary to complete the right of the security-holder places him in the position, as regards third parties, of owner of the subjects, and may involve him in liability in respect of them. Of these perhaps the most important are a lease, a right of partnership, and a share in a company on which there remains any liability in respect of uncalled capital. (As to shares, see Blank Transfer.) If a lease is registered under the Registration Act, 1857, it may be used as a subject of security under the forms provided by that Act. Such registration, however, is only competent in the case of leases for a time of not less than thirty-one years. In the case of leases not registered, no preferential right can be obtained by a creditor unless he actually enters into possession of the subjects (*Inglis & Co.*, 1829, 7 S. 469; *Clark*, 1882, 9 R. 1017). Apart from the practical difficulty of such a proceeding, it involves the security-holder in liability for the rent (*Ross*, 1786, Mor. 15290; *Ramsay*, 1842, 4 D. 405; *Moncreiff*, 1896, 24 R. 47). In the case of *Ramsay* it was decided that the security-holder, if he had once intimated his right to the landlord, and obtained his assent, even although he had never

entered into possession, would not get rid of his liability without the landlord's consent. The case was, however, a special one in respect that the security was constituted in the form of an *ex facie* absolute assignation of the lease, and it was suggested by Ld. Mackenzie that if the security had been framed as an assignation expressly in security, the holder would have been entitled to terminate his liability for rent, by a reassignation. Further, the security-holder, by entering into possession, may incur liability, if the lease is of such a character as to require outlay in carrying it on—a farming or mining lease, for example. Even if an attempt is made to take civil possession by constituting the lessee manager for the security-holder, the latter has been held personally liable for furnishings, although the party furnishing them was not aware of his connection with the subjects (*Macphail & Sons*, 1887, 15 R. 47). From these cases it is clear that a lease which involves the carrying on of a business is a subject on which it is very unsafe to advance money. If the lease is of a subject which does not occasion expense, for instance, a house, the security may be less dangerous, but the cases on what constitutes entering into possession of such a subject so as to avoid all risk of challenge from the trustee on the debtor's bankruptcy do not furnish a rule sufficiently distinct to enable a creditor to advance money safely on such a security (see *Sime's Tr.*, 23 May 1806, F. C.; *Wright*, 1839, 1 D. 641; *Roberts*, 1842, 5 D. 6; *Hardie*, 1879, 19 S. L. R. 83; *Macphail & Sons*, 1887, 15 R. 47).

Assignations of Right of Partnership.—The right of a partner in a firm may be assigned in security without rendering the assignee a partner. The following statement of the law in Lindley on *Partnership*, p. 698, 6th ed., 367, has been stated by Ld. Gifford (*Cassels*, 1879, 6 R. 936, at p. 955) correctly to represent the law of Scotland: "Although a partner cannot, by transferring his share, force a new partner on the other members of the firm without their consent, there is nothing to prevent a partner from assigning or mortgaging his share without consulting his partners; and if a partner does assign or mortgage his share, he thereby confers upon the assignee a right to payment of what, upon taking the accounts of the partnership, may be due to the assignor or mortgagor. But the assignee or mortgagee acquires no other right than this, and he takes subject to the rights of the other partners, and will be affected by equities arising between the assignor and his copartners subsequently to the assignment." The right of a partner to grant a subordinate assignation is not excluded by a general prohibition, in the contract of copartnery, of any assignation of any partner's share. In *Cassels* (1879, 6 R. 936; affd. 8 R. (H. L.) 1) it was provided that "it shall not be in the power of any of the partners to assign all or any part of his share or interest in the capital stock or profits of the concern to any person." This, it was held, prohibited an assignation so framed as to make the assignee a partner of the firm instead of the cedent, it did not prohibit an assignation of his rights under the contract by a member of the firm who continued to be a partner. An assignation of the right of a partner in a firm is an assignation of a *jus crediti*, and must, in order to confer on the assignee a right preferable to that of other creditors of the cedent, be completed by intimation to the firm (Ersk. iii. 5. 3; *Hill*, 1846, 8 D. 472, and 10 D. 78). As the share of a partner may be arrested by his creditors (Ersk. iii. 3. 24), and will pass to his trustee in bankruptcy (*Hill, supra*), such intimation is indispensable in order to make an assignation in security of any real value to the assignee. (As to what constitutes intimation to a partnership, see *Hill, supra*, and *Russell*, 1827, 5 S. 891; affd. 5 W. & S. 256). The assignation, which does not make the assignee a partner of the firm, but merely

gives him a redeemable right to the share of an individual partner, does not, it is conceived, subject him to liability for the debts of the firm (*Eaglesham & Co.*, 1875, 2 R. 960; cf. *Mess*, 1896, 23 R. 1105; Partnership Act, 1890, s. 2, subs. 3 (*d*)). But the rights conferred on the assignee render it a security of a limited and unsatisfactory kind. The nature of these rights (a point not illustrated by any Scotch decisions) is dealt with by the Partnership Act as follows (s. 31): "(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transaction, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. (2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

Assignation of Business of Sole Trader.—When a single individual carries on a business, it would seem to be extremely doubtful whether he can in any way assign it in security so as to give the assignee any preference in the event of his bankruptcy. Arrangements by which a trader, in consideration of an advance, assigns his business, and agrees to pay all the receipts to a creditor, or into a particular account at a bank, may be useful in preventing the debtor from applying the profits of the business, should it prove successful, to his own purposes instead of to the payment of his debt, but it would appear that they cannot confer on the assignee any right higher than that of an ordinary personal creditor, and are therefore useless in the event of the business proving unsuccessful (*Graham & Co.*, 1895, 23 R. 84). They do not transfer the stock-in-trade to the creditor, unless he takes actual delivery of it (*Stiven*, 1871, 9 M. 923; *Rhind's Tr.*, 1891, 18 R. 623; *Paterson's Tr.*, 1891, 29 S. L. R. 87); and it is conceived that if a debt due to the firm were arrested by another creditor, the arrestment would be good, unless the assignee of the business had taken the precaution of intimating his right to all the debtors (see opinion of Ld. M'Laren on *Graham & Co., supra*). The following cases, *Eaglesham & Co.*, 1875, 2 R. 960; *Stott*, 1875, 5 R. 1104; *Mess*, 1896, 23 R. 1106; *Edmunds*, 1865, L. R. 1 Q. B. 97, show the danger which a creditor in such arrangements incurs of being held liable for the debts of the concern, either as truly a partner, or as a principal for whom the debtor is an agent. It is true that in the Scotch cases referred to the debtor escaped liability, but it may be noted that in none of them had he entered into possession of the business, or done anything to place himself in the position of holding a preferential right over the assets.

Loans on Share of Profits.—Instead of taking an assignation of a business, it is not uncommon for a party advancing money to attempt to secure himself by stipulating for a share of the profits, or for interest at a rate varying with the profits. A study of the cases on the subject of arrangements of this kind leads to the conclusion that they should never be entered into by a person wishing to occupy the position of a lender of money, however suitable they may be for a person who wishes to embark his money as a partner in a private business with limited liability. Such arrangements,

unless fortified by the conveyance of a particular subject, or by the cautionary obligation of a third party, are in no sense rights in security (*Graham & Co.*, 1895, 23 R. 84). In fact, the provisions of the Partnership Act, 1890, place the lender of money on such conditions in a position inferior to that of an ordinary personal creditor. The Act has the following provisions (s. 2, subs. 3 (*d*)): "The advance of money by way of loan to a person engaged or about to engage in any business, on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business, or liable as such, provided that the contract is in writing, and signed by or on behalf of all the parties thereto" (s. 3). "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section,"—"being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to receive anything in respect of his loan"—"until the claims of the other creditors of the borrower for valuable consideration in money or money's-worth have been satisfied." This latter section, reproducing sec. 5 of Bovill's Act (28 & 29 Vict. c. 86), which, however, was definitely limited to contracts in writing, must, in almost all cases of bankruptcy, deprive the lender of the ordinary right of ranking on his debtor's estate. There has as yet been no decision in Scotland on the question whether sec. 3 of the Partnership Act applies to loans which are not framed in forms which directly fall within the terms of subs. 3 (*d*) of sec. 2. In England it has been held that the section is applicable although the agreement following on the loan is not in writing (*ex parte Schofield*, [1897] 2 Q. B. 495), and when the agreement was that the lender should be entitled to a specified sum out of the profits (*ex parte Jones*, [1896] 2 Q. B. 484). On the other hand, in a complicated case, it was held that sec. 3 did not apply, on the ground that the agreement was unintelligible and inoperative (*re Vince*, [1892] 2 Q. B. 478). The lender is not precluded from realising any independent security he may hold for his loan (*ex parte Sheil*, 1877, 4 Ch. D. 789; *Badely*, 1888, 38 Ch. D. 238); and as he is a creditor it would appear, though it has not been decided, that he is entitled to attach the estate of the borrower by diligence. It should be observed that the Partnership Act, 1890, does not provide that a person providing money on a profit-sharing agreement shall not be liable for the debts of the business; it only enacts that liability is not to be inferred from profit-sharing alone. The result of the cases seems to be that the question of the lender's liability will depend upon whether the Court, looking at the agreement as a whole, shall come to the conclusion that the so-called lender is really a partner. In *Miller*, 1876, 3 R. 548; *Stott*, 1878, 5 R. 1104; *Mess*, 1896, 23 R. 1105; *Mollwo, March, & Co*, 1872, L. R. 4 P. C. 419; *Badely*, 1888, 38 Ch. D. 238; *ex parte Jones*, [1896] 2 Q. B. 484, the transaction was held a mere loan. In *Syers*, 1876, 1 App. Ca. 174; *Pooley*, 1876, 5 Ch. D. 418; *in re Delhasse*, 1878, 5 Ch. D. 511; and *Murray*, 1898, 36 S. L. R. 29, it was held a partnership. In the case of *Mess* it was held that the lender was not liable although it was provided that, in addition to interest at a fixed rate, the profits of the business were to be retained for three years, and then divided equally between borrower and lender; that the borrower was to supply half-yearly balance-sheets, and that, on any balance-sheet showing that the capital of the business had sunk below £500, the agreement was to terminate, and such balance as

remained was to be paid to the lender. There was, however, in this case the specialty that the share of the profits effeiring to the lender was not to be paid to him directly, but was to be applied towards payment of a large debt due by the borrower to the representatives of the lender's father. It was also the result of the agreement that the business, on the termination of the arrangement, would remain the property of the borrower. In the more recent case of *Murray* (*supra*), where at the end of the arrangement half the business was to belong to the lender, he was held liable as a partner.

Policies of Insurance.—Policies of life insurance may either be used as collateral securities to an assignation of a reversionary right, or as independent subjects of security. The questions which have arisen in the former case are dealt with in the article on LIFE INSURANCE (vol. viii. p. 107), and the actuarial calculations upon which such transactions depend will be found in the session papers in the case of *Menzies* (1893, 20 R. (H. L.) 108). Where premiums have been paid on a policy, it becomes a subject of ascertainable value, and is frequently assigned in security. A form of such an assignation will be found in the *Jurid. Styles*, ii. 695. The right of the creditor therein must be completed by intimation to the insurance company, as a mere deposit of the policy does not give a real right to it, and a creditor arresting in the hands of the company is preferable to such a depositary (*Strachan*, 1835, 13 S. 954; *United Kingdom Life Assurance Co.*, 1838, 16 S. 1277; *Scottish Provident Institution*, 1888, 16 R. 112). But a mere deposit of the policy may be good, at least in a question with any posterior assignee, if it is made in pursuance of a contract entered into in a foreign country where a deposit is recognised as a mode of transferring a right to the policy (*Scottish Provident Instit.* v. *Cohen*, 1888, 16 R. 112; *Scottish Provident Instit.* v. *Robinson*, 1892, 29 S. L. R. 733). The only danger in a security by an assignation of a policy of insurance, besides the possibility, which should always be settled by inquiry, that the company may have a lien over it for advances made to the assured, is that the policy may be avoided in respect of misrepresentations made by the assured at the time when it was taken out. (As to what misrepresentations will avoid a policy, see LIFE INSURANCE.) It has been decided that any plea of this kind open to the company in a question with the assured, is also open to them in a question with an assignee (*Scottish Widows' Fund*, 1876, 3 R. 1078), though the company, if aware of such objections, is not entitled to continue to receive the premiums from an assignee, and then, when the policy becomes payable, to plead that it is avoided in respect of initial misrepresentation (*Scottish Equitable Life Assurance Co.*, 1877, 4 R. 1076, per Ld. Pres. Inglis). It is believed that most companies, in the case of a policy of any standing being assigned, would consent to grant a waiver of any such objections.

Rights of Creditor; Collateral Advantages.—The general principles which determine the legal results and incidents of a right in security, when duly completed, may be best considered from the point of view of the rights of the creditor. It may first be noted that the Courts are inclined to restrict the rights of a creditor to those which primarily flow from his contract, *i.e.* the right to obtain payment of his debt, principal and interest. The question would appear still to be open in Scotland whether there is any equitable rule which would prevent a creditor from enforcing a contract whereby it was stipulated that he should be entitled to make use of the subject of his security as a source of profit, or should be entitled to any incidental profits that might arise from it. (For English law on the point, see White and Tudor's *Equity Cases*, 7th ed., vol. ii. p. 16.) But however this may be, it is settled that without express stipulation no collateral

advantage may be obtained. Thus a person who is in possession of land under the powers in a bond and disposition in security cannot exercise the rights of a proprietor in voting or county government (*Forsyth*, 1853, 16 D. 197). And where a right of patronage was adjudged, it was decided that the adjudger had no right to present to the church on a vacancy occurring (*Grindlay*, 1833, 1 Ross' *L. C.* 140). Again, where a company offered to its shareholders the right of subscribing for new shares on favourable terms, it was held that a creditor, who had had the shares transferred to his name in order to complete his security, was the agent for the debtor, was bound to communicate the offer to him, and, if he failed to do so, would be liable for any damage the debtor thereby sustained (*Dougall*, 1892, 20 R. 8). This principle and its limitations are well illustrated by an English case. A brewery company entered into possession of a public-house mortgaged to them, and let it subject to a clause restricting the tenant to their beer. In a question of accounting with the debtor it was proved that a higher rent could have been obtained if this clause had been omitted. It was held that the company were bound to debit themselves with rent at this higher rate, but that they were not bound to account for the profits they had made by supplying the beer (*White*, 1888, 42 Ch. D. 237).

Irritancies.—A similar equitable principle to that which prevents a creditor obtaining any collateral advantages from his security is the foundation of the rule that a security cannot be turned into a right of property by mere contract. In English law this principle is expressed in the maxim "once a mortgage always a mortgage"; and in the law of Scotland it is thoroughly settled that penal clauses in bonds—clauses, that is, whereby it is declared that on the happening of a certain event, for instance, on failure of payment by a certain date, the right of redemption should be extinguished—will not receive effect (*Thomson*, 1844, 6 D. 1106; *Smith*, 1879, 6 R. 794). "The principle is quite fixed, that if a transaction is only a security it cannot be converted into a right of property without a declarator of the extinction of the former proprietor's right" (per Ld. Pres. Inglis in *Smith, supra*, at p. 800). The rule has even been allowed to prevail over the express terms of the Act 1672, c. 19, whereby it is declared that lands adjudged "shall remain heritably and irredeemably with the creditor in case they be not redeemed within the space of five years after the decree of adjudication." These words notwithstanding, adjudications have always been held redeemable until a declarator of expiry of the legal has been obtained (*Campbell*, 1794, Mor. 321, 1 Ross' *L. C.* 155). The same principle results in the rule that a stipulation in a bond that non-payment after a fixed date shall exclude the right to redeem only gives the creditor the right to bring a declarator of irritancy of the debtor's right. The irritancy may, until the declarator is obtained, be purged by payment of the sum due (Stair, i. 13. 14; *Earl of Tullibardine*, 1667, Mor. 7206; *Adam*, 1848, 10 D. 722). This rule would appear to hold even if the creditor has been invested with a title of property, provided that it can be proved that it was really in security (*Smith*, 1879, 6 R. 794). In such a case, however, the debtor's right of redemption may be cut off by the negative prescription (*Chambers*, 1823, 2 S. 366; *National Bank*, 1885, 13 R. 380, per Ld. Fraser). The principle that a contract, if originally a security, must remain so until its character is altered by a declarator, was strongly illustrated in the case of *Salt* v. *Marquess of Northampton*, [1892] App. Ca. 1. In that case A. was entitled to succeed to an entailed estate of some value on the death of his father. Before that event he borrowed £10,000 from an insurance company, granting a bond and disposition in security over the entailed estate, and arranging

that the company should be entitled to insure his life, as against that of his father, for £20,000 in any office they might select, and on terms which resulted in the borrower being liable to pay the premiums. The company effected the insurance in their own office. It was an express part of the contract that if A. should predecease his father without having repaid the loan, the proceeds of the insurance policy should belong to the lenders. On A. predeceasing, it was held that the company was bound to account for the £20,000 to his representatives, under deduction of the amount of the loan, arrears of interest, and unpaid premiums. The *ratio decidendi* was that the policy originally as taken out belonged to A., that the interest of the company in it was only that of a mortgagee, and that the clause providing that it should become their property on A. predeceasing his father without having repaid the loan, was a penal clause in a security-contract to which the Courts would not give effect (see also *Marquess of Queensberry*, 1839, 1 D. 1203; affd. 1 Bell's App. 183; *Shand*, 1859, 21 D. 878; *Knox*, 1870, L. R. 5 Ch. 515; *Preston*, 1879, 12 Ch. D. 760).

Obligations of Creditor.—The obligations of a creditor to whom a subject has been given in security, whether by *ex facie* absolute transfer or as a mere pledge, are to keep the subject with reasonable care, and to restore it on payment of the debt. The degree of care required would seem to be that known as ordinary diligence (*Coggs*, 1 Smith's *L. C.* 167). Thus a party who takes a bill of exchange in security is bound to present it for payment in due course, and to take the ordinary proceedings to preserve recourse on its being dishonoured (*Peacock*, 1863, 32 L. J. C. P. 266; *Dominion Bank*, 1889, 16 R. 1081). Should the subject of the security be lost from causes which would not have been averted by ordinary diligence, the security-holder is not liable, and is still entitled to exact the debt (*Syrad*, 1858, El. B. & E. 469), unless the case is one which falls under the Pawnbrokers Act, 1872. On payment being tendered, the security-holder, unless he has a claim of retention (see RETENTION), is bound to restore the subject of his security, and will be answerable in damages if it is thereafter lost or damaged, even from a cause beyond his control (*Coggs*, 1 Smith's *Leading Cases*, 167, per Ld. Holt, at p. 178). The obligation to restore the subject of the security as he received it has important consequences in the event of the debtor having parted with his property in that subject. Where he retains the right of property, he may often have no interest to demand an assignation of the security, as a mere discharge is sufficient to extinguish the creditor's right. But where he has conveyed the subject to a third party, but still remains liable for the debt, it is open to the creditor to sue him personally instead of realising the security. If, however, he thus proceeds on the debtor's personal obligation, he is bound to assign to him his security, in order that the debtor may be enabled to work out his relief against the person to whom the subject of the security has been transferred. If the creditor has consented to restrict or limit his security in favour of the party to whom the subject has been transferred, he can no longer, in granting such an assignation, assign the security as he received it, and therefore he is not entitled to sue the original debtor on the personal obligation (*North Albion Property Investment Co.*, 1893, 21 R. 90; *Mackirdy*, 1895, 22 R. 340; *Kinnaird*, 1888, 39 Ch. Div. 636). Thus in the case of *Mackirdy*, A. granted a bond and disposition in security to B. over the lands of X. He afterwards conveyed these lands, subject to the security, to C. C. feued the lands, and obtained the consent of B. to free the *dominium utile* of the parts feued from the security, reserving his right over the *dominium directum*, or superiority. In an action by B. against A.

for payment of the loan under the personal obligation, it was held that by thus freeing the *dominium utile* of the lands, he had rendered himself unable to assign the security to A. in its entirety, and had therefore lost his right to enforce A.'s personal obligation. This principle is not applicable if the debtor has consented, directly or indirectly, to the restriction of the security, and therefore a creditor who has sold the subjects under a power of sale is not thereby precluded from suing the debtor for any balance of the debt which may remain after exhausting the proceeds of the sale (*North Albion Property Investment Co., supra*, per Ld. M'Laren; *Jones*, 24 Q. B. D. 269).

Obligation to Assign.—Not only is the creditor bound to assign his security to the debtor on receiving payment: he is also bound to assign to anyone who tenders payment of the debt and has the authority of the debtor in doing so (*Fleming*, 1867, 5 M. 856; *Mackintosh's Trs.*, 1898, 25 R. 554). The fact that the security is heritable, and that the debtor has been inhibited, does not alter the case, and the creditor is still bound to grant the assignation, and in doing so does not incur any liability to the inhibitor (*Mackintosh's Trs., supra*). But a creditor who is not pressing for payment is not bound to assign his security to anyone, for instance a postponed security-holder, who has not the authority of the debtor to demand it (*Smith*, 1844, 6 D. 1164; *Fleming*, 1867, 5 M. 856). If, however, he is pressing for payment, or about to realise his security, he is bound to assign to anyone who proposes to pay the debt on behalf of the debtor, or who can show a reasonable interest to demand such an assignation (Ersk. iii. 5. 11; *Cunningham's Trs.*, 1847, 10 D. 307).

A creditor who is offered payment is not bound to assign his security if he can show that he has a reasonable interest to refuse. Such an interest may arise from the fact that the assignation might expose him to some liability. Thus where a creditor held an adjudication on a debt on which several parties were co-debtors, and was in possession of the subjects adjudged, and one of these co-debtors offered to pay the debt, as it should be fixed on accounting, on receiving an assignation of the debt and the lands adjudged, it was held that the creditor was not bound to accept this offer, because the accounting would not be binding upon the other debtors, and he might therefore be exposed to liability to them, in the event of their pleading that he had been already repaid by his intromissions with the rents during the period for which he was in possession (*Will*, 1867, 6 M. 9; see also *Russell's Tr.*, 1857, 20 D. 125). The creditor may also be entitled to refuse an assignation on the ground that he has further interests in the subjects which would be injured by the assignation being granted. Thus it was held that a landlord, who was in process of sequestrating his tenant for rent, was not bound to assign the right obtained under the sequestration to a friend of the tenant's, who offered to pay the rent, because he had a reasonable interest in preventing his tenant from borrowing money on the security of his crops, by means of an assignation of the landlord's sequestration (*Graham*, 1842, 4 D. 903). In *Smith* v. *Gentle* (1844, 6 D. 1164), A. held a decree for expenses, and the payment thereof had been made a condition of B.'s obtaining a new trial. A third party offered payment, and demanded an assignation of the decree. A. refused the offer, on the ground that if he was successful in the action, B. would again become his debtor, and the decree assigned might be used as a basis for diligence which would affect B.'s estate. It was held that this was not a legitimate reason for the refusal of an assignation. The case where a creditor refuses to assign on the ground that he has another security over, or some further interest in, the same

subjects is dealt with in the article on CATHOLIC AND SECONDARY SECURITIES.

Limitations of Right to realise Security.—The position and rights of a creditor in realising the subject of his security depend upon the terms on which the security was granted. An *ex facie* absolute transfer or disposition, by investing the creditor with a title of an owner, gives him, as has already been noticed, the right to sell. The same right may be given by an express power of sale, and is provided, by the Pawnbrokers Act, 1872, in cases of pledge which fall within the scope of that Act, on certain specified conditions. Again, in the case of mortgages or debentures issued by a company incorporated by Act of Parliament, it is usually provided that the mortgagees or debenture-holders shall have the right to petition the Court for the appointment of a judicial factor to receive the tolls of the undertaking for their benefit. The procedure to be followed in such a petition, and the powers and duties of the judicial factor when appointed, are regulated by the Companies Clauses Acts, 1845 and 1863 (8 & 9 Vict. c. 17, and 26 & 27 Vict. c. 118), and the Railway Companies Act, 1867. (See *Primrose*, 1851, 13 D. 1214; *Haldane*, 1881, 8 R. 669, and 9 R. 253; *Cotton*, 1889, 17 R. 262; *Broad*, 1888, 15 R. 615 and 641.) But this procedure rests on the powers conferred by the private Act of Parliament by which the company is incorporated, and is not open to a private creditor, or to a creditor of a company registered under the Companies Acts (*Glasgow, Barrhead, etc., Rwy. Co.*, 1850, 12 D. 1014). Further, in the case of rights of hypothec over a ship, whether conventional, by a bond of bottomry or respondentia, or legal, by a hypothec for collision, salvage, or seamen's wages, the subject may be realised under special procedure in an Admiralty Court. Apart from these special cases, a creditor in a security which does not confer upon him the title of an owner, and which does not contain a power of sale, can only realise his security by obtaining authority to sell from a competent Court (Bell, *Prin.* s. 207; *Wood*, 1842, 4 D. 1363; *Robertson's Tr.*, 1890, 18 R. 12, per Ld. M'Laren). In the case of a pledge of moveable property a warrant to sell may be obtained upon application to the Sheriff Court (Bell, *Prin.* s. 207); in the case of heritable property it is believed that the proper procedure is an application to the Court of Session for the appointment of a judicial factor with power of sale.

The creditor selling under a power of sale is bound to observe strictly the conditions of that power. In the case of heritable securities, where the procedure is statutory, the slightest deviation from the forms prescribed will render the sale liable to reduction, and will entitle the purchaser to resile (*Ferguson*, 1895, 22 R. 643). In securities of older date, where particular forms of selling are prescribed, these must be strictly adhered to (*Melville*, 1854, 16 D. 419); or, if their observance is impossible, if, for instance, advertisement in a newspaper which is no longer published is required, a petition for authority to dispense with them should be presented. There would seem no reason to doubt that the same rules would apply to the case of a security over moveables with an express power of sale.

In realising his security, the creditor is not entitled to act in reckless disregard of the interests of the debtor or of other creditors. His position has been described by the consulted judges, in a case decided by the whole Court, in the following terms: "Our opinion therefore is, that by law the heritable creditor, whose right is constituted by infeftment in the way and manner here done, cannot be deprived of his right to sell. Still, however, it is a right subject to control. He is but an incumbrancer; and subordinate rights may be lawfully created by the common debtor, to which the creditor

must pay a certain regard, provided they do not injure his own rights. Further, he is, to a certain extent, trustee for the common debtor, and of course for his representatives, and therefore when he exercises his right he must do so in a way beneficial, and not hurtful, to those concerned. If he acted nimiously, the Court would certainly interfere in the exercise of this right of sale" (*Beveridge*, 1829, 7 S. 279, at p. 281; approved by Ld. Pres. Inglis, *Stewart*, 1882, 10 R. 192, at p. 203). The cases on this point do not illustrate very exactly the limits imposed by this principle upon the exercise of a right of sale. A creditor has been held entitled to sell at an upset price which left nothing for postponed bondholders, if the price was a fair one under the circumstances (*Wilson*, 1843, 8 D. 1261). And an application for interdict of a sale, at the instance of a trustee representing the interests of the unsecured creditors, and on the ground that the price would be prejudicially affected by the fact that the debtor's law agent held the title deeds under a lien, was refused (*Bell*, 1838, 16 S. 657). On the other hand, a postponed bondholder on a heritable subject was held to be entitled to interdict a prior bondholder from selling at an upset price which would leave nothing to satisfy the postponed bond, at a time when a reduction of the title of the granter of the bonds was threatened (*Kerr*, 1848, 11 D. 301).

Creditor cannot purchase Subjects.—On the principle that a creditor, in selling, is in the position of a trustee, it is conceived that he cannot in any case purchase the subjects himself, except under the procedure provided by the Heritable Securities Act, 1894. Before that Act was passed, it was settled law that a heritable creditor could not purchase the subjects, either directly, or by means of a petition for a judicial factor with power of sale (Menzies, *Conveyancing*, p. 860; *Jeffrey*, 1826, 4 S. 722; *Taylor*, 1846, 8 D. 400; *Stirling's Trs.*, 1865, 3 M. 851). There would seem to be no specialty in the fact of the security being heritable to preclude the conclusion that the same rule would be universally applicable to all securities. But on a sale at the instance of one bondholder, another bondholder may be the purchaser (*Begbie*, 1837, 16 S. 232), and a security-holder may purchase on a sale by a trustee in bankruptcy (*Cruickshank*, 1849, 11 D. 614; Bankruptcy Act, 1856, s. 120). For the principle of foreclosure, introduced by the Heritable Securities Act, 1894, see BOND AND DISPOSITION IN SECURITY; POWER OF SALE.

Right of Redemption.—A debtor is in the ordinary case entitled to redeem the security by payment of his debt. The procedure which he must adopt in doing so depends, if the security is a bond and disposition over heritable subjects, on statutory provisions (see BOND AND DISPOSITION IN SECURITY), or in other cases, upon the terms of his contract. If there is no contractual provision on the subject, it is conceived, at least if the security is a pledge of, or lien over, corporeal moveable subjects, that the debtor may tender payment at any time. It has already been explained that an agreement that the power of redemption shall be extinguished after a certain time will not be enforced. But an agreement deferring the power of redemption for a term agreed upon is legal (*Ashburton*, 1892, 20 R. 187); and in the event of the bankruptcy of the debtor before that time has expired, the creditor is entitled to rank for damages for the loss of his investment (*Don's Tr.*, 1885, 22 S. L. R. 348). It is obvious, however, that such a term must be limited, otherwise the effect would practically be to cut off the debtor's right of redemption altogether. There is no Scotch authority as to the time for which such a stipulation may be lawfully made; the English rule would appear to be that whereas a

stipulation against redemption for five or seven years is reasonable and enforceable, a similar stipulation for twenty or thirty years is not (*Jeevan*, 1882, 20 Ch. Div. 724, per Jessel, M. R.).

The means by which a security may be extinguished depend to a large extent on the form of the security, and on the nature of the subject. Reference is therefore made to the articles on HERITABLE SECURITIES; PLEDGE; LIEN; HYPOTHEC; RETENTION.

Securities in Competition with Creditors using Diligence.—The validity of a voluntary security may be tested either by the subject being attached by the diligence of another creditor, or by the insolvency or bankruptcy of the debtor. The rule that a creditor using diligence obtains a right to the subject attached which is preferable to any uncompleted disposition of the subject, whether absolute or in security, may be regarded as completely settled by the recent case of *Robertson* v. *Baxter* (1897, 24 R. 758; affd. 1898, 35 S. L. R. 963). In that case A. indorsed delivery-orders for goods in a warehouse to B., and C., a creditor of A., arrested them in the hands of the warehouse-keeper before B. had intimated his right. It was held by the whole Court (Ld. Young dissenting) and by a unanimous judgment in the House of Lords, that the right of B. could not be completed without intimation to the warehouse-keeper, and that, seeing it was incomplete, the arrestments used by C. entitled him to a preference. It was also decided in the same case, that in a competition as to the real right to moveables situated in Scotland, between a party holding an assignation and a party holding diligence, the question must be decided by the *lex rei sitæ* and the *lex fori, i.e.* by the law of Scotland, even although the parties to the assignation were both domiciled in England, and the assignation itself took place there. As to the rules in a competition between heritable creditors, adjudgers, and inhibitors, see ADJUDICATION; HERITABLE SECURITIES; INHIBITION.

Bankruptcy Act, 1696, *c.* 5.—The validity of a security may be challenged under the bankruptcy laws, either as granted in security of a prior debt, contrary to the Act 1696, c. 5, or as excluded by the rights of the trustee in bankruptcy. Many important questions have arisen as to the effect of a challenge under the Act 1696 in cutting down securities granted for prior debts, and completed either by the creditor or by the debtor within sixty days of the bankruptcy of the latter. These cases have, however, already been dealt with in the article on BANKRUPTCY.

Trust Deeds for Creditors.—A party may be divested of his estates in bankruptcy either by a trust deed for creditors or by the legal assignation involved on sequestration or cessio. A trust deed for creditors is only an assignation or conveyance in security, and has no statutory effect. It requires to be completed, like any other right or security, by the methods appropriate to the subjects of property which are conveyed (*Nicolson*, 1872, 11 M. 179; *Mess*, 1898, 25 R. 398; affd. 36 S. L. R. 73). It may, like any other security for prior debts, be cut down as a fraudulent preference under the Act 1696, c. 5, if granted within sixty days of the bankruptcy of the granter (*Stein's Assignees*, 1832, 10 S. 647; *Mackenzie*, 1868, 6 M. 833). Therefore it would seem clear, though there does not appear to be any direct decision on the point, that any competition between the trustee and a non-acceding creditor, who had obtained a security, but had not completed a real right to the subject thereof, would not be determined in any way by the date of the trust deed, but would depend upon whether the trustee completed his right to the particular subject comprised in the security before or after the secured creditors had obtained a real right therein. The creditor is therefore clearly entitled to complete

his right after the trustee has been appointed, just as he would be entitled to complete his right to a prior security after a second security over the same subject had been granted. For instance, if a non-acceding creditor held an assignation of an incorporeal right, say a policy of insurance, and had not completed his right by intimation when the trust deed was granted, he would still be entitled to intimate to the insurance company, and his right would depend upon whether he or the trustee gave the first intimation. While this would seem to be clear if the question were with a creditor who did not accede to the trust, it is probable that a creditor who acceded would be held to have barred himself from completing any right in security which was incomplete at the date of his accession (*Mill*, 1825, 4 S. 219; *Meldrum's Tr.*, 1826, 5 S. 122).

Sequestration or Cessio.—The estate of a bankrupt is transferred to the trustee, on sequestration, as at the date of the first deliverance (Bankruptcy Act, 1856, ss. 42, 102); in cessio, as at the date of the decree (43 & 44 Vict. c. 34, s. 9). This statutory transmission has the effect, as regards moveables, of actual delivery, or intimation, as the case may require, and, as regards heritage, of a decree of adjudication recorded at the date of the sequestration (Bankruptcy Act, 1856, s. 102). It is not yet perfectly clear what is the effect of sequestration upon inchoate securities. There would seem no doubt that the debtor's hands are tied, that he cannot do anything to make the security effectual; he could not, therefore, give delivery of moveables which he had impignorated, and of which the creditor had not taken possession (cf. *Pattison's Tr.*, 1893, 20 R. 806). On the other hand, it is also settled that in the case of unregistered securities over heritable property (*Cormack*, 1829, 7 S. 868; *Lindsay*, 1844, 6 D. 771; per Ld. Ormidale in *Morrison*, 1876, 3 R. 406), or of shares in a company (*Morrison, supra*), and probably in the case of a security over any subject held by registered title, the sequestration of the debtor is not an impediment to the creditor completing his security by an entry in the appropriate register. It is then a race of diligence between the creditor and the trustee, and whichever first obtains registration will be preferred. A case which might seem to rest on the same principles is that of a security by an assignation unintimated at the date of bankruptcy. In that case the debtor has done all that lies in his power, and the security can be completed by the creditor alone. Its completion by intimation within sixty days of the bankruptcy of the debtor does not expose the security to reduction under the Act 1696, c. 5, as a security for prior debts (*Scottish Provident Institution*, 1888, 16 R. 112; *Guild* (*Kettle's Tr.*), 1884, 22 S. L. R. 520). It might therefore be held that sequestration, while it ties the hands of the debtor, does not tie those of the creditor. The words of the Bankruptcy Act, 1856, however, by making sequestration equivalent to intimated assignation, seem necessarily to infer that his right must therefore be preferable to that of any creditor whose intimation is later in date. The authorities also seem conclusive in favour of that view (*Hill*, 1846, 8 D. 472; *Tod's Tr.*, 1869, 7 M. 1100; *Gray*, 1895, 22 R. 326), though the opinion of Ld. Deas in *Watson* (1879, 6 R. 1247), based on the principle that the trustee in bankruptcy takes the estate *tantum et tale* as it stood in the bankrupt, may seem to cast some doubt upon them.

Valuation and Deduction of Securities.—Where a creditor holds a completed security at the date of the debtor's bankruptcy, he is entitled to be ranked on the bankrupt estate, but his right to a ranking varies according as the estate is distributed at common law or under the rules of the Bankruptcy Act.

Under the Common Law Rules.—In bankruptcies regulated by the common law, the rule is that every creditor is entitled to be ranked for his whole debt as it existed at the date of bankruptcy. A secured creditor is therefore entitled to be ranked for the whole amount due to him, and also to realise his security. The limitation of the right is that he is not entitled to draw, from the dividends on the estate and his security taken together, more than 20s. in the £. Subject to this limit he is entitled to be ranked and to receive a dividend on his whole debt (Bell, *Com.* ii. 419; *Kirkaldy*, 1841, 4 D. 202; *Molleson*, 1884, 11 R. 415). As, however, the rights of creditors are fixed at the date of the bankruptcy, any payments which he may have obtained before the bankruptcy, from his security or from co-obligants, must be deducted from his claim (Bell, *Com.*; *Hamilton*, 1841, 3 D. 494). But although the security is realised between the date of the bankruptcy and that at which a scheme of ranking is actually drawn up, no deduction need be made from the claim. These rules are still applicable on trusts for behoof of creditors, unless it is arranged, as it usually is, that the estate should be distributed according to the rules of the Bankruptcy Act.

Under Rules in Sequestration and Cessio.—A different rule prevails in sequestration (Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), s. 65), in cessio (A. S., 1882, s. 7), and in the liquidation of a company (Companies Act, 1886 (49 Vict. c. 23), s. 4). It is there provided in effect that where a creditor holding a security over a bankrupt estate claims to be ranked as a personal creditor, he is bound to value his security, upon oath, and to deduct that value from his debt and specify the balance. The section (65) is as follows: "To entitle any creditor who holds a security over any part of the estate of the bankrupt to be ranked in order to draw a dividend, he shall on oath put a specified value on such security, and deduct such value from his debt, and specify the balance; and the trustee, with the consent of the commissioners, shall be entitled to a conveyance or assignation of such security, on payment of the value so specified out of the first of the common fund, or to reserve to such creditor the full benefit of such security; and in either case the creditor shall be ranked for and receive a dividend on the said balance, and no more, without prejudice to the amount of his debt in other respects." On that balance he is entitled to be ranked and to receive dividends. But as a check upon unduly low valuations, it is provided that the trustee, with the consent of the commissioners, may demand from the creditor an assignation or conveyance, at the expense of the estate, of the security at the value placed upon it, on payment of that sum to the creditor out of the first available funds. The trustee is entitled to access to the subjects of the security in order to see whether he will avail himself of the option (*Ross*, 1826, 5 S. 192); but he is bound to decide within a reasonable time whether to purchase the security or not, particularly in cases where the subjects are of fluctuating value. Thus where a creditor holding security over shares, in an estate sequestrated in September, realised his security in November, it was held that the trustee was not entitled, in the following January and after the shares had risen in value, to demand a conveyance of them at the value which the creditor had put upon them in making his claim in the sequestration (*Henderson's Tr.*, 1872, 10 M. 946). But the creditor is entitled, at any time before a demand is made by the trustee for a conveyance, to revalue his security (Bell, *Com.* ii. 371; *Commercial Bank*, 1883, 13 R. 257). Thus where, after a first dividend had been declared, the security fell in value, it was held that the creditor might lodge a new claim, in which the security was valued at a lower sum, and the

balance was consequently larger, and that he was entitled to be ranked on the larger balance in future dividends (*Commercial Bank, supra*).

Meaning of Security in Bankruptcy Act.—The word "security" in the 65th section of the Bankruptcy Act is held to cover not only securities constituted by voluntary conveyance and rights of hypothec and retention, but also rights in security acquired by the use of diligence (Bankruptcy Act, 1856, s. 4; *Mitchell*, 1888, 16 R. 122). In making a claim on a sequestrated estate for the purpose of voting, a creditor is probably bound to specify every security which he holds over the bankrupt estate, even although it may, as a matter of fact, be valueless (*Mitchell, supra*). Similarly, he should mention and value any security he holds in claiming to be ranked for a dividend, but he may value the security at a nominal sum, or at nothing. A creditor who holds a security sufficient to secure his debt is not bound to claim to be ranked on the sequestrated estate (*Brown*, 1849, 11 D. 494). If, however, he abstains from doing so, and the security turns out to be insufficient, it is not settled whether he can claim and be ranked for future dividends, though, on the principle of *Commercial Bank* v. *Speedie's Trs.* (*supra*), it would appear that he should be entitled to do so.

Securities over "Estate of Bankrupt."—The securities which a creditor is bound to value and deduct are those "over any part of the estate of the bankrupt." If, therefore, the security held by the creditor consists of the personal obligation of a third party, or covers property not belonging to the bankrupt, he is not bound to value and deduct, but may rank on the bankrupt estate for his whole debt, and also utilise his security to the extent of obtaining full payment. An exception is admitted in the case where a creditor claims to be ranked on the estate of a partner of a company for a company debt. The value of the claim against the company must then be estimated by the trustee, and deducted from the creditor's claim (Bankruptcy Act, s. 66). The case where the security consists of the personal obligation of a third party is dealt with under CAUTIONARY OBLIGATIONS (*q.v.*). In the case of real securities the question whether they must be valued and deducted depends upon whether the subjects were, at the date of the sequestration, the property of the bankrupt, or, as it may be otherwise put, whether the subjects would, but for the security, have passed to the trustee as part of the assets of the estate (*Royal Bank*, 1877, 15 S. L. R. 13; *University of Glasgow*, 1882, 9 R. 643; *Royal Bank*, 1882, 9 R. 679). It is immaterial by whom the security was granted, or to whom the subjects belonged at the date of granting, as the question is one of their ownership at the date of the sequestration. Thus the debtor in a bond and disposition in security sold the subjects under an agreement by which the personal obligation transmitted against the purchaser. The creditor was no party to the transaction. On the bankruptcy of the original debtor it was held that the creditor would rank on his estate for the whole debt, without deducting the value of the security, because the subjects of the security had ceased to be the property of the bankrupt before the date of the sequestration (*University of Glasgow, supra*). Conversely, in *Royal Bank* the partner in a firm granted a security over his private property for a company debt. The property thus conveyed in security was afterwards acquired by the company. It was held that the creditor, in ranking on the sequestrated estate of the company, was bound to value and deduct the security granted by the partner, because the subjects were the property of the company at the date of the sequestration (*Royal Bank*, 1882, 9 R. 679).

In considering whether the subjects of a security form any part of a bankrupt estate, it would seem that regard is to be had to the nominal

title, rather than to the beneficial ownership. Subjects to which the bankrupt has the ultimate right, but to which a third party possesses an apparently unqualified title, are not part of the bankrupt's estate in the sense of sec. 65 of the Bankruptcy Act. The trustee could not acquire these subjects if the security were out of the way: he would only acquire a right to a conveyance of them from the party in whose name they stand (*Royal Bank*, 1877, 15 S. L. R. 13; *British Linen Co.*, 1877, 4 R. 651). Thus where a partner granted to a bank a security over subjects of which he was the apparent owner, to cover a company debt, and it was proved that he held in reality as a trustee for the company, it was held that whether the bank was aware of the trust or not, there was no obligation to value and deduct the security in ranking on the sequestrated estate of the company (*Royal Bank, supra*).

The principle above indicated is of importance in the case where two persons are bound for the same debt, and a security granted by one of them in favour of the other has been assigned to the common creditor. It is then a question upon which estate the security should be deducted in ranking. If the security was constituted by *ex facie* absolute title, it is settled that it must be valued and deducted in claiming on the estate of the grantee, in whose name the absolute title stood, and not on that of the granter, although the ultimate beneficial interest in the subjects might vest in his estate (*British Linen Co.*, 1877, 4 R. 651; *ex parte Brett*, 1871, L. R. 6 Ch. 838). Thus A. obtained an advance from B., accepted a bill for it, and made out bills of lading in favour of B. for a cargo which then belonged to him. B. discounted the bill with a bank, and indorsed the bill of lading as security for it. On the bankruptcy of A. and B. it was decided that the bank must value and deduct their security over the bills of lading in ranking on the estate of B., and not on that of A., on the ground that as B. had been invested with an absolute title to the cargo by having the bills of lading taken in his name, the property in it was part of his estate in bankruptcy, subject, no doubt, to an obligation to reconvey it to A. on repayment of the advance made upon it (*British Linen Co., supra*). Where the security is taken by a title *ex facie* limited, it is more doubtful on which estate the security should be deducted. Thus if A. grants to B. a bond and disposition in security, and the bond is assigned by B. to a bank for a debt on which both are liable, on which estate should the bank value and deduct that security? In the opinion of Ld. Shand it should be deducted in ranking on the estate of B., but Ld. Deas was of a different opinion (*British Linen Co., supra*, per Ld. Shand, at p. 656, and Ld. Deas, at p. 655). It is clear that in the case supposed A. had the benefit of the advance for which the bond was given, and therefore his estate should bear the burden of it without deduction. But the question is not one of equitable principles, but of the construction of the terms of the 65th sec. of the Bankruptcy Act, and it is difficult to hold that subjects, over which A. had granted a bond and disposition in security, were not a part of his estate on his bankruptcy.

Sederunt, Act of.—See Act of Sederunt.

Sedition.—The common law crime of sedition embraces all practices, by writing, speech, or conduct, which are suited and calculated to disturb the tranquillity of the realm and incite the people to coerce the Government or control legislation by unconstitutional means. Mere criticism of the

Legislature or Government, however violent and ungovernable it may be, is not sedition, unless it tends to create disaffection, or stir up tumult. There is no need to prove intention on the part of the accused to bring about such a result (*Grant and Others*, 1848, J. Shaw, 17 and 51). It is sufficient that tumult and violence were the likely sequences of his conduct. Where there is actual tumult and violence, it will depend on the circumstances of the case whether or not the common law crime of sedition has merged into the statutory one of treason.

Punishment.—Formerly sedition was punished by an arbitrary sentence. The Act 6 Geo. IV. c. 67 restricted the sentence to one of fine and imprisonment, with an alternative of banishment on a second offence. This alternative was taken away by 7 Will. IV. c. 5.

[Hume, i. 533; Alison, i. 581; Ersk. iv. 4. 29; Macdonald, 235; Anderson, *Criminal Law*, 35.]

Seducing Royal Forces to Mutiny or Desertion.—Any person who maliciously and advisedly seduces any person of the Royal (land or sea) Forces from his allegiance, or who incites or stirs up any such person to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, is liable to penal servitude for life, or not less than fourteen years, or imprisonment not exceeding three years. (37 Geo. III. c. 70; 57 Geo. III. c. 7; 7 Will. IV. and 1 Vict. c. 91, s. 1; 20 & 21 Vict. c. 3, s. 2.) See DESERTION (NAVAL, MILITARY; ETC.).

Seduction.—The leading example of seduction is obtaining carnal knowledge of a woman under promise of marriage. Seduction is usually spoken of in the books as involving fraud or dole, but in the case put that element does not require to be present at the date of the promise or connection. It may be held to occur, however, when the man breaks, or refuses without just cause to implement, his promise of marriage; and apparently breach of promise is of the essence of the action. But there may be liability where there has been something short of an actual promise (and where, consequently, there has been no breach), as if a man has behaved so as to induce a woman's consent to connection upon a reasonable expectation of marriage caused by his conduct. It was held relevant to allege as seductive means, that the defender had courted and professed honourable intentions towards pursuer during a period of eighteen months (*Gray*, 1878, 5 R. 97; *M'Candy*, 1826, 4 S. 520 or 527; *Kay*, 1850, 12 D. 845). It has also been said that artful practices to corrupt or entrap an inexperienced female (*Stewart*, 1837, 12 F. C. 1097; affd. 1841, 2 Rob. App. 547, 8 Cl. & Fin. 309), and continued solicitations of a female in a position of dependence, when followed by success, may be sufficient to constitute seduction (*Buchanan*, 16 June 1785, F. C.; *Linning*, 1748, Mor. 13909). But carnal connection is not seduction, and, unless it has been induced in some of the ways pointed out, gives no claim of damages, however injurious it may have proved to the woman (*Campbell*, 1826, 2 W. & S. 309). Previous bad character on the part of the pursuer is not an absolute bar to an action, but will receive great effect in mitigating damages (*Walker*, 1857, 19 D. 340).

Adultery, that is, connection with a married woman, whether seduction or not, always gives her husband a claim of damages against the adulterer.

It is no defence to an action at a husband's instance that his wife was a willing victim, or was the party who induced the act, since it is for the invasion of his own rights, and not as representing his wife, that a husband sues. But the circumstances in which the adultery occurred are relevant to the estimation of damages (*Baillie*, 1818, 1 Mur. 334). A husband does not require to bring an action of divorce against his wife to make an action for damages competent (*Paterson*, 10 Dec. 1803, F. C.), and is not barred by pardoning the offence and resuming cohabitation with her (*Macdonald*, 1885, 12 R. 327).

Since the law of England does not give an action to a woman for her seduction, it follows that no action will lie on this ground for an act committed in England (*Ross*, 1891, 19 R. 31).

[Glegg on *Reparation*, 96–99; Walton on *H. & W.* 296–298.]

Self-Defence.—See Culpable Homicide; Assault.

Semiplena probatio—a half proof.—In affiliation actions, a pursuer was formerly entitled, on adducing a *semiplena probatio*, to her oath in supplement, to prove that the defender was the father of her child. A *semiplena probatio* was just enough proof to show that the woman was not falsely naming a person father at her pleasure. It was such a proof as induced, not merely a suspicion but a reasonable belief that the pursuer's case was well founded, and consisted generally of a proof of opportunity for connection, acts of familiarity on the part of the defender towards the pursuer, etc. Ld. Pres. Boyle, in *Mann Forrest* (1850, 12 D. 1090), has said: "What is *semiplena probatio*, must be judged of according to the circumstances of each case. The only rule that can be laid down is that *semiplena probatio* is evidence on which you can rely amounting to almost complete proof, and the oath is just to fill up any little deficiency that may exist therein." The evidence, apart from that of the woman, was narrowly scanned, and if the witnesses were all persons of bad character, the Court considered what weight should be given to such testimony. In such a case the *semiplena probatio* was held not to be established (*Mann, supra*); and where the evidence of the pursuer under the new system is only supported by such witnesses, the effect to be given to it will be judged of in the circumstances of the case. There are a great many cases reported, in some of which *semiplena probatio* was found established and in others not. The facts of one case, however, can never be identical with those of another, and every case must be tried by itself. But certain points of general application settled by the decisions will be found in Fraser's *Parent and Child* (134 *et seq.*).

In addition to the *semiplena probatio*, the pursuer was entitled, as already mentioned, to her oath in supplement to complete her proof, because in such cases it was rarely possible to obtain direct evidence of the alleged connection, except from the woman herself. If the Court held that a *semiplena probatio* was established—*i.e.* that the pursuer had proved intercourse likely to have been the cause of her child's birth,—an interlocutor was pronounced, allowing the woman to give her oath in supplement of her defective proof. She then appeared as a witness in the cause. This was different from an oath on reference (*M'Naughton*, 1838, 16 S. 614 and 1103). *M'Naughton's* case fixed that a woman giving her oath in supplement was truly in the situation of an additional witness in the cause. Where the

oath was contradictory of the *semiplena probatio* in the special facts deponed to, the defender was assoilzied (*M'Naughton, supra*); and if the woman died before giving her oath, the whole case was at an end (*Dobbie* v. *Gaff*, 18 July 1843). After a woman had given her oath in supplement, she could not then be judicially examined (*Jameson*, 14 Jan. 1820, F. C.).

Since the Evidence Act, 1853 (16 & 17 Vict. c. 20), the rules relating to *semiplena probatio* have been entirely superseded. The Act applies to actions of filiation, and in every case the parties are examined as witnesses *in causa*; and the woman having thus appeared as a witness, is not entitled, on the ground of a *semiplena probatio* having been established, to emit her oath in supplement. The law as it now stands was precisely stated by Ld. J.-Cl. Inglis in the case of *M'Bayne* (1860, 22 D. 738), and his language is so often referred to that it may be here quoted: "Filiation cases have no longer the peculiarity, that the evidence of one of the parties is received as conclusive after a *semiplena probatio* has been made out. The evidence is to be dealt with as in other cases; the parties are the principal witnesses, they know the facts which lie at the bottom of the case, and what the Court has to consider is, on the whole evidence, on which side is the balance of credibility." The rule laid down in *M'Bayne* has been followed by the Court ever since, and in the recent case of *Young* (1893, 20 R. 768) it was expressly approved of.

See AFFILIATION; Bell's *Prin.* s. 2061; Fraser's *Parent and Child*, 132 *et seq.*

Senators of College of Justice.—See COLLEGE OF JUSTICE.

Sentence.—In a literal sense a "sentence" is the "opinion" of a judge on the facts of a criminal case. Thus, in its most comprehensive sense, the term includes judgments of acquittal, complete and qualified, as well as judgments of condemnator. But the word is usually employed to denote the award of punishment inflicted by a judge after a verdict or finding of guilty of a criminal charge has been reached.

When a verdict of guilty has been reached, the prosecutor moves the Court to pronounce sentence. No sentence can be pronounced if the prosecutor does not appear or if he declines to move for sentence (*Nicolson*, 1829, Bell, *Notes*, 300; *Smith*, 1842, *ib.*). In a capital case the prosecutor may, at any period of the trial, and even after verdict, restrict the pains of law to an arbitrary punishment. A charge laid both on statute and common law may be restricted to the common law charge.

The accused must also be present when sentence is pronounced, unless he has been convicted under a statute which authorises trial and sentence in the absence of the accused. Sentence of outlawry is necessarily pronounced in the accused's absence. The accused must also be in his senses when sentence is to be pronounced, otherwise the diet will be adjourned.

Pleas in Bar of Sentence.—The accused is entitled to state competent pleas in bar of sentence. It is incompetent to urge in bar of sentence objections to the libel (*Allan*, 1872, 2 Coup. 402), or to the evidence which has been led. It is a bad objection to sentence to allege, after the verdict has been returned, that during the trial a juryman was out of the custody of the officers of Court. The proper time to state such an objection is

before the jury have returned their verdict (*Luke*, 1866, 5 Irv. 293). The only competent pleas in bar of judgment are these:

(1) That the verdict is insufficient, *i.e.* that it does not amount to a verdict of guilty of the charge libelled.

(2) That sentence is beyond the powers of the Court. Almost the only question raised under this head has been the case of a trial on circuit taking place in a different month from that mentioned in the libel, but this objection was repelled (*M'Kay* and *Broadly*, 1861, 4 Irv. 97).

(3) That the accused is unfit to undergo the sentence. Under this plea it is competent for a pregnant female, convicted of a capital crime, to ask for delay in pronouncing sentence of death. If her plea is substantiated, sentence is postponed till delivery has taken place.

The accused is entitled to urge any competent plea in mitigation of punishment. See PUNISHMENT.

The sentence must be consistent with the libel. If imprisonment is craved, it is incompetent to order payment of a fine (*Hood*, 1853, 1 Irv. 236). So it is incompetent to imprison when a fine is the penalty craved in the libel (*Orr*, 1855, 2 Irv. 183). If the crime is a statutory one, the sentence is invalid if the statutory penalty is not inflicted (*Ferguson*, 1862, 4 Irv. 196; *Gardner*, 1865, 5 Irv. 13). If a cumulative penalty is imposed where only alternatives are sanctioned, the sentence is nugatory (*Methven*, 1848, J. Shaw, 146). If a sentence of penal servitude or imprisonment is pronounced, the period must be fixed. It is incompetent to pronounce a sentence of imprisonment "not exceeding" a certain period (*Grant*, 1855, 2 Irv. 227).

In a High Court case the presiding judge may certify the case to a fuller bench to determine the question of imprisonment (*Watson*, 1884, 5 Coup. 448).

The presiding judge announces the sentence, which is minuted in the record and signed by the Clerk of Court. The Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), provides (s. 57) that in all cases, whether in the Sheriff Court or in the High Court of Justiciary, the sentence to be pronounced shall be announced by the judge in open Court; and all such sentences, except sentences of death, shall be entered in the record in the short form now in use in the Court of Justiciary; and it shall not be necessary to read the entry of the sentence from the record; and the form and mode in which any sentence of death shall be entered in the record shall be such as the High Court of Justiciary may appoint by Act of Adjournal. In capital cases the sentence is read out from the record by the presiding judge (Act of Adjournal, 1st Aug. 1849). Sentences of imprisonment run from the date of judgment. If the accused is already undergoing imprisonment for a previous offence, the new sentence may be appointed to commence on the expiry of the first period (*Graham*, 1842, 1 Broun, 445). In the case of a capital sentence, the Court must fix a date for the execution not less than fifteen days or more than twenty-one days after judgment, if south of the Forth; and not less than twenty-one days or more than twenty-seven days, if north of the Forth (2 Geo. IV. and 1 Will. IV. c. 37). The High Court has power to alter the day fixed for an execution.

An incompetent or imperfect sentence, which has not been issued or acted upon, may be superseded by a correct one (*Forbes*, 1865, 5 Irv. 213). The executorial part of a sentence may be altered after issue of the sentence, provided no substantial alteration is made upon the sentence itself (*Mackenzie*, 1889, 2 White, 253). After a sentence has been

pronounced, it is incompetent for any Court to make any substantial alteration or amendment of it. (But see *Stewart*, 1855, 2 Irv. 327; *Clarkson*, 1871, 2 Coup. 125.)

[Hume, ii. 470; Alison, ii. 653; Macdonald, 511; Anderson, *Criminal Law*, 258.]

Separation (of Spouses).—See Judicial Separation.

Septennial Prescription.—See Cautionary Obligations (Septennial Limitations of).

Sepulchres, Violating.—See Violating Sepulchres.

Sequels.—Sequels were payments originally in kind exigible under the obligation of thirlage in addition to the multures (the price of grinding). They were the payments for the services of the miller and his servants. Whether originally voluntary or not (cf. *Mar*, 1610, Mor. 15962; rev. by *Adamson, infra*), they came to be exacted as a matter of right. Under an Act of William (xxxv., *Thoms. Acts*, p. 59) each mill was required to have a miller and two assistants, and their fees (sequels) were respectively knaveship, and bannock, and lock or gowpen. They were due over and above the stipulated multures (*Campbell*, 1672, Mor. 15978). Like multures, they were exigible whether the corn was ground at the mill or not, and they could be sued for in an action of abstracted multures, the reason assigned being that these servants must be in attendance at the mill to serve the thirl, whether they were actually employed or not (*Adamson*, 1628, Mor. 15965, 1 B. S. 221). Though not expressed, they were necessarily implied in a general obligation to pay multures (*Malcolm*, 1697, Mor. 15990); and, similarly, liberation from thirlage in general terms by infeftment *cum molendinis*, etc., necessarily freed from liability for sequels (*Caskiben*, 1612, Mor. 15963). But there might be astriction for sequels only (see *E. of Cassilis*, 1667, Mor. 15977).

See Thirlage; Knaveship; Bannock; Lock; Gowpen.

Sequestration.

I. Proceedings to obtain Sequestration . . . 167
II. Recall of Sequestration . 177
III. Registration and Publication of Sequestration . 181
IV. Interim Preservation of Estate 182
V. Claims for Voting . . 183
VI. First Meeting — Election of Trustee and Confirmation . . . 190
VII. Election and Duties of Commissioners. . . 195
VIII. Examination of Bankrupt 196
IX. Sequestration in Relation to Diligence . . . 198
X. Vesting of Estate in Trustee . . . 200
XI. Management and Realisation of Estate . . 215
XII. Ranking of Claims—Payment of Dividends . 220
XIII. Discharge of Bankrupt without Composition . 228
XIV. Composition Contract . 234
XV. Deed of Arrangement . 241
XVI. Judicial Proceedings—Appeals . . . 242
XVII. The Trustee . . . 246
XVIII. The Bankrupt . . . 251
XIX. The Creditors . . . 253
XX. The Accountant of Court 255

Nature Generally.

Sequestration as a process for the attachment of an insolvent debtor's estate and its rateable distribution among his creditors was first introduced in the year 1772, by the Act 12 Geo. III. c. 72. The Act was limited in duration to ten years, and in its operation to the debtor's moveable estate. On its expiry in 1782, a new Act was passed (23 Geo. III. c. 18), which re-enacted the provisions of the previous one, and extended the operation of sequestration to heritable as well as moveable estate, but restricted the process to debtors engaged in trade. This Act was succeeded by the Statutes 33 Geo. III. c. 74, and 54 Geo. III. c. 137, the latter of which was renewed from year to year until the Sequestration Act of 1839 (2 & 3 Vict. c. 41) was enacted as a permanent statute. The Act of 1839, among other improvements, extended the process of sequestration to deceased debtors, whether traders or not. It was amended in 1853 by the Act 16 & 17 Vict. c. 53, and it was entirely superseded and repealed in 1856, when the existing Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), was passed. By the Act of 1856 sequestration was made applicable to the case of all debtors, whether engaged in trade or not (s. 13), and another important change was made in conferring on the Sheriff Court jurisdiction to award it (ss. 18, 19). Various other amendments of the law were made by the Act which it is unnecessary here to particularise. The Act of 1856, which continues to be the principal Bankruptcy Act in Scotland, has been amended by the Acts 20 & 21 Vict. c. 19; 23 & 24 Vict. c. 33; 38 & 39 Vict. c. 26; 43 & 44 Vict. c. 34; 44 & 45 Vict. c. 22; 45 & 46 Vict. c. 42; 47 & 48 Vict. c. 16; and 52 & 53 Vict. c. 39. Certain sections also of the English Bankruptcy Act of 1883, relating to disabilities of persons made bankrupt, and the enforcement of bankruptcy orders throughout the United Kingdom, etc., extend to Scotland (46 & 47 Vict. c. 52, ss. 32, 117, 118, 119).

In view of the wide range of the subject, the aim in the present article has been to give preference to the aspects of it most important in ordinary practice, and to eliminate topics of bankruptcy law not immediately pertinent to sequestration. Such subjects as, *e.g.*, the constitution of notour bankruptcy, and fraudulent alienations or preferences by insolvent debtors, will be found fully treated under the headings of Bankruptcy and Insolvency.

I. Proceedings to obtain Sequestration.

1. Debtors who may be Sequestrated 167
2. Conditions of Liability to Sequestration 168
3. Creditor's Qualification to Petition or Concur 170
4. Petition for Sequestration . . . 172
5. Award of Sequestration . . . 175

1. Debtors who may be Sequestrated.—The Bankruptcy Act gives no definition of debtors liable to sequestration other than that contained in sec. 13, which defines the conditions under which sequestration may be awarded of the estate of "a living debtor subject to the jurisdiction of the Supreme Courts of Scotland," or of "a deceased debtor who at the date of his death was subject to the jurisdiction of the Supreme Courts of Scotland." This definition abrogated the restriction of sequestration in the case of living debtors to those in trade which obtained under the prior law (see *supra*). From the generality of the definition it follows that any exemption from sequestration must be sought for outside the Act. Thus, joint-stock com-

panies registered under the Companies Acts, although liable to be made notour bankrupt, are exempt from sequestration because the winding-up procedure provided by these Acts is exclusive (*Standard Property Investment Co.*, 1884, 12 R. 328); and railway companies, being exempt by statute from ordinary diligence (30 & 31 Vict. c. 126, s. 4), can only be wound up by Act of Parliament (*Haldane*, 1881, 8 R. 669; *Haldane*, 1881, 9 R. 253). No other class of debtor, however, against whom notour bankruptcy can be constituted, appears to be exempt from sequestration. Thus, given notour bankruptcy, sequestration is competent in the case of married women, pupils and minors, lunatics, peers and members of Parliament, partnerships, corporate bodies, such as burghs (*Wotherspoon*, 1863, 2 M. 348), aliens and undischarged bankrupts (*Fisken*, 1845, 7 D. 842; *Taylor*, 1879, 7 R. 128; *Abel*, 1883, 11 R. 149). For the conditions under which notour bankruptcy may be constituted against these respective classes of debtors, reference is made to the article on BANKRUPTCY (see also Goudy on *Bankruptcy*, 74–80, 121–122). In England a married woman could not be adjudicated bankrupt prior to the Married Women's Property Act, 1882, unless she had obtained a decree of judicial separation or a protection order, or where her husband was *civiliter mortuus*. Creditors could in a Court of Equity obtain a decree or order entitling them to proceed against her separate estate, but she was not in law their debtor, and could not be sued as such in an ordinary action for payment. (See *ex parte Jones, in re Grissell*, 1879, 12 Ch. D. 484.) By the Act of 1882 a married woman engaged in trade separately from her husband is, in respect of her separate property, subject to the bankruptcy laws in the same way as if she were a *feme sole* (45 & 46 Vict. c. 75, s. 1 (5); *ex parte Coulson, re Gardiner*, 20 Q. B. D. 249). There is no express decision on the subject in Scotland; but as there are various cases in which a married woman in this country may validly contract obligations entitling the creditors to obtain decree for payment against her as their debtor (see, *e.g.*, *Henderson*, 1895, 22 R. 895), it seems to follow that, in respect of such obligations, notour bankruptcy may be constituted, and sequestration obtained against her; and in practice this has repeatedly occurred.

2. CONDITIONS OF LIABILITY TO SEQUESTRATION.—(*a*) *Living Debtor.*—The debtor must be "subject to the jurisdiction of the Supreme Courts of Scotland"; and the application may be presented either (1) at the instance of the debtor himself, with the concurrence of a creditor or creditors qualified as the Act requires, or (2) at the instance of a creditor or creditors so qualified (see as to qualification, *infra*).

The jurisdiction required by the Act may exist in respect of domicile proper, or of such a right or interest in heritage in Scotland as would found jurisdiction in an ordinary action (Mackay, *Practice*, 53 and 57), or of forty days' residence in this country, whereby a domicile of citation is acquired (*Joel*, 1859, 21 D. 929). Arrestment *ad fundandam jurisdictionem* does not seem a competent ground of jurisdiction for sequestration. The question was raised in the case of *Croil*, 1863, 1 M. 509, where the Lord Ordinary (Ld. Barcaple) negatived the jurisdiction, but the case was ultimately decided on other grounds. Jurisdiction by arrestment is special in that it is only constituted in favour of the arrester; and is otherwise of so anomalous a character that it is not likely to be now extended beyond what is warranted by precedent. Jurisdiction *ex reconventione* is not sufficient for sequestration, being limited in effect to rendering competent an *actio reconventionis, i.e.* action based on any such claim by the Scotch defender against the foreigner as has a relation to the foreigner's claim and may be

usefully tried along therewith, to the effect of enabling the Court to do justice between the parties (*Thomson*, 1862, 24 D. 331; *Allan*, 1894, 21 R. 866, per Ld. Rutherfurd Clark; see *Joel*, *supra*, per Ld. Pres. Inglis; *Goetze*, 1874, 2 R. 150).

Where the petition is at the instance of the debtor, or with his concurrence, it is not necessary that he should be notour bankrupt or insolvent. It is only required that there shall be jurisdiction in terms of the Act (see *supra*) and the concurrence of duly qualified creditors, *i.e.* of any one creditor whose debt amounts to not less than £50, or of two creditors whose debts together amount to not less than £70, or of three or more creditors whose debts together amount to not less than £100, whether such debts are liquid or illiquid, provided they are not contingent (B. A., ss. 13, 14). The petition is competent at any time (s. 15); and on its being presented, a deliverance awarding sequestration is forthwith issued (s. 29).

Where the petition is at the instance of creditors alone, the following are the requisites in the case of debtors other than companies: (1) Jurisdiction (see *supra*); (2) that the debtor be notour bankrupt; (3) that he have "within a year before the date of the presentation of the petition resided or had a dwelling-house or place of business in Scotland"; (4) that the petitioning creditor or creditors be qualified in the same way as above stated regarding creditors concurring in a petition by the debtor—the qualification for petitioning or concurring being the same (ss. 13, 14); (5) that the petition be presented within four months of the date of the debtor's notour bankruptcy (s. 15). Notour bankruptcy may be constituted anew so as to found a petition for sequestration (s. 9; *Balfour*, 1841, 3 D. 612; *Llair*, 1889, 16 R. 947, 17 R. (H. L.) 76; *Wood*, 1891, 18 R. 382).

Where the debtor is a company, the requisites for sequestration at the instance of the company itself are the same as in the case of any other living debtor. Where the petition is by a creditor without the company's concurrence, the requisites are: (1) Jurisdiction; (2) notour bankruptcy; (3) that the creditor be duly qualified as above mentioned; (4) that either the company have within a year before the date of the presentation of the petition carried on business in Scotland, and any partner have resided or had a dwelling-house there, or that the company within such period have had a place of business in Scotland; (5) that the petition be presented within four months of notour bankruptcy (ss. 13, 14, 15).

Where the petition is presented in a Sheriff Court, it is necessary that the debtor "for the year preceding the date of the petition" have "resided or carried on business" in the county in question (s. 18).

(*b*) *Deceased Debtor.*—The requisites for sequestration are: (1) that the deceased was at his death subject to the jurisdiction of the Court; (2) that the petition be presented either by a mandatory to whom the deceased has granted a mandate to apply for sequestration, or by a creditor or creditors qualified as already mentioned (ss. 13, 14; see *Wryghte*, 1856, 19 D. 55, 3 Macq. 772, as to call on shares emerging after date of death). Notour bankruptcy or insolvency is not essential. In case, however, of a petition by creditors, although the petition may be presented at any time after the debtor's death, sequestration cannot be awarded before the expiration of six months from the date of death, unless the debtor was at the time of his death notour bankrupt, or unless his successors concur in the petition or renounce the succession (s. 15). "Successors" are defined to include "all persons who have succeeded to any property which was vested in a party deceased at the time of his death, whether as heirs, heirs-apparent, trustees under voluntary conveyances, representatives by deed or otherwise, executors

or administrators or nearest of kin, or as assignees or legatees, and shall also include singular successors where they have acquired the right" (s. 4). Apparently every party entitled to take up the *hæreditas* of the deceased must concur (see *Hope*, 1850, 12 D. 913). A petition by a mandatory is competent at any time (s. 15). There is no direct provision in the Act that the deceased debtor must have resided, or had a dwelling-house or place of business in Scotland (s. 13). Sec. 24, however, provides that a petitioning creditor shall in his oath or in a separate oath "specify the place where the debtor resided or had a dwelling-house or carried on business in Scotland at the time of his death, and whether he was then owner of estates in Scotland." As sec. 13 purports to define the conditions of liability to sequestration, it does not seem legitimate to control it by sec. 24. There has been no decision on the question.

While such are the conditions of liability to sequestration under the provisions of the Bankruptcy Act considered by themselves, it must be kept in view that they may be inoperative if there is an existing bankruptcy in another country. Thus where a German firm had been made bankrupt in Germany, the country of the bankrupts' domicile, and according to the law of that country the bankruptcy operated as a universal assignment of the bankrupts' moveable estate wherever situated, it was held that sequestration could not be granted in Scotland, although there were valuable assets belonging to the bankrupts in this country (*Goetze*, 1874, 2 R. 150). In order to have such effect the foreign bankruptcy must be in the country of the bankrupt's domicile (*ib.*). But for this purpose there may be a trading domicile; and if there should be more than one trading domicile, preference will be given to the bankruptcy first instituted (*Royal Bank*, 20 Jan. 1813, F. C.; see *Obers*, 1897, 24 R. 719).

No sequestration can be awarded in any Court after production of evidence that sequestration has already been awarded in another Court, and is still undischarged (B. A., s. 18). A second sequestration in the same Court, however, does not seem to be incompetent; but as sequestration carries all *acquirenda* of the bankrupt, a second sequestration will not be effectual save as to any estate of the bankrupt which the creditors in the first sequestration have abandoned to the bankrupt, or are barred by their actings from claiming an exclusive right to, as where the bankrupt is, with their knowledge and acquiescence, allowed to carry on business and contract new debt (see *Fisken*, 1845, 7 D. 842; *Mein*, 1855, 17 D. 435; *Taylor*, 1879, 7 R. 128, per Ld. Pres. Inglis; *Abel*, 1883, 11 R. 149; and article on ABANDONMENT IN BANKRUPTCY).

(*c*) *Debtor under Cessio.*—There is one case in which the conditions of liability to sequestration as above defined do not fully apply. In any proceedings under the Cessio Acts where the liabilities of the debtor exceed £200, the Sheriff, if he thinks it expedient having regard to the value of the estate and the whole circumstances of the case, has power to award sequestration; whereupon the provisions of the Bankruptcy Acts apply in the same manner as if sequestration had been awarded upon a petition for sequestration in terms of sec. 29 of the Bankruptcy Act, 1856 (44 & 45 Vict. c. 22, s. 11).

3. CREDITOR'S QUALIFICATION TO PETITION OR CONCUR.—(1) *Title to Petition or Concur.*—Questions as to a creditor's title or capacity to petition depend on the same principles as regulate the instance of an ordinary action (see Mackay, *Practice*, 125 *et seq.*). Joint creditors must petition jointly (Bell, *Com.*, 5th ed., ii. 320). But where there were two joint drawers of a bill as individuals, and one indorsed away his interest, it was held

correct for the other drawer and the indorsee each to depone to one-half of the bill debt as due to him (*Hair*, 1830, 8 S. 671). And where two cautioners had paid up the debt between them and petitioned together for the principal debtor's sequestration, an oath by one of them as to his share of the claim was held sufficient to support the petition (*Greenhill*, 1824, 2 S. 531). Where a debt is due to a firm, the petition must be at the instance of the firm. Where the petitioning creditor is a registered company in liquidation, the petition should be at the instance of the company, not of the liquidator alone (25 & 26 Vict. c. 89, s. 95, *ex parte Winterbottom*, 18 Q. B. D. 446; *Mackay*, 58 L. T. 237; *Munro*, 1896, 3 S. L. T. 413). Representative parties, such as executors, must of course petition in their representative character (*Fulton*, 9 July 1816, 19 F. C. 191). An agent to whom a debt (*e.g.* a bill) is made payable expressly as agent for another is entitled to petition in his own name (*Wixon*, 1849, 11 D. 1188; *Brown*, 1845, 17 Sc. Jur. 296; see *Bonar*, 3 D. 830). "Whoever is vested with the right to the debt for the time being, whether in trust or not, is entitled to swear that the debt is due to him. The proper person to swear under the statute is the person entitled to sue for the debt" (*Bonar*, *supra*, per Ld. Fullerton). An undischarged bankrupt, being divested of his title, cannot competently petition or concur (*M'Nab*, 1851, 14 D. 182; Stuart's Rep. 164; *Campbell*, 1853, 15 D. 685, per Ld. Curriehill; *Gillon*, 1882, 10 R. at p. 61). Reversal of a sentence of outlawry has been held (under a petition for recall) to validate retrospectively a creditor's concurrence (*Black*, 1825, 4 S. 124). Reinvestiture of a bankrupt by discharge on composition or under a deed of arrangement would probably be held to have a similar effect. Decree for expenses in name of an agent-disburser is a good title to the client to petition, unless the agent has begun diligence (*M'Creadies*, 1882, 10 R. 108; *Black*, 1825, 4 S. 125, per Ld. Pitmilly).

(2) *Amount and Nature of Creditor's Claim.*—"Petitions for sequestration may be at the instance or with the concurrence of any one creditor whose debt amounts to not less than £50, or of any two creditors whose debts together amount to not less than £70, or any three or more creditors whose debts together amount to not less than £100, whether such debts are liquid or illiquid, provided they are not contingent" (B. A., 1856, s. 14). Interest when due may be accumulated as at the date of the petition, and, on the other hand, should apparently be deducted where the debt is one not falling due till after that date (s. 52). Exchange and re-exchange and expenses, if ascertained, upon foreign drafts or bills may be included (see *Paul*, 1834, 12 S. 431, 7 W. & S. 462). A debt may be founded on at its nominal value, although purchased for less, and it is not a good objection that it has been so purchased after the debtor's notour bankruptcy (*Robb*, 1830, 8 S. 839, 5 W. & S. 740). Partial payments made before the petition is presented must be deducted: but payments made thereafter will not have the effect of destroying the creditor's qualification (*Allan*, 1840, 3 D. 152; and see B. A., s. 30). Liquid counter-claims instantly verifiable must be deducted (Bell, *Com.*, 5th ed., ii. 323; see *Knowles*, 1865, 3 M. 457).

The debt founded on may be either liquid, as, *e.g.*, debt due under bond, bill, or decree, or illiquid, as debt due upon open account or upon a statement of intromissions (see *Knowles*, *supra*; *Simpson*, 1881, 9 R. 104, per Ld. Fraser). A claim for ascertainable damages arising from breach of contract seems a sufficient debt to found a petition (Bell, *Com.*, 5th ed., ii. 319). A claim for a stipulated penalty under a contract must be accompanied by a specific estimate of the damage incurred by breach (*Anderson*, 1847, 9 D. 1432). Where the debt is a law agent's account, the debtor is entitled to

have the account taxed before sequestration is awarded (see procedure in *Weir*, 1848, 10 D. 1361). Where a security is held for the debt, it must be specified in the affidavit; but the Act does not require that it be deducted in estimating the debt (s. 22; cf. ss. 59, 65; *Learmonth*, 1845, 7 D. 1094; *Gordon*, 1855, 17 D. 779, per Ld. Mackenzie; *Knowles*, 1865, 3 M. 457; cf. *Elder*, 1850, 12 D. 994; Bell, *Com.* ii. 564).

The debt must not be contingent (see s. 14, *supra*; *Fleming*, 1884, 9 App. Ca. 966). Thus a current bill of exchange is contingent as against the drawer and indorsers (*Morrison*, 1832, 10 S. 259; *Gordon*, 1851, 13 D. 1154). And the same holds in the case of a cautioner prior to default on the part of the principal debtor. An award of expenses, for which decree for interim execution has been granted pending an appeal to the House of Lords, is a contingent debt (*Forbes*, 1890, 18 R. 182; see *Stuart*, 1891, 19 R. 223, as to arrears of rent due by crofter). There is no direct authority on the question whether a claim of damages for injury is a contingent debt in the sense of the statute (see Ersk. iii. 6. 8; *Miller*, 1884, 11 R. 731; Goudy, 130, 131). Absence of vouchers would seem to preclude such a claim from being founded on.

A prescribed debt cannot be the ground of a petition for sequestration (Bell, *Com.*, 5th ed., ii. 323; see *Lockhart*, 1849, 11 D. 1341).

4. Petition for Sequestration.—(See forms appended.)—The petition may, in all cases, be presented to the Lord Ordinary on the Bills in the Court of Session (B. A., ss. 18, 21). Alternatively, it may, in the case of a living debtor, be presented to the Sheriff of any county "in which the debtor for the year preceding the date of the petition has resided or carried on business" (*ib.*, s. 18); and in the case of a deceased debtor, to the Sheriff of the county "in which the debtor for the year preceding his death had resided or carried on business" (20 & 21 Vict. c. 19, s. 2). The residence or carrying on of business is apparently required to have been continuous during the year. "Sheriff" includes both the Sheriff and Sheriff-Substitute (B. A., s. 4).

In the Court of Session the process is a Bill Chamber one, and Bill Chamber procedure is observed so far as applicable (*ib.*, s. 43; see *Kerr*, 1845, 7 D. 809; *Scott*, 1848, 10 D. 732; *Gow*, 1862, 1 M. 25; *Cooper*, 1878, 5 R. 414; Mackay, *Practice*, 14). In the Sheriff Court the Sheriff Clerk is clerk to the sequestrations awarded by the Sheriff (s. 43). No sequestration in either Court falls asleep or is liable to dismissal, under the 15th section of the Sheriff Courts Act, 1853 (16 & 17 Vict. c. 80), in respect of failure to proceed therein during a period of three consecutive months (*ib.*).

A petition in the Bill Chamber must be signed by the petitioner or his counsel or agent, and marked to one of the Divisions (s. 21; see *Gow*, 1862, 1 M. 25; *Cooper*, 1878, 5 R. 414). A petition in the Sheriff Court must be signed by the petitioner or his agent (s. 21). In a petition at the instance of the debtor not signed by him, there must be produced therewith "a mandate authorising the same signed by him or, in the case of a company [see s. 4], signed by a party entitled to act for the company" (s. 21). There is no statutory form of mandate (see *Scudamore*, Mor. 8559; *Cole*, Mor. 4820; Bell, *Com.*, 5th ed., ii. 349), and it is commonly in these terms—

To *A. B.* [*Place and Date.*]

I, *C. D.*, hereby authorise you to apply for sequestration of my estates in terms of the Bankruptcy Statutes. (Signed) *A. B.*

A mandate by a partnership must be signed by all the partners save in

exceptional circumstances, as, *e.g.*, where one partner has fled the country to avoid apprehension (*Buchanan*, 1849, 11 D. 510), or has gone abroad leaving special authority to his co-partner to take sole management (*Maclean*, 1824, 3 S. 82). If the debtor die before the petition is presented, the mandatory must petition in his own name (s. 13, 2nd (A)); but if he die after the petition is presented and prior to an award of sequestration, the proceedings fall (*Orr*, 1882, 10 R. 53).

Where the petition is presented in the Sheriff Court, the usual practice is to frame it in accordance with the form prescribed by the Sheriff Court Act, 1876 (39 & 40 Vict. c. 70, ss. 3, 6), for ordinary Sheriff Court petitions; although it is doubtful whether this is imperative (see form appended; *Crozier*, 1878, 5 R. 936; *Nat. Bank*, 1886, 23 S. L. R. 612; *Cuthbertson*, 1887, 14 R. 736, per Ld. Young; Lees, *Styles*, 91).

A second petition, either in the same or in a different Court, is not incompetent, whether it is a supplementary one to cure a defect in the original petition (*A.* v. *B.*, 1840, 2 D. 1357; *Jarvie*, 1865, 4 M. 79; *Steel*, 1852, 14 D. 348) or presented in ignorance of or to supersede it (*Jarvie*, *supra*; *Tennent*, 1879, 6 R. 786; *Simpson*, 1881, 9 R. 104; *Fletcher*, 1883, 10 R. 835).

Where competing petitions have been presented, the question upon which of the petitions an award should be allowed is not one of legal right. "The real question is, what, in the interests of the creditors, is the most convenient and least expensive mode of procedure" (*Fletcher*, *supra*, per Ld. Pres. Inglis). This is illustrated by the following cases. After a creditor had brought a petition in the Sheriff Court, and obtained warrant of citation thereon, the debtor presented a petition and obtained an award in the Bill Chamber, under which a trustee was appointed and confirmed. On a petition for recall, the Court recalled the award *hoc statu*, and remitted the petition to be conjoined with that in the Sheriff Court. The object of recalling *in hoc statu* only was to meet the case of the first petition turning out defective, in which case an award might have been granted anew on the second (*Jarvie*, 1865, 4 M. 79). In another case recall was, in similar circumstances, refused on the ground that proceedings under the second petition had gone so far that recall would have caused serious delay, inconvenience, and expense, without any equivalent advantage. The trustee had been confirmed, two statutory meetings of creditors had been held, and the bankrupt had twice undergone public examination (*Tennent*, 1879, 6 R. 786; see *Reid*, 1895, 3 S. L. T. 55). And recall was refused on the same ground where the proceedings under the second petition had gone the length of a deed of arrangement, and no question of preferences was involved (*Fletcher*, *supra*). Where an award had been refused on a first petition in the Bill Chamber, and the judgment was reclaimed against, but, before the reclaiming note was heard, another creditor obtained an award on a second petition, under which a trustee was appointed, and the examination of the bankrupt took place without any petition for recall being presented within forty days, the Court refused the reclaiming note on the ground that the award had become final (*Simpson*, 1881, 9 R. 104). The judge before whom a second petition is brought has, however, no discretion in awarding sequestration if the statutory requisites concur (*M'Kinlay*, 3 S. L. T. 13; *Joel*, 1859, 21 D. 929; *Stuart*, 1891, 19 R. 223); and the competition between the applications must be determined under a petition for recall (*Jarvie*, *Tennent*, *Simpson*, *Fletcher*, *supra*).

If the earlier of two petitions is objected to as defective, it has been thought the Court might conjoin the two, so as to carry back the date of

sequestration to the first deliverance on the earlier petition (see *Love*, 1846, 8 D. 1016; *Jarvie*, 1865, 4 M. 79; *Simpson*, 1881, 9 R. 104). A second sequestration, awarded in absence of evidence that a prior sequestration in another Court remains undischarged, is not *eo ipso* invalid, but the Court may put matters into shape, as by recalling the sequestration under one of the petitions *in hoc statu* (*Kellock*, 1875, 3 R. 239).

If a creditor who has presented or concurred in a petition withdraws, or becomes bankrupt or dies, "any other creditor" may be sisted in his place and follow out the proceedings (s. 34; see *Forsyth*, 1883, 10 R. 1061, where there was an interval of about eight months). The Act does not require the sisting creditor to be qualified as for petitioning (see *Allan*, 1840, 3 D. 152).

Productions with Petition.—There must be produced: (1) An oath or affidavit to the verity of the debt due to the petitioning or concurring creditor; (2) the account and vouchers of the debt (s. 21); (3) written evidence of the debtor's notour bankruptcy where the debtor is not petitioner (ss. 13, 26).

The oath is one to the *verity* of the debt save in the exceptional cases where an oath of credulity is sanctioned by the Act (ss. 21, 22, 23, 25; see form appended). The creditor must depone what other persons, if any, besides the bankrupt are liable for the debt or any part of it, and specify any security held over the estate of the bankrupt or other obligants, and depone that he holds no other obligants or securities than those specified; and where he holds no other person than the bankrupt so bound, and no security, he must depone to that effect (s. 22). Where the debtor is deceased, a petitioning creditor must specify in his oath or in a separate one "the place where the debtor resided or had a dwelling-house or carried on business in Scotland at the time of his death, and whether he was then owner of estates in Scotland" (s. 24). The oath is in form the same as the oath for voting or ranking, save that securities are not deducted or valued (see *Learmonth*, 1845, 7 D. 1094; *Gordon*, 1855, 17 D. 779, per Ld. Mackenzie; *Knowles*, 1865, 3 M. 457). The oath is bad if the creditor be not actually sworn (*Blair*, 16 R. 325). It may be taken prior to the debtor's notour bankruptcy (*Taylor*, 1 Sh. App. 254); and the lapse of a year between the date of the oath and the petition for sequestration has been held not to invalidate the former (*Greenhill*, 1824, 2 S. 531). A statutory form of declaration in terms of the Affirmations (Scotland) Act, 1865, may be used in lieu of an oath where a creditor has a conscientious objection to be sworn (28 Vict. c. 9, s. 2; 13 & 14 Vict. c. 21, s. 4; *M'Cubbin*, 1850, 12 D. 1123; see *Suttar*, 1861, 23 D. 465). A defect in the oath cannot be rectified, and involves dismissal of the petition (s. 21).

The account and vouchers required for petitioning are such as are *primâ facie* proof of the debt (*Scott*, 1847, 9 D. 1347; *Knowles*, 1865, 3 M. 457; *Ballantyne*, 1867, 5 M. 330); and must be in conformity with the debt as sworn to in the oath (see *Clark*, 1884, 11 R. 469). An open account *in re mercatoria* is a good voucher (*Scott, supra*; *Knowles, supra*; *Ballantyne, supra*; *Simpson*, 1881, 9 R. 104); but an unadjusted account between two joint adventurers has been held insufficient (*Knowles*); as has a cash account taken from the cash ledgers of the debtors (*Simpson, supra*). The absence of a necessary stamp will invalidate a voucher (*Scott, supra*). The Act does not authorise the granting of a diligence to enable the creditor to recover vouchers (see sec. 21; *Simpson, supra*); and it is doubtful whether the Court can in any case allow the creditor an opportunity of remedying a defect in his voucher (Goudy on *Bankruptcy*, 140; see *A. B.*, 2 D. 1357; *Robb*, 1831,

5 W. & S. 740. As to stamping, see Goudy, *ut supra*; 31 & 32 Vict. c. 100, s. 41; Bell, *Com. on Recent Statutes*, p. 138).

See more fully as to Account and Vouchers, *infra*, p. 186.

The expiry of a charge without payment, or failure to pay under a decree which does not need to be followed by a charge, afford *primâ facie* evidence of notour bankruptcy (*Macnab*, 1889, 16 R. 610; *Aitken*, 1890, 28 S. L. R. 115). A diligence to recover the evidence of notour bankruptcy will be granted if required (B. A., 1856, s. 26; *M'Rostie*, 1849, 12 D. 124).

Evidence may be taken as to any fact which forms an essential element in the application and is disputed (B. A., ss. 26, 58; *Davis*, 1866, 5 M. 80), as, *e.g.*, the fact of jurisdiction, or residence, or the existence of a partnership (*M'Gavin*, 1854, 16 D. 540). But it is incompetent to deal with such questions until the debtor has been cited to appear in terms of the statute (*Hope*, 1893, 21 R. 49).

5. Award of Sequestration.—(1) *On a petition by or with the concurrence of the debtor, or by his mandatory, or with concurrence of his successors if he is dead*, the judge must forthwith award sequestration. The deliverance appoints a meeting for election of the trustee, and, if in the Bill Chamber, remits the proceedings to such Sheriff Court as the Lord Ordinary deems expedient (B. A., ss. 29, 67, 19). Where the estate is that of a deceased debtor, the Court ordains any successor who has made up title to or is in possession of any part of the estate to convey it to the trustee (s. 29). "Successors" as used in the Act (see s. 4) seems to include all having a direct interest in the deceased's succession, as, *e.g.*, all the beneficiaries in the case of a trust settlement not empowering the trustees to apply for sequestration (Goudy, 142). A petition by a mandatory of the deceased is thought to fall under the terms "with concurrence of the debtor" (*ib.*; cf. Murdoch on *Bankruptcy*, 231, and Kinnear on *Bankruptcy*, 45). The award may be opposed by any creditor (Bell, *Com.* ii. 293; see *Cheyne*, 1828, 7 S. 60). The Act, however, makes no provision for giving public intimation of petitions by debtors.

(2) *Where the petition is by a creditor without the consent of the debtor or his successor*, the Court must forthwith grant warrant to cite the debtor or his successor to appear and show cause why sequestration should not be awarded (s. 26). It is incompetent to pronounce any prior interlocutor; and this was held where the Sheriff, before granting warrant to cite the debtor, who had appeared before him to support a caveat denying jurisdiction, allowed a proof on that point, and thereafter repelled the plea (*Hope*, 1893, 21 R. 49). At the same time the Court orders intimation of the warrant and diet of appearance to be made in the *Gazette* (s. 28), and, if required, grants diligence to recover evidence of notour bankruptcy (s. 26). The *inducie* is not less than six nor more than fourteen days, or, if the citation be edictal, is twenty-one days. After due advertisement and service, the petitioner verbally or by minute states that he has made them, produces the evidence thereof and of the other requisites, and moves for sequestration; "and if the debtor or, if dead, his successor, do not appear at the diet of appearance, either in person or by his counsel or agent, and show cause why the sequestration cannot be competently awarded, or if the debtor so appearing do not instantly pay the debt or debts in respect of which he was made bankrupt, or produce written evidence of the same being paid or satisfied, and also pay or satisfy or produce written evidence of the payment or satisfaction of the debt or debts due to the petitioner, or to any other creditor appearing and concurring in the petition, the Lord Ordinary

or Sheriff, on production of evidence of the citation and of the foresaid requisites for sequestration, shall award sequestration in manner and to the effect before mentioned" (B. A., s. 30). In an application for sequestration of the estate of a deceased debtor under the Act of 1839, it was held that upon consignation of the debt of the applicant by a judicial factor on the estate (who had raised a reduction of the ground of debt) sequestration ought to be refused (*Alexander*, 1845, 7 D. 264; *Roger*, 1850, 12 D. 985; see *Steel*, 1852, 14 D. 348, as to expenses of petitioner). Apart from consignation, the term "satisfaction" has not been construed by any decision.

If the statutory requisites are duly complied with, and the debt in respect of which notour bankruptcy was constituted, and the debt of the petitioner, etc., are not paid or satisfied in terms of sec. 30 above quoted, sequestration must be awarded. The Court has no discretion in the matter (*Joel*, 1859, 21 D. 929; *Stuart*, 1891, 19 R. 223; see also *Reid*, 1890, 17 R. 757). Under the earlier Sequestration Acts the Courts had a discretionary power.

The award of sequestration may be opposed by the debtor, or, if dead, his successor, or by any creditor, the objections being either stated orally, or, if the Court so order, in the form of written answers, upon which a record may be made up. Proof *prout de jure* is not allowed save as to any relevant questions connected with the existence of the statutory requisites. Thus on a petition for sequestration of a partnership the existence of which was disputed and not supported by any *primâ facie* evidence, the Court refused to allow investigation, and dismissed the petition (*M'Gavin*, 1854, 16 D. 540).

The grounds of objection may be failure of some statutory requisite, such as jurisdiction or residence, or defect in the petitioner's oath or vouchers or in the evidence of notour bankruptcy, or it may be that sequestration has already been granted in another Court in Scotland, and is still undischarged (s. 18; as to a second sequestration in the same Court, see *Fisken*, 1845, 7 D. 842; *Taylor*, 1879, 7 R. 128). Objections founded on expediency cannot be entertained. If the debtor be really solvent notwithstanding *primâ facie* evidence of notour bankruptcy produced, his remedy is to make the payment or satisfaction under sec. 30 above quoted, which will entitle him to have the petition dismissed. (As to grounds for recall of sequestration, see *infra*.)

If a creditor opposing a petition either by the debtor or by another creditor withdraws, or becomes bankrupt, or dies, any other creditor may be sisted in his stead (B. A., s. 34).

(3) *In the case of a company, i.e.* bodies corporate, politic, or collegiate, and partnerships (B. A., s. 4), sequestration may be awarded "of the estates of the company and partners jointly, or of their respective estates separately," (B. A., s. 27). It is sufficient citation of a company "that a copy of the petition and warrant be left at the place where the business of the company is or was last carried on, provided a partner or a clerk or a servant of the company be there, and failing thereof, at the dwelling-house of any of the acting partners; and if the house of such partner cannot be found, by leaving a copy at the office of Edictal Citations" (s. 27).

Where two firms consist of the same partners, they fall to be dealt with as separate firms with separate estates, "provided that there is a real and perceptible distinction of trade and establishment between them," and in such circumstances each firm is liable to sequestration by itself (Bell, *Com.* ii. 515, 516; *Commercial Bank*, 1895, 33 S. L. R. 161, per Ld. Low, Ordinary).

(4) *In the case of a debtor under cessio* where the Sheriff exercises his discretionary power of awarding sequestration (under sec. 11 of 44 & 45 Vict. c. 22), the deliverance contains the same order fixing a meeting of creditors for the election of a trustee as in the case of a deliverance on a petition, and, like the latter, it is final, and can only be considered under a petition for recall. The date of the deliverance itself, and not the date of the petition for cessio under which it is granted, is the date of the sequestration (*Galbraith*, 1885, 22 S. L. R. 602). The Court will rarely interfere with the exercise of the Sheriff's discretion in awarding sequestration (see *Jaffray*, 1883, 10 R. 719).

(5) *Appeal.*—A deliverance awarding sequestration is final and not subject to review (B. A., s. 31); but where sequestration is refused, the deliverance may be appealed (*Marr & Sons*, 1881, 8 R. 784). If pronounced by the Sheriff, the appeal lies to either Division of the Court of Session, or to the Lord Ordinary on the Bills during vacation, and must be taken within eight days by a note of appeal lodged with the Sheriff Clerk (s. 170). There is no statutory form of note. A deliverance by the Lord Ordinary on the Bills is brought under review by reclaiming note in common form within fourteen days (B. A., s. 171).

II. Recall of and Annulling Sequestration.

1. Petition for Recall . . . 177
2. Grounds of Recall . . . 178
3. Proceedings other than Recall . 180

1. Petition for Recall.—While the deliverance awarding sequestration is not subject to appeal, it is competent to present a petition to have it recalled (B. A., s. 31). The petition is presented to the Lord Ordinary on the Bills; and, unless where presented by nine-tenths in number and value of the creditors ranked, or where the successors of a deceased debtor have been cited edictally (see *infra*), it is only competent within forty days after the date of the deliverance (ss. 31, 32). It may be presented by "any debtor whose estate has been sequestrated without his consent, or the successors [see sec. 4] of any deceased debtor whose estate has been sequestrated without their consent, unless on the application of a mandatory authorised by the deceased debtor or any creditor" (s. 31). A creditor petitioning must produce oath and vouchers as in petitioning for sequestration (see *Perryman*, 1852, 14 D. 508; *Partridge*, 1873, 1 R. 253). If he has actively homologated the sequestration, as by lodging a claim and competing for the trusteeship, he may be barred *personali exceptione*, provided there is no radical defect in the proceedings (*Ure*, 1857, 19 D. 758; see *Tennent*, 1879, 6 R. 786). Where a petitioning creditor withdraws, or becomes bankrupt, or dies, any other creditor may be sisted in his place (B. A., s. 34).

Where sequestration has been awarded of the estate of a deceased debtor, and his successor has been cited edictally, it is competent for such successor, or any person having interest, to petition for recall at any time before the publication of the advertisement for payment of the first dividend (s. 31).

A petition for recall sets forth the grounds of recall, and is signed by the petitioner, or his counsel or agent (*Scott*, 1848, 10 D. 732). The parties who petitioned for sequestration or concurred therein, and the trustee if appointed and confirmed (*Arnold*, 1852, 14 D. 986), must be called as respondents. (See form of petition in Appendix.) The bankrupt may oppose the petition without finding caution (*Hooper*, 1850, 12 D. 1309). A record may be made up on the petition and answers, and proof taken

(see *Muir*, 1850, 12 D. 512; *Arnold, supra*). If an opposing creditor withdraws, or becomes bankrupt, or dies, any other creditor may be sisted in his place (B. A., s. 34).

The Lord Ordinary's judgment may be reviewed on reclaiming note within fourteen days (B. A., s. 171). While sec. 21 of the Act of 1856 makes it imperative, where a petition for sequestration originates in the Bill Chamber, to mark it to one of the Divisions when presented, it has been held competent to bring a reclaiming note in a petition for recall to the other Division than that to which the petition for sequestration has been so appropriated (*Cooper*, 1878, 5 R. 414; cf. *Gow*, 1862, 1 M. 25).

Where a petition for recall is successful, the Court will not award the petitioner the expenses of the petition, as it is "a proceeding required by the statute whether the respondent appeared or not" (*Smith*, 1860, 23 D. 140; *Riddell*, 1896, 34 S. L. R. 43). But the Court may award against a compearing respondent expenses incurred by his unsuccessful opposition (*ib.*).

Where sequestration is recalled, the interlocutor must be entered in the Register of Sequestrations and on the margin of the Register of Inhibitions (B. A., s. 31).

"Pending any petition for recall, and until the sequestration be finally recalled, the proceedings in the sequestration shall go on as if no such petition had been presented" (*ib.*, s. 33; see *Crawford*, 1821, 1 S. 189; *Ballantyne*, 1867, 5 M. 330, per Ld. Neaves). Where all the creditors of a bankrupt except two who had petitioned for recall, accepted a composition, the Court, pending the petition, granted the bankrupt's discharge on condition of his finding "caution, in the event of the sequestration being recalled, to make good and effectual all rights and interests of the said [petitioning] creditors, in the same manner and to the same extent as if the discharge had not been granted," and in respect the trustee was to remain a party to the petition for recall (*Annan*, 1848, 10 D. 891). It was observed by Lord Fullerton in this case: "You must read these words 'go on' as applicable even to the conclusion of the sequestration."

A petition for recall is competent at any time if presented by nine-tenths in number and value of the creditors ranked (s. 126) on the estate (B. A., s. 32). The Lord Ordinary orders notice of his deliverance to be published in the *Gazette*, requiring all concerned to appear within fourteen days from the date of the publication to show cause against the recall, and on expiration of said time pronounces judgment.

2. Grounds of Recall.—"Recall may be competently applied for on any of the grounds which were stated and repelled in opposing the award of sequestration (*Elder*, 1850, 12 D. 994), or on grounds which might have been effectual but were not stated (*Campbell*, 1853, 15 D. 685), or on grounds which have emerged since the awarding of sequestration (*Muir*, 1850, 12 D. 512; see *Ure*, 1857, 19 D. 758)" (Goudy on *Bankruptcy*, 151).

Defects in the statutory requisites constitute good grounds for recall, as, *e.g.*, the insufficiency of the petitioning creditor's oath or vouchers (*Morrison*, 1832, 10 S. 259; *Campbell*, 1853, 15 D. 685; *Ballantyne*, 1867, 5 M. 330; *Riddell*, 1896, 34 S. L. R. 43), or the want of due constitution of notour bankruptcy (but see Bell, *Com.*, 5th ed., ii. 333, for view that this objection may be met by production of evidence that debtor had been duly made notour bankrupt by other diligence). Where there is any *ex facie* defect in the statutory proceedings, the Court has no discretion, but must recall the sequestration (*Ballantyne, supra*; *Tennent*, 1879, 6 R. 786; *Mitchell*, 1888, 16 R. 122; *Blair*, 1889, 16 R. 325; *Riddell*, 1896, 34

S. L. R. 43). And in such a case it is no answer that the sequestration has been acted on by the petitioning or other creditors (*Campbell*, 1853, 15 D. 685), nor that all the other creditors wish it to go on (*ib.*). But "where there is no nullity *ex facie* of the proceedings, though nullity may be made out on investigation, the Court may exercise its discretion as to recalling or not recalling the sequestration" (*Ballantyne*, *supra*, per Ld. Benholme). Thus recall was refused where the creditor petitioning for sequestration had omitted to specify an inhibition in his affidavit, the Court being satisfied that it was valueless (*Mitchell*, 1888, 16 R. 122). Recall has been granted on the ground that the sequestration was nimious and improper (*Gardner*, 1862, 24 D. 1133). Fraud on the part of a debtor who has petitioned for sequestration, or a creditor who has concurred, may constitute a ground for recall (*Anderson*, 1868, 40 Jur. 498; see *Joel*, 1859, 22 D. 6). Where the petitioning creditor was not put on oath by the magistrate before whom his affidavit bore to be sworn, the Court, on proof of the fact, recalled the sequestration (*Blair*, 1889, 16 R. 325). But recall was refused where the ground was that the concurring creditor was an undischarged bankrupt (*Macnab*, 1851, 14 D. 182; but see *Campbell*, 1853, 15 D. 685, per Ld. Curriehill; and *Gillon*, 1882, 10 R. 59, per Ld. Pres. Inglis), and where there had been failure to insert *Gazette* notices (*Gray*, 1844, 6 D. 569). It is a relevant ground for recall that the debt of the creditor who petitioned for sequestration is not really due (*Aitken*, 1890, 28 S. L. R. 115; *Lindsay*, 1896, 4 S. L. T. 43 and 141), or that the debtor is solvent (*Aitken*, *supra*). "The true and only proper test of solvency in an application for recall" is "whether the debtor at the time of being made bankrupt was in a position to meet his current obligations" (*Aitken*, *supra*, per Ld. M'Laren). Objections to a sequestration based on mere inexpediency are not good grounds for recall (*Joel*, 1859, 21 D. 929, and 22 D. 6; *Stuart*, 1891, 19 R. 223), as, *e.g.*, the absence of apparent estate (*Gardner*, 1862, 24 D. 1133), the expense of the process compared with the value of the estate (*Kid*, 1830, 8 S. 510).

Where the grounds of recall are discretionary, the Court, in exercising its discretion, will look at the whole circumstances of the case. Thus it was observed by Ld. Pres. Inglis in the case of *Blair* (1889, 16 R. 325): "If this had been a sequestration the awarding of which had had the effect of reducing undue preferences, or of equalising diligences, or of creating a right, or cutting down a right, or of preferring one or more creditors, that might have been a reason for considering whether it was necessary in the circumstances of the case, with the view of doing justice between the parties, absolutely to recall it." In the same case Ld. Adam stated the question thus: "Is it or is it not established, as against the recall of the sequestration, that other creditors have acquired rights which would be prejudicially affected by a recall?"

Recall *hoc statu* may be granted where the debtor has been twice sequestrated, the second process being thus suspended so that it may be taken up should the first turn out defective (*Jarvie*, 1865, 4 M. 79; *Kellock*, 1875, 3 R. 239). But where sequestration was obtained by a debtor in the Bill Chamber after he had been cited on a creditor's petition in the Sheriff Court, and two statutory meetings were held and a trustee appointed in the Bill Chamber sequestration (no award having been obtained in the Sheriff Court), the Court refused to recall it, there being nothing to show that any preferences had been obtained between the dates of the two petitions (*Tennent*, 1879, 6 R. 786; see also *Fletcher*, 1883, 10 R. 835; *Simpson*, 1881, 9 R. 104).

There is one discretionary ground of recall specially provided for by statute. The Bankruptcy Amendment Act of 1860 enacts that if it shall appear to the Court of Session or the Lord Ordinary, upon a summary petition by the Accountant or any creditor, or any other person having interest, presented to either Division or the Lord Ordinary within three months after the date of any sequestration, that a majority of the creditors in number and value reside in England or in Ireland, and that from the situation of the property of the bankrupt, or other causes, his estate and effects ought to be distributed among the creditors under the bankrupt or insolvent laws of England or Ireland, the said Court in either Division thereof, or the Lord Ordinary, after such inquiry as to them shall seem fit, may recall the sequestration (23 & 24 Vict. c. 33, s. 2). A judgment by the Lord Ordinary is subject to review by reclaiming note within fourteen days (*ib.*, s. 4; B. A., 1856, s. 171). The power of recall under this provision is entirely discretionary (*Smith*, 1860, 23 D. 140; *Brandon*, 1862, 24 D. 263; *Haines*, 1862, 24 D. 383; *Moses*, 1866, 4 M. 1056; *Smith*, 1869, 8 M. 100). In computing the majority of creditors, all are included who have lodged oaths and vouchers not open to objection, whether their claims are under £20 or over (*Haines, supra*). The bankrupt cannot take exception to any parties being regarded as creditors whom he has given up in his state of affairs (*ib.*). In *Brandon* (1862, 24 D. 263) recall was granted, with expenses, although the sequestration had gone the length of the bankrupt having got his discharge without composition, the Court being satisfied that the whole proceedings had been conducted solely for the benefit of the bankrupt and not of the creditors.

Decree of recall reinvests the bankrupt in his estate. It restores efficacy to any preferences by diligence or voluntary act of the bankrupt which the subsistence of the sequestration would have rendered inoperative. But *bonâ fide* transactions carried through during the currency of the sequestration, such as sales, discharges, etc., hold good notwithstanding recall (B. A., s. 33). Expenses incurred in a competition for the trusteeship, which was interrupted by recall of the sequestration, were awarded and decerned for thereafter in the competition proceedings (*Crawford*, 1821, 1 S. 189). The interrupting of prescription effected by lodging a claim in a sequestration is not affected by recall (B. A., s. 109).

3. Proceedings to terminate Sequestration other than Recall.—In circumstances where procedure by way of recall is inapplicable, the Court may *ex nobili officio* declare sequestration at an end. This has been done where the bankrupt, after sequestration, entered into an extrajudicial arrangement with all his creditors, under which they granted him a discharge (*Anderson*, 1866, 4 M. 577); where a creditor disclaimed the petition for sequestration presented in his name as unauthorised (*A. B.*, 1842, 5 D. 74); where a petitioning debtor, discovering his solvency after the award, paid the concurring creditor's debt, no proceedings having taken place upon the award, and there being no appearance to oppose (*A. B.*, 1835, 13 S. 262). And in a recent case, where the trustee on the sequestrated estate of a deceased debtor had been discharged, all the estate having been divided except a heritable property the value of which the bankrupt's representatives had paid to the trustee in exchange for a discharge of all his claims thereto, the Court, on a petition, granted a decree declaring the bankrupt's testamentary trustees reinvested in the property (*Macleish's Trs.*, 1896, 24 R. 151).

There are two instances of an action of reduction for annulling sequestration proceedings. In the first (*Gibson*, 1894, 21 R. 840) the ground of

reduction maintained was that the award of sequestration was incompetent in respect of the dependence of prior bankruptcy proceedings in England. In the second (*Whittlie*, 1898, 25 R. 412) the debtor averred fraud of the concurring creditor. Both actions were dismissed. The competency of reducing a sequestration is therefore undecided. It has been suggested that relevant grounds for bringing a reduction of a sequestration where procedure by recall is impossible might be that the award had been obtained by forgery or gross fraud (Goudy on *Bankruptcy*, 155).

As to terminating sequestration by deed of arrangement, see DEED OF ARRANGEMENT.

III. REGISTRATION AND PUBLICATION OF SEQUESTRATION.

It is the duty of the party applying for sequestration to have it duly registered and published. He must before the expiry of the second lawful day after the first deliverance, if by the Lord Ordinary, present to the Keeper of the Register of Inhibitions at Edinburgh, or present or transmit by post to him before the expiration of the second lawful day after said deliverance if by the Sheriff, an abbreviate of the petition and deliverance, signed by him or his agent, in the form of Schedule A, No. 1, appended to the Act (B. A., s. 48). The registration has from the date of the deliverance "the effect of an inhibition and of a citation in an adjudication" (*ib.*), and it is not competent to stop such effect, or the effect of the sequestration after it is awarded, by paying the debt in respect of which it was awarded (*ib.*). An error in registration may be rectified by obtaining authority to register from the Court of Session on a petition at the instance of the party charged with the duty (*A. B.*, 1858, 21 D. 24; *Allan*, 1861, 23 D. 972; *Morrison*, 1874, 1 R. 392; *Harrison*, 1880, 18 S. L. R. 187; *Stark*, 1886, 23 S. L. R. 507); and when so rectified, the sequestration proceedings will stand good (*Munro*, 1851, 13 D. 1209), save that creditors will not be prevented, prior to registration, from perfecting preferences (see Goudy on *Bankruptcy*, 157).

The party applying for sequestration has also the duty of publishing the award when obtained. Within four days of its date when in the Bill Chamber, or, if by the Sheriff, within four days after a copy of the deliverance could be received in course of post in Edinburgh, he must insert a notice, in the form of Schedule B of the Act of 1856, in the *Edinburgh Gazette*, and also within six days from said date insert said notice in the *London Gazette* (s. 48: see as to mistakes, *Gray*, 1844, 6 D. 569; *Von Rotberg*, 1876, 4 R. 263). Delay or error in inserting the notice may be rectified by petition to the Court as above mentioned (*Garden*, 1848, 10 D. 1509; *Ross*, 1852, 14 D. 546; *Tolmie*, 1853, 16 D. 105; *Foubister*, 1869, 8 M. 31; *Fife*, 1844, 6 D. 686; *Von Rotberg*, *supra*; as to expenses of petition, see *A. B.*, 1858, 21 D. 24). As to the effect of mistakes, the rule is that the prior proceedings remain unaffected, while those after the faulty insertion must begin *de novo* (*Gray*, 1844, 6 D. 569; *Tolmie*, 1853, 16 D. 105; cf. *Robertson*, 1885, 12 R. 1361).

The party applying for sequestration must further, where it is awarded in the Bill Chamber, transmit a copy of the petition and first deliverance, and of the deliverance awarding sequestration, certified by one of the Bill Chamber clerks, and the productions, to the Sheriff Clerk of the county to the Sheriff of which the process has been remitted (B. A., s. 43).

The expenses, as taxed, incurred by the petitioning or concurring creditor in obtaining the sequestration and doing the other acts required

by the statute prior to the election of the trustee, fall to be paid to him by the trustee out of the first of the funds which come into his hands (B. A., s. 41; *Dalrymple*, 1823, 2 S. 355; *Baillie*, 1833, 11 S. 609; *Bell*, 1854, 16 D. 915; *Taylor*, 1840, 2 D. 512 and 812). An agent-disburser is entitled to claim the expenses from the trustee (*Cook*, 1831, 9 S. 667).

IV. Interim Preservation of Estate.

By the Bankruptcy Act, 1856, s. 16, the Court to which a petition for sequestration is presented is empowered "to take immediate measures for the preservation of the estate, either by the appointment of a judicial factor, who shall find such caution as may be deemed necessary, with the powers necessary for such preservation, including the power to recover debts, or by such other proceedings as may be requisite, and such interim appointments or proceedings shall be carried into immediate effect." Such measures may be taken at any time prior to the confirmation of the trustee (*Partridge*, 1873, 1 R. 253). The application may be in the petition for sequestration, or by separate petition (s. 16). In the latter case, if the applicant is not a petitioning or concurring creditor he must produce affidavit and vouchers to prove his title (*Partridge, supra*, per Ld. Cowan); but it is not required that he be qualified as for petitioning (s. 16). A judgment by the Lord Ordinary is final; but one by the Sheriff is appealable (ss. 16, 170), whether it grants or refuses the application (see *Partridge, supra*). The application is not granted without specific averment of danger to the estate (*M'Creadies*, 1882, 10 R. 108, per Ld. Shand; *Cuthbertson*, 1887, 14 R. 736).

An interim factor is entitled to take all steps necessary for preserving the estate. He may recover debts (s. 16), open lockfast places (*M'Lachlan*, 1895, 23 R. 126), demand delivery of goods, stop *in transitu*, require payment of bills (Bell, *Com.* ii. 300), and probably also carry on a going business (*ib.*; Goudy on *Bankruptcy*, 163). But he cannot otherwise sell the estate, unless with judicial authority where it is of a perishable nature (*Crawford*, 1827, 6 S. 127; *Malcolm*, 1828, 6 S. 1025); or interfere with the diligence of creditors (*Urquhart*, 1883, 10 R. 991). He is entitled to his expenses and remuneration from the trustee out of the first of the funds (see 2 & 3 Vict. c. 41, s. 53; *Anderson*, 1845, 7 D. 947), but without lien therefor (see Bell, *Com.* ii. 301); and where sequestration is not awarded, can claim them from the party who obtained him appointed (Goudy on *Bankruptcy*, 164). On handing over the estate, he obtains exoneration and discharge from the Court, and delivery of his bond of caution (*Esson*, 1842, 4 D. 739).

It is competent to the Sheriff, on cause shown by any creditor, or without any application, (1) at any time before the election of the trustee to cause to be sealed up and put under safe custody the books and papers of the bankrupt, and to lock up his shop, warehouse, or other repositories, and to keep the keys thereof until the trustee has been confirmed (B. A., s. 17); (2) at any time after the presentation of a petition for sequestration, to grant warrant to take possession of and put under safe custody any bank notes, money, bonds, bills, cheques or drafts, or other moveable property belonging to or in the possession of the debtor, and, if necessary for that purpose, to open lockfast places, and to search the dwelling-house, shop, counting-house, warehouse, or other premises, as well as the person of the debtor (43 & 44 Vict. c. 34, s. 12; 44 & 45 Vict. c. 22, s. 13). The Sheriff is also empowered, during the dependence of appeals or petitions and

complaints, to give such orders as may be necessary to regulate the interim possession and administration of the estate (B. A., s. 172), and to take similar measures where more than one sequestration has been awarded (*ib.*, s. 20).

V. Claims for Voting.

1. Form of Oath 183
2. Rectification of Oaths . . . 186
3. Account and Vouchers . . . 186
4. Secured Debts 188
5. Contingent Claims . . . 189
6. Annuities 189
7. Assignees 189
8. Mandatories 189

To entitle a creditor to vote or draw a dividend, he must produce at the meeting for election of the trustee, or in the hands of the trustee after he is confirmed, an oath as to the amount of his claim, and the account and vouchers necessary to prove it (B. A., s. 49). The oath does not supersede the "production of legal evidence, when required, in any discussion before the Court of Session, the Lord Ordinary, the Sheriff, or the trustee" (B. A., s. 58; see *Rhind*, 1846, 9 D. 231). The oath, etc., when produced, are initialed by the preses of the said meeting or the trustee, as the case may be, and entered, with the date of production, in the sederunt book (*ib.*, s. 50; *Woodside*, 1847, 9 D. 1486; see as to failure duly to initial and enter, *Stewart*, 1865, 3 M. 1031; *Brandon*, 1862, 24 D. 263; and as to loss of claim in hands of trustees, *Galloway*, 1849, 12 D. 394). The grounds of debt are returned to the creditor if required, and need not be produced at subsequent meetings unless specially called for. An assignee to a claim may found on it without lodging a new one (*Walker*, 1835, 13 S. 428). The trustee makes no deliverance upon claims to vote; but a scrutiny may take place, and the sufficiency of claims for voting purposes be judicially ascertained, in course of such proceedings as a competition for the trusteeship, or an appeal against a creditors' resolution. Where a vote is objected to at a meeting, it is not necessary to state specific grounds of objection, a general protest being enough, or an appeal without any protest (see *Miller*, 1858, 20 D. 803). In proceedings under a scrutiny, parole proof is not in the ordinary case admissible (Bell, *Com.*, 5th ed., ii. 347; *Rhind*, 1846, 9 D. 231; *Wylie*, 1884, 11 R. 968), and the party concerned must be able to instantly verify his objection or claim by unambiguous written evidence (*M'Ewan*, 1842, 5 D. 273; *Rhind, supra*; *Hay*, 1850, 12 D. 676), to recover which a diligence in specific terms may be obtained (*Foulds*, 1851, 13 D. 1357; *Tennent*, 1878, 5 R. 433; *Reid*, 1879, 7 R. 235). Reference to the oath of the bankrupt or claimant is not admitted (*Dyce*, 1846, 9 D. 310; *Adam*, 1847, 9 D. 560; *Anderson*, 1847, 9 D. 1460; *Reid*, 1887, 14 R. 847). An objection to a claim is not barred by its having been voted on formerly without objection (*Henderson*, 1849, 11 D. 1470; *Lockhart*, 1849, 11 D. 1341). A final judgment against a particular vote on a claim prevents it being voted on thereafter (*Berry*, 1825, 3 S. 336; affd. (H. L.) 1826, 2 W. & S. 93; *Campbell*, 1855, 18 D. 99). Where a creditor's vote is objected to, the creditor is not debarred from voting while the objection is *sub judice* (Bell, *Com.*, 5th ed., ii. 348; *Watson*, 1848, 10 D. 1414).

The lodging of a claim interrupts prescription, and bars any statute of limitations in any part of Her Majesty's dominions (B. A., s. 109); it also creates jurisdiction *ex reconventione* (*Ord*, 1847, 9 D. 541; *Barr*, 1879, 7 R. 247).

1. Form of Oath.—The form of oath is the same for petitioning, voting, or ranking, except that (1) an oath for petitioning only specifies securities and claims against co-obligants, without valuing and deducting

them; (2) an oath for voting also values and deducts securities over the bankrupt's estate, claims on co-obligants, and securities liable in relief to the bankrupt; and (3) an oath for ranking deducts only securities over the bankrupt's estate.

There is no statutory form of oath. A form of oath in the terms customary in practice will be found in the Appendix. It is (save as after mentioned) an oath "to the verity of the debt" (B. A., s. 22); and it is therefore sufficient to aver that the debt is due and resting owing (see *Gibson*, 1825, 4 S. 133; *Taylor*, 1848, 10 D. 335; *Glen*, 1849, 11 D. 387; *Forbes*, 1851, 13 D. 1272). The oath must be definite as to the amount of the debt (see *Paul*, 1834, 12 S. 431, 7 W. & S. 462; cf. *Lizars*, 1835, 13 S. 963). Marginal additions and erasures *in essentialibus* must be duly authenticated (*M'Kersy*, 1829, 7 S. 556; *Miller*, 1848, 10 D. 1419; *White*, 1846, 9 D. 283; *Jardine*, 1848, 10 D. 1501; *Murray*, 1856, 19 D. 44; cf. *Martin*, 1897, 5 S. L. T. 208—deletion). As to rectification of defective oaths, see *infra*. Several debts may be accumulated in one oath (see *Allan*, 1840, 3 D. 152; *Smith*, 1849, 11 D. 517; *Patten*, 1853, 15 D. 617).

The creditor must in his oath "state what other persons, if any, are, besides the bankrupt, liable for the debt or any part thereof, and specify any security which he holds over the estate of the bankrupt or of other obligants, and depone that he holds no other obligants or securities than those specified; and where he holds no other person than the bankrupt so bound, and no security, he shall depone to that effect" (B. A., s. 22). "Security" includes "securities, heritable or moveable, and rights of lien, retention or preference [*e.g.* inhibition or arrestment—*Mitchell*, 1888, 16 R. 122], and conveyances thereof and any part thereof" (s. 4). As to meaning of obligant, see *Forrest*, 1848, 11 D. 308. The oath must deal with obligants and securities separately. Thus an oath was held bad where the creditor omitted to state that he held no other person than the bankrupt bound, although he deponed to holding no other "securities" than those specified (*Imrie*, 1842, 4 D. 1532; *Wright*, 1842, 5 D. 164). But "holds no security for the debt other than A. and B." was held sufficient (*Forbes*, 1851, 13 D. 1272). And informalities may be disregarded if the meaning be clear, as, *e.g.*, the omission of the word "no" (*Taylor*, 1848, 10 D. 335), or of the pronoun "I" (*Hair*, 1830, 8 S. 671). And an oath was sustained which bore that the debt was due by a company and the partners, and that the creditor held no other than the company liable (*M'Cubbin*, 1850, 12 D. 1153). Where the words "that no security is held for the same" were deleted without authentication, the deletion was held not to be a ground for recalling the sequestration, being proved not to have existed at the date of the award (*Martin*, 1897, 5 S. L. T. 208). Besides specifying securities and claims against co-obligants, the creditor must, for voting purposes, value and deduct these (see as to this *infra*). For ranking, he deducts only the value of securities over the bankrupt's estate (see *infra*, *Ranking of Claims*).

A creditor is entitled to vote and rank for the accumulated sum of principal and interest to date of the sequestration, but not for interest after the sequestration; and if the debt is one due after the sequestration, he must deduct interest from that date, and any discount applicable to it by usage of trade (B. A., s. 52; see *Love*, 1846, 8 D. 1016; *Paterson*, 1846, 19 Jur. 144; *Crawfurd*, 15 May 1812, F. C.; *Duncan*, 1879, 6 R. 582). But he is not bound to specify separately, in his oath or claim for his debt, the amount of any interest due thereon, or of any interest or discount deducted therefrom, or to specify therein any

accumulated sum of principal and interest (*ib.*). If there is any residue of the estate after discharging the debts ranked, he is entitled to claim thereout the full amount of the interest on his debt in terms of law (*ib.*).

Where the deponing creditor is residing within the United Kingdom, he must personally (*Wilkie*, Bell, *Com.*, 5th ed., ii. 342, note) take the oath before a Judge Ordinary, Magistrate, or Justice of the Peace (B. A., s. 22; see *Murray*, 1821, 1 S. 84, where oath before baron-bailie sustained; *Paterson*, 1846, 8 D. 950). It is immaterial for what county a justice holds his commission (*Taylor*, 1 Sh. App. 254; *Turnbull*, 1828, 6 S. 676; see *Kerr*, 1852, 14 D. 864). Where the creditor is residing out of the United Kingdom, either (1) he may personally take the oath of verity "before a magistrate or justice of the peace or other person qualified to administer oaths in the country where he resides (he being certified to be a magistrate or justice of the peace, or qualified as aforesaid, by a British minister or British consul, or by a notary public)"; or (2) his known agent or mandatory in Great Britain or Ireland may take an "oath of credulity" (B. A., s. 23; see *infra* as to *Oath of Credulity*). The creditor must be actually sworn by the magistrate, etc. (*Blair*, 1889, 16 R. 325), who must along with him sign the oath (see *M'Cubbin*, 1850, 12 D. 1123; *Dow*, 1875, 2 R. 459), and may, if the creditor be unable to write, sign it for him (*Paul*, 1834, 12 S. 431; *Perryman*, 1852, 14 D. 508).

A claim in name of an ordinary firm or unincorporated company may be sworn to by a partner (B. A., s. 25). A claim by a corporation (including registered companies; s. 4) may be sworn to "by the secretary, manager, cashier, clerk, or other principal officer," although not a member of the corporation (*ib.*, s. 25). This category includes the assistant manager of a bank (*Dow*, 1875, 2 R. 459), but not an agent at a branch (*Anderson*, 1847, 9 D. 1432; *Campbell*, 1853, 15 D. 685), unless the debt is constituted in his name (*Bonar*, 1841, 3 D. 830; and see *Brown*, 1845, 17 Sc. Jur. 296—a blank indorsation held by agent of unincorporated company). An assignee must make oath (see *Glen*, 1849, 11 D. 387; *Blair*, *supra*), unless the assignation is after the claim is lodged (see Bell, *Com.*, 5th ed., ii. 341; *Walker*, 1835, 13 S. 428; *Chalmers*, 1860, 22 D. 1060). Where the claim is for a sequestrated estate, the oath is by the trustee (*Berry*, 1825, 3 S. 336; affd. 2 W. & S. 93; see *M'Kellar*, 22 June 1805, F. C.; *Taylor*, 1848, 10 D. 335; *Samson*, 1851, 13 D. 1395; and as to case of trustee's bankruptcy, see *Leck*, 1855, 17 D. 1075). One of a body of trustees or executors may depone (Bell, *Com.* ii. 304; see *Watson*, 1848, 10 D. 1414), and prior confirmation is not required (*Chalmers*, *supra*).

A factor, agent, or mandatory cannot, save where the principal is abroad or *incapax* (see *infra*; ss. 23, 25), take the oath on his behalf (*Wixon*, 1849, 11 D. 1188; *Campbell*, 1853, 15 D. 685; *Wilkie*, Bell, *Com.*, 5th ed., ii. 342, note; see *Fleming*, 1842, 5 D. 305), unless the debt is constituted in the agent's person, thus enabling him to depone as the creditor in it, as, *e.g.*, a bill payable to A. B., as agent for C. D. (*Wilson*, *supra*; *Bonar*, 1841, 3 D. 830).

Oath of Credulity.—Where a creditor is residing out of the United Kingdom, his known agent or mandatory within the United Kingdom may take an oath of credulity on his behalf (B. A., s. 23; see *supra*); and when a creditor is "under age [*i.e.* pupils; *Miller*, 1840, 2 D. 1112], or incapable to make oath," an oath of credulity by "his authorised agent, factor, guardian, or manager" is sufficient. Incapacity includes the case of those who are lunatics or under curatory or interdiction, and probably those

incapacitated by illness (see Bell, *Com.*, 5th ed., ii. 342). The agent, etc., must produce his mandate or authority to act (*Aitken*, 1852, 14 D. 572). The only difference in form between an oath of verity and an oath of credulity is that in the latter the deponent swears to the debt as being due to his principal "to the best of the deponent's knowledge and belief" (see Form of Oath appended). As to the competency of an oath of credulity by a creditor unable to depone positively as to his debt, see *Paul*, 1834, 12 S. 431; affd. 7 W. & S. 462; *Gibson*, 1825, 4 S. 133; Goudy on *Bankruptcy*, 177).

2. Rectification of Oaths.—When an oath or claim, produced with a view to voting or ranking and drawing a dividend, is not framed in the manner required by the Bankruptcy Act, the Sheriff or trustee is directed to call on the creditor, his agent or mandatory to rectify the same, pointing out wherein it is defective; and, failing rectification, to reject the same; but when the defect appears to have been made for some improper or fraudulent purpose, or where injury can be qualified by creditors in respect thereof, it is not incumbent on the Sheriff or trustee to allow rectification (B. A., s. 51). This does not apply to an oath produced in petitioning. The amendment must be on oath (*Gibson*, 1853, 16 D. 233). It may be allowed and made at any time before the validity of the oath or claim has been finally determined by the Sheriff (*Latta*, 1865, 4 M. 100; *Dow*, 1875, 2 R. 459, per Ld. Pres. Inglis). An interlocutor allowing rectification may be appealed (*Latta, supra*, per. Ld. Pres. Inglis).

Wilful falsehood in an oath exposes the deponent to a prosecution for perjury at common law (see *Blair*, 1889, 16 R. 325, per Ld. Pres. Inglis), and also is a ground for prosecution under sec. 178 of the Bankruptcy Act, 1856, and under sec. 14 of the Debtors Act, 1880.

3. Account and Vouchers of Claim.—Along with the oath there must be produced the "account and vouchers" of the debt (B. A., ss. 21, 49). The general rule is that for purposes of voting these must be "such as would be sufficient to entitle the party to be ranked if his claim is not objected to" (*Turnbull*, 1850, 12 D. 1097). Where debts are vouched by written documents, an account is not necessary if the debts are such as do not ordinarily run into account (see *Kinnear*, 1849, 12 D. 66; *Tytler*, 1883, 10 R. 702). Where debts stand on open account, the production of the account is enough if it is an ordinary trade account, or such as to indicate that no separate vouchers exist (*Kinnear, supra*; *Forbes*, 1851, 13 D. 1272; *Laidlaw*, 1844, 6 D. 530; *Wink*, 1849, 11 D. 995; *Ballantyne*, 1867, 5 M. 330).

Any document specially vouching a claim must be produced, as, *e.g.*, a bond or bill, a lease (*Menzies*, 1851, 13 D. 1044, tacit relocation), a policy of insurance (*Murray*, 1856, 19 D. 44), or, in the case of a claim for calls, the minute of directors' meeting making the call, and register of shareholders (*Kinnear*, 1849, 12 D. 66).

Where debts are numerous and run into account, the account must be produced, and each item vouched (*Laidlaw, supra*; *Lizars*, 1835, 13 S. 963; *Anderson*, 1847, 9 D. 1460; *Woodside*, 1847, 9 D. 1486; *Ballantyne*, 1867, 5 M. 330). Such entries as "To balance," "To amount of account rendered," "To cash lent you," have been held insufficient without vouchers (*Holiday*, 1848, 10 D. 1476; *Miller*, 1848, 10 D. 1419; *Kinnear, supra*; *Hay*, 1850, 12 D. 676; see *Elder*, 1850, 12 D. 994; *Low*, 1851, 13 D. 1349; cf. *Kinnear, supra*; *Paul*, 1834, 12 S. 431; affd. 7 W. & S. 462). It is regarded as doubtful whether a cash-credit bond, with certified statement in terms thereof, sufficiently vouches a claim (see *Murray*, 1821, 1 S. 84;

Miller, supra; Bell, *Com.*, 5th ed., ii. 344). An account only partly vouched will stand good *quoad* that part (*Chalmers*, 1860, 22 D. 1060; *Knowles*, 1865, 3 M. 457).

An open account extracted from business books and duly certified is a sufficient voucher, provided the account is a proper trade account for goods supplied or work done (*Forbes*, 1851, 13 D. 1272; *Knowles*, 1865, 3 M. 457; *Wink*, 1849, 11 D. 995; *Lizars*, 1835, 13 S. 963; *Samson*, 1851, 13 D. 1395; *Wiseman*, 1870, 8 M. 661, per Ld. Pres. Inglis). The account must be complete. Such an entry as "To goods," or "To goods *per* invoice," is not good without details (*Hair*, 1830, 8 S. 671; *Lallantyne*, 1867, 5 M. 330; *Riddell*, 1896, 34 S. L. R. 43). An entry "*per* estimate" must be accompanied by the estimate (*Woodside*, 1847, 9 D. 1486). Immaterial omissions or mistakes will not vitiate the account (*ib.*; *Foulds*, 1851, 13 D. 1357; *Johnston*, 1840, 2 D. 1463; *Paul*, 1834, 12 S. 431). An open account does not form a good voucher for cash advances contained in it (*Knowles, supra*; *Wiseman, supra*). A claim for a balance due upon a joint adventure was held not vouched by an open account (*Knowles, supra*).

A prescribed bill or account or other voucher is not sufficient, unless the prescription is elided by the production of the bankrupt's writ granted before sequestration (*Wink*, 1849, 11 D. 995; *Low*, 1851, 13 D. 1349; *Lockhart*, 1849, 11 D. 1341). An unstamped voucher will be accepted if stamped during the judicial discussion of the claim (*Tennent*, 1878, 5 R. 433; *Morics*, 1843, 6 D. 97; see *Robb*, 1831, 5 W. & S. 740), but not otherwise (see *Scott*, 1847, 9 D. 1347). It is a good objection that the account or voucher shows the debt to be one which the law will not enforce, as, *e.g.*, an account bad under the Tippling Act (*Girvan*, 1837, 16 S. 175). Erasure *in essentialibus* will vitiate a document of debt as a voucher (*M'Cubbin*, 1850, 12 D. 1123; *M'Rostie*, 1850, 12 D. 816). A claim for a penalty under a deed must be accompanied by a statement of damage (*Anderson*, 1847, 9 D. 1432). A decree *cognitionis causa* in absence against the next of kin of a deceased bankrupt is not a sufficient voucher for voting (*Turnbull*, 1850, 12 D. 1097).

A debt of which the voucher is *ex facie* imperfect will not be set up by the bankrupt's acknowledgment granted on the eve of bankruptcy, or under circumstances indicating collusion or arousing suspicion (*Samson*, 1851, 13 D. 1395, per Ld. J.-Cl. Hope; *Dyce*, 1847, 9 D. 1141).

Vouchers may be rejected if *primâ facie* collusive or suspicious, as, *e.g.*, acknowledgments of debt to near relatives on the eve of bankruptcy (*Cullen*, 1842, 4 D. 1522; *Anderson*, 1852, 14 D. 866; *Tytler*, 1883, 10 R. 699; *Witham*, 1884, 11 R. 776; *Gascoyne*, 1847, 10 D. 231—I. O. U. to law agent: see *Williamson*, 1882, 9 R. 859). In such cases some corroboration of the claim is required (see *Cullen, supra*, per Ld. Fullerton; *Dyce*, 1847, 9 D. 1141, per Ld. Moncreiff; *Tytler, supra*; *Anderson, supra*).

Besides the vouchers constituting the debt, creditors who claim as assignees or representatively must instruct their title (*Murray*, 1856, 19 D. 44; *Anderson*, 1847, 9 D. 1460; *Aitken*, 1852, 14 D. 572; *Ewing*, 1860, 22 D. 1060).

An account need not be signed by the magistrate (*Turnbull*, 1828, 6 S. 676), but the creditor should sign it where there is no separate voucher (see *Hair*, 1830, 8 S. 671; *Cullen*, 1842, 4 D. 1522; *Woodside*, 1847, 9 D. 1486). If, however, the account is incorporated as an essential part of the oath by reference, as where the valuation and deduction of securities is made in it instead of in the body of the oath, it must be signed both by the magistrate and creditors (*M'Cubbin*, 1850, 12 D. 1123). Vouchers

produced along with an account do not need to be signed (*Cullen, supra*; *Kinnear*, 1849, 12 D. 66).

4. Secured Debts.—Securities constituted over the bankrupt's estate at the date of sequestration (see *Royal Bank*, 1882, 9 R. 679; *University of Glasgow*, 1882, 9 R. 643) must be valued and deducted in the oath and the balance specified; or, if the security have been sold, the creditor must specify and deduct the net proceeds and specify the balance (B. A., s. 59). The creditor votes for such balances only, "without prejudice to the amount of his debt in other respects"; but in questions as to the disposal or management of the estate subject to his security, he is entitled to vote as a creditor for the full amount of his debt without any deduction (*ib.*). "Security" is defined by sec. 4 of the Bankruptcy Act, 1856. The category has been held to include an inhibition (*Mitchell*, 1888, 16 R. 122; *Hay*, 1850, 12 D. 676), an arrestment in security (*Woodside*, 1847, 9 D. 1486; *Gibson*, 1853, 16 D. 233; *Dow*, 1875, 2 R. 459), a right of retention over the future proceeds of an insurance policy (*Borthwick*, 1864, 2 M. 595), the right to payment of entailer's debts from an entailed estate (*Smith*, 1849, 11 D. 517), and also, apparently, a law agent's hypothec (*Elder*, 1850, 12 D. 994); but not a privileged debt (*Low*, 1851, 13 D. 1349).

Co-obligants and Collateral Securities.—For voting purposes (but not for ranking) the creditor must deduct the value of the obligation of any "obligant bound with but liable in relief to the bankrupt," or "any security from an obligant liable in relief to the bankrupt, or any security from which the bankrupt has a right of relief," to the extent to which the bankrupt is entitled to relief (B. A., s. 60. As to right of relief, see *Forrest*, 1848, 11 D. 308; *Wink*, 1849, 11 D. 995). The existence of a liability to relieve, where not concluded by the terms of obligatory writings founded on by the creditor, is determined on the terms of the creditor's oath (*Dyce*, 1847, 9 D. 993; *Givan*, 1837, 16 S. 175), as where he depones that a joint granter with the bankrupt of a promissory note is an accommodation party. The value of a claim against a partner is not deducted in claiming against the company estate (B. A., s. 61; see *M'Cubbin*, 1850, 12 D. 1123), but in claiming against a partner's estate the creditor must value and deduct his claim against the company, and also against the other partners so far as liable in relief (*ib.*; see Burton on *Bankruptcy*, ii. 473; *Nicol*, 1827, 5 S. 819; *Cormack*, 1832, 11 S. 72; *Dunlop*, Mor. 14610, and App. "Society," No. 2).

Securities and claims against co-obligants must be valued though believed to be worthless, the value being put at a nominal figure, or at nothing (*M'Ewan*, 1842, 5 D. 273; *Hay*, 1850, 12 D. 676; *Poynter*, 1839, 1 D. 700; *Gibson*, 1853, 16 D. 233; *Aitken*, 1848, 10 D. 1269; see *Dow*, 1875, 2 R. 459; *Mitchell*, 1888, 16 R. 122; *M'Kay*, 1864, 3 M. 74; *Brown*, 1849, 11 D. 474). A cumulo valuation of several securities or claims is incompetent in the general case (*Smith*, 1849, 11 D. 517; for exceptional case, see *Foulds*, 1851, 13 D. 1357).

A secured creditor is bound, at the expense of the estate, to convey his securities or claims against co-obligants to the trustee at the valued amount plus 20 per cent. thereof on being requisitioned to do so either (1) by the trustee, with the consent of the commissioners, within two months after the creditor has used his oath in voting at any meeting, or assenting to or dissenting from the bankrupt's composition or discharge; or (2) by the majority in value of the other creditors assembled at any meeting and during such meeting (B. A., s. 62; *Russell*, 1868, 6 M. 648; *Greig*, 1853, 15 D. 742. As to requisition in case of ranking, see sec. 65 and *infra*, p. 221).

At any time before any such requisition the creditor may correct his valuation by a new oath, and deduct such new value from his debt (s. 62).

5. Contingent Claims.—As to what is a contingent claim, reference may be made to the article on Contingent Debts in Bankruptcy, vol. iii. A contingent creditor has two courses open to him: (1) To have his claim valued, and vote and rank on the valued amount; or (2) to have a dividend set aside for him to await the purification of the contingency (B. A., ss. 53, 129, 126). In the former case the creditor applies to the Sheriff, if the trustee has not been elected, or, if elected, to the trustee, to put a value on the debt as at the date of valuation, and, on such value being fixed, he votes and ranks in respect thereof (B. A., s. 53). Until valuation he cannot vote. If the contingency is purified before valuation, he may vote and rank for the ascertained amount of the debt (*ib.*). For form of petition to Sheriff, see Appendix. The application is intimated to the bankrupt and petitioning or concurring creditor. The decision of the Sheriff or trustee is appealable (s. 53); the creditor whose claim has been valued being entitled to vote pending appeal (see *Watson*, 1848, 10 D. 1414). If the creditor elects not to have his claim valued, but to await the issue of the contingency, he has no vote in the interval (see secs. 129, 126). If he has the claim valued, he must abide by that course, subject to his right, apparently, to have the claim revalued for ranking (see Goudy on *Bankruptcy*, 193).

6. Annuities.—A creditor for an annuity cannot vote or rank until he obtains it valued by applying to the Sheriff or trustee, as in the case of a contingent claim (see *supra*; B. A., s. 54). In valuing, regard is had "to the original price given for the annuity, deducting therefrom such diminution in the value of the annuity as shall have been caused by the lapse of time since the grant thereof to the date of the sequestration" (*ib.*). Annuities for life are usually valued on Life Assurance Tables. The procedure, including right of appeal, is the same as in the case of contingent claims. A cautioner for an annuity is not liable for payments after the sequestration, except to the extent of such valued sum; and on payment thereof may vote and rank: but if he does not so pay before any payment or payments of annuity after the valuation become due, he must first pay up the same with interest, deducting any dividends received by the creditor (B. A., s. 55).

7. Assignees who acquire debts *bonâ fide* after the sequestration are entitled to claim for the full amount thereof, irrespective of the price paid by them (*Walker*, 1835, 13 S. 428); subject to the exception that if the debts are acquired otherwise than by succession or marriage, the assignee cannot vote in the election of the trustee or commissioners (B. A., s. 64). This exception does not apply to payment by a co-obligant (*Hay*, 1850, 12 D. 676), or to a bill-holder who retires a discounted bill (*Larrie*, 1848, 10 D. 1236). Co-obligants bound with the bankrupt are entitled, on paying the full amount due by them (see *Erart*, 1865, 3 M. (H. L.) 36), to an assignation of the debt, and to vote and rank, if otherwise legally entitled to do so (*ib.*, s. 56). The granter of an accommodation bill which the bankrupt has pledged in security of a debt of larger amount is not entitled, on taking up the bill, to claim in respect of it unless the said debt is fully paid (*Black*, 1840, 2 D. 706).

8. Mandatories.—A creditor may vote through a mandatory (B. A., s. 63). The mandatory may be one of the commissioners (s. 75), but not the trustee (see *Witham*, 1884, 11 R. 776); and he may be appointed to vote at all meetings, or at a particular meeting or meetings. The mandate

must be in writing, but need not be holograph or tested (*Scudamore*, 1797, Mor. 8559), nor stamped (B. A., s. 184). There is no prescribed form for mandates, which are commonly in the following terms:—

[*Place and Date.*]

Sir,—I hereby authorise you to vote and act at all meetings under the sequestration of *A. B.* [*design*], with the same powers as belong to your obedient servant.

(Signed) *C. D.*

To [*insert name and address of mandatory*].

A partner has authority to grant a mandate for his firm, and it will be good although signed in his individual name (*Turnbull*, 1828, 6 S. 676).

Informalities in mandates are not dealt with very critically in the absence of *mala fides*. Thus in a competition for a trusteeship the following objections were repelled: (1) That a mandate had on it an address to a candidate in the handwriting of the creditor which had been scored, leaving another in the handwriting of the candidate (who also wrote the body of the mandate) in favour of one of his friends. (2) That a mandate was signed by a company-firm, while the oath bore the debt to be due to the partners, without specifying the firm under which they carried on business; and that the name of the bankrupt was blank in the mandate—the affidavit, mandate, and account sworn to, which was signed by the company-firm, being all on one sheet of paper. (3) That a mandate was signed in the individual name of the managing partner of a company, while the debt was sworn to by him as due to the company (*Turnbull*, 1828, 6 S. 676). And a mandate was sustained where the mandatory was wrongly designed "advocate" instead of "writer" in Aberdeen, there being no question as to his identity (*Dyce*, 1846, 9 D. 310). It has been said that where a mandate is unaddressed, possession seems enough to supply the omission (Bell, *Com.*, 5th ed., ii. 349).

A mandate to vote and act at all meetings empowers the mandatory to consent to a composition (see *Morison*, 1849, 11 D. 653), and to concur in the bankrupt's discharge, although the concurrence is not given at a meeting (*Buchanan*, 1882, 9 R. 621), and to question the bankrupt at his examination (*Smyth*, 1843, 6 D. 331), and to bind the principal to pay a share of the costs of an action carried on by the trustee (*Barclay*, 1868, 7 M. 9), but not to appeal against a deliverance by the Sheriff recalling a resolution (*Ewing*, 1860, 22 D. 354).

VI. First Meeting—Election of Trustee.

1. First Meeting 190
2. Trustee's Qualification . . . 192
3. Procedure at Election . . . 193
4. Caution by Trustee 193
5. Objections to Election—Confirmation of Trustee . . . 194

1. First Meeting.—The election takes place at the first meeting of creditors, the day, hour, and place of which is fixed in the deliverance awarding sequestration, the day being "not earlier than six nor later than twelve days from the date of the *Gazette* notice of the sequestration having been awarded" (B. A., 1856, s. 67) (six clear days must elapse, *Wilson*, 1891, 19 R. 219), and the place being "a convenient place within the county of the Sheriff awarding sequestration, or to whom the sequestration is remitted" (*ib.*; see *Stuart*, 1822, 1 S. 291; *A.* v. *B.*, 1847, 10 D. 245). Where the statutory requirements are not observed, the Court of Session, on a petition by the bankrupt or a creditor to either Division, will order a new meeting (*M'Donald*, 1861, 23 D. 719; *Mitchell*, 1860, 22 D. 632; *Wilson*,

supra). The meeting may be adjourned to a date within the twelve days (B. A., s. 68).

The bankrupt must at this meeting produce and deliver to the clerk a state of his affairs and rental of his heritable property, which must be subscribed by the bankrupt and be delivered to the trustee (B. A., s. 81). The state of affairs must specify "his whole property wherever situated, the property in expectancy or to which he may have an eventual right, the names and designations of his creditors and debtors, and the debts due to or by him" (*ib.*; "property" does not include a mere *spes successionis*, nor estate held in trust on *ex facie* absolute title (*Heritable Reversy. Co.*, 1892, 19 R. (H. L.) 43; *Reid*, 1893, 20 R. 510). In the case of sequestration of a company and partners, separate states must be made up for the company and each partner. The trustee must compel the bankrupt to produce the state and rental (*Scobie*, 1869, 8 M. 161; *York*, 1861, 23 D. 1245).

The Sheriff, if required by notice from two or more creditors, must attend and preside, the Sheriff Clerk or his depute acting as clerk of the meeting. The Sheriff may attend without notice (*Mann*, 1892, 20 R. 13). Honorary Sheriff-Substitutes may act (*ib.*).

If the Sheriff does not attend, the majority of the creditors in value appoint a preses and clerk (B. A., 1856, ss. 68, 101). The absence of the preses during part of the proceedings will invalidate the election (*Anderson*, 1827, 6 S. 235).

The preses must mark the oaths and productions with his initials (see *Turnbull*, 1828, 6 S. 676, omission to mark not fatal to vote; and *Stewart*, 1865, 3 M. 1031), and he must also sign the minutes (B. A., s. 68; see *Mann, supra*). If the Sheriff is present, the clerk retains the oaths of the several claimants, subject to exhibition thereof, in his hands until the election is determined, when he delivers them to the trustee (s. 68). If the Sheriff is not present, the oaths remain in the hands of the Sheriff Clerk if he or his depute be present, and, if not, they are transmitted by the preses to the Sheriff Clerk in reporting the proceedings to the Sheriff, and in either case they remain in the hands of the Sheriff Clerk until the trustee is finally appointed, when they are handed by him to the trustee (B. A., ss. 68, 70).

The minutes are the only competent evidence of the proceedings (Bell, *Com.*, 5th ed., ii. 365; see Dickson on *Evidence*, s. 1216). The clerk must write them out in presence of the meeting, entering therein "the names and designations of the creditors or mandatories and the amount for which they claim, and any other circumstances relating to the said meeting which the preses shall judge fit" (B. A., s. 68). Where the minutes did not record the appointment of a clerk, a new meeting was ordered (*Gascoyne*, 1848, 10 D. 376). The minutes should be signed in presence of the creditors (see *Brown*, 1869, 7 M. 595; cf. *Lea*, 1828, 6 S. 350). Where the minutes of a meeting and of an adjourned meeting were initialed by the presiding Sheriff on each page, and signed by him at the end, but there was no signature at the end of the part written prior to the adjournment, an objection to the validity of the election was repelled (*Mann*, 1892, 20 R. 13). Objections to the regularity of the minutes fall to be taken before the Sheriff, *supra*).

The trustee is elected by "the creditors or their mandatories who have produced their oaths and documents of debt, and who have been entered in the minutes" (B. A., s. 68), the majority in value prevailing in case of competition (*ib.*, s. 101). A creditor is not disqualified for voting by being conjunct and confident with the bankrupt (Bell, *Com.*, 5th ed., ii. 366), nor by having an adverse interest to the general body of creditors (*Murray*,

1821, 1 S. 84; *Campbell*, 1825, 4 S. 124), nor on the ground that the value of his vote enables him to control the election (*Blyth*, 1825, 4 S. 155; see *Paul*, 1834, 12 S. 431). The bankrupt's wife is expressly disqualified, as is any trustee for her (B. A., s. 64). And no creditor can vote in respect of a claim acquired after the sequestration otherwise than by succession or marriage (B. A., s. 64). This does not apply to a bill-holder taking up after sequestration a bill discounted by him (*Lawrie*, 1848, 10 D. 1236), nor to a cautioner who pays after sequestration and ranks in lieu of the creditor (*Hay*, 1850, 12 D. 676).

2. Qualification of Trustee.—The Bankruptcy Act, 1856 (s. 68), excludes from the office (1) the bankrupt; (2) any person conjunct or confident with the bankrupt (see article Conjunct or Confident Person); (3) any person who holds an interest opposed to the general interest of the creditors; (4) any person whose residence is not within the jurisdiction of the Court of Session. Instances of opposing interest are where the candidate claims a challengeable preference (Bell, *Com.*, 5th ed., ii. 371); where he has a large and disputed debt against the bankrupt (*Willison*, 11 March 1815, F. C.; *Forrest*, 1848, 11 D. 308), or one which is shown, by documents produced, to be open to suspicion (*Robison*, 1827, 6 S. 104; *Campbell*, 1840, 2 D. 1183; *Bisset*, 1841, 3 D. 1283). It has also been held an objection that the candidate, who had, under a private arrangement before sequestration, managed the estate, had (as alleged) acted improperly, and when appointed interim factor had devolved the duties on the bankrupt, and was accountable to the trustee (*Mowbray*, 1821, 1 S. 123); that he had been private trustee for the bankrupt, and thereafter trustee in his cessio, and was liable in an accounting (*M'Farlane*, 1848, 10 D. 551); that he was subject to the control of a creditor having an adverse interest (*M'Tavish*, 1824, 3 S. 196; *Corsan*, 1827, 6 S. 125; *Clark*, 1847, 9 D. 399). The son of a deceased partner of a firm which had an adverse interest was held disqualified (*Campbell*, 1840, 2 D. 1183). But it was held not enough to invalidate an election that the trustee was the nominee of a creditor whose claim was large enough to control the election, that the claim was a suspicious one, and that the trustee was procurator-fiscal and the creditor clerk of the same court (*Colville*, 1850, 13 D. 415; see also *Blyth*, 1825, 4 S. 155). The fact that a candidate is a creditor holding a security falling to be valued and deducted, does not seem necessarily to imply such an opposing interest as to disqualify him (see *Reid*, 1836, 14 S. 809). The existence of an opposing interest must, of course, be proved by the party alleging it.

At common law, a candidate may be objected to as ineligible for the office, as, *e.g.*, on the ground that he is not major and *sui juris* (*Threshie*, 30 May 1815, F. C.), or that he has expressed personal hostility to the bankrupt (*Lowe*, 1835, 13 S. 465), or that he holds an office the duties of which are incompatible (not merely unsuitable) with the trusteeship (Bell, *Com.*, 5th ed., ii. 370; *Scott*, 1836, 14 S. 552; *M'Farlane*, 1848, 10 D. 551; see *Allan*, 1841, 3 D. 646; as to case of company and partners, see *Watson*, 1822, 1 S. 498; *Robison*, 1827, 6 S. 104). Disapproval has been expressed of clergymen acting as trustees (*Wilson*, 1828, 6 S. 551). A candidate who held a commission to act as Sheriff Clerk Depute in the county of the sequestration was held ineligible (*Clark*, 1847, 10 D. 117), but a J.P. procurator-fiscal not (*Colville*, 1850, 13 D. 415). Personal misconduct may disqualify, as where the candidate had put an elusory value on a security in his claim with a view to obtaining the trusteeship (*A. B.*, 1837, 15 S. 1107); where he had promised a share of the commission to a creditor to secure his vote (*M'Gown*, 13 Dec. 1808, F. C.); where he had

promised a creditor employment (*Mann*, 1857, 19 D. 942); where he had promised to rank bills challenged as forgeries (*Robison*, 1827, 6 S. 104); where he had tried to obtain a collusive preference before the sequestration (*Corsan*, 1827, 6 S. 125); where he had improperly tampered with claims of creditors whose mandate he held (*Railton*, 1835, 13 S. 1076; see *Buchan*, 1863, 1 M. 922). That a candidate is an undischarged bankrupt does not necessarily disqualify him (*Richmond*, 1850, 12 D. 1017; see *Macnab*, 1851, 14 D. 182; Bell, *Com.*, 5th ed., ii. 371; cf. *Barton*, 1831, 9 S. 573).

The party alleging a ground of disqualification may be allowed a proof *prout de jure* if it is denied (*Moncur*, 1887, 14 R. 305). If a personal objection is sustained which was not stated at the meeting, a new election will be ordered (*Pattison*, 26 Jan. 1811, F. C.; see *Couper*, 9 D. 909).

3. Procedure at Election.—Formal nomination of a candidate is not required (*Farquharson*, 1888, 15 R. 759), nor is protest by the contesting creditors as to the result of the vote, although usual (*Miller*, 1846, 8 D. 1207). Only one person can be elected trustee on a particular estate; but two or more may be elected to act in succession in case of non-acceptance, death, resignation, removal, or disqualification (B. A., s. 68). Where, however, the failure of the first trustee is after his confirmation, a new meeting must be held (*ib.*, s. 74; see Bell, *Com.*, 5th ed., ii. 375; *M'Laggan*, 1851, 13 D. 1394). In case of sequestration of a company and partners, one trustee may be elected on all estates, or one on each (B. A., s. 68), separate votes being taken in the latter case by the different bodies of creditors (*Stephen*, 1863, 1 M. 866; *Cormack*, 1832, 11 S. 72), unless all the creditors have similar votes on each estate (*ib.*).

A new meeting for electing a trustee may be ordered by the Lord Ordinary where a trustee is removed under sec. 74; and by the Sheriff, on application by a commissioner or a creditor entitled to be ranked, where a trustee dies, resigns, or is removed, or remains at any one time for three months furth of Scotland (B. A., s. 74). The Sheriff has no power to order a new meeting except where authorised by statute (*Hutton*, 1872, 10 M. 620). The Court of Session, however, *ex nobili officio* has in various cases ordered a new meeting, as where the trustee elected declines, or is found disqualified, and no one has been chosen in succession, and there is no competitor who can be elected (*Jeffrey*, 1828, 6 S. 968; *Mann*, 1857, 19 D. 942; *Mitchell*, 1860, 22 D. 632; *Wiseman*, 1870, 8 M. 661): or where the trustee is removed by the Court on report by the Accountant (*Davie*, 1884, 11 R. 1013): or where the statutory requirements fail, as by unavoidable delay in transmission of the certified copy petition and deliverance (*M'Donald*, 1861, 23 D. 719); or where the creditors make no election at the first meeting (*Stewart*, 1864, 2 M. 1216): or where, upon the emergence of estate after the trustee's discharge, it is desired to revive the sequestration (*Thomson*, 1863, 2 M. 325; *Russell*, 1867, 5 M. 282; *Gentles*, 1870, 9 M. 176; *Hutton*, 1872, 10 M. 620; *Assets Co.*, 1886, 23 S. L. R. 276; *North Herit. Co.*, 1888, 16 R. 100, and 18 R. (H. L.) 37; *Young*, 1888, 16 R. 92; *Black*, 1891, 28 S. L. R. 288; *Drybrough*, 1893, 20 R. 396). Where a separate application is necessary, the procedure is by petition to either Division, the Court usually remitting to the Lord Ordinary or the Sheriff to fix the time and place of meeting, and granting warrant for transmission of the sederunt book if necessary (see cases cited: as to procedure in case of new meeting, see Goudy on *Bankruptcy*, 227, and B. A., s. 74).

4. Caution by Trustee.—Sec. 72 of the Bankruptcy Act, 1856, provides: "The creditors shall at the meeting for election of a trustee fix a sum for

which the trustee shall find security for his intromissions and performance of the duties and rules hereby enacted, and shall also decide on the sufficiency of the caution offered; and the person declared to be trustee shall forthwith lodge with the Sheriff Clerk a bond of caution, signed by the trustee and his cautioner, in the form of the Schedule (C) hereunto annexed, which bond shall be furnished to him by the Sheriff Clerk: Provided that nothing hereinbefore contained shall be held or construed to prevent the creditors accepting the bond of a guarantee society in lieu of the bond of caution aforesaid." The cautioner must not be resident out of Scotland (Bell, *Com.*, 5th ed., ii. 366; see *Bell*, 1842, 5 D. 318, per Ld. Mackenzie). The caution cannot be dispensed with (*A. B.*, 1833, 11 S. 412); and the sum fixed must not be elusory (Bell, *Com.*, 5th ed., ii. 372). Where there is a competition, each candidate should offer caution; so that in the event of the election not being confirmed, the competing candidate, if eligible, may be confirmed without a new election; and the same holds with regard to trustees elected in succession (*MacKersy*, 1841, 3 D. 1214; *Miller*, 1846, 8 D. 1207; *M'Farlane*, 1848, 10 D. 551; *Wiseman*, 1870, 8 M. 661; see *Rankine*, 9 M. 1053). A cautioner is not released by negligence on the part of the commissioners or creditors in supervising the trustee's proceedings (*M'Taggart*, 1 S. & M'L. 553 (p. 592); *Creighton*, 1838, 16 S. 447; affd. 1 Robinson App. Ca. 131; *Biggars*, 1846, 9 D. 78).

5. Objections to Election—Confirmation of Trustee.—If the Sheriff be present at the election, and there be no competition or objection stated to the candidates, he must, by a deliverance on the minutes, declare the person chosen to be trustee (B. A., 1856, s. 69). If there be competition or objections to the candidate or candidates, such objections to the votes or candidates must be stated at the meeting, and the Sheriff may either forthwith decide thereon or make avizandum; and, if necessary, he makes a short note of the objections and answers, on which he must within four days after the meeting hear parties *viva voce*, and declare the person or persons trustee or trustees in succession whom he finds to be duly elected (*ib.*).

Where the Sheriff is not present at the meeting, the preses reports the proceedings to him, and in the absence of competition or objection he declares the person chosen trustee (*ib.*, s. 70). If there is competition or objection, the parties must within four days from the date of the meeting lodge with the Sheriff Clerk short notes of objections, and the Sheriff must forthwith hear parties thereon *viva voce*, and give his decision (*ib.*).

The objections may be to the validity of votes given, or on the ground of disqualification of the trustee, or irregularity in the proceedings. The note of objections may be informal, and need not be signed by a law agent (*Miller*, 1858, 20 D. 803). (See form appended.) The objections must be specific (*Lockhart*, 1849, 11 D. 1341; *Foulds*, 1851, 13 D. 1357). Grounds of objection to a vote may be stated although not stated at the meeting (*Dyce*, 1846, 9 D. 310). The Sheriff is not confined to the objections stated to any particular vote, but he cannot disallow votes not objected to (*Farquharson*, 1888, 15 R. 759; *Smith*, 1892, 19 R. 428). New grounds of objection may competently be stated on an appeal of the Sheriff's judgment (*Dyce*, 1847, 9 D. 993). Where during competition a vote was withdrawn which was the sole support of a candidate and gave him a majority, the Court ordered a new election (*Lawrie*, 1848, 10 D. 1236).

The Sheriff is directed to give his decision with the least possible delay, but may make avizandum, and he may grant diligence to recover documents for instantly verifying objections (*Rhind*, 1846, 9 D. 231; *Wylie*, 1884,

11 R. 968; *Reid*, 1887, 14 R. 847). Proof at large is incompetent (*Wylie, Reid, supra*).

No part of the expenses of any competition for the office of trustee can be paid out of the estate, but they are payable by the unsuccessful to the successful party (20 & 21 Vict. c. 19, s. 4). They may be modified by the Court (*Dyce*, 1847, 9 D. 1161; *Menzies*, 1851, 13 D. 1044), and, if the election be held void, none will be awarded (*MacKersy*, 1841, 3 D. 1213; *Miller*, 1846, 8 D. 1207; *M'Farlane*, 1848, 10 D. 551; *Lawrie*, 1848, 10 D. 1236).

The Sheriff's judgment declaring an election is final (B. A., 1856, s. 71; *Buchan*, 1863, 1 M. 922; *Rankine*, 1871, 9 M. 1053; *Brown*, 1869, 7 M. 595; *Foulis*, 1871, 10 M. 20). But a decision that there has been no valid election may be appealed (*Mann*, 1857, 19 D. 942; *Miller*, 1858, 20 D. 803; *Wiseman*, 1870, 8 M. 661, per Ld. Pres. Inglis), as may also interlocutory deliverances prior to judgment (*Wylie*, 1884, 11 R. 820; *Moncur*, 1887, 14 R. 305, and cases there cited), and any judgment which is *ultra vires* (see *Buchan, supra*; *Rankine, supra*; *Wylie, supra*; *Moncur, supra*; *Farquharson*, 1888, 15 R. 759; *Reid*, 1887, 14 R. 847). The appeal lies to either Division of the Court of Session, or the Lord Ordinary on the Bills during vacation, and must be taken within eight days (B. A., 1856, s. 170).

Confirmation of Trustee.—On the trustee who is declared to be elected lodging his bond of caution, the Sheriff confirms the election, and the act and warrant in favour of the trustee is issued by the Sheriff Clerk. A copy must forthwith be transmitted by the trustee to the Accountant of Court (B. A., 1856, s. 73), and an abbreviate must be recorded in the Register of Abbreviates of Adjudications within twenty-one days (*ib.*, s. 79). If the abbreviate is not duly recorded, warrant to record may be obtained from the Court of Session on petition to either Division (see *Munro*, 1851, 13 D. 1209; *A. B.*, 1855, 18 D. 286; *Martin*, 1857, 20 D. 55). The act and warrant forms conclusive evidence of the trustee's title (B. A., 1856, s. 73; see *infra, Vesting of Estate in Trustee*). The confirmation is not subject to review (*ib.*). As to procedure subsequent to confirmation, see *infra, Examination of Bankrupt.*

VII. The Commissioners.

The commissioners are an elective committee of the creditors, three in number (if there be so many creditors), who act gratuitously, and whose function is to advise with and form a check upon the trustee in his management of the estate. They are elected by the creditors at the first meeting, after the election of the trustee, the Sheriff declaring their election by a deliverance in the sederunt book, which is final and requires no confirmation (B. A., 1856, s. 75). The proceedings in their election are the same as in the election of the trustee, except that they do not find caution (*ib.*). A majority forms a quorum (*ib.*). No person is eligible for the office who is disqualified to be trustee (*ib.*; see *Turcan*, 1832, 10 S. 352; *Learmonth*, 1858, 20 D. 564; Bell, *Com.*, 5th ed., ii. 385). Mandatories for creditors may be elected.

A commissioner may resign at any time. He may be removed: (1) If a mandatory, by written intimation to the trustee that his mandate is recalled (B. A., 1856, s. 75). (2) By a majority (in value) of creditors at a meeting called for the purpose, who then elect another commissioner in his place (B. A., 1856, ss. 76, 101; see *Thomson*, 1859, 21 D. 1129). (3) He may be removed or censured by the Court of Session on a report by the Accountant

of Court that the duties of his office are not being faithfully performed (B. A., 1856, s. 159; see *Boaz*, 4 S. 403). Where a commissioner declines, or resigns, or becomes incapacitated, the trustee must call a meeting for electing a new one, the other commissioners acting in the meantime (B. A., 1856, s. 75; see *Gunn*, 1850, 13 D. 317; *Cadell*, 8 July 1819, Bell, *Com.*, 5th ed., ii. 386, note; Alexander on *Bankruptcy*, 134).

The commissioners "superintend the proceedings of the trustee, concur with him in submissions and transactions, give their advice and assistance relative to the management of the estate, decide as to paying or postponing payment of a dividend, and may assemble at any time to ascertain the situation of the bankrupt estate, and any one of them may make such report as he may think proper to a general meeting of creditors" (B. A., 1856, s. 85). Their discretion is not readily interfered with (see *Wighton*, 1865, 4 M. 261; *Weldon*, 1879, 7 R. 235). They have right of access to the sederunt book, and accounts and other documents, even though confidential (B. A., 1856, s. 84). A commissioner may at any time call a meeting of creditors, giving notice to the trustee prior to doing so (*ib.*, s. 98; *M'Fadyean*, 1884, 21 S. L. R. 479; *Lang's Tr.*, 1892, 19 R. 488).

The commissioners examine and audit the trustee's accounts (B. A., 1856, ss. 125, 130, 132; see *Russell*, 1869, 8 M. 219; *M'Taggart*, 1834, 12 S. 332; rev. 1 S. & M'L. 553; *Gibson*, 1836, 15 S. 143), and declare or postpone dividends (B. A., 1856, ss. 125, 130, 132, 85, 134). Their concurrence is necessary to enable the trustee to do certain acts, such as fixing the price of the heritable estate for sale (s. 114), fixing a meeting of creditors to consider as to sale of the whole estate (s. 136), and the compromising or referring to arbitration of claims (ss. 85, 176). They are liable to account for their intromissions (s. 86), but not liable for damage arising from their advice to the trustee (*Wilson*, 1803, Mor. 13968; *Kirkland*, 1838, 16 S. 860). On the other hand, their sanction does not relieve the trustee from the consequences of failure to perform a statutory duty (*Maben*, 1837, 15 S. 1087).

VIII. Examination of Bankrupt.

Within eight days after the date of his act and warrant the trustee must apply to the Sheriff to name a day for the public examination of the bankrupt. The Sheriff thereupon issues his warrant on the bankrupt to attend within the Sheriff Court House on a specified day and at a specified hour, being not sooner than seven nor later than fourteen days from the date of the warrant (B. A., 1856, s. 87). The diet is published by the trustee in the *Gazette* (Schedule F) and intimated by him to the creditors through the post (*ib.*). The practice is to make publication in the *Gazette* first issued after the date of the warrant. If necessary, the Sheriff grants warrant to apprehend the bankrupt and bring him up for examination, or to have him delivered up from prison (*ib.*, s. 88; see *M'Kellar*, 1861, 23 D. 1269). Warrant may also be granted for his apprehension or transmission from prison if out of Scotland (s. 89; see 46 & 47 Vict. c. 52, ss. 117, 118, as to enforcement of warrants out of Scotland). A commission may be granted for the bankrupt's examination "if the bankrupt cannot be brought from jail or the sanctuary, or cannot be examined by the Sheriff there, or is by a lawful cause prevented from attending at the time and place appointed, or is in custody on a criminal charge, or is abroad" (B. A., 1856, s. 88; A. S., 10 July 1839, s. 69). It has been held to be a "lawful cause" justifying a commission, that the bankrupt was unable through want of funds to pay his travelling expenses (*Sinclair*, 1897, 5 S. L. T. 172, per Ld. Pearson).

Parties other than the bankrupt may at any time be examined under an order by the Sheriff obtained on the trustee's application. These are "the bankrupt's wife and family, clerks, servants, factors, law agents, and others who can give information relative to his estate" (B. A., 1856, s. 90; see *Burnet*, 1855, 17 D. 933; *A. B.*, 1858, 20 D. 1058; *Sawers*, 1858, 21 D. 153). It is incompetent, however, to examine a creditor or litigant with the trustee (or his law agent) as to his claim (*Sawers, supra*; *A. B., supra*; *Brash*, 1888, 15 R. 583). The trustee does not require to state special reason in applying for warrant to examine third parties (*Burnet*, 1855, 17 D. 933; *Park*, 1871, 10 M. 10). They are entitled to an allowance as witnesses (B. A., 1856, s. 90). Third parties who refuse or neglect to appear may be apprehended on the Sheriff's warrant, which in the case of others than members of the bankrupt's family or his clerks or servants cannot be issued until the expiry of eight days from the service of the first warrant, unless the trustee specify on oath a reasonable ground of belief that they intend to leave the country to avoid examination (B. A., 1856, s. 90). Third parties in Scotland may, if necessary, be examined on commission (*ib.*). Where a trustee desired to examine third parties in England or Ireland, it was held that he might apply to the Sheriff, who would grant an order and request the Bankruptcy Court in England or Ireland to aid in carrying it out (*Park*, 1871, 10 M. 10; 46 & 47 Vict. c. 52, ss. 117, 118).

The bankrupt or others examined must answer "all lawful questions relating to the affairs of the bankrupt" (B. A., 1856, s. 91). The object of the examination, however, is to ascertain what "the bankrupt's estate consists of, where it is, and what he has done with it or to affect it" (*Delvoitte*, 1877, 5 R. 143, per Ld. Pres. Inglis). This excludes examination as to the claim of a creditor or person litigating with the trustee (*Delvoitte*, 1877, 5 R. 143; *Sawers*, 1858, 21 D. 153; *A. B.*, 1858, 20 D. 1058; *Brash*, 1888, 15 R. 583; *Paul*, 1855, 17 D. 457). A question as to the bankrupt's present residence was disallowed (*Tod*, 1872, 10 M. 980).

The examination is not subject to strict rules of evidence (see *Sawers, supra*, per Ld. Benholme; *M'Kay*, 1863, 1 M. 440), nor are confidential communications privileged (*Sawers, supra*; see *Mackersy*, 1823, 2 S. 225). Third parties are not bound to answer questions that will criminate them or expose them to any penalty or forfeiture (Bell, *Com.*, 5th ed., ii. 396 and 398; 16 Vict. c. 20, s. 3; as to bankrupt, see *Sawers, supra*, per Ld. Cowan; *ex parte Cossens*, Buck, 540; *in re Heath*, 2 D. & C. 214; *ex parte Schofield*, 6 Chan. Div. 230).

A party's deposition may be used as evidence against himself in other proceedings (*Dundas*, Bell, *Com.*, 5th ed., ii. 400, note); but not against others, unless the deponent has died (Bell, *Com.*, 5th ed., ii. 482; see *Kirkland*, 1831, 10 S. 169; *Smith*, 1820, 2 Mur. 342; *Hunter*, 1822, 3 Mur. 231).

The Sheriff may order third parties "to produce for inspection any books of account, papers, deeds, writings, or other documents in their custody relative to the bankrupt's affairs, and cause the same or copies thereof to be delivered to the trustee" (B. A., 1856, s. 91; see *Selkirk*, 1880, 8 R. 29; *Pollock*, 1841, 7 D. 172). Where the bankrupt was a publican, the Court ordered delivery to be given to the trustee of the licence and permit book (*Fraser's Tr.*, 1896, 23 R. 978). The trustee cannot retain documents produced by third parties (*Trousdale*, 1867, 5 M. 824).

The examination is on oath (or affirmation), and proceeds in presence of the Sheriff, who writes or dictates the evidence of the bankrupt (B. A., 1856, s. 92; see *M'Intosh*, 1828, 6 S. 648; *M'Kay*, 1863, 1 M. 440), and, in the case of third parties, takes notes of the evidence as prescribed by 16 & 17

Vict. c. 80, s. 10, except where it appears to him necessary to record and authenticate it in form of a regular deposition (B. A., 1856, s. 92). The examination is in open Court or in private, as the trustee decides (B. A., 1856, s. 92; see *Wright*, 1878, 6 R. 289), and in practice usually proceeds in open Court. It may be adjourned by the Sheriff or commissioner for a brief interval, to enable it to be proceeded with and closed (B. A., 1856, ss. 88, 90; see *Wright, supra*; *Walker*, 1861, 24 D. 155), but not at the instance of creditors to permit of inquiries to test the bankrupt's statements (*Unger*, 1867, 5 M. 1049). The questions may be put by the trustee, the Sheriff, or any creditor (or his mandatory) with the sanction of the Sheriff (B. A., 1856, s. 93; *Smyth*, 1843, 6 D. 331; *Clark*, 1848, 10 D. 1471). A creditor is, as a rule, entitled to put any lawful question to the bankrupt which he thinks it in his interest to put, and the trustee is not entitled to object on the ground that the answer will be injurious to the general body of creditors (*Barstow*, 1849, 11 D. 687; see *Wright*, 1852, 24 Jur. 230).

The Sheriff may order the bankrupt to be examined as often as he shall see fit, on application by the trustee (B. A., 1856, s. 88) on grounds stated (*Somerville*, 1859, 21 D. 467). The creditors, at a general meeting called for the purpose, may direct such application (*Somerville, supra*), but not individual creditors (see *Unger*, 1867, 5 M. 1049, per Ld. Cowan).

The bankrupt, before the close of his examination, may make such additions to or alterations upon the state of his affairs as may have occurred to him to be necessary, the state being then subscribed by the Sheriff and the bankrupt. The bankrupt finally emits a statutory oath deponing to the full disclosure of his estate and affairs, which is engrossed in the sederunt book and subscribed by the Sheriff and the bankrupt (B. A., 1856, s. 95).

A latent partner of a sequestrated company must intimate the fact of his partnership to the trustee on or before the day of examination on pain of forfeiting the privileges of the Act, unless he satisfies the Lord Ordinary or the Sheriff that the omission arose from innocent causes, and takes steps to remedy the omission (*ib.*, s. 94).

Any deliverance by the Sheriff finding a party liable or not liable to examination, or admitting or refusing a question, may be appealed within eight days to either Division of the Court of Session, or the Lord Ordinary on the Bills during vacation (B. A., 1856, s. 170; see *Fraser*, 1896, 23 R. 978; *Pollock*, 1844, 7 D. 172; *Paul*, 1855, 17 D. 457).

For enforcing the right of examination and production of papers, etc., the Sheriff is vested with power to commit recalcitrants to prison, his warrant not being subject to review, but only to recall on petition to the Lord Ordinary on the Bills (B. A., 1856, s. 93; see Bell, 5th ed., ii. 398; *Nicol*, 1851, 13 D. 614; *Auld*, 1888, 25 S. L. R. 434).

Reference may be made to the "Notes issued by the Accountant of Court" for instructions as to the conduct of examinations (see Goudy on *Bankruptcy*, App. 746; Parliament House Book).

IX. Sequestration in Relation to Diligence.

1. Adjudication 198
2. Arrestment and Poinding . . 199
3. Poinding of the Ground . . 199
4. Maills and Duties . . . 200
5. Landlord's Hypothec . . . 200
6. In case of Deceased Debtor . . 200

1. Adjudication.—Sec. 107 of the Bankruptcy Act, 1856, provides—

"The sequestration shall, as at the date thereof [*i.e.* the date of the first deliverance, s. 42], be equivalent to a decree of adjudication of the heritable estates of the bankrupt for payment of the whole debts of the bankrupt,

principal and interest, accumulated at the said date, and when the sequestration is dated within year and day of any effectual adjudication, the estate shall be disposed of under the sequestration according to the provisions of this Act; provided that nothing herein contained shall affect the rights of any heritable creditor holding a power of sale preferable to the powers of the trustee." (As to Crown debts, see Bell, *Com.* ii. 52, and 5th ed., 330; *Com. on Recent Statutes*, 49.)

2. Arrestment and Poinding.—Sec. 108 provides—

"The sequestration shall, as at the date thereof [s. 42], be equivalent to an arrestment in execution and decree of forthcoming and to an executed or completed poinding; and no arrestment or poinding executed of the funds or effects of the bankrupt on or after the sixtieth day prior to the sequestration shall be effectual, and such funds or effects, or the proceeds of such effects, if sold, shall be made forthcoming to the trustee; provided that any arrester or poinder before the date of the sequestration who shall be thus deprived of the benefit of his diligence shall have preference out of such funds or effects for the expense *bonâ fide* incurred by him in such diligence." This provision applies in the case of a deceased debtor although sequestration is awarded after seven months from his death (*Rough*, 1857, 19 D. 305). Diligence on the sixtieth day, excluding the date of the sequestration, is ineffectual (*Stiven*, 1891, 18 R. 422). Arrestments struck at do not require to be loosed (*Allan*, 1835, 14 S. 80). The expenses for which a poinding or arresting creditor is entitled to preference are in practice limited to the execution of the diligence. Where an attachment is used in a foreign country prior to sequestration, it is doubtful whether it would fall under the equalising rules of the statute (see *Lindsay*, 1840, 2 D. 1373, per Ld. Gillies; *Ord*, 1847, 9 D. 541).

It is a question under the first part of the above enactment whether sequestration, where awarded within four months after notour bankruptcy has been constituted, is entitled to the equality of ranking with prior diligences under sec. 12 of the Act of 1856, which provides that "arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date." Under the earlier statutes, which did not expressly confer on sequestration the effects of an arrestment and poinding as now given to it by sec. 108 of the 1856 Act, equalisation was not admitted (Bell, *Com.* ii. 75). But under the 12th and 108th sections of the Act of 1856, sequestration is entitled to such equality (see *Nicolson*, 1872, 11 M. 179, per Ld. Deas; *Galbraith*, 1885, 22 S. L. R. 602, per Ld. Kinnear).

3. Poinding of the Ground.—No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration is available in any question with the trustee, except only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term (B. A., 1856, s. 118; repealed by 37 & 38 Vict. c. 94, s. 55, but re-enacted by 42 & 43 Vict. c. 40, ss. 3–5. As to common law rule, see *Campbell*, 1835, 13 S. 237; *Bell*, 1831, 10 S. 100; *Dick*, 1879, 6 R. 586; *Thomson*, 1882, 9 R. 430; *Urquhart*, 1883, 10 R. 991). The current term is that current at the date of the first deliverance in the sequestration (*Budge*, 1872, 10 M. 958). It is competent to poind *currente termino* (*Stewart*, 1880, 8 R. 270). "Interest" includes the case of a ground-annual (*Bell*, 1896, 23 R. 650). The rights of a superior are not affected by the provision (B. A., 1856, s. 102, 2nd). The rule above stated applies

where the bankruptcy is in a foreign country, and also to the case of poindings at the instance of creditors of the bankrupt's ancestor (50 & 51 Vict. c. 69, s. 2).

4. Maills and Duties.—The effects of a decree of maills and duties in competition with the sequestration are regulated by the common law (37 & 38 Vict. c. 94, s. 55, repealing sec. 118 of the B. A. 1856). A creditor may obtain a preference for the full amount of his debt by an action of maills and duties, and such action may be raised even after confirmation of the trustee (see *Dick*, 1879, 6 R. 586; *Thomson*, 1882, 9 R. 430; as to expenses of decree, see *Johnston*, 1871, 8 S. L. R. 381).

5. Landlord's Hypothec is declared by the Bankruptcy Act to be not affected by sequestration (B. A., 1856, s. 119). In a recent case, where a tenant during the currency of a five years' lease was sequestrated on 14th May 1897, it was held that the landlord had no right of hypothec for the rent of the year from Whitsunday 1897, and that, on payment of the Whitsunday rent, the trustee was entitled to remove the furniture in the premises (*Sawers*, 1897, 25 R. 45).

6. Deceased Debtor.—"When the sequestration of the estates of a deceased debtor is dated within seven months after his death, any preference or security for any prior debt acquired by legal diligence on or after the sixtieth day before his death, or subsequent to his death, and any preference or security acquired for a prior debt by any act or deed of the debtor which has not been lawfully completed for a period of more than sixty days before his death, and any confirmation as executor-creditor after the debtor's death, shall in these several cases be of no effect in competition with the trustee, and the estates and effects over which such preferences or securities shall have been obtained, or of which confirmation shall have been expede, shall belong to the trustee. Provided that the creditor who is so deprived of the benefit of his diligence or confirmation shall have preference for payment out of the said estates or effects of the expenses *bonâ fide* incurred by him in such diligence or confirmation" (B. A., 1856, s. 110. As to preferences or securities created by act or deed of debtor, see *Scot. Prov. Inst.*, 1888, 16 R. 112). Where sequestration is awarded subsequent to seven months from the death, a confirmation as executor-creditor expede within sixty days prior to the date of the sequestration is apparently not cut down (see *Rough*, 1857, 19 D. 305, per Ld. Curriehill). It is not competent for any creditor after the date of the first deliverance to be confirmed executor-creditor, or to raise or insist in any adjudication against the estate of a deceased debtor (B. A., 1856, s. 30).

X. Vesting of Estate in Trustee.

1. General Effects 200
2. Moveable Estate 204
3. Heritable Estate in Scotland . 205
4. Real Estate in England, Ireland, etc. 206
5. *Acquirenda* 207
6. Government Pay, Pensions, etc. 209
7. Alienations and Preferences by Bankrupt 209
8. Rights of Action . . . 210
9. Contracts 210
10. Property of Bankrupt's Wife . 212
11. Property held by Bankrupt as Trustee, etc. 213
12. Personal Powers of Bankrupt . 213
13. Reputed Ownership . . . 214

1. General Effects of Vesting.—Sec. 102 of the Bankruptcy Act, 1856, provides that: "The act and warrant of confirmation in favour of the trustee shall *ipso jure* transfer to and vest in him, or any succeeding trustee for behoof of the creditors, absolutely and irredeemably as at the date of

the sequestration [*i.e.* the first deliverance, s. 42], with all right, title, and interest, the whole property of the debtor to the effect following" (see *infra* as to moveable and heritable estate particularly). The bankrupt remains undivested until the act and warrant.

The word "property" is defined as including "every kind of property, heritable or moveable, wherever situated, and all rights, powers, and interests therein capable of legal alienation, or of being affected by diligence or attached for debt" (B. A., 1856, s. 4). It does not include a *spes successionis*, or expectancy not becoming a vested right prior to the bankrupt's discharge, as, *e.g.*, the bankrupt's chance of succeeding to the capital of a trust estate under liferent provided he survive the liferenter, till which event vesting is suspended (*Reid*, 1893, 20 R. 510; *Trappes*, 1871, 10 M. 38; *Kirkland*, 1886, 13 R. 798; see *M'Donald*, 1874, 1 R. 817). But the bankrupt cannot defeat the chance of such an expectancy falling into the sequestration by discharging or assigning it (*Obers*, 1897, 24 R. 719; see *Carter*, 1862, 24 D. 925, as to assignation before sequestration). Nor does the sequestration affect alimentary funds except *quoad* an excess in the provision as the same may be defined by the Court (Bell, *Com.* i. 124–5; *Livingstone*, 1886, 14 R. 43; *Haydon*, 1895, 3 S. L. T. 286).

It is "property of the debtor" which passes to the trustee. This means "all property, whether heritable or moveable, in which the bankrupt has a beneficial interest, whether the title be in him or in a trustee for him, to the extent of that interest" (*Herit. Reversy. Co.*, 1892, 19 R. (H. L.) 43, per Ld. Watson). It does not therefore include property, either heritable or moveable, held by the bankrupt in trust although upon a title *ex facie* absolute (*Herit. Reversy. Co., supra*: *Gordon*, 1824, 2 S. 566; *Watson*, 1879, 6 R. 1247). "That which in legal as well as in conventional language is described as a man's property is estate, whether heritable or moveable, in which he has a beneficial interest which the law allows him to dispose of. It does not include estate in which he has no beneficial interest, and which he cannot dispose of without committing a fraud" (*Herit. Reversy. Co., supra*, per Ld. Watson). This principle extends to estate held by the bankrupt on *ex facie* absolute title but really in security. Such estate will only pass to the trustee by way of security, as the bankrupt holds it, the reversion or radical right remaining with the true owner (see *Herit. Reversy. Co., supra*, per Ld. Watson: *Forbes' Trs.*, 1898, 35 S. L. R. 720).

A different question arises in the case of estate originally belonging to a debtor in beneficial ownership, but which he has, prior to his sequestration, onerously conveyed or assigned by delivered disposition or assignation to a party who has delayed to complete his title by infeftment or intimation before completion of the title of the trustee. Suppose, for example, that A., being owner of a house, sells and dispones it by delivered conveyance, for a full price paid, to B., who refrains from taking infeftment, and possesses the house upon his unrecorded conveyance. If A. becomes bankrupt, say after twenty years, does the trustee in his sequestration, by infefting himself on his act and warrant before B. has recorded his conveyance, become entitled to claim the house as being "property" of A. within the meaning of sec. 102 of the 1856 Act? A.'s position differs from that of a trustee in this respect, that the property of which he remains undivested is one which originally belonged to him in full beneficial ownership. Apart from the *dicta* of the judges of the House of Lords in the case of the *Heritable Reversionary Co.* v. *Millar*, *supra*, the effect of the decisions seems to be that A.'s trustee would take the property in preference to B. Thus where a woman assigned her interest in a trust estate to trustees under an antenuptial

marriage contract, who omitted to intimate the assignation, the trustee in the cedent's sequestration, occurring twenty-two years afterwards, was held entitled to prevail (*Tod's Trs.*, 1869, 7 M. 1100; see *Morrison*, 1876, 3 R. 406; *Graeme's Tr.*, 1888, 15 R. 691; and cf. *Watson*, 1879, 6 R. 1247, per Ld. Deas). The case was held "to involve a simple competition between two assignations of the same fund," and the doctrine of *tantum et tale* was considered to be inapplicable (per Ld. Kinloch). Again, it has been decided that an adjudging creditor of a seller is entitled to prevail over the purchaser possessing upon an unfeudalised conveyance. Thus, where A. sold and conveyed a house to B., who entered into possession but did not take infeftment, and thereafter sold to C., who obtained an assignation of B.'s disposition, but likewise abstained from taking infeftment, a subsequent adjudication at the instance of creditors of A. was held preferable to the right of C. (*Mitchells*, Mor. 10296; see *Smith*, 1894, 22 R. 130, per Ld. Kinnear). An adjudging creditor seems to be in the same position in this question as a trustee in sequestration. Neither of them gives any price or consideration for the property claimed, or gives credit specifically on the faith of the undivested seller's apparent ownership in the way a *bonâ fide* purchaser does (see *Herit. Reversy. Co., supra*, per Ld. Watson). It is, however, very difficult to reconcile the right of a trustee in sequestration to take estate in such a case with the principles on which the judgment of the House of Lords proceeded in the case of the *Heritable Reversionary Co.* v. *Millar, supra*). All the judges adopted, as a criterion of the trustee's right, the test of whether the estate claimed as "property of the bankrupt" was estate in which the bankrupt had a beneficial interest which he could lawfully dispose of without committing a fraud. Attention was drawn to the earlier Sequestration Acts, which provided for the estate being transferred to the trustee by means of a disposition granted by the bankrupt, as pointing to the result that the estate vesting in the trustee does not comprise what the bankrupt could not lawfully convey. Ld. Watson said that the bankrupt's property, in the sense of the Act, consisted of estate "in which he has a beneficial interest which the law allows him to dispose of," to the extent of such interest, but does not include estate "in which he has no beneficial interest, and which he cannot dispose of without committing a fraud." The other judges all appealed to the same test; and the distinction was emphatically drawn between a mere legal title, on the one hand, and the real and substantial right of beneficial ownership on the other hand. The case under consideration by the Court was, no doubt, one of trust proper; but the *ratio decidendi* above referred to seems to have a wider range. Estate which the bankrupt has, prior to sequestration, sold and conveyed under a delivered but unrecorded conveyance is not, in ordinary parlance, "property belonging to the bankrupt," although he remains undivested of the feudal title. Although he continues to hold the title, he cannot be said to have any "beneficial interest which the law allows him to dispose of." He commits a fraud if he attempts to appropriate the subjects to his own uses by selling them a second time, or making them over to a prior creditor in satisfaction of his claim. He may, no doubt, give a good title to a *bonâ fide* purchaser, but so may a trustee holding an *ex facie* absolute title. Suppose that the seller in such a case, having become embarrassed, is approached by his whole creditors, who propose that he should make over the property to them privately in order that they may realise it and divide the proceeds in payment of their claims. His answer would be that he could not lawfully comply with their request, as to do so would amount to a fraudulent appropriation of the property of another person. If this is so, it is difficult on

principle to see how the same creditors, by initiating a sequestration and electing a trustee, could put themselves in a position to have the subjects in question applied in payment of their claims, as being "property belonging to the bankrupt." Can the statute be construed as legalising an appropriation of the property to the creditors which, apart from it, would be illegal and fraudulent? A seller, as a rule, remains ignorant whether the purchaser has completed his title or not; and when the transaction has been settled by payment of the price and delivery of the disposition, it is not in accordance with the ordinary use of language to describe the subjects sold as remaining the property of the seller, and no honest seller ever dreams of so regarding them.

While it is undoubtedly difficult to reconcile the *dicta* and reasoning in the case of *The Heritable Reversionary Co.* v. *Millar* with the previous decisions on the subject, it must, however, be acknowledged that the case contains no disapproval of these decisions. On the contrary, the case of *Mitchells* v. *Ferguson* (*supra*) is expressly approved by Ld. Watson as one in which the doctrine of *tantum et tale* was rightly rejected. It may be observed, however, that his Lordship classes that case as one where there was only "a personal right to demand a conveyance" from the seller, which does not accurately represent the facts of the case, unless the unfulfilled obligation to infeft is pointed at. A purchaser holding an unrecorded conveyance differs from one who is only creditor in an obligation to convey in this important respect, that the latter cannot complete his title without an act of the seller, upon whose bankruptcy he cannot have a higher right to demand performance than creditors in other obligations, and must rank *pari passu* with them on the sequestrated estate; while the former is under no necessity of resorting to the seller or his trustee for performance of any act, but can complete his title at his own hand. A buyer of goods remaining undelivered in the custody of the seller was, prior to the Mercantile Law Amendment Act, 1856, within the former category.

It may, finally, be noted that in a recent case where property had been conveyed by a husband in a recorded antenuptial marriage contract to trustees for purposes which did not enter the record, the view was expressed that, so standing the title, the property was liable to be adjudged by the husband's creditors (*Smith*, 1894, 22 R. 130, per Ld. Kinnear).

Where the bankrupt stands owner of estate as to which he is under only a personal obligation to convey it (as under a *pactum de retrovendendo*), the property will pass to the trustee, and the creditor in the personal obligation will only be entitled to a ranking on the sequestrated estate in respect of the obligation (*Wylie*, 1803, Mor. 10269; see *Herit. Reversy. Co.*, per Ld. Watson).

The vesting of the bankrupt's property in the trustee is to be "subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible" (B. A., 1856, s. 102, 1st, 2nd). Where a security is one creating a *nexus* merely, as an arrestment, the trustee takes the property, and the creditor is entitled to claim in the ranking such preference as his security gives him (see *Lindsay*, 1840, 2 D. 1373; *Gordon*, 1842, 4 D. 352; *Gibson*, 1853, 16 D. 233; *Mitchell*, 1881, 8 R. 875). Where it confers a real right, as a pledge or heritable bond, the trustee can only take the security-subject on paying the debt. He is entitled, however, to access to the security-subject, if necessary, to enable him to judge whether he will redeem it. Thus a trustee in one case obtained interdict against a sale of goods until he had an opportunity of inspecting them (*Ross*, 1826, 5 S. 178). In the case of a law agent's hypothec over papers

in his hand, the law agent must, if required, give them up to the trustee, being then entitled to a preference for the amount of his claim (*Johnstone*, 1823, 2 S. 133; *Renny*, 1841, 3 D. 1134; *Renny*, 1847, 9 D. 619; *Skinner*, 1865, 3 M. 867; *Adam and Winchester*, 1884, 11 R. 863; see *Craig*, 1895, 2 S. L. T. 484, 3 S L. T. 24). The preference must be made good in the ranking; there is no claim against the trustee personally (*White's Tr., supra*). The preference extends over the sequestrated estate generally (*Skinner, supra*, per Ld. J.-Cl. Inglis).

The holder of a security not completed by intimation or infeftment, may complete it effectually at any time before the trustee obtains a title by confirmation or infeftment (*Buchan*, Mor. 2905; *Cormack*, 1829, 7 S. 868; *Smith*, 1857, 19 D. 384; *Tod's Trs.*, 1869, 7 M. 1100; *Morrison*, 1876, 3 R. 406; Bell, *Com. on Recent Statutes*, 168).

Where a new trustee has been elected, his act and warrant will draw back, so as to make his title continuous with that of the former trustee (B. A., 1856, s. 102).

Where the bankrupt's rights are subject to equitable exceptions, these can be pleaded against the trustee, who takes the estate *tantum et tale* as it stands in the bankrupt (see *Gordon*, 1824, 2 S. 566; *Littlejohn*, 1855, 18 D. 207; *Fleeming*, 1868, 6 M. (H. L.) 113; *Watson*, 1879, 6 R. 1247; *Herit. Reversy. Co.*, 1891, 18 R. 1166, 19 R. (H. L.) 43). The precise limits of this familiar rule are difficult to define. The dictum of Ld. Westbury in *Fleeming*, 1868, 6 M. (H. L.) 121, assimilating the trustee's position to that of a gratuitous alienee, has been characterised as one requiring considerable modification (*Herit. Reversy. Co.*, 1892, 19 R. (H. L.) 43, per Ld. Watson). The following instances illustrate the rule: Property acquired by the bankrupt's fraud cannot be retained (*Thomson*, 1786, Mor. 10229; *Watt*, 1846, 8 D. 529; *Molleson*, 1873, 11 M. 510), or funds wrongly immixed with his own, if distinguishable (*Macadam*, 1872, 11 M. 33); nor can illegal obligations, such as those for gambling debts, be sued on (see *Nicholson*, 5 El. & Bl. 999; cf. *Tennant*, 1 B. & P. 3). Again, a trustee's right to demand a valid feu-charter in implement of articles of roup under which the bankrupt had bought, was held subject to a bond granted by the bankrupt while holding under a defective title previously granted under the articles which was erroneously thought to give him a good feudal title (*Edmond*, 1855, 18 D. 47, and (H. L) 3 Macq. 116). A clause of devolution in an unrecorded but feudalised entail excluded the trustee in the sequestration of an heir of entail supervening after the event which brought the clause of devolution into operation (*Fleeming, supra*). A tenant of a house who prepaid rent *in bonâ fide*, was held not liable to repeat it to the trustee in a sequestration of the landlord occurring prior to the term (*Davidson*, 1868, 7 M. 77). Again, a trustee was held to be barred from founding jurisdiction by arrestment against a debtor to the bankrupt, on the ground that the fund arrested could not have been arrested by the bankrupt himself without his committing a breach of trust (*More* (*Graeme's Tr.*), 1888, 15 R. 691).

Any person claiming right to any estate wrongly included in a sequestration may present a petition to the Lord Ordinary on the Bills praying to have such estate taken out of the sequestration (B. A., 1856, s. 104).

2. Vesting of Moveable Estate.—The act and warrant vests in the trustee as at the date of sequestration "the moveable estate and effects of the bankrupt wherever situated, so far as attachable for debt, to the same effect as if actual delivery or possession had been obtained or intimation

made at that date, subject always to such preferable securities as existed at the date of the sequestration and are not null or reducible." The necessary wearing apparel of the bankrupt, his wife and family, are excepted (see sec. 95). The trustee's title requires no procedure by way of delivery or intimation to complete it (as to cases of competition with assignees, see *Strachan*, 1835, 13 S. 954; *Hill*, 1846, 8 D. 472; *Tod's Tr.*, 1869, 7 M. 1100). But in a case relating to shares of a railway company it was held that, as registration in the company register was necessary to complete the right, an assignee who obtained himself registered a year after the sequestration, but before the trustee, was preferable (*Morrison*, 1876, 3 R. 406; see *Thomson*, 1842, 5 D. 379).

Where the sequestration is of a deceased debtor, and a successor is in possession or has expede confirmation, the judgment awarding sequestration ordains the successor to convey the estate to the trustee (B. A., 1856, s. 29; see sec. 4 for definition of "successor").

Where moveable estate is under effectual arrestment or poinding at the date of the sequestration, the trustee is entitled to take such estate, and the creditor receives the benefit of his preference in the ranking (*Lindsay*, 1840, 2 D. 1373; *Gordon*, 1842, 4 D. 352; *Gibson*, 1853, 16 D. 233; *Mitchell*, 1881, 8 R. 875). A summary petition by the trustee for delivery is competent (*Allan*, 1835, 14 S. 80; see *Dow*, 1875, 2 R. 459, per Ld. Pres. Inglis). (See *supra*, *General Effects of Vesting*.)

3. Vesting of Heritable Estate in Scotland.—The act and warrant *ipso jure* vests in the trustee as at the date of the sequestration (*i.e.* the date of the first deliverance, s. 42), "the whole heritable estate belonging to the bankrupt in Scotland, to the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a poinding of the ground had then been executed, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible, and the creditor's right to poind the ground as hereinafter provided; and the right of the trustee shall not be challengeable on the ground of any prior inhibition (saving the effect which such inhibition may be entitled to in the ranking of the creditors): Provided always, that such transfer and vesting of the heritable estate shall have no effect upon the rights of the superior, nor upon any question of succession between the heir and executor of any creditor claiming on the sequestrated estate, nor upon the rights of the creditors of the ancestor (except that the act and warrant of confirmation shall operate in their favour as complete diligence); and if any part of the bankrupt's estate be held under an entail, or by a title otherwise limited, the right vested in the trustee shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey, or the creditors attach" (B. A., 1856, s. 102, 2nd).

The statutory vesting is not equivalent to infeftment, nor, in the case of long leases, to registration; the register in which the statute declares that the act and warrant is to be held as recorded being the Register of Adjudications (Goudy on *Bankruptcy*, 270; cf. observations by Ld. Kinnear in *Herit. Reversy. Co.*, 1891, 18 R. 1166). But in the case of leases and other heritable rights not requiring infeftment, the trustee's title is complete under his act and warrant (Bell, *Com. on Recent Statutes*, 168). Where a debtor assigned his lease in security to a creditor who took no possession, but intimated the assignation to the landlord and granted a sublease to the debtor, who remained in possession and paid the rents, the assignation was

held ineffectual against the trustee in the debtor's sequestration (*Brock*, 1830, 8 S. 647; see *Clark*, 1882, 9 R. 1017; *Macdowall*, 1824, 2 S. 574).

The act and warrant, while infeftment is not taken upon it, does not prevent infeftment by persons holding uncompleted conveyances. "The effect of this provision as to such heritage as requires sasine is to make the trustee run a race of diligence for the obtaining of sasine with creditors holding an inchoate security; the first completed right being preferable" (Bell, *Com. on Recent Statutes*, 168; see *Buchan*, Mor. 2905 *per curiam*; *Cormack*, 1829, 7 S. 868; *Melville*, 1842, 4 D. 1311, per Ld. Ivory; *Lindsay*, 1844, 6 D. 771; *Smith*, 1857, 19 D. 384). As to the right of the trustee in competition with purchasers holding unfeudalised conveyances, reference may be made to what has been already said (*ante*, p. 201). The trustee may complete his title by expeding a notarial instrument under 31 & 32 Vict. c. 101, s. 25, Scheds. (O) and (LL), or, in the case of long leases, under 20 & 21 Vict. c. 26, s. 11, Sched. F. To prevent questions of accretion arising, the title should be made up in the trustee's name. The opinion has been generally held that a title made up in name of the bankrupt will accresce to and validate prior rights granted by him, as to which accretion would operate had the bankrupt himself voluntarily completed his title before sequestration (Menzies, *Conveyancing*, 785; Bell, *Conveyancing*, 814; Goudy on *Bankruptcy*, 271, 272). This view, however, is questioned by Prof. Bell (*Com.* i. 738; *Prin.* s. 882 (5)). The bankrupt must grant all deeds necessary for recovering his property and feudally vesting it in the trustee, and superiors must, if required, enter the trustee, or purchasers from him, in terms of law (B. A., 1856, s. 105).

The trustee may sell and convey the heritable estate without making up a feudal title and without the concurrence of the bankrupt, such conveyances being as effectual as if granted by the bankrupt with concurrence of the trustee, and not affected by any inhibition against the bankrupt (*ib.*).

The effect of an inhibition prior to sequestration is to give the inhibiting creditor a preference in ranking for his debt in competition with creditors in debts contracted after the inhibition (*Ewing*, 1860, 22 D. 1347; see sec. 102, *supra*).

Where the bankrupt is an heir of entail, the trustee can petition for disentail under the provisions of the Entail (Scotland) Act, 1882. As to minister's glebe, see *Lcarmonth*, 1858, 20 D. 418.

Where the sequestration is of a deceased debtor whose successor has made up title, the trustee may petition the Lord Ordinary on the Bills to have the estate transferred to and vested in him (B. A., 1856, s. 106), and that although the estate has passed from the immediate successor to a more remote one (*Barstow*, 1843, 6 D. 293; see this case as to reservation of preferable rights and securities granted over the property).

The act and warrant operates "as complete diligence" in favour of the creditors of the ancestor. As to the construction of this clause, see *Millar's Trs.*, 1886, 13 R. 543; and as to diligence against estate by ancestor's creditors, see Act 1661, c. 24; Bell, *Com.* i. 770, and 5th ed., ii. 734).

As to the liabilities of the trustee in regard to heritable property taken up by him, see *infra, Onerous Contracts.*

4. Real Estate in England, Ireland, etc.—The act and warrant *ipso jure* transfers to and vests in the trustee as at the date of the sequestration, "all real estate situated in England, Ireland, or in any of Her Majesty's dominions, belonging to the bankrupt, and all interest in or regarding such real estate, which the bankrupt held, or to which he was entitled: Provided

always, that as regards all freehold, copyhold, and leasehold estate in England, Ireland, or any of Her Majesty's dominions (except Scotland), the act and warrant of confirmation shall be registered in the chief Court of Bankruptcy for the country in which the property is situated, in the like manner as an adjudication of bankruptcy or other similar process ought to be registered according to the law of that country, either in a separate book or in the general book, as the Court of Bankruptcy shall order, or to the intent that all persons concerned may have the same means of ascertaining whether any person has been adjudged a bankrupt according to the law of Scotland as they have or shall have of ascertaining whether any person has been adjudged a bankrupt according to the law for the time being of the country in which the property is situated; and no purchaser for valuable consideration of any freehold, copyhold, or leasehold estate (except in Scotland) shall be affected by any such bankruptcy until the act and warrant of confirmation shall have been so registered as aforesaid: Provided also, that where, according to the laws of England, Ireland, or other Her Majesty's dominions, any deed or conveyance would require registration, enrolment, or recording, the act and warrant of confirmation shall be so registered, enrolled, or recorded according to the laws of England, Ireland, or other Her Majesty's dominions; and if any purchase is made by any person for valuable consideration, and without notice of the sequestration prior to the registration, enrolment, or recording of the said act and warrant of confirmation, such purchase shall not be invalidated by the existence of such act and warrant, or the subsequent registration, enrolment, or recording thereof" (B. A., s. 102, 3rd).

The transference operated as above does not dispense with the formalities of conveyancing required by the law of the country where the estate is situated.

5. ACQUIRENDA.—All property acquired by the bankrupt prior to his discharge falls under the sequestration. Sec. 103 of the Bankruptcy Act, 1856, provides as follows:—

"CIII. *Acquisitions of Bankrupt after the Sequestration to belong to the Creditors.*—If any estate, wherever situated, shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall *ipso jure* fall under the sequestration, and the full right and interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee, as at the date of the acquisition thereof or succession, for the purposes of this Act; and the trustee shall, on coming to the knowledge of the fact, present a petition setting forth the circumstance to the Lord Ordinary, who shall appoint intimation to be made in the *Gazette*, and require all concerned to appear within a certain time for their interest; and after the expiration of such time, and no cause being shown to the contrary, the Lord Ordinary shall declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee, as at the date of the acquisition thereof or succession thereto, to the same effect as is hereinbefore enacted in regard to the other estates; and the proceeds thereof, when sold, shall be divided in terms of this Act; and if the bankrupt do not immediately notify to the trustee that such estate has been acquired, or has come to him as aforesaid, he shall forfeit all the benefits of this Act, and it shall be competent to the trustee to examine him as aforesaid in relation thereto: Provided always that the rights of the creditors of the person from whom such estate shall come or descend to the bankrupt shall be reserved entire" (see sec. 29; *Trappes*, 1871, 10 M. 38; *Taylor*, 1879, 7 R. 128;

Abel, 1883, 11 R. 149; *North. Herit. Co.*, 1888, 16 R. 100, and 18 R. (H. L.) 37). The petition to the Lord Ordinary should specify the particular estate and mode and date of acquisition (see *Mein*, 1855, 17 D. 435).

A sum of damages recovered by the bankrupt in an action for slander was held to fall under this section (*Jackson*, 1875, 3 R. 130). A *spes successionis* or expectancy does not fall under the sequestration until it vests (*Reid*, 1893, 20 R. 510); but the bankrupt cannot deprive his creditors of the chance of its vesting during the sequestration by discharging or assigning it (*Obers*, 1897, 24 R. 719). The salary of an office vested in the bankrupt at the date of sequestration is regarded as estate then belonging to him and recoverable under the 102nd section of the Act, not under the 103rd (*Barron*, 1881, 8 R. 933—schoolmaster appointed *ad vitam aut culpam*). The salary of a professor has been held to be attached by sequestration (*Laidlaw*, 1801, Mor. App. *voce* "Arrestment," No. 4), as also the stipend of a clergyman (*A. B.*, 1824, 3 S. 133; see *Learmonth*, 1858, 20 D. 418, as to glebe). In such cases, however, the bankrupt is entitled to a *beneficium competentiæ* (*ib.*). In the case of *Barron* the question was raised how far a bankrupt's personal earnings after sequestration (not derived from an office vested in him at date of sequestration) can be claimed by the trustee. The trustee's claim was negatived by the Lord Ordinary (Ld. Fraser), but the case was decided in the Inner House upon the ground that the 103rd section did not apply (see also *Moinet*, 1833, 11 S. 348). The question is not decided in Scotland. In England the creditors cannot claim purely personal earnings of the bankrupt, except accumulated savings over and above what is required for the maintenance of the bankrupt and his family (*Chippendall*, 4 Doug. 318; *ex parte Vine*, 8 Chan. Div. 364; *Emden*, 17 Chan. Div. 768). But earnings from carrying on a business by aid of servants are not protected to the same extent (*Crofton*, 1 B. & Ad. 568; *Elliot*, 16 Q. B. 581; *in re Dowling*, 4 Chan. Div. 689).

If the acquisitions claimed by the trustee are the product of a business which the bankrupt has carried on with the acquiescence of the trustee and creditors, the trustee may be barred from claiming such acquisitions to the exclusion of new creditors (see *Christie*, 1835, 14 S. 191; *Abel*, 1883, 11 R. 149; *Fisken*, 1845, 7 D. 842; *Mein*, 1855, 17 D. 435; *Troughton*, Amb. 630; *Tucker*, 4 De G., M. & G. 395; *Ford*, 1 Chan. Div. 521; *ex parte Watson*, 12 Chan. Div. 380; Goudy on *Bankruptcy*, 277).

It will be a good answer by the bankrupt to the petition, if established, that the estate claimed has been abandoned to him by the creditors, either expressly or by a course of actings. "The acts of the trustee and creditors in relation to it may be such as to indicate that the bankrupt is, according to their desire, to be deemed to be in future the master or the owner of the property, and that they have abandoned and rejected it" (per Ld. Watson in *North. Herit. Co.*, 1891, 18 R. (H. L.) 37). Knowledge that the bankrupt is carrying on a trade or business does not of itself imply an abandonment by the creditors in favour of the bankrupt of their claim to his acquisitions (Bell, *Com.* i. 126, 127; *Troughton*, Amb. 630; as to rights of new creditors, see *supra*). It is no answer to the trustee's claim for acquisitions that the trustee has been discharged, or that the bankrupt has been discharged, between the date of acquisition and the presentation of the petition (*North. Herit. Co.*, 1888, 16 R. 100, and 18 R. (H. L.) 37). Where the trustee has been discharged, the creditors may obtain a new one appointed for the purpose of ingathering and distributing new estate, by a petition to the Court of Session in either Division (*Thomson*, 1863, 2 M. 325; *Russell*, 1867, 5 M. 282; *North. Herit. Co., supra*; *Drybrough*, 1893, 20 R. 396).

6. Government Pay, Pensions, etc.—The Bankruptcy Act, 1856, s. 149, provides as follows:—"The Lord Ordinary or Sheriff may order such portion of the pay, half-pay, salary, emolument, or pension of any bankrupt as, on communication from the Lord Ordinary or Sheriff to the Secretary of War, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officers of the department to which such bankrupt may belong or may have belonged, or under which such pay, half-pay, salary, emolument, or pension may be enjoyed by such bankrupt, or to the Court of Directors of the East India Company, they respectively may, under their hands, or under the hand of their respective chief secretary or other chief officer for the time being consent to in writing, to be paid to the trustee, in order that the same may be applied in payment of the debts of such bankrupt: and such order and consent being lodged in the office of Her Majesty's Paymaster-General, or of the secretary of the said Court of Directors or of any other officer or persons appointed to pay or paying any such pay, half-pay, salary, emolument, or pension, such portion of the said pay, half-pay, salary, emolument, or pension as shall be specified in such order and consent shall be paid to such trustee until the Lord Ordinary or Sheriff shall make order to the contrary." A salary paid by the Treasury does not fall under this section (*Latta*, 1857, 19 D. 1107). It is only out of an excess beyond a *beneficium competentiæ* that a payment will be ordered (*Scott's Tr.*, 1885, 12 R. 540). The procedure is for the trustee to present a petition to the Lord Ordinary or Sheriff, setting forth the amount of the salary, etc., and the general position of the sequestration, and craving an order recommending the head of the particular department to grant a consent in terms of the Act for payment of a certain portion of the pay to the trustee. The petition must be intimated to the bankrupt, and the judgment thereon is subject to appeal (*Scott's Tr.*, 1884, 12 R. 182, and 1885, 12 R. 540).

7. Challenge of Alienations and Preferences by the Bankrupt.—(*a*) *Alienations and Preferences before Sequestration.*—Prior to the Bankruptcy Act, 1856, a trustee in bankruptcy had no statutory title to challenge alienations or preferences granted by the bankrupt during insolvency or notour bankruptcy. In practice, however, his title came to be recognised in cases where he represented the class of creditors entitled to make the challenge in the particular case. By the 11th section of the 1856 Act it is provided that the trustee shall be entitled to set aside for behoof of the general body of creditors all alienations by an insolvent or bankrupt debtor which are voidable by statute or at common law, and in doing so shall be entitled to the benefit of any presumption which would have been competent to any creditor.

A challenge by the trustee differs from one at the instance of an individual creditor in that the trustee is entitled to obtain a decree not merely setting aside the alienation or preference, but also for payment or delivery to him of the funds or assets forming the subject thereof (see *Cook*, 1896, 23 R. 925).

All such alienations and preferences may be set aside either by way of action or exception (B. A., 1856, s. 10; see *Dickson*, 1866, 4 M. 797; *Mackenzie*, 1868, 6 M. 833; *Cook*, *supra*). See Bankruptcy, *ante*, vol. ii. pp. 20, 21; Insolvency, *ante*, vol. vii. pp. 18, 19.

(*b*) *Alienations by Bankrupt after Sequestration.*—All such alienations are null and void (B. A., 1856, s. 111); "but if a *bonâ fide* purchaser is in possession of moveable effects received from the bankrupt after sequestration, but in ignorance thereof, and when ignorant thereof for a price paid,

or which he is ready to pay, he shall not be obliged to restore the effects; and if a debtor, in ignorance of the sequestration, have paid his debt *bonâ fide* to the bankrupt, he shall not be obliged to pay it a second time to the trustee; and if the possessor of any bill or promissory note, which is payable by the bankrupt, with recourse on other parties, or of a security for a debt due by the bankrupt, shall have received payment of his debt from the bankrupt in ignorance of the sequestration and given up such bill, promissory note, or security to the bankrupt, such person shall not be liable to repay to the trustee the amount so received, unless the trustee shall replace him in the situation in which he stood, or reimburse him for any loss or damage" (see *Pearson*, 1876, 3 R. 800).

Creditors who receive a voluntary preference from the bankrupt out of estate abroad must communicate it as a condition of claiming in the sequestration, and, if they claim, are liable *ex reconventione* to be sued by the trustee for its recovery (Bell, *Com.* ii. 573; *Ord*, 1847, 9 D. 541; *Barr*, 1879, 7 R. 247; *Stewart*, 1851, 13 D. 1337).

8. Rights of Action, generally, vest in the trustee.—Where an action is depending at the time of sequestration, it will be sisted until intimation is made to him, and he may sist himself and carry it on (*Hallowell*, 1843, 5 D. 655; *Gallie*, 1840, 2 D. 445). Where he declines to sist himself, reserving his right to litigate the question, decree against the bankrupt in the action will not generally be *res judicata* against the trustee (*Shepperd*, 1829, 7 S. 680). By taking up the action, the trustee incurs liability for the whole expenses, past and subsequent (*Torbet*, 1849, 11 D. 694), but this does not follow when he sists himself for purposes of inquiry merely (*Muir*, 1843, 5 D. 579).

The trustee's right of action extends to actions of damages for personal injury to the bankrupt. Thus where a bankrupt, discharged on dividend, brought an action during the subsistence of the sequestration for reparation for injury to credit, and *solatium* for injury to reputation and feelings, arising out of conduct prior to the sequestration, the trustee was held entitled to sist himself in room of the bankrupt even *quoad* the claim for *solatium* (*Thom*, 1857, 19 D. 721; see *Auld*, 1874, 2 R. 191; *Bern*, 1893, 20 R. 859). But it is otherwise when the injury is one solely affecting the bankrupt's character (*Thom*, *supra*, per Ld. J.-Cl. Hope; *Jackson*, 1875, 3 R. 130; *Rogers*, 12 Cl. & Fin. 700), although damages recovered in an action at the bankrupt's instance in such a case will fall to the trustee (*Jackson*, *supra*). And purely personal actions, such as an action of divorce, or declarator of marriage, although attended with patrimonial consequences, can be insisted in by the bankrupt only (Goudy on *Bankruptcy*, 379; Mackay, *Practice*, 151; *Greenhill*, 1822, 1 S. 275; *Beckham*, 2 H. of L. Ca. 579; see *Green*, 1896, 24 R. 211).

9. Contracts.—The trustee is not bound to take up existing contracts of the bankrupt. Thus it is for his consideration whether he will take up a feu or a lease or shares or other onerous or speculative contracts (*Anderson*, 1875, 2 R. 355; Bell, *Com.*, 5th ed., ii. 413; *Cuthill*, 21 Nov. 1818, F. C.; *Kirkland*, 1831, 9 S. 596, 6 W. & S. 340; *Kirkland*, 1838, 16 S. 860). "Where the element of *delectus personæ* does not enter a contract, it cannot be doubted that the creditors of the insolvent party have it in their power to adopt such contract and to proceed with it notwithstanding the bankruptcy. And there can be as little doubt that they have it in their power to repudiate any contract, whether it involves the element of *delectus personæ* or not" (per Ld. Ormidale in *Anderson*, *supra*).

The trustee's election must be declared within a reasonable time (*Anderson, supra*). If he elects to adopt a contract he cannot thereafter resile, and he is liable personally for its performance (Bell, *Com.* ii. 320; *Jeffrey*, 1821, 1 S. 103, 2 Sh. App. 349; *Davidson*, 1826, 5 S. 121; *MacKessack*, 1886, 13 R. 445), with relief against the estate. Adoption is a question of circumstances, and may be express or be implied from conduct (see *Stead*, 1835, 13 S. 280; *Edin. Herit. Secur. Co.*, 1886, 13 R. 427; and see *infra* cases as to leases). Where a trustee stated that he would "adopt as assets in the sequestration" certain properties subject to bonds, and agreed to pay arrears of interest on condition of the bondholders making advances for completing the property and letting the loans lie in hope of a better market for the benefit of all parties, he was held not to have incurred liability for the loans (*Edin. Herit. Secur. Co., supra*).

Where the trustee elects not to adopt a contract, the other party is entitled to be ranked on the estate for damages for non-implement (see *Cuthill*, 21 Nov. 1818, F. C.; *Kirkland*, 1831, 9 S. 596, 6 W. & S. 340; *Kirkland*, 1838, 16 S. 860; *Stead*, 1835, 13 S. 280; *Bidoulac*, 1889, 17 R. 144). Sequestration, however, does not *per se* terminate a contract *quoad* the bankrupt (see as to leases, Bell, *Com.* i. 76; Rankine on *Leases*, 558).

Entering into possession of a feu and drawing the rents does not in itself subject the trustee to greater liability than as an intromitter (*Mitchell*, 1834, 12 S. 322; see *Balfour*, 1817, Hume, 771; *Douglas*, 1881, 8 R. 470).

Where the trustee adopts a lease, he becomes personally liable for all the prestations (*Dundas*, 1857, 20 D. 225; Rankine on *Leases*, 562; *Moncreiffe*, 1896, 24 R. 47), including arrears of rent (*M'Lean*, 1850, 13 D. 90). It is not enough to prove adoption that the trustee has occupied the premises. Thus where a trustee entered on and refused to give up possession of manufacturing premises until the issue of an action in which he unsuccessfully claimed the great machinery, and during this period refused to concur in joint measures for letting the premises, but did not carry on any work therein, it was held that he had not adopted the lease, but that he was liable in damages for wrongous retention of possession (*Stead*, 1835, 13 S. 280). And liability for arrears of rent was not inferred from a trustee concurring with the bankrupt in opposing the landlord's resumption of possession under a lease which by its terms became void upon the tenant's bankruptcy (*Richardson*, 1835, 13 S. 972). Again, where a lease was to become void at the term of Martinmas after the tenant's bankruptcy, and, after his sequestration, the trustee possessed the farm for three months prior to Martinmas, directing and controlling all farm operations, keeping a large number of milch cows, sub-letting some pasture, and generally ingathering the crops, it was held that he had only done his statutory duty in realising the bankrupt's property, and had not adopted the lease (*M'Gavin*, 1891, 18 R. 576). A similar decision was given where a trustee, instead of himself entering on the farm and realising, sold and transferred his rights to the bankrupt's wife (*Imrie's Tr.*, 1897, 25 R. 15). In another recent case, where a tenant assigned his lease to a trustee for creditors, who obtained the landlord's consent to the assignation, and possessed the farm, the trustee was held liable for the current year's rent, although the landlord, in giving his consent, had acceded to the trust deed, and accepted a renunciation of the lease at the ensuing term of Martinmas (*Moncreiffe*, 1896, 24 R. 47). Where the trustee disclaims a lease, the landlord is entitled to rank on the estate for damages (*Kinloch*, 1836, 14 S. 905; see *Bidoulac*, 1889, 17 R. 144). Where, on the other hand, the landlord avails himself of an option to hold the lease at an end on

the occurrence of bankruptcy, he cannot claim damages (*Walker's Trs.*, 1886, 13 R. 1198; *Bidoulac*, 1889, 17 R. 144; *Tait*, 1897, 24 R. 1128).

Contracts of Sale. — Sec. 1 of the Mercantile Law Amendment (Scotland) Act, 1856, as to goods sold but undelivered, has been repealed by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 60). The trustee's right to goods in the bankrupt's possession which have been the subject of a contract of sale by him, now depends on the rules of the last-mentioned Act regulating the passing of the property in goods sold and the rights of an unpaid vendor. As the Act has codified the law on the subject, reference is made to it *brevitatis causa*.

The trustee may exercise a right of stoppage *in transitu* competent to the bankrupt. (For rules on the subject, see 56 & 57 Vict. c. 71, ss. 44 *et seq.*). Goods rejected by an insolvent buyer prior to his sequestration may be recovered from his trustee by the seller (Bell, *Com.* i. 253; *Drake*, 1807, Hume, 691; *Inglis*, 1842, 4 D. 478; *Booker*, 1870, 9 M. 314). Goods of which an insolvent buyer has taken delivery may be recovered from his trustee if the circumstances of the buyer were such as to make the taking of delivery a fraud on the seller, as where the buyer has already announced an intention *cedere foro* (*Carnegie*, 1815, Hume, 704; *Schuurmans*, 1828, 6 S. 1110; *Watt*, 1846, 8 D. 529; *Clarke*, 1885, 12 R. 1035; Bell, *Com.* i. 264; *Richmond*, 1854, 16 D. 403, per Ld. J.-Cl. Hope; *Booker*, *supra*, per Ld. Kinloch).

10. Property of Bankrupt's Wife.—The trustee is, of course, entitled to take all property belonging to the husband *jure mariti*, subject to the provision of the Conjugal Rights Amendment Act, 1861, s. 16, entitling the wife to a reasonable provision for support and maintenance out of property of which the husband or his trustee has not obtained possession prior to the wife's claim being made (see *Clark*, 1881, 8 R. 723; *Reid*, 1878, 5 R. 630; *Somner*, 1871, 9 M. 594; *Jack*, 1878, 5 R. 624; *Miller*, 1871, 10 M. 107, per. Ld. Mackenzie, Fraser, *H. & W.* i. 833).

The trustee is entitled to claim all property forming the subject of donations by the husband to the wife *stante matrimonio*.

The exemption of a wife's earnings in any employment, occupation, or trade carried on in her own name, or money or property acquired by her through the exercise of any literary or artistic skill (40 & 41 Vict. c. 29, s. 3), does not extend to stock in trade or implements by which such earnings are made (*Ferguson*, 1883, 11 R. 261).

Any money or other estate which, by virtue of the Married Women's Property Act, 1881 (44 & 45 Vict. c. 21, s. 1 (4)), belongs to a wife as separate estate and has been lent or intrusted to her husband or immixed with his funds, falls to be treated as assets of the husband's estate in bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the value of such money or other estate after, but not before, the claims of the other creditors of the husband for valuable consideration in money, or money's worth, have been satisfied (see *Anderson*, 1892, 19 R. 684; *National Bank of Scotland*, 1893, 21 R. 4; *Adam*, 1894, 21 R. 676). Where furniture belonging to a wife before marriage was taken by her to the house in which she lived with her husband after marriage, it was held not to have been immixed with his estate or lent or intrusted to him (*Adam, supra*). The trustee does not take furniture which belonged to a wife before marriage (the marriage being prior to 1881) and was settled on her by antenuptial marriage contract, or which before or during the marriage has been settled on the wife by a third party, exclusive of the *jus mariti* (Fraser, *H. & W.* i. 790; *Annand*, 1774, Mor. 5844, and 2 Pat.

App. 369; *Young*, 1855, 17 D. 998). Prior to the Act of 1881 it was decided that furniture of the husband settled on the wife by antenuptial marriage contract, and remaining in the husband's house after the marriage, fell under his bankruptcy, on the principle of reputed ownership (*Shearer*, 1842, 5 D. 132; *Brown*, 1850, 13 D. 373; see *Campbell*, 1848, 10 D. 1280). It has been questioned whether similar decisions would be given now, in view of the change of presumption from possession arising from the Act of 1881 (see Goudy on *Bankruptcy*, 311).

11. Property held by the Bankrupt as Trustee, Factor, etc.—Property held in trust, whether heritable or moveable, and whether held on title *ex facie* qualified by the trust or *ex facie* absolute, does not pass to the trustee, not being property of the bankrupt in the sense of the Bankruptcy Act (*Heritable Reversy. Co.*, 1891, 18 R. 1166; rev. 1892, 19 R. (H. L.) 43, *supra*, p. 204). This rule assumes that the trust property is capable of identification. Where it consists of money which the bankrupt has immixed with his own, the claim against him resolves itself into a claim of debt, and the creditor in the claim can only receive a ranking on the sequestrated estate along with other creditors (Bell, *Com.* i. 275–279; see *Leek*, 1855, 17 D. 1075; *Cochrane*, 1857, 19 D. 1019; *Parke*, 1 East. 544.) But if the funds, although immixed to some extent, are capable of separation, the creditor is entitled to follow and claim them, as, *e.g.*, funds paid by the bankrupt into his bank account, but not drawn out (*Pennell*, 4 De G., M. & G. 372; *Knatchbull*, 13 Ch. Div. 696). Property directly acquired by the conversion of trust property may be claimed as *surrogatum* (*Taylor*, 3 M. & S. 579; *Mags. of Edinburgh*, 1881, 8 R. (H. L.) 140).

The same principles apply to other cases where the bankrupt holds property in representative capacities, as where he is an executor, factor, or agent (Bell, *Com.* i. 287; *Taylor, supra*; *Tooke*, 5 T. R. 215). Where a law agent paid into his bank account a sum sent to him by a client to be invested on a specific heritable security, and it remained undrawn at the date of his sequestration, the Court granted a petition, under sec. 104 of the 1856 Act, to have the money struck out of the sequestration (*Macadam*, 1872, 11 M. 33).

The rule is also applied to money or property placed in the bankrupt's hands and specifically appropriated towards a particular purpose (Bell, *Com.* i. 277; see *Macadam, supra*; *ex parte Prescott*, 3 D. & C. 218). Specific remittances or consignments made by the bankrupt to an agent for behoof of a third party, who has given value to the bankrupt therefor, are held specially appropriated to the third party (*Brierly*, 1843, 5 D. 1100, 5 Bell's App. 1; *ex parte Imbert*, 1 D. & J. 152; cf. *Pearson*, 1842, 4 D. 1509). But directions by the bankrupt to an agent to pay to a creditor the proceeds of goods in his hands, without communication of such directions to the creditor, will not give the latter any preference if the sequestration occur while the goods are still in the agent's hands (*Scott*, 3 Mer. 652).

Consignation in neutral hands to await the result of an action, divests the consigner and excludes his trustee if the other party be ultimately successful (*Gordon*, 1838, 1 D. 1; *Stiven*, 1891, 18 R. 422; cf. *Baird*, Mor. 7737).

Where funds were handed by a bankrupt to his law agent before sequestration, to defray the expenses of his defence against a criminal charge, the trustee was held entitled to claim them, on the ground that the mandate fell by sequestration (*M'Kenzie*, 1894, 21 R. 904).

12. Personal Powers of Bankrupt.—Powers purely personal, which do not affect the sequestrated estate, remain in the bankrupt solely.

Powers which are incidental to the sequestrated estate as a general rule pass to the trustee, as, *e.g.*, power of revocation of donations *inter virum et uxorem* (Ersk. i. 6. 32; *Kemp*, 1842, 4 D. 558), or the right to elect between legitim and conventional provisions, falling to the bankrupt (*Aikman, Petr.*, 1893, 30 S. L. R. 804; *Wishart*, 3 S. L. T. p. 42). On the other hand, the Court, in an action at the instance of a husband's creditors, refused to interfere with the election of the bankrupt's wife between her legitim and conventional provisions under her father's will of slightly larger value, from which her husband's *jus mariti* was excluded (*Lowson*, 1854, 16 D. 1098).

13. Reputed Ownership.—There are no provisions in the Bankruptcy Acts in Scotland regarding property in the reputed ownership of the bankrupt at the date of his sequestration, and any claim by a trustee to have such property included in the sequestrated estate must rest on the common law. It is beyond the limits of the present article to deal with the subject in any detail.

Reputed ownership is said by Mr. Bell to exist "when the appearance of ownership is carried beyond the purpose or occasion of a legitimate contract, and powers of disposal are ostensibly given or allowed to be assumed" (*Prin.* ss. 1316, 1317), the requisites being: (1) Possession, (2) repute of ownership, (3) consent of the true owner (*ib.*; *Anderson*, 1848, 11 D. 270). The general rule is that where the possession is had under any definite contract, with fixed rights and incidents, such as lease or loan, the plea of reputed ownership will be excluded (see *Orr*, 1870, 8 M. 936; *Marston*, 1879, 6 R. 898; *Duncanson*, 1881, 8 R. 563; *Robertsons*, 1882, 9 R. 772; *Scott*, 1889, 16 R. 504; *Liddell's Tr.*, 1893, 20 R. 989; *Pattison's Tr.*, 1893, 20 R. 806; *Mitchell's Trs.*, 1894, 21 R. 586; *Mitchell*, 1894, 21 R. 600).

The only example in the decisions for many years of the application of the doctrine is to be found in the case of *Edmond*, 1868, 7 M. 59. In that case A. sold certain sea-bathing machines, etc., forming a bathing establishment, in 1847, to B., who sold them, in 1849, to C. A., who remained in uncontrolled possession, was sequestrated, and was discharged in 1855, but his possession was not interrupted, and continued till his death in 1867. The property was held to be carried by a second sequestration of A.'s estates after his death (see *Sim*, 1862, 24 D. 1033).

In the case of *Robertsons*, 1882, 9 R. 772, Ld. J.-Cl. Moncreiff said: "The doctrine of reputed ownership has been paid little attention to of late years, and is no longer of much importance." The doctrine is, however, by no means obsolete. In the case of *M'Bain*, 8 R. (H. L.) 106, Ld. Blackburn said: "It is perfectly true, I think, as regards the law of Scotland, that independent of bankruptcy, and before there is bankruptcy at all, where one person has allowed another to have possession of goods under such circumstances, and in such a way, as to accredit that other person and entitle him to sell them, or to acquire credit upon them,—if the true owner has allowed this to take place,—he should be responsible for the consequences, and it would be unjust for him to take away the goods to the damage of those who may, in consequence of his having accredited the other person, have acquired a right over them, though before there has been bankruptcy." In the same case Ld. Watson said: "I think it is sufficiently clear that where a purchaser permits the seller to retain the goods and to deal with them as if they were his own, and as if no sale of them had actually taken place, he cannot have any claim to have those goods delivered to him, not as in a question with the seller of the goods, but as in a question with onerous creditors of the seller."

In considering questions of this kind it must be kept in view that, in cases of sale, delivery is no longer requisite to the passing of the property in goods sold (Sale of Goods Act, 1893, 56 & 57 Vict. c. 71), and thus, in the absence of any external sign of change of ownership, there may now be more room for the application of the principle of reputed ownership where goods of a buyer remain in the seller's possession. In England, where delivery has never been requisite to the passing of the property, the Bankruptcy Statutes have for long contained provisions giving the creditors on bankrupt estates rights over property in the order and disposition of the debtor before his bankruptcy. See *Reputed Ownership*.

XI. Management and Realisation of Sequestrated Estate.

1. Generally.—Second Meeting of Creditors . . . 215
2. Sale of Estate 217
(*a*) Heritable Estate 218
(*b*) Moveable Estate 219
(*c*) Outstanding Estate 219

1. Generally.—At the meeting for the election of trustee the bankrupt must submit a state of his affairs as already mentioned (*vide ante*, p. 191). The trustee, as soon as may be after his appointment, must take possession of the bankrupt's estate and effects, and of his title deeds, books, bills, vouchers, and other papers, and also make an inventory of such estate and effects, and a valuation showing the estimated value and annual revenue thereof, and send copies thereof to the Accountant (B. A., 1856, s. 80).

The trustee must "manage, realise, and recover the estate belonging to the bankrupt, wherever situated, and convert the same into money according to the directions given by the creditors at any meeting; and if no such directions are given, he shall do so with the advice of the commissioners" (*ib.*, s. 82).

Second Meeting of Creditors.—After the bankrupt's examination, the creditors hold their second general meeting, for the purpose of considering the position of the estate and giving directions as to its administration. The meeting must, in the case of living debtors, be held not sooner than seven nor later than fourteen days after the day appointed for the bankrupt's examination (B. A., 1856, s. 87; as to adjournment, see *Walker*, 1861, 24 D. 155; *M'Kellar*, 1861, 23 D. 1269, per Ld. J.-Cl. Inglis). In the case of deceased debtors the meeting is held not later than fourteen days after advertisement by the trustee (s. 87), which in practice is made on the lapse of a short interval after the date of confirmation. Prior to the second meeting the trustee must prepare a report and estimate as to the bankrupt's estate, and submit it at the meeting and give all explanations relative thereto; and the creditors assembled at the meeting, or at any other meeting, may give directions for the recovery, management, and disposal of the estate (*ib.*, s. 96). The creditors act by the majority in value of those present and entitled to vote (*ib.*, s. 101). There is nothing to prevent a creditor voting on a question on which he has a direct personal interest; and a secured creditor is entitled, in any question affecting the subject of his security, to vote upon the full amount of his debt (*ib.*, s. 59). The Court will not entertain an application for directions on the management or realisation of the estate (*Low*, 1836, 15 S. 290). The trustee and commissioners cannot alienate any asset of the estate gratuitously (*Caledonian Rwy. Co.*, 1875, 2 R. 917). The bankrupt must at all times give

every information and assistance to the trustee; and if he fail to do so, or to grant any deed for the recovery or disposal of his estate, the trustee may apply to the Sheriff to compel him, under penalty of imprisonment and forfeiture of the benefit of the Act (*ib.*, s. 81). An allowance may be made to the bankrupt for his services (*ib.*, s. 78); but he cannot be employed in such a way as to supersede the statutory management of the trustee (*Turner*, 1822, 1 S. 444).

Resolutions by the creditors as to the disposal of the estate may be appealed either to the Lord Ordinary or the Sheriff within fourteen days (*ib.*, s. 169; as to appeal from Sheriff or Lord Ordinary, see secs. 170, 171). The Lord Ordinary or Sheriff may, if he thinks fit, order a new meeting to be held to reconsider the resolution appealed against (*ib.*, s. 169). Any creditor may appeal. The bankrupt would also seem to have a title (Bell, *Com.*, 5th ed., 412; see *Pentland*, 1827, 5 S. 825; *Burt*, 1863, 1 M. 382), but probably not the trustee (Goudy on *Bankruptcy*, 314; see *Haldane*, 1830, 8 S. 453; *Witham*, 1884, 11 R. 776). The right of appeal may be waived by actings (*Kerr*, 1849, 11 D. 691). The Court will rarely interfere with the discretion of the creditors in questions of mere expediency, as to which they are the proper judges of their own interests (*City of Glasgow Bank*, 1863, 2 M. 142; *Weldon*, 1879, 7 R. 235; Bell, *Com.*, 5th ed., ii. 411, 412). Resolutions may be appealed on the ground that they violate or are inconsistent with the intentions of the Bankruptcy Acts (see *Turner*, 1822, 1 S. 444; *Kirkland*, 1838, 16 S. 860), as, *e.g.*, a resolution to abandon a claim in face of an offer to purchase it (*M'Kay*, 1866, 4 M. 333), or to carry on a risky or speculative business or contract (*Kirkland, supra*; *Anderson*, 1875, 2 R. 355).

The trustee must lodge all money which he receives in such bank as the majority of the creditors in number and value at any general meeting shall appoint, and failing such appointment, in any joint-stock bank of issue in Scotland (provided that the bank be not one in which the trustee is acting partner, manager, or cashier); and the money must be lodged in the name of the trustee in his official character under the Bankruptcy Act, at the highest rate of interest which can be procured for the same; and such bank must, once yearly at least, balance such account and accumulate the interest with the principal sum, so that both shall thereafter bear interest as principal; and if such bank fail to do so, it is liable to account as if the interest had been so accumulated (B. A., 1856, s. 82). If the trustee lodges the money in his name as an individual, and not *qua* trustee, he will be liable therefor should the bank fail (Bell, *Com.*, 5th ed., ii. 378). If the trustee keeps in his hands any sum exceeding £50 for more than ten days, he must pay interest to the creditors at the rate of 20 per cent. on the excess for such time as the same is in his hands beyond ten days; and unless the money has been so kept in his hands from innocent causes, the trustee falls to be dismissed from office upon petition to the Lord Ordinary on the Bills or Sheriff by any creditor, and has no claim to remuneration, and is liable in expenses (B. A., 1856, s. 83). Sums erroneously paid away by the trustee *in bonâ fide* are not regarded as kept in his hands for the purposes of this provision (*Ferrier*, 1835, 13 S. 1081; *Maben*, 1837, 15 S. 1087). It does not excuse the trustee that he has acted with the approval of the commissioners (see *Black*, 1824, 3 S. 261), or that the money has been drawn to pay dividends due but not called for (*Accountant in Bankruptcy*, 1864, 2 M. 1293). Where the trustee is removed, he is liable in penal interest up to the date of removal, and simple interest thereafter, on the accumulated sum (*Johnstone*, 1826, 4 S. 487). The provision for dismissal is imperative (*Accountant in*

Bankruptcy, 1867, 6 M. 158). The Court may dismiss the trustee upon a report by the Accountant of Court under sec. 159 of the 1856 Act (*ib.*).

The trustee must keep a sederunt book, and record therein all minutes of creditors and commissioners, states of accounts, reports, and all the proceedings necessary to give a correct view of the management of the estate; and he must also keep regular accounts of the affairs of the estate, and transmit to the Accountant of Court, before each of the periods assigned for the payment of a dividend, a copy, certified by himself, of such accounts in so far as not previously transmitted, such copies being preserved in the office of the Accountant; and the sederunt book and the accounts must be patent to the commissioners and to the creditors or their agents at all times (B. A., 1856, s. 84). When any document, however, is of a confidential nature (such as an opinion of counsel), the trustee is not bound to insert it in the sederunt book, or to exhibit it to any other person than the commissioners (*ib.*). The trustee will be personally responsible for loss of the sederunt book (*Wotherspoon*, 1843, 6 D. 88; see *Christie*, 1827, 5 S. 219), and irregularities in keeping it will form a ground of complaint against him (see *Mitchells*, 1830, 9 S. 115; *Brown*, 1848, 11 D. 338). It forms *primâ facie* evidence of the matters contained in it, except when founded on by the trustee in his favour (see *Mansfield*, 1835, 13 S. 721; *Hunter*, 1822, 3 Mur. 231).

The trustee must within fourteen days after the 31st October in each year, or on the first lawful day after the expiry of said fourteen days, deliver, free of expense, to the Sheriff Clerk a return, in the form of Schedule (H) of the 1856 Act, giving a vidimus of the sequestration, failing which he is liable, on the application of any creditor, or of the Accountant of Court, to be removed from office or censured, and to be subjected to expenses (B. A., 1856, s. 158; see *Richmond*, 1854, 16 D. 546).

Subject to any directions given by the creditors (B. A., 1856, ss. 82, 96), the trustee may, with the consent of the commissioners, compound and transact and refer to arbitration any questions which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon; and the compromise, transaction, or decree-arbitral is binding on the creditors and the bankrupt (*ib.*, s. 176; see *Dalzell*, 1876, 4 R. 222; *Douglas*, 1881, 8 R. 470). The creditors may also abandon claims by the estate, and a resolution to abandon forms a bar to action by the trustee (*Gray*, 1850, 12 D. 684). A majority, however, cannot, by resolving to abandon a claim competent to them, preclude an individual creditor who offers to prosecute it from doing so (*Sprot*, 1828, 6 S. 1083; *Spence*, 1832, 11 S. 212; *M'Kay*, 1866, 4 M. 333). In so suing, the individual creditor proceeds at his own risk; and, on the other hand, should he recover more than sufficient to pay his own debt in full, he must hand over the surplus to the trustee for the benefit of the general body of creditors (*Spence, supra*; Bell, *Com.*, 5th ed., ii. 415). He is entitled to the use of the trustee's name in suing, on finding security to keep the trustee and the sequestrated estate *indemnis* (*Sprot, supra*). Or he may purchase the claim from the creditors and sue in his own name, taking from the trustee an assignation to his right (*Spence, supra*; *M'Kay, supra*). An offer by a dissenting creditor to guarantee the expenses of an action will not entitle him to have a compromise opened up (*Marshall & Aitken*, 1889, 16 R. 895).

2. Sale of Estate.—The creditors may resolve to sell at the second or any subsequent meeting, failing which the trustee acts in the matter with advice of the commissioners (B. A., 1856, ss. 96, 82). Where any estate is sold publicly by virtue of the Bankruptcy Act, it is lawful for any creditor

(including a concurring heritable creditor, *Cruickshank*, 1849, 11 D. 614) to purchase the same, but the trustee or commissioners may not do so (B. A., 1856, s. 120; see *Brown*, 1848, 11 D. 338; *Whyte's Tr.*, 1851, 13 D. 679; *Noble*, 1876, 4 R. 77; as to commissioner's firm, see *Whyte*, 1890, 17 R. 895). The law agent of the trustee is not disabled (*Rutherfurd*, 1891, 18 R. 1061). A sale to the trustee or a commissioner is voidable at the instance of the bankrupt or any creditor (see *Brown, supra*; *Noble, supra*).

(*a*) *Heritable Estate.*—Sec. 96 of the 1856 Act provides that "when any part of the estate consists of land or other heritable property, it shall be optional to the creditors to determine whether the trustee is to bring such property to judicial sale, or to dispose thereof by voluntary public sale, or by private sale."

Judicial sale, i.e. an action of ranking and sale, is rarely if ever resorted to.

Public voluntary sale is sale by public auction, the trustee and commissioners fixing the manner of sale and the upset price (*ib.*, s. 114). Failing a sale, the property may be re-exposed at a reduced upset. The purchaser receives a disposition by the trustee and commissioner, and takes the estate free from all securities or rights postponed to or ineffectual against the trustee. Where the trustee is not himself infeft, he may, without the concurrence of the bankrupt, grant conveyances of the estate, with such procuratories, precepts, or other warrants as the bankrupt might competently have granted, which conveyances are as effectual to the purchaser as if granted by the bankrupt with the concurrence of the trustee, and are not affected by any inhibition against the bankrupt (*ib.*, s. 105). The property may be conveyed subject to preferable securities upon it (see *M'Lane*, 1825, 4 S. 235; *Kirkland*, 1824, 2 S. 534).

Where any part of the heritable estate is subject to a preferable security conferring powers of sale, the creditor in such security may sell at his own hand in terms of his power, notwithstanding the sequestration, provided he commences proceedings before the creditors have resolved to sell by judicial or public voluntary sale, and does not unduly delay in carrying them out (B. A., 1856, ss. 112, 114); and the trustee may concur in the sale for the purpose of fortifying the title (*ib.*, s. 112). The trustee may, however, prevent the sale if he can qualify substantial injury (see *Beveridge*, 1829, 7 S. 279; *Kerr*, 1848, 11 D. 301). The trustee, or any posterior heritable creditor preferable to him, may, by petition to the Lord Ordinary or Sheriff, compel the selling creditor and purchaser to account for any reversion of the price (B. A., 1856, s. 112). Where the creditors resolve to sell any such estate subject to a security, the trustee may proceed to sell without interference if the resolution is prior to proceedings for sale by the secured creditor, or if such proceedings, although then begun, are unduly delayed (*ib.*, s. 114). There is no authority as to the extent of such proceedings required to exclude the trustee. The heritable creditor may concur in a sale by the trustee. The trustee in this case sells in his own name, but the articles of roup and conveyance are executed by him with consent of the creditor and commissioners, and the price is paid by the purchaser to the parties legally entitled thereto, and in so far as not paid at the time of delivery of the conveyance, it is consigned in the bank in which the money of the sequestrated estate is deposited; which payment or consignation discharges the property and the purchaser from the security in question, whether the secured debt be satisfied or not, and from all postponed securities (*ib.*, s. 113; as to judicial warrant for payment of price, see *infra*, and ss. 116, 117).

Sale of heritable property by the trustee by private bargain is competent with concurrence of a majority of the creditors in number and value, and of the heritable creditors, if any, and of the Accountant of Court, on such terms and conditions regarding price and otherwise as the trustee with concurrence of these parties may fix (*ib.*, s. 115; see *Dobie*, 1864, 2 M. 788). The creditors' consent must apparently be given at a meeting (*ib.*, s. 96; as to computing majority, see sec. 101 and *infra* "*The Creditors*"). The trustee cannot sell at his own hand (see *Robertson*, 1857, 19 D. 502).

Where the trustee sells by public auction or private bargain (under secs. 113, 114, or 115), it is his duty to make up a scheme of ranking and division of the claims of the heritable creditors and other creditors (such as inhibitors, see *M'Millan*, 1879, 6 R. 601; *Callum*, 1885, 12 R. 1137) on the price of the property sold; and such scheme must be reported by him to the Lord Ordinary on the Bills or either Division of the Court of Session, and the judgment thereon is a warrant for payment out of the price against the purchaser (B. A., 1856, s. 116; as to procedure, see *M'Millan, supra*; *Callum, supra*). It is competent for the Lord Ordinary or the Court, on application by the trustee or any creditor interested, with a report thereon by the Accountant of Court and on cause shown, to grant warrant for payment of preferable claims out of the price of the estate sold, or to authorise an interim scheme of division out of the price, which scheme of division is disposed of as the scheme of division already mentioned (*ib.*, s. 117). Where a trustee sold under sec. 114, it was held that he had a good title to receive payment of the price before a scheme of ranking and division had been made up, such payments, however, not affecting the claims of secured creditors over the property (*Callum, supra*).

A heritable creditor not concurring in a sale does not seem to be liable for any share of the expenses of the sale, unless directly beneficial to him, or of the expenses of the sequestration (see Goudy on *Bankruptcy*, 322; Kinnear on *Bankruptcy*, 138; *M'Lane*, 1825, 4 S. 235; *Globe Insur. Co.*, 1839, 1 D. 605; Bell, *Com.*, 5th ed., ii. 422–425).

(*b*) *Moveable Estate.*—The Bankruptcy Act contains no provision as to the mode of selling the moveable estate. Private sale of book debts has been held incompetent, but rather on the ground that such debts should be recovered and not sold (*Crichton*, 1833, 11 S. 781; *Robertson*, 1857, 19 D. 502). It is understood that in practice moveable assets of the estate are very commonly sold by private bargain.

(*c*) *Outstanding Estate.*—If, on the lapse of twelve months from the date of the deliverance actually awarding sequestration, it appears to the trustee and commissioners expedient to sell the heritable or moveable estates not disposed of, and any interest which the creditors have in the outstanding debts and consigned dividends, they must fix a day for holding a meeting of the creditors to take the same into consideration; and the trustee, besides advertising the same in the *Gazette*, must, fourteen days before the day appointed, send by post to each creditor claiming on the estate a notice of the time and place of the meeting, with a valuation of the estates and of the outstanding debts and the consigned dividends; and if three-fourths in value of the creditors assembled at the meeting decide in favour of a sale in whole or in lots, the trustee shall cause the estates, debts, and dividends to be sold by auction, after notice thereof published at least one month previous to the sale, once in the *Gazette* and in such other newspapers as the creditors at the meeting shall appoint (B. A., 1856, s. 136).

XII. Ranking of Claims and Payment of Dividends.

1. Divisible Fund 220
2. Proof of Claims for Ranking . 220
3. Special Rules of Ranking . . 221
   (*a*) Interest and Discount . 221
   (*b*) Secured Creditors . . 221
   (*c*) Privileged Creditors . . 222
   (*d*) Contingent and Annuity Creditors . . . 222
   (*e*) Inhibitions . . . 222
   (*f*) Double Ranking — Cautioners and Co-obligants . 222
   (*g*) Partial Payments . . 224
4. Adjudication on Claims . . 224
5. Appeal against Trustee's Deliverances 226
6. Payment of Dividends . . 227
7. Unclaimed Dividends . . 227

1. Divisible Fund.—The proceeds of the sequestrated estate when realised, and after deduction of (1) the expenses incurred by the petitioning or concurring creditor prior to the election of the trustee, and (2) the expenses of administration, form a fund for division among "those who were creditors of the bankrupt at the date of the sequestration, ranked according to their several rights and interests" (B. A., 1856, s. 121). Creditors holding preferable securities over estate of the bankrupt must be paid in full out of such estate, and without being charged with a share of the expenses of the sequestration, before such estate can be claimed by the trustee (*Globe Insur. Co.*, 1839, 1 D. 605; *Taylor*, 1840, 2 D. 812; B. A., 1856, s. 114; Goudy on *Bankruptcy*, 325).

Immediately on the expiration of four months from the date of the deliverance actually awarding sequestration, the trustee must proceed to make up a state of the whole estate of the bankrupt, of the funds recovered by him, and of the property outstanding (specifying the cause why it has not been recovered), and also an account of his intromissions, and generally of his management; and within fourteen days after the expiry of said four months, the commissioners meet and examine such state and account, and ascertain whether the trustee has lodged the moneys recovered by him in bank or not; and if he has failed to do so, they must debit him with interest and 20 per cent.; and they must audit his accounts and settle his commission, and certify in the sederunt book the balance due to or by the trustee; and declare whether any or what part of the net produce of the estate, after making a reasonable deduction for future contingencies, shall be divided among the creditors (B. A., 1856, s. 125). Similar states and accounts must be made up and procedure followed on the expiration of eight months from the date of said deliverance, and at similar intervals of time thereafter, in order that a dividend may be made on the expiration of every three months from the day of payment of the immediataly preceding dividend, until the whole funds shall be divided (*ib.*, ss. 130, 132).

2. Proof of Claims for Ranking.—The claiming creditor must produce oath, account, and vouchers as for voting purposes; the general rule being that for purposes of ranking the creditor must produce such evidence as would be necessary to prove the debt in an action of constitution. Claims for ranking, however, must be admitted to investigation *habili modo*, although the vouchers produced with the oath are insufficient to prove the debt *primâ facie* (*Pilling*, 1857, 19 D. 938; *A. & B.*, 1865, 4 M. 83; *Phosphate Sewage Co.*, 1874, 1 R. 840, 3 R. (H. L.) 77). It is different in claims for voting, in which, if a voucher is *ex facie* invalid, it cannot be set up by *prout de jure* evidence, and if valid *ex facie*, cannot be cut down by such evidence.

The kind of evidence by which a claim for ranking may be supported depends upon the legal rules of evidence (see, *e.g.*, *Forbes*, 1851, 13 D. 1272;

Purvis, 1869, 7 M. 764). But in regard to reference to oath, it has been held incompetent for a creditor to refer his claim to the oath of the bankrupt (*Adam*, 1847, 9 D. 560; *Thomson*, 1855, 17 D. 1081; Dickson on *Evidence*, 1479–81); and reference to the trustee's oath is also incompetent (Dickson on *Evidence*, s. 1463).

A creditor entitled to a preference must claim it in his oath (Bell, *Com.*, 5th ed., ii. 337); and must produce evidence to substantiate such claim, as well as the vouchers instructing the debt due to him (*Walker*, 1853, 16 D. 226; see *Forbes*, 1851, 13 D. 1272).

Claims for ranking must, to receive effect in the first dividend, be produced two months before the time fixed for payment thereof, or, when the time has been accelerated, one month prior thereto (B. A., 1856, s. 123). As to subsequent dividends, the time for lodging claims is at least two months before the date fixed for payment (B. A., 1857, s. 5). The periods for lodging claims are imperative (*Wright*, 1842, 5 D. 164; *Forbes, supra*). By failure to timeously lodge a claim a creditor does not absolutely forfeit his right to the amount of the dividend in question. Thus if he fail to lodge for the first dividend, he is entitled, on occasion of the payment of the second dividend, to receive out of the first of the fund (if sufficient for that purpose) an equalising dividend corresponding to the dividend he would have drawn if he had claimed in time for the first dividend (B. A., 1856, s. 123). And the same applies to subsequent dividends (*ib.*).

If a creditor be not in possession of the requisite accounts and vouchers previously to the time assigned for lodging claims for any dividend, he must state in his oath the cause of their non-production, and in whose hands they are; and such oath entitles him to have a dividend set apart till a reasonable time be afforded for production, or for otherwise establishing the debt according to law; but he is not entitled to vote till such production be made, or the debt be so established (*ib.*, s. 50; see *Taylor*, 1848, 10 D. 335; *Liston*, 1853, 15 D. 923; *Holiday*, 1848, 10 D. 1476). Where the trustee omitted to send the proper statutory notices, creditors who, in consequence thereof, had not lodged claims, were found entitled to interdict the trustee from paying the dividend without admitting them to share therein (*Scobie*, 1869, 8 M. 161). Special provision is made for the case of creditors resident out of the United Kingdom (B. A., 1856, s. 124).

3. Special Rules of Ranking.—(*a*) *Interest and Discount.*—Interest can only be claimed, in the first instance, to date of sequestration; but if, after paying in full all the claims ranked, there remain a surplus, the creditor is entitled to claim thereout the full amount of the interest on his debt in terms of law (*ib.*, s. 52). If the debt is one due after date of sequestration, the creditor must deduct interest and also any discount allowed by usage of trade (*ib.*).

(*b*) *Secured Creditors.*—In claiming to rank, a creditor holding a security over part of the sequestrated estate must in his claim put a specified value thereon, and deduct such value from his debt and specify the balance, and he ranks only for such balance (B. A., 1856, s. 65). A security requiring to be so deducted must be one forming a burden on the bankrupt's estate at the date of sequestration (*M'Lelland*, 1857, 19 D. 574; *British Linen Co.*, 1877, 4 R. 651; *Royal Bank*, 1882, 9 R. 679; *University of Glasgow*, 1882, 9 R. 643; *ex parte Brett*, L. R. 6 Chan. App. 838). A bond over a property sold by the bankrupt before sequestration does not therefore fall under the rule (*University of Glasgow, supra*; cf. *Royal Bank, supra*). A creditor who has valued a security for a first dividend may revalue it for a subsequent dividend if unrealised and altered in value (*Commercial Bank*, 1885, 13 R.

257). A creditor claiming solely for a preference does not require to value and deduct (*Brown*, 1849, 11 D. 474).

To protect the general body of creditors against undervaluation of securities, the Bankruptcy Act gives right to the trustee, with consent of the commissioners, to demand a conveyance of any security at the valued amount (s. 65; *Hunter*, 1860, 22 D. 1166), provided he do so within a reasonable time (*Henderson's Tr.*, 1872, 10 M. 946). Failing his doing so, "the full benefit of such security" is reserved to the creditor (*ib.*), *i.e.* to the extent and effect of obtaining full payment of his debt. In either case the creditor is ranked for and receives a dividend on the balance specified in his claim, and no more, without prejudice to the amount of his debt in other respects (*ib.*). The trustee is entitled to access to a security to enable him to decide what course he shall adopt (*Ross*, 1826, 5 S. 178). If a security is sold, the net sum realised will fall to be substituted in the creditor's claim for the former valued amount.

Obligations by co-obligants, or collateral securities (*i.e.* not over the bankrupt estate) must be set forth in the creditor's oath, but are not required to be valued and deducted for ranking (B. A., 1856, ss. 22, 49; *Balfour*, 29 Jan. 1819, F. C., 1 Sh. App. 131; *Black*, 1840, 2 D. 706; *University of Glasgow*, 1882, 9 R. 643, per Ld. Pres. Inglis; see *Ewart*, 1865, 3 M. (H. L.) 36).

A creditor of a company claiming on the estate of a partner is entitled to rank only under deduction of his claim against the company estate (B. A., 1856, s. 66). The valuation and deduction is made in this case by the trustee on the partner's estate (*ib.*; see *M'Clelland*, 1857, 19 D. 574), subject to appeal (s. 169). The creditor, however, must in his oath state his claim against the other partners, if any.

(*c*) *Privileged Creditors* holding debts which are preferable *ex lege* without any special security, are ranked on the free funds of the sequestrated estate prior to all ordinary creditors, according to the order of preference *inter se* recognised by law (see Bell, *Prin.* ss. 1402 *et seq.*).

(*d*) *Contingent and Annuity Creditors.* — The rules regarding such claims have been already stated (*ante*, p. 189). A creditor who does not value his debt is entitled to have a dividend set aside for him (*ib.*, s. 129; see *Mackenzie*, 1855, 17 D. 751, per Ld. Deas; *Garden*, 1860, 22 D. 1190). If the contingency is purified before valuation has taken place, the creditor draws a dividend on the actual amount of the debt, but former dividends allocated to other creditors are not disturbed (B. A., 1856, s. 53).

(*e*) *Inhibitions.*—Where inhibition is used against a debtor who is afterwards sequestrated, and whose debts have been partly contracted before and partly after the inhibition, the proper mode of ranking upon the proceeds of the heritable estate is, in the first place, to rank all the creditors entitled to dividend *pari passu*, and then to give the inhibiting creditor, by way of drawback from the posterior creditors, the difference between an equal dividend to all and the dividend which he would have drawn had there been no debts contracted subsequent to the inhibition (*Baird & Brown*, 1872, 10 M. 414).

(*f*) *Double Ranking.—Cautioners and Co-obligants.*—Where a principal and cautioner are bound for a debt and the principal becomes bankrupt, there can only be one claim in respect of the debt against the bankrupt estate. Thus where the creditor ranks on the estate for his whole debt and obtains a dividend, and thereafter recovers the balance from the cautioner, the latter cannot claim to rank on the principal's estate in relief of the sum so paid by him. The cautioner is not thus

deprived of his right of relief. The ranking and dividend obtained by the creditor enure to the cautioner's benefit by reducing the amount which he can be called on to pay; and he is placed in exactly the same position as if he had paid up the full amount of the debt and then ranked for relief upon the principal debtor's estate. To allow the cautioner as well as the creditor to rank would involve a double ranking, and the payment twice over of the dividend effeiring to the portion of the debt paid by the cautioner. So far as the bankrupt estate is concerned, the payment of dividend on a debt is payment of the debt itself (*M'Millan*, 1879, 6 R. 601; *Mackinnon*, 1881, 9 R. 393; Bell, *Com.* ii. 420). Thus in the case of a bill drawn or accepted for accommodation, if both parties become bankrupt and the holder ranks on the estate of each for the amount in the bill and receives dividends, the trustee on the estate of the accommodation party or cautioner is not entitled to claim against the estate of the principal debtor in relief of the dividend which the former estate has paid to the holder (*Anderson*, 1876, 3 R. 608). Where in such circumstances the cautioner has in his hands funds belonging to the principal debtor, but which have not been specifically appropriated for his indemnification on the bill, the trustee on the cautioner's estate is, on the same principle, debarred from claiming a right of retention over these funds in relief of the dividends paid from the cautioner's estate (*Anderson, supra*; *Mackinnon, supra*). To allow such retention would be to enable the cautioner's estate to obtain payment of a debt which the principal debtor's estate has *ex hypothesi* already paid in the form of the dividend drawn on the whole debt by the bill-holder. It is otherwise where the cautioner holds securities specifically appropriated for his relief. In this case the cautioner's trustee is entitled, in implement of the contract under which the securities have been given, to realise them and recoup his estate for the dividends paid by it to the bill-holder (*Royal Bank*, 1881, 8 R. 805, and 9 R. (H. L.) 67). Where the securities are insufficient to cover the whole debt, and the cautioner is solvent, the result to the cautioner and the bankrupt estate of the principal debtor will obviously vary according as the creditor either (1) ranks for the full debt on the principal's estate in the first instance, and recovers the balance beyond his dividend from the cautioner, or (2) recovers the full debt in the first instance from the cautioner, leaving him to rank on the principal's estate for the amount so paid, under deduction of the securities held by him. It has been decided in one Scotch case that, as it is the right of the creditor to take which course he pleases, the trustee on the principal debtor's estate is not entitled, in the event of the creditor taking the first course, to insist on reckoning with the cautioner on the same footing as if the creditor had chosen to adopt the second course (*Jamieson*, 1875, 2 R. 701; cf. *Christie*, 1838, 16 S. 1224, per Ld. Mackenzie). The rule in England seems to be to the contrary, at least where the creditor claims on the principal debtor's estate by an arrangement with the cautioner and with a view to the latter's advantage (*Baines*, 15 Q. B. D. 102, 16 Q. B. D. 330; *ex parte Sherrington*, 1 M. D. & D. 195).

The rule against double ranking only applies where there is a proper bankruptcy involving divestiture of the debtor and the handing over of his estate for distribution among his creditors (*Mackinnon*, 1881, 9 R. 393).

Ranking of Creditor on Estate of Cautioner.—If the debt is not yet due, the creditor can rank contingently on the bankrupt estate of the cautioner, to the effect of having a dividend set apart for his security (Bell, *Com.* i. 368). If the debt is due and the principal has made default, the creditor can rank on the cautioner's estate for the amount due at the date of the

bankruptcy (*ib.*). If a cautioner has undertaken an obligation of greater nominal amount than the debt really due by the principal debtor, the creditor cannot rank on the cautioner's estate for more than the true amount of the debt (*Jackson*, 1875, 2 R. 882). Where the holder of bills claimed and was ranked on the estate of an indorser and received a dividend, and thereafter obtained full payment from the acceptor, it was held that the indorser, after being discharged on composition, was entitled to demand repayment of the amount of the dividend paid from his estate (*Patten*, 1853, 15 D. 617). If there are several cautioners, bound as such, the right of division is lost by the bankruptcy of one or more of them, and the creditor may claim the whole debt from any solvent cautioner, or may rank for the whole debt on the estate of each bankrupt cautioner, and claim any balance from the solvent cautioners (Bell, *Com.* i. 371–2). If the creditor holds a security for the debt, a cautioner cannot claim the benefit of it without paying the full debt (*Ewart*, 1865, 3 M. (H. L.) 36).

A co-cautioner who pays more than his share after the principal's default may rank on the estates of the other cautioners in relief of the excess, provided the creditors have not already ranked (Bell, *Com.* i. 369, 373). A solvent co-cautioner, paying the whole debt, may rank on the estate of each bankrupt cautioner for half the amount so paid, in relief of the excess beyond his proper share (*ib.*, p. 371). If one co-cautioner becomes bankrupt before the principal's default, the other cautioners seem to be entitled to rank contingently on his estate in the event of the creditor not ranking thereon (Goudy on *Bankruptcy*, 597; *ex parte Stokes*, De G. 618).

A cautioner's right to rank on the bankrupt estate of the principal debtor is as follows:—(1) If the debt is not yet due and the creditors have not ranked, the cautioner may be ranked to the extent of having a dividend set aside for him in case he pays the debt (Bell, *Com.* i. 365; ii. 421). If the creditor ranks for the full debt, there can be no ranking of the cautioner. If the cautioner pays the debt, he may rank for the amount without an assignation from the creditor (Bell, *Prin.* s. 255; B. A., 1856, s. 65; see *Ewart*, 1865, 3 M. (H. L.) 36); and where the cautioner pays the outstanding debt after the creditor has drawn dividends from the principal's estate, the cautioner may thus rank *quoad* future dividends (Goudy on *Bankruptcy*, 597; *in re Bulmer*, 3 De G., M. & G. 218). Where the cautioner pays part of the debt before the principal's bankruptcy, then, as the creditor must deduct such amount in ranking, the cautioner may rank therefor (see *Thomson*, 1863, 1 M. 913; *Paley*, 12 Ves. 435).

Ranking on Bills of Exchange.—*Vide ante*, vol. ii. p. 122.

(*g*) *Partial Payments* before sequestration to account of a debt, whether made by the bankrupt or a co-obligant, must be deducted from the creditor's claim (B. A., 1856, s. 121; *Robertson*, 1823, 2 S. 403; *Mein*, 1824, 2 S. 645; *Farquharson*, 1832, 10 S. 526; *Hamilton*, 1841, 3 D. 494; Bell, *Com.*, 5th ed., ii. 338–9), but not if made after the date of sequestration (*ib.*; *Black*, 1840, 2 D. 706).

4. Adjudication on Claims.—Within fourteen days after the expiration of four months from the date of the deliverance actually awarding sequestration, the trustee must (unless payment of dividend has been postponed) examine the creditors' claims, and, in writing, either (1) admit or (2) reject them, or (3) require further evidence in support thereof (B. A., 1856, ss. 125, 126; see *Ritchie*, 1875, 2 R. 297; *Henderson*, 1849, 11 D. 1470. As to case of postponement of dividend, see *Monkhouse*, 1881, 8 R. 454). There must be a deliverance on each claim, and it should be dated and

signed and unambiguous (B. A., 1856, s. 126; Bell, *Com.*, 5th ed., ii. 430; *Ure*, 1824, 2 S. 545; rev. 1 W. & S. 565). The trustee cannot both reject a claim and at the same time call for further evidence (*Ritchie*, 1875, 2 R. 297, where interdict granted against payment of dividend). The trustee must make up classified lists of the claims admitted and rejected (B. A., 1856, s. 126).

Admission of Claim may be total or partial, absolute or conditional (see *Gibb*, 1838, 16 S. 1002; *Stewart*, 1851, 13 D. 1337; *Ewart*, 1865, 3 M. (H. L.) 36; *Assets Co.*, 1889, 26 S. L. R. 593; *Clydesdale Bank*, 1890, 27 S. L. R. 493), and may admit the claim as ordinary, preferable, contingent, or postponed. Where a creditor claims a preference, the trustee may rank him as an ordinary creditor, rejecting his claim for a preference (*Forbes*, 1851, 13 D. 1272). A deliverance admitting a claim, when once issued, cannot be recalled by the trustee *quoad* the particular dividend, and the creditor can claim the dividend from the trustee although the funds are exhausted (*Hamilton*, 1830, 9 S. 40; but cf. *Monkhouse*, 1881, 8 R. 454, as to deliverance where no dividend declared). Informal adjustment of a claim between the creditor and the trustee's clerk was held no bar to rejection (*Holiday*, 1848, 10 D. 1476). Admission of a claim for a first dividend does not bar its rejection in whole or in part for a subsequent one.

Rejection of a Claim must proceed on a ground specified in the deliverance (B. A., 1856, s. 126; see *Adcock*, 1843, 6 D. 199).

Call for further Evidence.—It is the duty of the trustee to call for further evidence where the circumstances make it appropriate; and if he rejects without doing so, he may be liable in expenses in an appeal (*A. & B.*, 1865, 4 M. 83; *Purvis*, 1869, 7 M. 764). Power is given him to "examine the bankrupt, creditor, or any other party on oath relative thereto" (B. A., 1856, s. 126), and it is his duty to take such evidence as is available (*Pilling*, 1857, 19 D. 938; *A. & B.*, *supra*; see *Thomson*, 1889, 16 R. 333; *Phosphate Sewage Co.*, 1874, 1 R. 840; 1876, 3 R. (H. L) 77), for which purpose he may obtain a warrant from the Sheriff to compel attendance of parties for examination (see Murdoch on *Bankruptcy*, 320). As a rule, the trustee should call for further evidence where it appears to him that the claim is a *bonâ fide* one, and that there is a prospect of its being established by evidence (*Pilling*, *supra*; *Ritchie*, 1875, 2 R. 297, per Ld. Pres. Inglis). On the other hand, where the facts in dispute are involved and complex, the proper course for the trustee may be to reject the claim, and leave the creditor to establish it on appeal (see *Phosphate Sewage Co.*, *supra*). Where the trustee has rejected without calling for further evidence, the Court may on appeal remit back to him for the purpose (*Pilling*, *supra*; *Oliver*, 1869, 7 M. 407), or may itself take proof (*Ritchie*, 1875, 2 R. 297), or remit back to the Sheriff for that purpose (*Thomson*, 1889, 16 R. 333).

Within eight days after the expiration of the fourteen days above mentioned, the trustee must give notice in the *Gazette* published next after expiration of such fourteen days of the time and place of payment of the dividend, and also notify the same by letters put into the post office on or before the first lawful day after the said fourteen days addressed to each creditor, in which he must specify the amount of the claim and the proposed dividend thereon; and when he has rejected any claim, he must notify the claimant thereof by letter as aforesaid, which letter must also contain a copy of his deliverance and specify the amount of the claim (B. A., 1856, s. 127; see *Adcock*, 1843, 6 D. 199).

Where there is an appeal to the Accountant of Court against the trustee's commission, the above procedure is postponed until the determina-

tion of the appeal (52 & 53 Vict. c. 39, s. 17). Where no immediate dividend is to be paid, the trustee simply advertises the postponement in the *Gazette* (B. A., 1856, s. 134).

5. Appeal against Trustee's Deliverances on Claims.—A deliverance by the trustee, admitting or rejecting a claim, may be appealed either to the Lord Ordinary on the Bills or to the Sheriff, within fifteen days from the date of publication in the *Gazette* of the foresaid notice of payment, by "a short written note" lodged and marked by the Bill Chamber Clerk or Sheriff Clerk (B. A., 1856, s. 127). Failing such appeal, the decision of the trustee is final and conclusive as regards the dividend in question (*ib.*); but in the case of a claim being rejected, the decision is without prejudice to any new claim being afterwards made in reference to future dividends, such new claim not disturbing prior dividends (*ib.*; *Blair*, 1844, 6 D. 705). After the lapse of the appealing days a reduction is not competent (*Barbour*, 1835, 14 S. 27). An appeal against a deliverance calling for the production of further evidence is regulated by sec. 169 of the 1856 Act (*Brown*, 1859, 21 D. 1133. *Vide post*, p. 244).

Any creditor may appeal, and that although his own claim is under appeal as having been rejected by the trustee (B. A., 1856, s. 127; *Morris*, 1843, 5 D. 439). The bankrupt cannot appeal under sec. 127 (*Robertson*, 1885, 13 R. 424); but it has been considered that he can appeal under sec. 169 where he has an interest to do so (*ib.*).

Where the deliverance is one rejecting a claim, the trustee is the proper respondent. Where it is one admitting a claim, the common practice is for the appeal to be served on the trustee, who intimates it to the claimant, leaving him to compear and defend the deliverance if so advised; but the correct course is to serve the appeal upon the claimant, he being the real contradictor (*Skinner's Tr.*, 1887, 14 R. 563). Where a trustee had admitted a preferable claim, it was held that he had no right to appear to defend it (*ib.*). Where a trustee rejected the claim of a creditor to a preference on a certain fund, and sustained the claim of another creditor which exhausted the fund, and the former creditor appealed against the first deliverance only, it was held that the appeal was competent, and that the proper course was to serve the appeal on the creditor whose claim had been sustained, in order that he might appear if so advised (*Marshall*, 1867, 5 M. 377). In the case of a scheme of ranking on the proceeds of the heritable estate, it was held that an appeal by a creditor against the deliverance on his claim competently brought under review the general scheme of ranking (*ib.*).

There is no statutory form of appeal. A style will be found in the Appendix hereto.

Where a creditor is successful in an appeal and found entitled to expenses against the trustee, no share of these expenses can be charged upon his dividend (*De Tastet*, 1825, 4 S. 245; *Houston*, 1841, 4 D. 80; *Adam & Kirk*, 1866, 5 M. 40). And the same holds as to the trustee's expenses, if no expenses are found due (*Scott*, 1822, 1 S. 448). The trustee is liable personally to a successful creditor for expenses given against him (*Cowie*, 1893, 20 R. (H. L.) 81; *Jeffrey*, 1821, 1 S. 103; affd. 1824, 2 Sh. App. 349; *A. & B.*, 1865, 4 M. 83; *Purvis*, 1869, 41 Sc. Jur. 396; see *White*, 1894, 21 R. 649; *Craig*, 1896, 24 R. 6). But a decerniture against him "as trustee" will not involve personal liability (see *Craig*, *supra*, and cf. *Gibson*, 1833, 11 S. 656).

Within fourteen days after the expiration of eight months from the actual award of sequestration, the trustee and commissioners proceed to

make provision for payment of a second dividend, should there be sufficient funds, in the same way as in regard to the first dividend, and the same procedure applies in regard to adjudication on claims and right of appeal, etc. (B. A., 1856, s. 130). And the same holds as to any subsequent dividends (20 & 21 Vict. c. 19, s. 6).

6. Payment of Dividends.—In ordinary course the first dividend is declared by the commissioners at their meeting for auditing the trustee's accounts and fixing the trustee's remuneration, held within fourteen days after the expiry of four months from the actual award of sequestration. They then declare what part of the estate shall be divided, if any. The second dividend is declared at the corresponding meeting held within fourteen days after the expiry of eight months from the award; and the like procedure takes place at the subsequent meetings, which fall to be held at such intervals as will enable a dividend to be paid at the end of three months from the date of payment of the preceding one (B. A., 1856, ss. 125, 130, 132; 20 & 21 Vict. c. 19, s. 6). The declaration of dividend is made by a writing under the hands of the commissioners engrossed or copied in the sederunt book (B. A., 1856, s. 125).

Before the expiry of six months from the award of sequestration, the trustee must make up a scheme apportioning the fund declared for division as first dividend among the creditors who have been ranked or whose claims are then under appeal (*ib.*, s. 128); and a scheme applicable to the second dividend must be made up within ten months of the award, and similarly with regard to subsequent dividends (*ib.*, ss. 129, 131).

The first dividend is, in ordinary course, paid on the first lawful day after the expiry of six months from the date of the award of sequestration; the second on the first lawful day after the expiry of ten months from said date; and subsequent dividends on the first lawful day after the expiry of three months from the day of payment of the preceding one (*ib.*, ss. 125, 129, 131, 132; 20 & 21 Vict. c. 19, s. 6). The trustee must appoint a place of payment, and notify the creditors by *Gazette* notice and by post letters sent to them individually (B. A., 1856, ss. 127, 130; see *Adcock*, 1843, 6 D. 199).

Dividends may be arrested or assigned (see *Barbour*, 1835, 14 S. 27; *Wallace*, 1821, 1 S. 56, 2 Sh. App. 467).

The trustee must lodge in bank at the time of payment of dividend, the dividends effeiring to (1) contingent creditors, (2) creditors in claims under appeal, to remain until purification of the contingency or disposal of the appeal (B. A., 1856, s. 129). He is responsible for money not lodged (*Houston*, 1842, 4 D. 1220). A dividend so set apart for a creditor whose claim fails on appeal, forms part of the fund for the next dividend (*Blair*, 1844, 6 D. 705).

The Bankruptcy Act, 1856, contains provisions under which the ordinary periods for payment of dividends may be accelerated, or postponed, or altered (ss. 133, 134, 135). A resolution to postpone is subject to appeal under sec. 169 (*Steele*, 1865, 3 M. 587).

7. Unclaimed Dividends.—Before the trustee's discharge, he must deposit in bank, under direction from the Accountant of Court, any unclaimed dividends, and transmit the deposit receipts to the Accountant, who retains them for seven years from the date of deposit, and who keeps a register of all unclaimed dividends (B. A., 1856, s. 153; 58 & 59 Vict. c. 19, s. 10). The interest on such deposits goes into a general fund called "The Interest Account of Unclaimed Dividends." The bank must, on or before the first day of April in each year, account to the Queen's and

Lord Treasurer's Remembrancer for the interest on the interest account of unclaimed dividends for the preceding calendar year. On the expiry of the seven years, the Accountant must hand over the deposit receipts to the Queen's and Lord Treasurer's Remembrancer, who thereupon obtains payment of the amount due, principal and interest, from the bank in which the deposit was made. After the trustee's discharge, any person producing evidence of his right to an unclaimed dividend may obtain a warrant from the Lord Ordinary on the Bills for payment without interest (*ib.*). The bankrupt has no right to such dividends (*Air*, 1886, 13 R. 734). A dividend arrested in the hands of the trustee and lodged by him in bank was held not to be an unclaimed dividend, and, on the arrestment being loosed, the creditor was found entitled to the sum with interest (*Parker*, 1841, 3 D. 1013).

XIII. Discharge of Bankrupt without Composition.

1. Application for Discharge . . 228
2. Award of Discharge . . . 230
3. Effects of Discharge . . . 231
4. Discharge of Company and Partners 233
5. Preferences and Collusive Agreements for procuring Discharge . 233

1. Application for Discharge.—The periods at which it is competent under the Bankruptcy Act, 1856, to apply for discharge are as follows: 1. At any time after the meeting held after the bankrupt's examination, provided that every creditor who has duly produced his oath concurs in the petition; (2) on the expiration of six months from the date of the deliverance actually awarding sequestration, provided a majority in number and four-fifths in value of the creditors who have produced oaths concur; (3) on the expiration of twelve months from the date of said deliverance, provided a majority in number and two-thirds in value of such creditors concur; (4) on the expiration of eighteen months from the date of said deliverance, provided a majority in number and value of such creditors concur; (5) on the expiration of two years from the date of said deliverance, without any consents of creditors (s. 146; see sec. 101 as to computing majorities; and *Gemmell*, 1853, 16 D. 264, as to contingent creditors).

The petition is presented to the Lord Ordinary on the Bills or the Sheriff (*ib.*). A form will be found appended. Where the bankrupt is abroad, it may be presented by a mandatory (*Cameron*, 28 Feb. 1818, F. C.; see *How*, 1833, 12 S. 211).

The concurrence of creditors, where required, must be given prior to the presenting of the petition (*Gilfillan*, 1836, 15 S. 149). It must be expressed in writing and contain reference to the trustee's report as to the bankrupt's conduct (see *infra*); but there is no prescribed form. The minutes of a creditors' meeting at which such concurrence has been given will be sufficient evidence (Bell, *Com.*, 5th ed., ii. 445). The concurrence must be express (*Charles*, 1835, 14 S. 139). It may be withdrawn prior to the presentation of the petition (see as to withdrawal, Bell, *Com.*, *ut supra*; *Reid*, 1838, 16 S. 549; *Sheriff*, 23 Nov. 1809, F. C.; *Megget*, 1830, 8 S. 1063; *Walker*, 1835, 13 S. 759).

It is not competent for the bankrupt to present a petition for discharge, or to obtain consents of creditors, until the trustee has prepared a report as to the bankrupt's conduct, stating (1) whether he has made a fair discovery and surrender of his estate; (2) whether he has attended the examination; (3) whether he has been guilty of any collusion; (4) whether his bankruptcy has arisen from innocent misfortune or business losses, or from the bankrupt's fault (B. A., 1856, s. 146; see *Scott*, 1872, 10 M. 626;

Campbell, 1855, 17 D. 430; *Dixon's Trs.*, 1867, 5 M. 767; for form of report, see notes issued by Accountant, printed in Parliament House Book). The report may be demanded on the lapse of five months from the date of the deliverance awarding sequestration (s. 146; *Mather*, 1881, 8 R. 952), free of cost (*White*, 1879, 6 R. 854; *Mather, supra*). It must be produced in the application for discharge and referred to in creditors' consents thereto (s. 146; *Scott, supra*). While constituting *primâ facie* evidence (*Findlay*, 1832, 10 S. 813; *Cooper*, 1872, 11 M. 38), it is not conclusive as to the facts stated in it (see *Dixon's Trs.*, 1867, 5 M. 767). Where a trustee has died or become incapacitated, or has left the country and cannot be found, the Court will, on petition, remit to the Accountant of Court, and accept his report in lieu of one by the trustee (*White*, 1893, 20 R. 600; *Meldrum*, 1895, 2 S. L. T. p. 406).

The petition, when presented, is ordered to be intimated in the *Gazette* and to each creditor (s. 146). The subsequent procedure, where discharge is obtained, embraces three steps: (1) A deliverance finding the bankrupt entitled to discharge; (2) a declaration or oath by the bankrupt; (3) a deliverance granting discharge (ss. 146, 147).

In the case of no opposition being offered to the application, the Bankruptcy Act, 1856, provided that, at the distance of not less than twenty-one days from the publication of the intimation of the petition, the Lord Ordinary or Sheriff should pronounce a deliverance finding the bankrupt entitled to a discharge (s. 146; see *Millar*, 1877, 5 R. 144). By subsequent statutes, however, important changes have been made on this rule. The Bankruptcy Act, 1860 (23 & 24 Vict. c. 33, s. 3), conferred on the Court a discretionary power to refuse discharge if it appears from the report of the Accountant or other evidence that the bankrupt has fraudulently concealed any part of his estate or effects, or has wilfully failed to comply with any of the provisions of the Bankruptcy Act, 1856 (see *Millar*, 1877, 5 R. 144). By the Bankruptcy and Cessio Act, 1881 (44 & 45 Vict. c. 22, s. 6), it is provided that discharge shall not be granted unless it is proved to the satisfaction of the Lord Ordinary or Sheriff either—"(*a*) that a dividend or composition of not less than 5s. in the £ has been paid out of the estate of the bankrupt, or that security for payment thereof has been found to the satisfaction of the creditors; or (*b*) that the failure to pay 5s. in the £, as aforesaid, has, in the opinion of the Lord Ordinary or the Sheriff as the case may be, arisen from circumstances for which the bankrupt cannot justly be held responsible." If the failure to pay 5s. in the £ has arisen wholly or mainly from the fault of the bankrupt, the Court has no discretion, but must refuse discharge (see *Shand*, 1882, 19 S. L. R. 562; *Wilson*, 1882, 20 S. L. R. 17; *Clarke*, 1883, 11 R. 246; *Boyle*, 1885, 12 R. 1147; *Phillips*, 1885, 13 R. 91). The onus of proof lies on the bankrupt. In order to determine whether either of the aforesaid conditions has been complied with, the Lord Ordinary or Sheriff has power to require the bankrupt to submit such evidence as he may think necessary, and to allow any objecting creditor such proof as he may think right (44 & 45 Vict. c. 22, s. 6 (2); *Alison*, 1890, 18 R. 212). A remit may be made to the Accountant to report (see *Clarke, supra*; *Boyle, supra*). The judgment of the Lord Ordinary or Sheriff under the above-mentioned provisions of the Act of 1881 is subject to appeal in the manner provided by secs. 171 and 170 of the Bankruptcy Act, 1856, a judgment of the Inner House on any such appeal being final (44 & 45 Vict. c. 22, s. 6 (3)). In the event of a discharge being refused under said provisions, the bankrupt may, if his estate shall yield or he shall pay to his creditors such additional sum as will with

the dividend or composition previously paid out of his estate during the sequestration make up 5s. in the £, apply for it anew in the same manner as if a dividend of 5s. had originally been paid out of his estate (*ib.*, s. 6 (4)).

A petition for discharge may be opposed by any creditor, whether he has proved his debt or not (*Cant*, 1868, 6 M. 368; see *Samson*, 1851, 13 D. 1395. As to creditor who has given concurrence, see *Reid*, 1838, 16 S. 549, per Ld. Meadowbank). The trustee, if a creditor, may oppose (see *Wylie & Lochead*, 1859, 21 D. 577).

In the case of opposition the Act of 1856 provides that the Lord Ordinary or Sheriff "shall judge of any objections against granting the discharge, and shall either find the bankrupt entitled to his discharge or refuse the discharge, or defer the consideration of the same for such period as he may think proper, and may annex such conditions thereto as the justice of the case may require" (s. 146; as to conditions, see *Napier*, 1850, 13 D. 222; *Learmonth*, 1858, 20 D. 418; *Blaikie*, 1871, 10 M. 140; *Kirkland*, 1886, 13 R. 798; *Reid*, 1893, 20 R. 510; *M'Carter*, 1893, 20 R. 1090). In the case last cited it was made a condition that the bankrupt should pay the expenses of the sequestration.

The grounds for refusing discharge under the Bankruptcy Act, 1860, and Bankruptcy and Cessio Act, 1881, already stated, apply equally whether the petition is opposed or not. The following grounds of opposition may also be pleaded:—

(1) Material defects in the statutory requirements under the petition (Bell, *Com.*, 5th ed., ii. 441; see *How*, 1833, 12 S. 211; *Wylie & Lochead*, 1859, 21 D. 577; *Scott & Campbell*, 1872, 10 M. 626; cf. *Finlay*, 1832, 7 F. C. 396).

(2) Failure by the bankrupt to comply with his statutory duties in material respects. Where the bankrupt refuses when called on to make over to his creditors a fund or interest not attached by the sequestration (as, *e.g.*, a *spes successionis*), it is not settled whether such refusal is a good objection to discharge (see *Blaikie*, 1871, 10 M. 140; *Kirkland*, 1886, 13 R. 798; *Reid*, 1893, 20 R. 510).

(3) Fraud or collusive conduct on the part of the bankrupt, as, *e.g.*, embezzlement or fraudulent disposal of goods on the eve of bankruptcy (*Cuninghame*, 1821, 1 S. 143; *Findlay*, 1832, 10 S. 813; *Cooper*, 1872, 11 M. 38; *Millar*, 1877, 5 R. 146), or entering into such collusive arrangements as are struck at by sec. 150 of the 1856 Act.

(4) Extravagance or reckless trading on the part of the bankrupt (see *Learmonth*, 1858, 20 D. 418; *M'Nellan*, 1856, 18 D. 488; *Gemmell*, 1853, 16 D. 264; *Dixon's Trs.*, 1867, 5 M. 767; *Napier*, 1850, 13 D. 222).

The deliverance on the petition may be appealed within eight days if pronounced by the Sheriff, or within fourteen days if by the Lord Ordinary (B. A., 1856, ss. 170, 171; see *Samson*, 1851, 13 D. 1395; *M'Nellan*, 1856, 18 D. 488). A judgment of the Inner House under sec. 6 of the 1881 Act is final (44 & 45 Vict. c. 22, s. 6 (3)).

The expenses of an unsuccessful petition may be given against the bankrupt (see *Cuninghame*, 1822, 1 S. 355; *Maben*, 1837, 15 S. 1087; *Smith*, 1860, 22 D. 1078; cf. *Clarke*, 1883, 11 R. 246).

2. Award of Discharge.—After a deliverance has been pronounced, finding the bankrupt entitled to his discharge, he must make a declaration, or, if required by the trustee or any creditor, an oath, in the terms prescribed by sec. 147 of the Act of 1856, viz. that he "has made a full and fair surrender of his estate, and has not granted or promised any preference or

security, nor made or promised any payment, nor entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to his discharge." A commission may be granted to take such declaration or oath if the bankrupt is at the time beyond the jurisdiction of, or is by lawful cause prevented from coming before the Lord Ordinary or Sheriff (*ib.*; see *Liddell*, 1840, 3 D. 135). The Lord Ordinary or Sheriff, if satisfied with the declaration or oath, then pronounces a deliverance discharging the bankrupt "of all debts and obligations contracted by him, or for which he was liable at the date of the sequestration" (B. A., 1856, s. 147). An extract of the deliverance, signed by the Clerk of the Bills or Sheriff Clerk, must forthwith be transmitted to the Accountant of Court (*ib.*); and an abbreviate thereof, issued by the Clerk of the Bills or the Sheriff Clerk, must be recorded in the Register of Inhibitions and Adjudications (20 & 21 Vict. c. 19, s. 7).

The deliverance awarding discharge may be appealed within eight days if pronounced by the Sheriff, or within fourteen days if pronounced by the Lord Ordinary (B. A., 1856, ss. 170, 171; see *Ferrier*, 1826, 2 W. & S. 93); but the prior deliverance finding the bankrupt entitled to discharge, is not thereby brought under review if not itself timeously appealed against (*Alison*, 1890, 18 R. 212). The discharge may be reduced on the ground of fraud or non-compliance with statutory requirements (*Wylie*, 1859, 21 D. 577), and fundamental statutory defects may be pled against it without reduction (see *Melliss*, 22 June 1815, F. C.; *Lindsay*, 1844, 6 D. 412).

3. Effects of Discharge.—A discharge without composition does not, like a discharge on composition, reinvest the bankrupt in the sequestrated estate, which remains vested in the trustee for distribution among the creditors entitled to be ranked thereon, including all acquisitions falling to the bankrupt prior to discharge (B. A., 1856, ss. 102, 103; *Buchanan*, 1865, 4 M. 135; *Henderson*, 1849, 11 D. 1470; *Northern Herit. Secur. Invest. Co.*, 1888, 16 R. 100, 18 R. (H. L.) 37; Bell, *Com.*, 5th ed., ii. 454). The discharge frees the bankrupt from "all debts and obligations contracted by him, or for which he was liable at the date of the sequestration," and all property subsequently acquired by him after discharge belongs to him free from such claims. Thus the general rule is, that a bankrupt is after discharge free from all debts and claims capable of being ranked for in the sequestration.

The effect of discharge upon certain kinds of contingent liabilities is not well defined. There seems to be no doubt that there are contingent liabilities where the chance of an active obligation emerging is so remote and uncertain, that the creditor is not entitled to rank in respect thereof on the obligant's sequestrated estate. An obligation of warrandice forms an example. The purchaser may have possessed peaceably for many years, and there may not be any known ground for anticipating a challenge of his title, but all the same the seller lies under a valid obligation to indemnify him should eviction take place. If, in these circumstances, the seller is sequestrated, it appears that the purchaser will not be entitled to rank as a contingent creditor on his estate (*Garden*, 1860, 22 D. 1190). On the other hand, the purchaser will be entitled to rank if a challenge has been made before or during the subsistence of the sequestration. Thus where a purchaser's title was, during the subsistence of the seller's sequestration, challenged in an action which was decided in the purchaser's favour, it was held that during the time allowed for appealing to the House of Lords the purchaser was entitled to rank as a contingent creditor, although no appeal had so far been taken (*Garden, supra*). Opinions were

reserved as to the effect of discharge on an obligation of warrandice which had not, through the emergence of a challenge, ripened into an obligation capable of being ranked for. Another case in which the question under notice arises, is that of the liability of a bankrupt shareholder of a company for future calls. Where discharge under cessio was obtained by a partner of a common law company which was in winding-up prior to the cessio, the discharge was held not to release the bankrupt from liability for a call made by the directors after the decree of cessio (*Tulloch*, 1847, 9 D. 582). Where a shareholder in a registered company, holding shares with liability attached, was sequestrated, and afterwards reinvested by discharge on composition, the company having made no claim in the sequestration, the Court refused a petition by the shareholder to have the register of the company rectified by the removal of his name therefrom (*Taylor*, 1889, 16 R. 711). In England, however, it has been held that the liability of a shareholder for future calls is a debt capable of being fairly estimated, and therefore proveable under his bankruptcy, and that whether the company be in liquidation at the date of the bankruptcy or be still a going concern (*In re Mercantile Mutual Marine Insur. Assoc.*, 25 Ch. D. 415). Where the unsuccessful pursuer of an action became bankrupt, and thereafter carried on proceedings for obtaining a new trial until he had obtained discharge on composition, with the object and effect of preventing his adversary from obtaining and ranking on a decree for expenses, he was held liable after discharge in payment of the whole costs of the action (*Mackenzie*, 1855, 17 D. 751). It is a question how far alimentary claims *ex jure naturæ* are affected by discharge. The future currency of such claims, as a rule, depends on circumstances which render them incapable of fair estimation, so as to allow of a contingent ranking. As to a claim for aliment of an illegitimate child, opinions have varied as to whether it is properly a claim arising *ex jure naturæ*, or a claim of debt. Such a claim is, however, entitled to be admitted to ranking in the sequestration of the father as a contingent debt (*Downs*, 1886, 13 R. 1101). No opinion was expressed in this case as to the effect of discharge on such a claim. In an earlier case, where the father of an illegitimate child had granted a written obligation for its aliment, and thereafter was sequestrated, and the mother ranked for the arrears due at the date of sequestration, it was held that the bankrupt was liable after discharge for aliment accruing after the date of sequestration (*Marjoribanks*, 1831, 10 S. 79).

It is a question how far debts of an alimentary nature or arising *ex jure naturæ* are *quoad* the future affected by discharge (*Marjoribanks*, 1831, 10 S. 79; see *Tulloch*, *supra*; *Downs*, 1886, 13 R. 1101). Arrears of an alimentary debt, however, are extinguished by discharge (see *Marjoribanks*, *supra*).

Discharge does not free the bankrupt from debt due to the Crown, or any debt or penalty with which he stands charged at the suit of the Crown, or any person for any offence committed against any act or acts relative to any branch of the public revenue, or at the suit of any sheriff or other public officer, upon any bail-bond entered into for the appearance of any person prosecuted for any such offence, unless the Commissioners of the Treasury consent to such discharge (B. A., 1856, s. 148).

Where an action begun prior to sequestration is carried on thereafter by the bankrupt, he remains liable after discharge for the whole costs if awarded against him (*Mackenzie*, 1855, 17 D. 751; *Jackson*, 1862, 1 M. 48; see *Miller*, 1884, 11 R. 729).

Co-obligants with the bankrupt in any debts due by him are not freed

by his discharge, nor by the creditor in any such debt assenting thereto (B. A., 1856, s. 56).

4. Discharge of Company and Partners.—Where both the firm estate and the estates of the partners as individuals are sequestrated, discharge may be granted to the partners as such and as individuals, or to them as partners only or as individuals only; and one partner may obtain discharge as a partner and as individual although the other partners do not apply (*Fraser*, 27 May 1815, F. C.; see *How*, 1833, 12 S. 211). A discharge of a firm as such is competent although unusual (*Steel*, 1855, 18 D. 34). The discharge of a partner as an individual frees him both from his partnership and his separate obligations (Bell, *Com.*, ii. 566); but discharge as partner only does not free him from the latter (*ib.*; *Melliss*, 22 June 1815, F. C.), unless, perhaps, in the case of the sole "partner" of a firm (Bell, *Com.* ii. 514; *Lindsay*, 1844, 6 D. 412, per Ld. Moncreiff). Where a bankrupt was sole partner of a sequestrated firm and was discharged "as partner" thereof, he was held not freed from liability on an obligation undertaken by him as partner of another and solvent firm (*Lindsay, supra*).

5. Preferences and Collusive Agreements for procuring Discharge.—By sec. 150 of the Bankruptcy Act, 1856, it is provided that "All preferences, gratuities, securities, payments, or other consideration not sanctioned by this Act, granted, made, or promised, and all secret or collusive agreements and transactions for concurring in facilitating or obtaining the bankrupt's discharge, either on or without an offer of composition, and whether the offer be accepted or not, or the discharge granted or not, shall be null and void." (As to effect of consent by trustee and creditors, see *Thomas*, 1872, 11 M. 81.) The nullity attaches although the bankrupt is not himself an active party in the transaction (*Thomas*, 1872, 11 M. 81). If he is "personally concerned in or cognisant of the granting, giving, or promising any preference, gratuity, security, payment, or other consideration, or in any secret or collusive agreement or transaction as aforesaid, he shall forfeit all right to a discharge and all benefits under this Act; and such discharge, if granted, either on or without an offer of composition, shall be annulled; and the trustee, or any one or more of the creditors, may apply by petition to the Lord Ordinary to have such discharge annulled accordingly" (*ib.*, s. 151: *Inglis*, 1843, 5 D. 1029; *Brown*, 1846, 8 D. 822; *Pendreigh*, 1875, 2 R. 769; *M'Culloch*, 1897, 34 S. L. R. 753). The provision as to forfeiture is imperative (*Pendreigh*). A petition for annulling a discharge cannot be brought after the bankrupt's death (*Rae*, 1877, 5 R. 34).

No action will lie in respect of a transaction to which the statutory nullity applies (*Thomas*, 1872, 11 M. 81; *Kerr*, 1828, 6 S. 546; see *Riddle*, 1821, 1 S. 145).

If, during the sequestration, any creditor has obtained any such preference, gratuity, etc., the trustee is entitled to retain his dividend, and he or any creditor ranked on the estate may present a petition to the Lord Ordinary or Sheriff praying that such colluding creditor shall be found to have forfeited his debt, and be ordained to pay to the trustee double the amount of the preference, gratuity, etc., given, made, or promised; and if no cause be shown to the contrary, decree is pronounced accordingly, and the sums which in such case may be recovered, under deduction of the expenses of recovering the same, fall to be distributed among the other creditors in the sequestration (B. A., 1856, s. 150). It will not protect the creditor receiving the preference from these penal consequences, that he was unaware of its illegality and has actually received no benefit from the transaction (*Thomas*, 1872, 11 M. 81; *Pendreigh's Tr.*, 9 M. (H. L.) 49). The prefer-

ence, however, must be one capable of pecuniary estimation (*Murdoch*, 1864, 2 M. 515).

If the sequestration has been closed when it is desired to take action in such a case, it is competent to any creditor who has not received payment of his debt to raise a multiplepoinding in name of the person who has obtained such preference, gratuity, etc.; and, on the value of the preference, etc., being ascertained, double such value, together with the amount of the debt of the colluding creditor, must be ordered to be consigned by him and be divided among the creditors who were ranked or entitled to be ranked in the sequestration and have not received full payment of their debts, and who lodge claims according to their respective rights and interests (B. A., 1856, s. 150; see *Murdoch*, 1864, 2 M. 515). The multiplepoinding must be executed against the colluding creditor, and notice thereof at the same time be inserted in the *Gazette* (*ib.*). In the event of there being any surplus after paying the full debts of the creditors and defraying the expenses of the sequestration or other proceeding, it falls to be paid into the account of unclaimed dividends (*ib.*).

After being discharged the bankrupt may legally undertake to pay a debt which might have been ranked, but in good faith was omitted to be put forward in the sequestration (*Hunter*, 1835, 13 S. 390; see *Sutherland*, 1830, 8 S. 313; *Halyburton*, 1838, 16 S. 1235; cf. *Jones*, 20 W. R. 92).

XIV. Composition Contract.

1. Offer and Acceptance of Composition 234
2. Judicial Approval of Composition 236
3. Objections to Approval of Composition 237
4. Discharge of Bankrupt on Composition 237
5. Effects of Discharge 238
6. Payment of Composition . . 239
7. Annulling Composition Contract 240

The general nature of this method of winding up a sequestrated estate is that the creditors agree to accept a composition on the amount of their respective debts, and upon approval of the arrangement by the Court, the debtor is discharged and thereby retrocessed in his estates.

1. Offer and Acceptance of Composition. — A first offer may be made at the meeting for electing the trustee, or at the meeting after the bankrupt's examination, or at any subsequent meeting called for the purpose by the trustee with the consent of the commissioners (B. A., 1856, ss. 137, 139; see *Weldon*, 1879, 7 R. 235). If it is made at the meeting for election of trustee, a resolution to entertain it must be carried by a majority in number and nine-tenths in value of the creditors present who have produced oath and vouchers (s. 137; *Smith*, 1848, 10 D. 1474), and if at any subsequent meeting, by a majority in number and four-fifths in value (s. 139; as to creditors entitled to vote and reckoning majorities, see ss. 53, 59, 61, 101). Creditors present who do not vote are computed as if voting against the resolution (*M'Kay*, 1864, 3 M. 74). Where an offer has been rejected or become ineffectual, no other offer can be entertained unless nine-tenths in number and value of all the creditors ranked or entitled to be ranked on the estate assent in writing to such offer, which must state the amount of composition and terms of payment, and be subscribed by the cautioner proposed (B. A., 1856, s. 145).

The offer may be made by the bankrupt or his friends, or if he is dead, by his successors (ss. 137, 139; see Bell, *Com.*, 5th ed., ii. 457, as to offer by bankrupt carried through by successors), and in case of a company, by a partner (s. 137). The offer must be to pay a rateable proportion per £ to

each of the creditors, not a slump sum (Bell, *Com. ut supra*); and it seems competent to adject a contingent offer to pay an additional composition (*M'Funn*, 11 July 1811, F. C.), or to assign a particular estate as additional security (*Adam*, 1845, 7 D. 276), though not in part payment of the composition (Bell, *Com.*, 5th ed., ii. 458). The offer must include all the bankrupt's creditors, not merely those actually claiming (Bell, *Com. ib.* 457). It cannot be withdrawn without cause assigned, such as a material change of circumstances not attributable to the bankrupt himself (*Lee*, 1883, 11 R. 26; see *Ironside*, 1841, 4 D. 629; Bell, *Com.*, 5th ed., ii. 469). It must be accompanied by an offer of caution (B. A., 1856, ss. 137, 139) for the whole composition to all the bankrupt's creditors (*M'Minn*, 1804, M. No. 22, App. "Bankrupt"; *Livingstone*, 1811, Bell, *Com.* ii. 353 (note); *M'Vicar*, 1829, 8 S. 146 (consignation)). Additional cautioners for separate parts of the composition may be offered (Bell, *Com.*, 5th ed., ii. 461, note 5; cf. *Handyside*, 26 June 1811, F. C.; *Ironside*, 1841, 4 D. 629). And the creditors may stipulate for security in addition to caution, to be applied *pro rata* (Bell, *Com. ut supra*; *Aitken*, 1845, 7 D. 996; *Gray*, 1812, note to Bell, *Com. ut supra*; *Adam*, 1845, 7 D. 276). The cautioner may stipulate for security by way of conveyance of the estate to a trustee for his behoof. His right to withdraw seems co-extensive with that of the bankrupt (*supra*; *Lee*, 1883, 11 R. 26).

In the case of a firm, the offer may be made by one or more partners (B. A., 1856, s. 137), and may stipulate for discharge to all the partners or only those offering the composition. Or it may be accepted from one partner, and he alone be discharged while the sequestration continues *quoad* the others (*Grant*, 21 Dec. 1811, F. C.), or from all the partners while the sequestration continues *quoad* the company (*Smith*, 1827, 5 S. 331; *Taylor*, 1840, 2 D. 952). A partner offering may stipulate for an assignation of the creditor's claims against the firm (see *Shand*, 1848, 11 D. 162). A corporate or *quasi*-corporate company may be wound up by composition (see *Robertsons*, 1831, 5 W. & S. 1). Where two firms with the same name and interests, but differing as to their constituent members, were sequestrated, a single composition, or the massed estates of both firms, was held incompetent (*M'Laren*, 1869, 7 M. 926).

The offer cannot be accepted at the meeting at which it is made. If it is made at the meeting for election of trustee, and the creditors resolve to entertain it (see *supra*), the trustee forthwith advertises the fact in the *Gazette*, notifying that the offer will be decided on at the meeting after the bankrupt's examination (B. A., 1856, s. 137); and also sends letters to each of the creditors claiming or mentioned in the bankrupt's state of affairs, giving them an abstract of the state of affairs and of the valuation of the estate (*ib.*: see *Miln*, 1845, 7 D. 888; *Smith*, 1848, 10 D. 1474). An acceptance at the second meeting must be by a majority in number and nine-tenths in value of the creditors present (B. A., 1856, s. 138). A partner has authority to accept a composition on behalf of his firm (*Mains*, 1895, 22 R. 329). The offer must be accepted according to its terms (*Miln*, 1845, 7 D. 888; *M'Intosh*, 1846, 18 Jur. 559). If the offer be made at the meeting after the bankrupt's examination, or any subsequent one, and is entertained, the trustee calls another meeting for a day not less than twenty-one days thereafter, and must, seven days prior thereto, give notice by letters to all creditors claiming or mentioned in the state of affairs, sending them an abstract of that state and of the valuation of the estate (B. A., 1856, s. 139). An acceptance at such meeting must be by a majority in number and four-fifths in value of the creditors present (*ib.*).

If a second offer of composition be entertained (see as to conditions, *supra*), a meeting is called in the same way to decide upon it, and an acceptance thereof must be by a majority in number and nine-tenths in value of the creditors present, and must also be expressly assented to in writing by nine-tenths in value of the creditors who have produced oaths entitling them to be ranked (B. A., 1856, s. 145; see *Charles*, 1835, 14 S. 139; *Forbes*, 1836, 14 S. 380). Fraud on the part of the debtor, or delay accompanied by material change of circumstances, will entitle the creditors to withdraw an acceptance (see Bell, *Com.*, 5th ed., ii. 246). The resolution of acceptance may be appealed against under sec. 169 of the B. A., 1856 (*M'George*, 1887, 14 R. 841).

Following on acceptance of the offer, the bond of caution must be forthwith lodged with the trustee (B. A., 1856, ss. 138, 139, 145; see *M'Minn*, Bell, *Com.*, 5th ed., ii. 460, note), executed by the bankrupt, or his successors, or the partners of a bankrupt firm, as the case may be, and the cautioner or cautioners (*ibid.*). The sequestration, however, proceeds, and the trustee continues in the execution of his duties as if no offer had been made, until the deliverance of the Court discharging the bankrupt is pronounced (B. A., 1856, ss. 142, 140; *Latta*, 1862, 24 D. 1251, per Ld. J.-Cl. Inglis; see *Neilson*, 1843, 5 D. 475).

2. Judicial Approval of Composition.—Upon receiving the bond of caution, the trustee must transmit to the Bill Chamber Clerk or Sheriff Clerk (whichever he may select) a report, signed by him, of the resolution of the meeting accepting the offer of composition, together with the bond of caution (B. A., 1856, ss. 138, 139, 145).

Where the offer accepted is a second offer, he also instructs the necessary assents of creditors (see s. 145; *Torry*, 1827, 5 S. 765; *Ireland*, 1834, 13 S. 223). The bankrupt may compel the trustee to make his report (*Kemp*, 1832, 10 S. 389. As to effect of delay in proceedings, see *Robertson*, 1850, 13 D. 316; *Brown*, 1846, 8 D. 822). In case of death or incapacity of the trustee, the Court may, on petition, empower the commissioners to sign the report (*Guthrie*, 1845, 7 D. 637). The report, besides recording the amount of composition, the caution given, and the resolution of acceptance (*Langmuir*, 1829, 8 S. 12), usually, but not necessarily, states that the trustee's accounts have been audited and the balance ascertained, his remuneration fixed, and it, as well as the expenses of sequestration, paid or provided for (see *Lee*, 1883, 11 R. 31, per Ld. Pres. Inglis). There is also produced the minutes of both meetings, a copy of the *Gazette*, and a certificate of posting of letters to creditors (see Bell, *Com.*, 5th ed., ii. 468).

Before approval of the composition settlement can be obtained, the commissioners must audit the trustee's accounts and ascertain the balance, and also fix his remuneration, subject to review of the Lord Ordinary or Sheriff, and such remuneration and the expenses of the sequestration must have been paid or provided for to the satisfaction of the trustee and commissioners (B. A., 1856, s. 141; see *Brownlee*, 1831, 9 S. 384; *Clark*, 1843, 5 D. 772). An appeal to the Lord Ordinary or Sheriff against the trustee's remuneration may be taken under sec. 169 of the B. A., 1856, and must be insisted in prior to the deliverance awarding discharge (see *Clark*, 1843, 5 D. 772; *Franklin*, 1840, 3 D. 188). An appeal may also be taken to the Accountant of Court under 52 & 53 Vict. c. 39, s. 17. Where a former trustee had resigned prior to the offer of composition, he was held entitled to have his accounts audited and his remuneration fixed and paid or provided for under the above provision (*Miller*, 1872, 11 M. 164). It is sufficient that the trustee states that he is satisfied as to the provision made

for his remuneration and the expenses of sequestration (see *Tweedie*, 1823, 2 S. 321).

3. Objections to Approval of Composition.—The approval of the composition may be opposed by creditors who have lodged oath and vouchers (see *Brown*, 1846, 8 D. 822; *Scottish Prov. Assur. Co.*, 1859, 21 D. 333; *M'George*, 1887, 14 R. 841), and by the trustee, and apparently also the bankrupt's cautioner (see *Miller*, 1872, 11 M. 164; *Ironside*, 1841, 4 D. 629; *Lee*, 1883, 11 R. 26). The ground of objection may be: (1) *Defect in proceedings*, such as bad votes, want of advertisement or notice to creditors (*Brown*, 1846, 8 D. 822; *Smith*, 1848, 10 D. 1474), misleading statements by trustee to creditors (*Miln*, 1845, 7 D. 888), delay accompanied by material change of circumstances (*Brown, supra*; *Robertson*, 1850, 13 D. 316; see *Lee*, 1883, 11 R. 26); (2) fraud or collusion, such as secret preferences by the bankrupt (*Johnstone*, 23 Feb. 1811, F. C.), collusion between trustee and bankrupt (see *Urquhart*, 1855, 17 D. 773; *Arnott*, 1834, 12 S. 931), fictitious claims (see *Gordon*, 6 July 1839, F. C.); (3) insufficiency of caution offered (see Bell, *Com.*, 5th ed., ii. 469); (4) unreasonableness of composition on its merits (B. A., 1856, ss. 138, 139), as being, *e.g.*, grossly disproportionate to the value of the estate (see *Arnott*, 1834, 12 S. 931; *Kilpatrick*, 1827, 5 S. 831), or accompanied by improper conditions (*Latta*, 1862, 24 D. 1251); (5) failure to pay or provide for the trustee's remuneration and the expenses of the sequestration (B. A., 1856, s. 141; see *M'Carter*, 1893, 20 R. 1090).

If the Lord Ordinary or Sheriff, after hearing any objections by creditors, shall find that the offer of composition with the security has been duly made and is reasonable, and has received the requisite supports from the creditors, and that the trustee's remuneration and the expenses of sequestration have been duly paid or provided for, he pronounces a deliverance approving of the same (ss. 138, 139, 141, 145). If he refuses approval or rejects the vote of any creditor, he must specify the grounds of such refusal or rejection (ss. 138, 139, 145).

4. Discharge of Bankrupt on Composition.—On the deliverance being pronounced approving of the composition settlement, the bankrupt or other party offering the composition makes a declaration or, if required by the trustee or any creditor, an oath before the Lord Ordinary or Sheriff that he has made a full and fair surrender of his estate, and has not granted or promised any preference or security, or made or promised any payment, or entered into any secret or collusive agreement or transaction to obtain the concurrence of any creditor to such offer and security (B. A., 1856, s. 140. A commission may be granted on lawful cause, *ib.*). The successor of a bankrupt who dies before making the declaration may make a declaration of his belief (see B. A., 1856, s. 140; *City of Glasgow Bank*, 1882, 19 S. L. R. 809; *Robertson*, 1842, 4 D. 627; *Keiller*, 1842, 4 D. 742).

Following on the declaration or oath, the Lord Ordinary or Sheriff pronounces a deliverance discharging the bankrupt of all debts due by him at the date of the sequestration, and declaring the sequestration to be at an end and the bankrupt reinvested in his estate, reserving always the claims of the creditors for payment of the composition (B. A., 1856, s. 140. As to deliverance in case of deceased debtor, see *Robertson*, 1842, 4 D. 627). The bond of caution is recorded in the Books of Council and Session or Sheriff Court Books, as the case may be, and an extract of the deliverance, signed by the Clerk of the Bills or Sheriff Clerk, must be forthwith transmitted to the Accountant, who preserves the same along with a copy of the proceedings in the sequestration transmitted to him (s. 140). An abbreviate

of the deliverance falls to be recorded in the Register of Inhibitions and Adjudications to clear the record (20 & 21 Vict. c. 19, s. 7).

The deliverance awarding discharge may be appealed within eight days if pronounced by the Sheriff, or within fourteen days if pronounced by the Lord Ordinary (B. A., ss. 170, 171), the appealing days not being cut short by extract (*Samson*, 1849, 11 D. 1208). Any creditor may appeal (*Scottish Prov. Assur. Co.*, 1859, 21 D. 333). Objections to the composition settlement cannot be raised under such appeal (*ib.*).

A statutory restriction of the right to discharge was introduced by the Bankruptcy and Cessio (Scotland) Act, 1881 (44 & 45 Vict. c. 22), which provides (s. 6) that no bankrupt sequestrated after the Act shall be entitled to discharge unless it is proved to the Lord Ordinary or Sheriff, as the case may be: (*a*) That a composition of not less than 5s. in the £ has been paid out of the estate, or that security therefor has been found to the satisfaction of the creditors; or (*b*) that the failure to pay 5s. in the £ has, in the opinion of the Lord Ordinary or the Sheriff, arisen from circumstances for which the bankrupt cannot justly be held responsible. The judge has power to require the bankrupt to submit such evidence as he may think necessary, and to allow objecting creditors proof (*ib.* As to expenses, see *Clarke*, 1883, 11 R. 246). A deficiency of composition may be made up by subsequent payments so as to entitle the bankrupt to discharge (44 & 45 Vict. c. 22, s. 6 (4)).

5. Effects of Discharge on Composition.—Discharge on composition differs from discharge without composition in this, that it not only operates as a release of the bankrupt from his debts, but reinvests him in his estates and terminates the sequestration (B. A., 1856, s. 140; *Holmes*, 1829, 7 S. 535), no separate act of retrocession being required. He has thus full right and title to vindicate his estates, and for that purpose to take up actions begun by the trustee (*Shand*, 1848, 11 D. 162; *Whyte*, 1858, 20 D. 971; see *Fleming*, 1876, 4 R. 112. As to right to sue party under obligation to provide funds for composition, see *Cunningham*, 1895, 3 S. L. T. 10). His title extends to funds omitted from his state of affairs, subject to questions with his creditors as to the effect of such omission (*Geddes*, 1889, 17 R. 278; see *Whyte*, 1888, 16 R. 95; *Baillie*, 1835, 13 S. 472), unless, perhaps, where the omission was fraudulent (see *Geddes, supra*; *Kerr*, 1876, 13 S. L. R. 480: *Baillie*, 1837, 15 S. 893; Bell, *Com.* ii. 368). In a recent case it was held that a retrocessed bankrupt could not claim from his agents rents which they had collected after the date of the sequestration, and which they maintained right to retain against a debt due by him to them prior to sequestration (*Stevenson, Lauder, & Co.*, 1896, 23 R. 496). The bankrupt or his cautioner may call the trustee and his cautioner to account for the trustee's intromissions, notwithstanding the trustee's discharge, by petition to the Lord Ordinary or Sheriff (B. A., 1856, s. 142; *Burns*, 1869, 7 M. 476. An ordinary action is incompetent, *Burns, ib.*).

The reinvestiture of the bankrupt is commensurate with the estate vested in the trustee, and does not, apparently, subject him to taking up onerous property, such as a burdensome feu, not taken up by the trustee (see *Holmes*, 1829, 7 S. 535; Bell, *Com.*, 5th ed., 413 (6); *Fleming*, 1876, 4 R. 112). But where a holder of partly paid-up shares in a company was sequestrated, he was held not entitled after discharge to have his name removed from the register (*Taylor*, 1889, 16 R. 711).

Securities held by creditors, as, *e.g.*, heritable bonds, or assignations in security, are not affected by the bankrupt's reinvestiture. Where inhibition has been used, and debts have been contracted subsequent thereto, the effect

is that the inhibitor is entitled to draw as large a composition as if the posterior creditors had not been in the field; but in the absence of such subsequent debts, the inhibitor receives composition as an ordinary creditor (Bell, *Com.*, 5th ed., ii. 476. See *Stewart*, 23 Feb. 1813, F. C.). Privileged debts, if not paid prior to the acceptance of the composition, must be paid in full before any of the instalments of composition.

Neither the bankrupt nor his cautioner is entitled to object to any debt given up in the state of affairs as due, or admitted without question to be reckoned in the acceptance of the offer of composition, nor to object to any security held by any creditor, unless in the offer of composition such debt or security is stated as objected to, and notice in writing is given to the creditor in right thereof (B. A., 1856, s. 143). Similarly, the right to challenge after discharge fraudulent preferences granted by the bankrupt must have been expressly and specifically stipulated for in the offer of composition, and assigned to the bankrupt by the trustee (Bell, *Com.*, 5th ed., ii. 458; *Adam*, 1842, 5 D. 391; *Irvines*, 1824, 3 S. 87; see *Smith*, 1889, 16 R. 392). Notice of the stipulation for such assignation must be given in writing to the particular creditors in question (see B. A., 1856, s. 143; *Adam*, *supra*).

A composition being, like dividend, payment of the debt (*M'Millan*, 1879, 6 R. 601; see *Double Ranking*), discharge is effectual to exclude any claims against the debtor which would virtually involve a double ranking, as, *e.g.*, a claim of relief by a cautioner where the principal has been ranked for the debt, and received composition (see Bell, *Com.*, 5th ed., ii. 442, 474). Where the holder of bills was ranked on the bankrupt estate of an indorser and received a dividend, and thereafter received payment from the acceptor of the whole amount due on the bills, it was held that the indorser, after being discharged on composition, was entitled to claim repayment of the amount of the dividend (*Patten*, 1853, 15 D. 617). A co-obligant for a debt is not released by the creditor accepting a composition from the debtor, and by the latter's discharge thereon (B. A., 1856, s. 56).

A discharge to partners of a firm does not seem to discharge their liabilities as partners of another and separate firm, unless they are discharged both as partners and individuals (*Lindsay*, 1844, 6 D. 412).

6. Payment of the Composition.—The statutory composition contract differs from an extrajudicial one in this, that after the bankrupt's discharge the creditors are restricted to their claim for the composition, and cannot, on failure of payment, revert to their original debts, which have been extinguished by the discharge (B. A., 1856, s. 140; *Saunders*, 1827, 5 S. 531; see Composition Contract, *ante*, vol. iii. 159).

It has been already stated that the offer of composition must be to the bankrupt's whole creditors at the date of sequestration, not merely to those actually claiming, the reason being that the bankrupt's discharge extends to all his debts existing at the date of sequestration. Accordingly, every true creditor of the bankrupt, whether in debts present, future, or contingent, is entitled to composition (*Fergusson*, 1836, 15 S. 25; *Murray*, 1836, 14 S. 624; *Dick*, 1845, 8 D. 1; *Pitcairn*, 1823, 2 S. 495); subject to the constitution, if required by the debtor, of illiquid claims not duly lodged and admitted by the trustee prior to the conclusion of the composition settlement (*Cuningham*, 1823, 2 S. 194; *Pitcairn*, *supra*; *Smith*, 1828, 6 S. 975). Debts given up in the state of affairs, or admitted in the vote on the composition, cannot be disputed (B. A., 1856, s. 143; *Morison*, 1849, 11 D. 653; *Black*, 1859, 22 D. 215; *Gordon*, 1828, 6 S. 393; see *Hatley*, 1861, 23 D. 881), unless the right of challenge has been specifically stipulated for with notice

to the creditors in question (*ante*, p. 239; s. 143; *Adam*, 1842, 5 D. 391; *Sillars*, 1850, 13 D. 431).

Secured creditors must deduct the value of their securities, if unrealised, in claiming composition (*M'Bride*, 1884, 11 R. 702; Bell, *Com.*, 5th ed., ii. 474–6); a composition contract being construed as a contract to pay composition on the debts as entitled to rank in the sequestration. There are no statutory rules for valuing securities in claims for composition. It has, however, been said that if the creditor proposes to put too low a value on his security, the debtor will be justified in redeeming the security-subject at the sum named by the creditor (*M'Bride, supra*, per Ld. Pres. Inglis and Ld. Shand). If the secured creditor delays to claim composition in reliance upon the sufficiency of his security, the debtor may perhaps be entitled to call upon the creditor "either, 1st, to accept the subject of security as in full value of his claim; or, 2nd, to bring the subjects to immediate sale, so that their capacity to cover the debt may be seen; or, 3rd, to put a value upon the security, giving the debtor an option either to take it at the valuation or to leave it in the hands of the creditor at that value" (Goudy on *Bankruptcy*, 431; Alexander on *Bankruptcy*, 211). Collateral securities do not fall to be deducted (see *Black*, 1840, 2 D. 706).

Where bills or other documents on which diligence may be done are not granted for the composition, execution against the debtor proceeds upon the bond of caution, which contains a consent that letters of horning on six days' charge and other legal execution may pass thereon, and is registered in the Books of Council and Session or Sheriff Court Books (according as the composition has been approved by the Lord Ordinary or Sheriff), the extract being lent by the trustee to any creditor requiring it (see Mackay, *Practice*, 8; B. A., 1856, s. 140; Bell, *Com.*, 5th ed., ii. 471). Creditors holding liquid documents of debt or decrees obtain a warrant of diligence in the Bill Chamber on production of the document and the extract bond (see *Dick*, 1845, 8 D. 1). Creditors in illiquid debts may obtain letters of horning in the Bill Chamber on producing the extract bond along with evidence of their debts having been ranked (*Brown*, 11 Feb. 1809, F. C.; *Atkinson*, 1833, 11 S. 429) or given up in the debtor's state of affairs, or admitted to vote upon the acceptance of the composition (B. A., 1856, s. 143).

The cautioner's liability to creditors who have not produced their oaths before the date of the deliverance approving of the composition is limited to the period of two years from that date (B. A., 1856, s. 144; *Morison*, 1849, 11 D. 653).

7. Annulling Composition Contracts.—A reduction of a composition settlement and the discharge following thereon may be brought on the ground of (1) incompetency in the proceedings, as, *e.g.*, that the offer accepted at the second meeting of the creditors was different from that made and entertained at the first (*Muln*, 1845, 7 D. 888); (2) preferences given, or collusive agreements entered into by the bankrupt and struck at by sec. 150 of the Act of 1856; (3) material error on the part of the creditors, induced by the bankrupt's misrepresentation (Bell, *Com.* ii. 360; *Stewart*, 1836, 14 S. 989; *Baillie*, 1837, 15 S. 893). The first of these grounds is not competent to the bankrupt or creditors who participated in the proceedings challenged (Bell, *Com.*, 5th ed., ii. 476–7; *Buchanan*, 1829, 8 S. 201).

The action of reduction must be directed not only against the bankrupt, but also against the trustee, and the creditor who claimed in the sequestration; and the cautioners for the composition should also be called

(see *Stewart*, 1836, 14 S. 989). A reduction at the instance of the whole creditors sets aside the composition settlement *in toto*, and should be followed by a petition for revival of the sequestration by having a new trustee elected (Bell, *Com. ut supra*; Goudy on *Bankruptcy*, p. 433; see *ante*, p. 193, as to petition for election of new trustee). A reduction by an individual creditor apparently has effect only *quoad* his own interest, restoring him to his original position as creditor in his full claim against the bankrupt (*Baillie*, 1837, 15 S. 893).

Obligations undertaken by the bankrupt after discharge for payment of any of his creditors in full are quite unobjectionable, provided they are not the result of secret agreements prior to discharge (*Grimshaw*, 1842, 4 D. 1360; *Clark*, 1869, 7 M. 335; see *Roy*, 1831, 9 S. 766; *Hunter*, 1835, 13 S. 390).

XV. Deed of Arrangement.

This mode of terminating a sequestration was first introduced by the Bankruptcy Act, 1856.

At the meeting for election of the trustee, or any subsequent one called for the purpose, a majority of the creditors in number and four-fifths in value (see sec. 101), present or represented at the meeting, may resolve that the estate be wound up in this form, and that an application be made to the Lord Ordinary or Sheriff to sist procedure for not more than two months (B. A., 1856, s. 35). At this stage the character of the arrangement cannot be determined on (*Dixon*, 1867, 5 M. 1033). The bankrupt or anyone appointed by the meeting may report the resolution to the Lord Ordinary or Sheriff within four days, and crave a sist (s. 36). The limit of time is imperative (s. 39). The judge hears parties interested, and may grant the application if satisfied that the resolution is reasonable, and may on the application of any creditor make such arrangement for interim management as appears necessary and reasonable (ss. 36, 37; see *Douglas*, 1859, 21 D. 1302; *Dixon*, 1867, 5 M. 1033).

Following on the sist, the creditors may at any time within the period thereof produce to the judge a deed of arrangement signed by, or by authority of, four-fifths in number and value of the creditors of the bankrupt (and the bankrupt); which is considered and intimated to all non-concurring creditors (*North of Scotland Banking Co.*, 8 R. 117, per Ld. Shand), and parties are heard thereon; and if the Lord Ordinary or Sheriff is satisfied that it has been duly entered into and executed and is reasonable (see *Douglas*, 1859, 21 D. 1302, as to examining bankrupt), he approves thereof and declares the sequestration at an end, the deed being thereafter binding on all the creditors as if they had all acceded thereto (B. A., 1856, s. 38). In practice, intimation of application for approval is given to non-concurring creditors by *Gazette* notice and circular, and the bankrupt emits a declaration that his state of affairs is true, the list of creditors therein correct, and that there are no non-concurring creditors other than those to whom circulars have been sent (Goudy on *Bankcy.* 439). The creditors signing are those who have lodged their oaths and vouchers with the trustee, or, if no trustee has been elected, those who produce them in process (see, however, *North of Scotland Banking Co., supra*).

The deliverance declaring the sequestration at an end must be recorded in the same manner as if the sequestration had been recalled (ss. 40, 31).

If the resolution to wind up is not duly reported, or if a sist is refused, or if the deed of arrangement is not duly produced or is not approved of by the Lord Ordinary or Sheriff, the sequestration goes on, it being provided

that the interval of time subsequent to the resolution is not to be reckoned in calculating periods of time prescribed by the Act, and power being given to the Lord Ordinary or the Sheriff to make all necessary orders by appointing meetings of creditors and others for resuming the necessary procedure in the sequestration (B. A., 1856, s. 39).

The statute prescribes no form of the deed of arrangement. It may be by way of a composition settlement (23 & 24 Vict. c 33, s. 5; see form given *ante*, vol. iv. 128). It may provide for the realisation and distribution of the estate by the creditors or by a trustee, or for the reinvestiture of the bankrupt in consideration of an agreement to pay composition. Where the arrangement is on composition, failure to pay the composition revives the original debts of the creditors in full (*Alexander*, 1873, 1 R. 185). Caution for the composition is not a necessary requisite. A discharge to the bankrupt by the deed may or may not be granted according to the arrangement. The statute contains no provision for discharge applicable to winding up by deed of arrangement. A partner's affairs may apparently be wound up by deed of arrangement while the sequestration subsists *quoad* the firm, as in the case of a composition (see Murdoch on *Bankruptcy*, 252).

Right to challenge preferences is not, without express assignment, conferred on the bankrupt by reinvestiture under a deed of arrangement, nor on a purchaser of the sequestrated estate (Bell, *Com.*, 5th ed., ii. 458–9; *Smith & Co.*, 1889, 16 R. 392). Where the creditors retain the estate for realisation, they are entitled to challenge preferences notwithstanding the declared termination of the sequestration (B. A., 1856, s. 38).

XVI. Judicial Proceedings.—Appeals.

1. Generally 242
2. Appeals in Sequestration . . 244
(*a*) Against Resolutions of Creditors and Deliverances by Trustee and Commissioners 244
(*b*) Appeal from Sheriff . . 245
(*c*) Appeal from Lord Ordinary 246
(*d*) Appeal to House of Lords . 246

1. Generally.—The jurisdiction of the Court of Session and Bill Chamber in applications for sequestration has been already dealt with (*ante*, p. 167).

The jurisdiction of both Courts in regard to sequestration is in the first instance purely statutory, and can only be exercised in conformity with the rules prescribed by the statutes. In matters of procedure not provided for by the statute, however, the ordinary jurisdiction and practice of the Court will be applied in working out the statutory proceedings. Thus the ordinary rules as to reponing by reclaiming note against decrees in absence in the Court of Session were held applicable to a deliverance of the Lord Ordinary discharging a trustee in the absence of objections (*Lindsay*, 1879, 6 R. 1246). Again, proceedings instituted between the trustee and third parties outside the sequestration follow the common law forms (see Bell, *Com.*, 5th ed., ii. 481; *M'Rae*, 1823, 2 S. 417; cf. *Paul*, 4 S. 424, for case of summary petition).

Besides its statutory jurisdiction, the Court of Session is by virtue of its inherent jurisdiction accustomed to exercise a *nobile officium* in providing a remedy in cases where errors in the sequestration proceedings require to be rectified, or where some special procedure not provided for by the Act is called for, as, *e.g.*, where *Gazette* notices have not been duly inserted (*Garden*, 1848, 10 D. 1509; *Ross*, 1852, 14 D. 546; *Von Rotberg*, 1876, 4 R. 263;

Myles, 1893, 20 R. 818), or the abbreviate of sequestration has not been recorded (*A. B.*, 1858, 21 D. 24; *Morrison*, 1874, 1 R. 392; *Harrison*, 1880, 18 S. L. R. 187; *Stark*, 1886, 23 S. L. R. 507), or where, after discharge of the trustee, the sequestration has to be revived by appointing a new trustee to realise and distribute assets which have emerged (*Thomson*, 1863, 2 M. 325; *Assets Co.*, 1886, 23 S. L. R. 276; *Young*, 1888, 16 R. 92; *Northern Herit. Secur. Co.*, 1888, 16 R. 100, and 18 R. (H. L.) 37; *Drybrough*, 1893, 20 R. 396; *Macduff*, 1892, 20 R. 101). Again, where the whole documents in the hands of a trustee in sequestration had been lost, the Court on petition made orders enabling claims to be called for anew and the sequestration to proceed (*Skirving's Tr.*, 1883, 11 R. 17; cf. *Anderson*, 1884, 11 R. 405, where principal petition lost). Where a trustee has died or disappeared so that a report cannot be obtained as required for the bankrupt's discharge, the Court will remit to the Accountant and accept his report in lieu of one by the trustee (*White*, 1893, 20 R. 600; *Meldrum*, 1895, 2 S. L. T. 406). The exercise of the *nobile officium* is peculiar to the Inner House of the Court of Session (*Shaw*, 1884, 11 R. 814; *Hutton*, 1872, 10 M. 620; see *Rankine*, 1871, 9 M. 1053), though a remit may be made to the Lord Ordinary or Sheriff to give effect to it.

The judges of the Court of Session are empowered to pass Acts of Sederunt for carrying out the purposes of the statute in certain respects (B. A., 1856, s. 185). Three Acts have been so passed: (1) An Act of 25th Nov. 1857, as to judicial factors appointed for winding up the estates of deceased persons (see "Deceased Debtor"). (2) An Act of 26th May 1859, for regulating proceedings in sequestrations awarded before 1st Nov. 1856. (3) An Act of 22nd Dec. 1882, anent cessios.

The proceedings in a sequestration form one process, and there should be one common inventory for the whole, and not a separate inventory for each different proceeding (see *Campbell*, 1856, 18 D. 843; *Kerr*, 1845, 7 D. 809; B. A., 1856, s. 43). Proceedings in the Bill Chamber are regulated by Bill Chamber rules so far as applicable (*Scott*, 1848, 10 D. 732; B. A., 1856, s. 43); and, similarly, proceedings in the Sheriff Court follow the ordinary rules in that Court so far as not displaced by statutory provision (see sec. 43).

All conveyances, assignations, instruments, discharges, writings or deeds relating solely to the estate belonging to any bankrupt against whom sequestration has been or may be awarded, and which, after the execution of such conveyances, assignations, etc., is and remains the property of such bankrupt for the benefit of his creditors, or the trustee under the sequestration, and all discharges to such bankrupt, and all deeds, assignations, instruments, or writings for reinvesting such bankrupt in the estate, and all powers of attorney, commissions, factories, oaths, affidavits, articles of roup or sale, submissions, decrees-arbitral, and all other instruments and writings whatsoever relating solely to the estate of such bankrupt, and all other deeds or writings forming a part of the proceedings ordered under such sequestration, are exempt from all stamp duties or other Government duty (B. A., 1856, s. 184; 20 & 21 Vict. c. 19, s. 10; 23 & 24 Vict. c. 33, s. 8).

All deliverances under the Bankruptcy Act purporting to be signed by the Lord Ordinary or by any of the judges of the Court of Session, or by the Sheriff, as well as all extracts or copies thereof, or from the Books of the Court of Session or the Sheriff Court purporting to be signed or certified by any Clerk of Court, or extracts from or copies of registers purporting to be made by the Keeper thereof, or Extractor, must be judicially

noticed by all Courts and judges in England, Ireland, and Her Majesty's other dominions, and be received as *primâ facie* evidence, without the necessity of proving their authenticity or correctness, or the signatures appended, or the official character of the persons signing, and are sufficient warrants for all diligence and execution by law competent (B. A., 1856, s. 174).

All deliverances, bonds, schedules, and executions under the Bankruptcy Act may be either printed or in writing, or partly both; and service or citation may be made by a competent officer without witnesses (*ib.*, s. 175, s. 43). Citation may be made in terms of the Citation Amendment Act, 1882 (see *Lochhead*, 1883, 21 S. L. R. 144).

Processes of sequestration do not fall asleep (B. A., 1856, s. 43).

The computation of time under the Bankruptcy Acts is regulated by sec. 5 of the Bankruptcy Act, which provides that periods of time are to be reckoned exclusive of the day from which such period runs (see *Wilson*, 1891, 19 R. 219; *Myles*, 1893, 20 R. 818).

2. Appeals in Sequestration.—(*a*) *Appeal against Resolutions of Creditors and Deliverances of Trustee and Commissioners.*—A general right of appeal against such resolutions and deliverances is given by sec. 169 of the Act of 1856. The appeal may be taken either to the Lord Ordinary on the Bills or the Sheriff, by a note of appeal lodged with and marked (see *Inglis*, 1864, 2 M. 882) by the Bill Chamber Clerk or Sheriff Clerk, within fourteen days from the date of the meeting at which the resolution was passed, or the date of the deliverance, as the case may be. Where appeals are taken both to the Lord Ordinary and to the Sheriff, the later in date is usually remitted to the judge before whom the earlier has been brought (see *M'Cubbin*, 1856, 18 D. 1219). There is no statutory form of note of appeal. It should set forth the resolution or deliverance in question, and state in what respect it is complained of (see form appended; *Taylor*, 1840, 2 D. 512; *Somerville*, 1859, 21 D. 467; *Hall*, 1866, 5 M. 57).

There must be a formal resolution or deliverance to make an appeal competent (*Robertson*, 1842, 5 D. 304; *Henderson*, 1849, 11 D. 1470).

The appeal may be taken by individual creditors, the bankrupt, or the trustee or commissioners, according to the interests infringed (*M'Cubbin*, 1856, 18 D. 1219; *Robertson*, 1885, 13 R. 424; *M'George*, 1887, 14 R. 841).

The Lord Ordinary or Sheriff orders a copy of the note of appeal to be served on the respondent or his mandatory or known agent (*Ewing*, 1860, 22 D. 354), and appoints the respondent to appear at a specified diet within such period as may be reasonable. A new diet may be ordered where necessary (*Aberdeen Bank*, 1859, 22 D. 162; *Douglas*, 1842, 5 D. 335). In the case of deliverances, the note of appeal should be served upon the trustee, and also, where the deliverance is one sustaining a claim, against the creditor in the claim (*Skinner's Tr.*, 1887, 14 R. 563). In the case of resolutions of creditors, the note of appeal should be served upon the creditors who voted for the resolution, and also the trustee and the bankrupt, if their interests are involved (see *Aberdeen Bank*, 1859, 22 D. 162; cf. *Smith*, 1848, 10 D. 1474). Separate appearances for respondents will not be allowed in the absence of distinct separation of interests (*Cookson*, 1864, 2 M. 662).

At the diet of compearance the Lord Ordinary or Sheriff must hear parties *viva voce*. The Lord Ordinary then proceeds to dispose of the case with or without a record, as he considers best. A record is usually made up. The Sheriff may decide without a record, provided he specifies the facts and assigns his grounds of judgment; but if he sees cause he may

order minutes to be lodged by the parties, containing their averments in fact and pleas in law without argument, and hold the same as a closed record, and proceed in a summary way; and in pronouncing his judgment he must assign his reasons (s. 169; *Davidson*, 1863, 1 M. 635). Where minutes are lodged, they represent the final statements and pleadings of parties (see *Ord*, 1846, 8 D. 1011).

Where an appeal is taken against a resolution of a meeting of creditors, it is competent to the Lord Ordinary or the Sheriff, as the case may be, to order a new meeting to be held in order to reconsider the resolution (s. 169).

The effect of an appeal is to subject the resolution or deliverance to review, both on its competency and on its merits (*Somerville*, 1859, 21 D. 467; *Steele*, 1865, 3 M. 587). The Court rarely interferes, however, in a mere question as to the discretion of the creditors in managing the estate (Bell, *Com.*, 5th ed., ii. 411, 412; *Weldon*, 1879, 7 R. 235; see *Marshall & Aitken*, 1889, 16 R. 895).

It is apparently competent to set aside, on the ground of fraud or other radical nullity, a resolution which has not been timeously appealed against (*Walker*, 1835, 14 S. 99).

(*b*) *Appeal from Sheriff.*—It is competent to bring under the review of the Inner House of the Court of Session, or of the Lord Ordinary on the Bills in time of vacation, any deliverance of the Sheriff, after the sequestration has been awarded (except where the same is declared not to be subject to review), by note of appeal lodged with and marked by the Sheriff Clerk within eight days from the date of the deliverance (B. A., 1856, s. 170; see B. A., 1860, s. 4; *Tennent*, 1878, 5 R. 433; *Marr & Sons*, 1881, 8 R. 784). There is no intermediate appeal from the Sheriff-Substitute to the Sheriff (see *Balderston*, 1841, 3 D. 597; B. A., 1856, s. 4). An appeal depending when the Court rises will be remitted to the Lord Ordinary on the Bills (see *Hain*, 1853, 16 D. 179); while one originating but not disposed of during vacation, proceeds before the Inner House during session (*Westland*, 1840, 3 D. 83; *Grant*, 1859, 22 D. 51). Every judgment may be appealed unless the statute has excluded review (*Latta*, 1865, 3 M. 508; *Davis*, 1866, 5 M. 80; *Marr & Sons*, 1881, 8 R. 784; *Scott*, 1885, 12 R. 540). Thus while a deliverance awarding sequestration is not subject to review, one refusing sequestration is (*Marr & Sons, supra*). Again, while a deliverance declaring the trustee's election is final, all interlocutory judgments in the course of a competition for the office may be appealed (*Tennent, supra; Wylie*, 1884, 11 R. 820; *Moneur*, 1887, 14 R. 305; see *Gult*, 1880, 7 R. 888). An appeal against an interlocutor does not subject to review prior substantive deliverances (*Scottish Provincial Assurance Co.*, 1859, 21 D. 333; *Alison*, 1890, 18 R. 212; cf. *Pilling*, 1857, 19 D. 938).

Pending appeals, the Sheriff may grant such orders as may be necessary to regulate the interim possession and administration of the estate (s. 172; see *Watson*, 1848, 10 D. 1414; *M'Nellan*, 1856, 18 D. 488).

There is no statutory form of note of appeal. It must contain the name of the appellant and the name of the process of sequestration, and mention the deliverance appealed against (see form appended; *Ewing*, 1860, 22 D. 354). When lodged, it must be forthwith transmitted by the Sheriff Clerk to the Bill Chamber, along with the process (s. 170).

Where an appeal involves a scrutiny of the votes given at a meeting, it is apparently competent for the respondent to challenge votes without bringing a counter appeal (*Hay*, 1850, 12 D. 676; see *Dyce*, 1847, 9 D. 993;

cf. *Forbes*, 1851, 13 D. 1272), provided he objected to them before the Sheriff (*M'Cubbin*, 1856, 18 D. 1219; see *Meikle*, 1884, 11 R. 867). A respondent, in an appeal to the Sheriff, who does not appear after due notice, cannot appeal against the Sheriff's judgment (*ib.*). Where the Sheriff allowed a proof before answer, a party who at first took part in the proof was held barred *hoc statu* from an appeal against the deliverance while the proof was not concluded (*Kerr*, 1849, 11 D. 691).

Upon hearing any appeal, the Inner House or Lord Ordinary on the Bills, as the case may be, may remit to the Sheriff with instructions (s. 170).

(*c*) *Appeal from the Lord Ordinary.*—Where any judgment of the Lord Ordinary on the Bills is to be brought under review of the Inner House, it must be done by reclaiming note in common form, presented within fourteen days from the date of the judgment, and the reclaiming note must be disposed of as speedily as the forms of Court will allow (B. A., 1856, s. 171). Such reclaiming notes go to the Summar Roll. The provisions of the Court of Session Act, 1868, do not apply to proceedings under the Bankruptcy Acts. Thus interlocutory judgments may be reclaimed against without leave (*M'George*, 1887, 14 R. 841; see also *Davis*, 1866, 5 M. 80; *Alison*, 1890, 18 R. 212). Where the reclaiming days expire in vacation, the note must be lodged on the first ensuing box day (*Joel*, 1860, 22 D. 357).

The right of fixing the Division lies with the reclaimer where the appeal is in a sequestration originating in the Sheriff Court (*Gow*, 1862, 1 M. 25). Where a petition for sequestration is presented in the Bill Chamber, the Bankruptcy Act (s. 21) makes it imperative that the Division of the Court to which it is appropriated shall be marked thereon, and reclaiming notes in proceedings under the petition must be presented to that Division (see opinions in *Gow*, *supra*). In one case, however, where a petition had been marked to the First Division, and a reclaiming note in an appeal under it was pending before that Division, and where a petition for recall was presented to the Lord Ordinary, and his judgment refusing recall was reclaimed to the Second Division, the Court refused to sustain in the Single Bills an objection stated to competency, on the ground of the appropriation of the proceedings under the original petition to the First Division, and sent the case to the Summar Roll, reserving the question of contingency (*Cooper*, 1877, 5 R. 414).

(*d*) *Appeal to House of Lords.*—Appeal is competent in all cases according to the ordinary conditions and rules of appellate procedure, save where such appeal is excluded by the terms of the Bankruptcy Acts (see B. A., 1856, s. 173). Where an appeal is taken, it is provided that "the sequestration shall, in all respects not inconsistent with or injurious to the interests which may be affected by the appeal, proceed without interruption, and the Lord Ordinary shall make such orders as may be necessary to regulate the interim possession and management of the estate, and which orders shall not be subject to appeal" (*ib.*).

XVII. The Trustee.

1. Powers and Liabilities . . 246
2. Remuneration 249
3. Removal and Resignation . . 249
4. Discharge—
(*a*) Where Estate wound up on Dividend . . . 250
(*b*) Where Composition Contract 251

1. Powers and Liabilities.—The qualifications and election of the trustee have been already dealt with (*ante*, pp. 190, 192).

"The nature of the trustee's office has been succinctly described by Bell.

'He is the trust proprietor and manager of the estate and effects; the judge in the first instance of all claims of debt and of preference, and the distributor of the divisible fund.' The trustee is thus at the same time both a representative agent and a judge; an agent in so far as the creditors as a body are concerned, acting for them in their transactions with third parties, enforcing their legal claims and fulfilling their legal obligations; a judge in so far as the creditors as individuals are concerned, deciding *primâ instantia* upon their claims to share in the estate, and their rights and preferences *inter se*. But at the same time he is to a certain extent also the representative of the bankrupt; for, so far as the latter's radical right in the estate is concerned, he is bound to account to him" (Goudy on *Bankruptcy*, p. 348; Bell, *Com.* ii. 319). The office is strictly personal (see *M'Taggart*, 1834, 12 S. 338).

The trustee is vested with the property of the sequestrated estate, and not merely administrator thereof like a company liquidator (B. A., 1856, s. 102; see per. Ld. Shand in *Standard Property Investment Co.*, 1884, 12 R. 335).

The trustee represents the body of creditors generally, and not the interest of any particular section or class of them (see *Mann*, 1879, 6 R. 1078; *Corbet*, 1879, 7 R. 200; *Skinner's Tr.*, 1887, 14 R. 563). In all matters of importance not specifically regulated by statute he should act with the concurrence of the commissioners (B. A., 1856, ss. 82, 85); and he is subject to the directions of the creditors (*ib.*, ss. 82, 96; see *Henderson*, 1836, 14 S. 797; *Gray*, 1850, 12 D. 684). Duties prescribed by statute must be specifically performed (*Aitken*, 6 June 1809, F. C.; *Parlane*, 1825, 4 S. 122; *Accountant in Bankruptcy*, 1862, 1 M. 126); and the authority of the commissioners or creditors will not relieve the trustee (*Maben*, 1837, 15 S. 1087; see *Farquharson*, 1830, 8 S. 752).

It is not proposed to enumerate the various statutory duties falling to be performed by the trustee in course of the sequestration proceedings (see Goudy on *Bankruptcy*, 350; notes issued by Accountant of Court, printed in Parliament House Book).

The trustee is entitled to take the advice and assistance of a law agent or agents, where necessary, at the expense of the estate (see *Baillie*, 1822, 1 S. 459; *Berry*, 1830, 8 S. 509). Such an agent is not an officer in the sequestration, but simply the law agent of the trustee (*Noble*, 1876, 4 R. 77; *Rutherfurd*, 1891, 18 R. 1061). He is responsible to the trustee and not the creditors (*Young*, 1827, 5 S. 472; *Gourlay*, 1827, 5 S. 743; *Berry, supra*; see *Graham*, 1850, 12 D. 754; *Paul*, 1826, 4 S. 424), and his claim for remuneration lies against the former (B. A., 1856, s. 57; see Begg on *Law Agents*, 142–3), his accounts being taxed before payment (B. A., 1856, s. 154). The trustee cannot claim remuneration for law agency work performed by himself, nor is he entitled to charge against the estate the cost of work done by the law agent which he should have done himself (*Gourlay*, 1827, 5 S. 743; *Wilson's Tr.*, 1863, 2 M. 9).

The trustee cannot act as agent for individual creditors in connection with their claims, or as mandatory in voting at meetings (*Witham*, 1884, 11 R. 776). Nor can he personally buy up claims against the estate (Bell, *Com.*, ii. 319; *ex parte Lucy*, 6 Ves. 625; see *Murray*, M. 9214; *Earl of Crawford*, M. 16208). He cannot purchase assets of the sequestrated estate (B. A., 1856, s. 120; Bell, *Com.*, 5th ed., ii. 377; *Maben*, 1837, 15 S. 1087; M'Laren on *Wills*, ii. 988) either directly or through a third party (*Brown*, 1848, 11 D. 338); as to resignation prior to sale, see Bell, *Com.*, 5th ed., ii. 378).

The trustee incurs personal liability for fulfilment (1) of contract of the bankrupt which he adopts (*vide ante*, p. 211), or contracts by a former trustee which he takes up (see *Davidson*, 1826, 5 S. 121; *Houston*, 1841, 4 D. 80); and (2) contracts made by him in the course of his engagement of the sequestrated estate (Bell, *Com.*, 5th ed., ii. 379; *Jeffrey*, 1821, 1 S. 103, 2 Sh. App. 349; *Davidson*, 1826, 5 S. 121; *Swan*, 1829, 7 S. 268; *Mackessack*, 1886, 13 R. 445; cf. *Edinburgh Heritable Security Co.*, 1886, 13 R. 427). Similarly he is personally liable for costs found due in actions which he enters upon (*Jeffrey, supra*; *Gibson*, 1833, 11 S. 656; *A. & B.*, 1865, 4 M. 83; *Purvis*, 1869, 41 Sc. Jur. 396; *Cowie*, 1893, 20 R. (H. L.) 81), this liability extending to the whole costs in current actions of the bankrupt which he takes up, and probably to the whole costs in actions raised by a former trustee which he takes up (see *Davidson*, 1826, 5 S. 121; *Houston*, 1841, 4 D. 80; *Torbet*, 1849, 11 D. 694; *Sandeman*, 1835, 13 S. 1037; *Ellis*, 1870, 8 M. 805; see *Miller*, 1884, 11 R. 729). A decerniture against him only "as trustee," does not, however, infer personal liability (*Craig*, 1896, 24 R. 6). He is not liable where he merely sists himself for purposes of inquiry (*Muir*, 1843, 5 D. 579), nor does he become liable for the bill of costs incurred by the bankrupt to his own agent in the prior stages of a case (see *Peddie*, 1856, 18 D. 1306; *Swan*, 1829, 7 S. 268). Where a trustee was removed, he was held not entitled to be sisted personally to prosecute an action in which he had been engaged as trustee in order to settle questions of costs (*MacKenzie*, 1897, 34 S. L. R. 810).

The trustee is personally liable for dividends for which he has ranked creditors (*Hamilton*, 1830, 9 S. 40; see *Jeffrey*, 1 W. & S. 565) and for wrongful acts done by him (*Gordon's Executors*, 1825, 3 Mur. 515; *Stead*, 1835, 13 S. 280; *Richardson*, 1835, 13 S. 672).

A trustee acting beyond his statutory powers will not have relief against the sequestrated estate, but only against any of the creditors whom he can show to have instructed him (*Kirkland*, 1838, 16 S. 860; see *Maben*, 1837, 15 S. 1087).

Responsibility for Conduct, etc.—The trustee may, at the instance of any party interested, be called on to account for his intromissions and management, by petition to the Lord Ordinary on the Bills or to the Sheriff, although the trustee is resident beyond the territory of the Sheriff (B. A., 1856, s. 86; as to form of petition, see *Henderson*, 1882, 10 R. 188; *Bell*, 1862, 1 M. 84, and 1 M. 257; *Paterson*, 1872, 11 M. 76). This mode of proceeding is mainly intended to apply to complaints of malversation (*M'Adam*, 1884, 12 R. 358); but a petition against the trustee's commission has been held competent (*Burt*, 1863, 1 M. 382), as also a petition for delivery of the trustee's report (*White*, 1879, 6 R. 854); but not a complaint against the trustee's adjudication on claims (*M'Adam, supra*). The petition may be barred by delay and acquiescence (*M'Lachlan*, 1830, 9 S. 54). Where the sequestration is terminated by a composition contract the trustee, notwithstanding his discharge, is liable on petition to the Lord Ordinary or Sheriff by the bankrupt or cautioner to account for his intromissions and management (B. A., 1856, s. 142; see *Burns*, 1869, 7 M. 476).

The Accountant of Court takes cognisance of the conduct of trustees; and in the event of a trustee not faithfully performing his duties and duly observing all rules and regulations imposed on him by statute, act of sederunt, or otherwise relative to the performance of those duties, or in the event of any complaint being made to the Accountant in regard thereto, he is directed to inquire into the same, and, if not satisfied with the

explanation given, he must report thereon to the Lord Ordinary on the Bills in time of vacation or during time of session to either Division of the Court, who, after hearing the trustee and investigating the matter, may censure the trustee or remove him from office or otherwise deal with him as the justice of the case may require (B. A., 1856, s. 159; see *Accountant in Bankruptcy*, 1867, 6 M. 158; *Lang*, 1870, 8 M. 753; *Paterson*, 1867, 11 M. 76; as to expenses, see *Accountant in Bankruptcy*, 1862, 1 M. 124). A petition and complaint at common law on the ground of fraudulent conduct by the trustee is incompetent without the concurrence of the Lord Advocate (*Paterson*, 1867, 11 M. 76).

2. Remuneration.—The trustee's remuneration is in the form of a commission fixed by the commissioners prior to the payment of each dividend (B. A., 1856, ss. 125, 130, 132; see *Assets Co.*, 1885, 13 R. 281). The deliverance must be intimated by the trustee to every creditor and to the bankrupt by circular (52 & 53 Vict. c. 39, s. 17). The rate of commission varies with the amount and character of the estate, 5 per cent. being a common rate (see *Bruce*, 1825, 4 S. 152; *Boaz*, 1829, 8 S. 175; *Thomson*, 1834, 12 S. 660; *Russell*, 1869, 8 M. 219; *Milne*, 1878, 5 R. 546). A commission of 3½ per cent. on an estate of £300,000 was considered extravagant (*Assets Co., supra*). The commission covers clerks' salaries and writings (see *Lindsay*, 1880, 7 R. 911). It is incompetent for the commissioners to increase retrospectively the rate of commission fixed by them for an earlier stage of the sequestration (*Lindsay*, 1880, 7 R. 911). The deliverance fixing the commission may be appealed either (1) to the Lord Ordinary or Sheriff within fourteen days from its date (B. A., 1856, s. 169; *Russell*, 1869, 8 M. 219; see also *Burt*, 1863, 1 M. 382), or (2) to the Accountant within ten days of the issue of the circular by the trustee, in the form of a note of objections; the Accountant, if necessary, reporting the matter to the Lord Ordinary or Sheriff, whose decision is final (52 & 53 Vict. c. 39, s. 17). An incompetent award of commission may be challenged by a creditor by way of objections to the trustee's discharge (*Lindsay*, 1880, 7 R. 911). Where the sequestration is wound up by composition contract, the trustee's remuneration (usually in the form of a percentage on the total composition) must have been fixed, paid, and provided for before the composition arrangement is approved by the Court (B. A., 1856, s. 141; *Brownlee*, 1831, 9 S. 384), subject to review by the Lord Ordinary or Sheriff (s. 141), or appeal to the Accountant of Court (52 & 53 Vict. c. 39, s. 17). An appeal presented after the deliverance approving the composition, was held incompetent (*Franklin*, 1840, 3 D. 188), and an appeal by the bankrupt has been held barred by his proceeding to obtain discharge upon the composition settlement (*Clark*, 1843, 5 D. 772).

3. Removal and Resignation.—(*a*) *Removal by Creditors.*—A majority in number and value of the creditors present at any meeting duly called for the purpose may remove the trustee, without reason assigned (B. A., 1856, s. 74; *Wallace*, 1824, 3 S. 46; *Walker*, 1835, 13 S. 428; see *Stephen*, 1863, 1 M. 866, as to company's and partner's trustees). The resolution may be appealed (ss. 169, 170; see *Stephen, supra*; *Hodge*, 1885, 18 D. 135).

(*b*) *By Court.*—One-fourth in value of the creditors who have duly lodged oaths and vouchers may at any time (*Brown*, 1848, 11 D. 338; *Henderson*, 1849, 11 D. 1470) petition the Lord Ordinary on the Bills to remove the trustee on cause shown (B. A., 1856, s. 74). Any creditor may be sisted in the application (*Richmond*, 1854, 16 D. 546; see *Cadell*, 1828, 6 S. 1101). The cause shown may be serious neglect or misconduct in the performance of the trustee's duties (Bell, *Com.*, 5th ed., ii. 382; *Aytoun*,

1824, 3 S. 54; *Richmond, supra*; *Brown, supra*; cf. *Ewing*, 1824, 3 S. 164; affd. 2 W. & S. 19; *Lowden*, 1835, 13 S. 389; *Henderson*, 1849, 11 D. 1470), or conflict of interest (Bell, *Com. ut supra*). It has also been held a good ground of removal that the trustee and his cautioners were both bankrupt (*Barton*, 1831, 9 S. 573; cf. *Richmond*, 1850, 12 D. 1017; *Macnab*, 1851, 14 D. 182).

The trustee may also be removed or censured—(1) by the Lord Ordinary on the Bills, for failure to make the annual return, upon a petition and complaint by the Accountant of Court or any creditor (B. A., 1856, ss. 158, 169); (2) by either Division of the Court, or the Lord Ordinary in vacation, where the Accountant, on the complaint of any creditor, reports that the trustee's duties are not being faithfully and properly performed (B. A., 1856, s. 159; *Accountant in Bankruptcy*, 1884, 11 R. 1013; *Lang*, 1870, 8 M. 753).

The Court does not seem to have power to remove a trustee *ex proprio motu*; but may order a meeting of creditors to be held to consider the matter (Bell, *Com.*, 5th ed., ii. 382; cf. *Cabbell*, 1828, 6 S. 1101; *Mitchell*, 1830, 9 S. 115).

Where a bankrupt presented a petition and complaint to the Court for removal of the trustee on the ground of malpractices, the Court, before answer and under reservation of the question of competency, remitted to the trustee to lay the proceedings before the creditors, and report. The creditors having resolved that they should not interfere, and that the trustee should continue in office, the Court dismissed the petition (*Robertson*, 1871, 9 M. 741).

(*e*) *Resignation.*—A majority in number and value of the creditors present at any meeting duly called for the purpose, may accept the resignation of the trustee (B. A., 1856, s. 74; see Bell, *Com.*, 5th ed., ii. 381).

As to election of a new trustee in the event of removal or resignation, see *ante*, p. 193.

4. Discharge.—(*a*) *Where Estate wound up by Dividend.*—The trustee may apply for discharge after final division of the funds. The first step is to call a meeting of creditors, at which he submits the sederunt book and accounts and list of unclaimed dividends, and the creditors declare their opinion of his conduct (B. A., 1856, s. 152). A resolution is not necessary (*Milne*, 1878, 5 R. 546). The trustee then presents a petition to the Lord Ordinary or Sheriff, which is intimated to any creditors who objected at the meeting, and the Accountant (*Milne*, 1898, 5 R. 546; *Lindsay*, 1879, 6 R. 1246), and on advising the petition with the minutes of the meeting and objections, if any, the Court either grants discharge or refuses it absolutely, or *in hoc statu*. A remit to the Accountant is commonly made before disposing of the petition. Before discharge, the trustee must transmit the sederunt book to the Accountant, who thereupon directs him to deposit in bank any unclaimed dividends in his hands (see *ante*, p. 227). Grounds for refusal are non-observance of statutory requirements in the proceedings, or material irregularities in the trustee's conduct of the sequestration (*Wyllie*, 1835, 14 S. 179; *Dundas*, 1822, 1 S. 238; *Bruce*, 1825, 4 S. 152; see *Stewart*, 1828, 6 S. 749; cf. *Bruce, supra*; and see *Craig*, 1895, 2 S. L. T. 484, 3 S. L. T. 20). A trustee who has resigned, or the representatives of one who has died, may, on handing over the estate, obtain discharge on petition to the Court (*Brown*, 1864, 3 M. 56; *M'Ewan*, 1872, 9 S. L. R. 568), expenses being given out of the estate if the sequestration is still open (*ib.*). An extract of the decree of discharge, signed

by the Clerk of the Bills or Sheriff Clerk as the case may be, must be forthwith sent to the Accountant, and entered in the Register of Sequestrations, the trustee's bond of caution being delivered up (B. A., 1856, s. 152).

A discharge may be annulled if it has been obtained by fraud (see *Robertson*, 1834, 12 S. 875).

(*b*) *Where Composition Contract.*—The Act makes no express provision for discharge in this case (B. A., 1856, s. 142). The practice is to grant discharge in the Bill Chamber after the deliverance approving the composition settlement, on proof that the trustee has accounted to the bankrupt and his cautioner, and transmitted the sederunt book to the Accountant. The petition should be intimated to the bankrupt and his cautioner and the Accountant.

XVIII. The Bankrupt.

1. Generally 251
2. Statutory Disqualifications . . 251
3. Radical Right in Estate . . 252
4. Liability to Action . . . 252
5. Allowance by Creditors . . 253

1. Generally.—It is not proposed to enumerate the powers of the bankrupt in the way of intervening in the sequestration procedure (see Goudy on *Bankruptcy*, 371).

A bankrupt does not by sequestration become incapacitated for holding such representative offices as those of trustee, executor, curator, but the Court may, on cause shown, supersede him in the exercise of the office (*Sawers*, 1881, 19 S. L. R. 258; *Whittle*, 1896, 23 R. 775), and where the office is that of a trustee or commissioner in sequestration, will usually remove him if sequestrated after appointment (Bell, *Com.*, 5th ed., ii. 382–385; *Barton*, 1831, 9 S. 573). Hereditary honours and dignities are not affected by sequestration (Bell, *Com.* i. 120). Nor is the bankrupt prevented from carrying on business while undischarged, although the profits earned by him, so far as in excess of a *beneficium competentiæ*, may be claimable by the trustee (see *ante*, p. 209). He commits a crime and offence, however, if he obtains credit to the extent of £20 without disclosing the fact of his being an undischarged bankrupt (47 & 48 Vict. c. 16, s. 4). He may be sued on obligations undertaken by him after sequestration, and the creditors in such obligations may have recourse against any property which has been abandoned to the bankrupt by the creditors in the sequestration, and also against property acquired by him through business carried on with the knowledge and acquiescence of these creditors (*ante*, p. 208; *Christie*, 1835, 14 S. 191; *Abel*, 1883, 11 R. 149).

2. Statutory Disqualifications.—A sequestrated bankrupt is disqualified from "sitting or voting in the House of Lords or on any committee thereof, or being elected as a peer of Scotland or Ireland to sit and vote in the House of Lords," and from "being elected to, or sitting or voting in, the House of Commons or on any committee thereof" (46 & 47 Vict. c. 52, s. 32 (1), (2); 47 & 48 Vict. c. 16, s. 5 (1)). These disqualifications cease on recall or reduction of the sequestration, or on the bankrupt's discharge (*ib.*). Where a member of the House of Commons continues under sequestration for six months from the date thereof, the Court which pronounced the award must, immediately after the expiry of that period, certify the same to the Speaker of the House, and thereupon the seat of the member becomes vacant (46 & 47 Vict. c. 52, s. 33; 47 & 48 Vict. c. 16, s. 6).

Sequestration also involves disqualification for "being elected to or

holding or exercising the office of provost, bailie, treasurer, dean of guild, deacon-convenor of trades, or councillor, or commissioner or magistrate of police, or being elected to or holding or exercising the office of member of a parochial board, or school board, or road trustee, or member of any local authority under any Act for the time being in force (whether passed before or after the commencement of this Act) relating to local government in Scotland" (47 & 48 Vict. c. 16, s. 5 (2); as to provision for vacating office, see s. 6), as also from acting as a justice of the peace, or as mayor, alderman, etc. (*ib.*, s. 5 (1); and 46 & 47 Vict. c. 52, s. 32 (1) (*c*, *d*, *e*)), or as a county councillor (53 & 54 Vict. c. 71, s. 9). These disqualifications cease on the recall or reduction of the sequestration, or the discharge of the bankrupt.

3. Radical Right in Estate.—The bankrupt retains a radical right in the sequestrated estate. Thus when the sequestration is terminated by a composition arrangement, the bankrupt after discharge has a full title in the assets of the estate without any retrocession. And, without such reinvestiture, if the trustee and the bankrupt be both discharged, the radical right of the latter revives as an active title to sue, although the creditors may claim any estate recovered by him which he cannot show to have been abandoned by them (*Whyte*, 1888, 16 R. 95; *Geddes*, 1889, 17 R. 278; see *Cooper*, 1893, 20 R. 920). Even where the trustee has not been discharged, there may be cases where the bankrupt's title to sue would be recognised (*Whyte, supra*; *Geddes, supra*; *Northern Herit. Secur. Invest. Co.*, 1891, 18 R. (H. L.) 37; *Cooper, supra*). The bankrupt has also a title to insist on the trustee duly accounting for his intromissions (B. A., 1856, ss. 86 and 142; see *Burt*, 1863, 1 M. 382; *Burns*, 1869, 7 M. 476).

The bankrupt is alone entitled to sue actions of a personal nature, although indirectly attended with patrimonial consequences affecting his estate, as, *e.g.*, an action of declarator of marriage or divorce (see Fraser, *H. & W.* ii. 1145; *Greenhill*, 1822, 1 S. 275; *Beckham*, 2 H. of L. Ca. 579; *Green*, 1896, 24 R. 211), or an action in respect of an injury solely affecting the bankrupt's character (see *Thom*, 1857, 19 D. 271, per Ld. J.-Cl. Hope; *Jackson*, 1875, 3 R. 130; *Rogers*, 12 Cl. & Fin. 700), although damages recovered in such a case will fall to the trustee (*Jackson, supra*). The bankrupt is also entitled to prosecute actions affecting his estate which the trustee declines to litigate (see *Fleming*, 1876, 4 R. 112, and cases there cited). As to the requirement of caution where the bankrupt sues, see Mackay, *Practice*, 152; Goudy on *Bankruptcy*, 379; and article on Caution, Judicial, *ante*, vol. ii. 352).

The bankrupt is entitled to any surplus of his estate which may remain after payment of all his debts with interest (B. A., 1856, s. 155; see per Ld. Watson in *Northern Herit. Secur. Invest. Co.*, 1891, 18 R. 37; and per Ld. Shand in *Standard Property Invest. Co.*, 1884, 12 R. 335), but he cannot as a rule demand this pending the currency of the sequestration (see, however, *Bell's Trs.*, 1882, 10 R. 370, where this was allowed). The bankrupt may claim any estate abandoned to him by the creditors, either expressly or impliedly by their actings (see per Ld. Watson in *Northern Herit. Secur. Invest. Co., supra*). He has, however, no right to unclaimed dividends (*Air*, 1886, 13 R. 734).

4. Liability to Action.—The bankrupt is, of course, liable to action at the instance of creditors in obligations contracted by him subsequent to the sequestration. As regards the claims of creditors existing at the date of the sequestration, there is no provision in the Bankruptcy Acts staying or making incompetent actions against the bankrupt. In one case, how-

ever, such an action was regarded as incompetent (*Fraser*, 1881, 8 R. 347). Under the older law such actions against the bankrupt were not uncommon, decree therein being available as a ground for personal diligence or for attaching *acquirenda* (*Neilson*, 1843, 5 D. 475). Under the present law decree against the bankrupt, if competent, is practically of little or no use, not being *res judicata* against the trustee or capable of founding diligence against the sequestrated estate.

The bankrupt is liable to personal diligence for payment of taxes, fines, or penalties due to Her Majesty, or rates or assessments lawfully imposed (43 & 44 Vict. c. 34, s. 4; 45 & 46 Vict. c. 42, s. 5), and he may be imprisoned by warrant of the Court for wilful failure to pay any sum decerned for aliment (45 & 46 Vict. c. 42, ss. 3, 4).

5. Allowance by Creditors.—Either at the meeting for election of the trustee, or at the meeting held after the bankrupt's examination, or at any meeting called for the purpose, four-fifths in value of the creditors present at the meeting may authorise payment from time to time to the bankrupt, or to the partners of a company (if the sequestration be that of a company estate), of such sum out of the estate as they shall think proper for sustenance, until the period assigned for payment of the second dividend, not exceeding £3, 3s. per week to the bankrupt, or to each individual partner of a company from the date of sequestration to the period foresaid; but no allowance can be given if the bankrupt has not complied with the provisions of the Bankruptcy Act (B. A., 1856, s. 78). If at any time it should be the opinion of a majority of the creditors present at a regular meeting that it is for the interest of the estate that a special allowance should be further made to the bankrupt, and if the Accountant of Court reports in its favour, it is competent for the Lord Ordinary or the Court, on application by the trustee, with the said concurrence of creditors and report by the Accountant, to award such allowance, which is then payable out of the estate (*ib.*).

XIX. The Creditors.

1. Generally 253
2. Meetings 253
3. Creditors as Individuals . . . 255

1. Generally. — The body of creditors on a sequestrated estate comprise those who were creditors of the bankrupt at the date of the sequestration (see B. A., 1856, s. 121). The rules as to the qualification of creditors for voting and ranking have been already explained (see *ante*, pp. 143 and 220).

The creditors have the paramount control of the administration and realisation of the assets of the estate, and the trustee must act under such directions as they give, failing which, he acts with the advice of the commissioners (B. A., 1856, ss. 82, 96).

2. Meetings.—The creditors act by resolutions passed at duly convened meetings of their body. Two general meetings are prescribed by statute: (1) The meeting for electing trustee (*ante*, p. 190); (2) the meeting after the bankrupt's examination, for considering and giving directions as to the administration of the estate (*ante*, p. 215). Special meetings may be called by the trustee for, *inter alia*, the following purposes: (1) To elect a new commissioner (s. 75); (2) to authorise allowance to bankrupt (s. 78); (3) to decide on offer of composition (ss. 137, 139, 145); (4) to declare opinion as to trustee's conduct before discharge (s. 152); (5) to remove commissioner and elect another (ss. 76, 98); (6) to remove trustee or accept resignation (ss. 74, 98); (7) to authorise prosecu-

tion under sec. 178; (8) to authorise deed of arrangement (ss. 35, 98); (9) to give directions as to bank in which to lodge funds (ss. 82, 98). In the case of Nos. 5, 6, 7, 8, 9, and 10, the meeting may also be called by a commissioner, with notice to the trustee given prior to the meeting (s. 98; *M'Fadyean*, 1884, 21 S. L. R. 479; *Lang's Tr.*, 1892, 19 R. 488). The following meetings may be called by the trustee, with consent of the commissioners: (*a*) To receive and entertain offer of composition (s. 139); (*b*) to consider as to sale of outstanding estate (s. 136). A meeting to elect a new trustee, or devolve estate on trustee next in succession, upon the trustee's removal by the Lord Ordinary, is held by order of the Sheriff, on application of a commissioner or creditor (s. 74).

Meetings may be called at any time by the trustee, or by a commissioner with notice to the trustee (s. 98; *Campbell*, *supra*; *Lang's Tr.*, *supra*); and the trustee is bound to call a meeting at any time when required by one-fourth in value of the creditors ranked on the estate, or by the Accountant of Court (s. 98).

Notice of the day, hour, place, and purpose of all meetings of creditors under the Act must be advertised in the *Gazette* seven days at least before the day of the meeting (s. 99; see Bell, *Com.*, 5th ed., ii. 351; *M'Fadyean*, 1884, 21 S. L. R. 479; *Watt, Philp, & Co.*, 1877, 4 R. 641). In certain cases the trustee must also send circulars to the creditors (ss. 87, 139, 136, 152, and s. 100 as to creditors under £20). Meetings may be adjourned to the following day, and that for electing a trustee for a reasonable time within the maximum period prescribed for it by the Act (s. 68; as to second meeting, see *M'Kellar*, 1861, 23 D. 1269). An omission to duly hold a meeting may be rectified by petition to the Inner House (see *Myles*, 1851, 14 D. 126; *Ross*, 1852, 14 D. 546; *Wilson*, 1891, 19 R. 219).

The procedure at meetings is not regulated by statute, but left to ordinary practice (*Witham*, 1884, 11 R. 776; Bell, *Com.*, 5th ed., ii. 364). They must be conducted under a preses (*Anderson*, 1827, 6 S. 235). No quorum of creditors is prescribed (*Cookson*, 1863, 2 M. 268). The creditors must discuss the topics before them, and pass their resolutions as one body (Bell, *Com. ut supra*). Special rules as to majorities are provided in various cases (see, *e.g.*, secs. 35, 74, 75, 101, 137, 138). In all other cases the rule is that "all questions at any meeting of creditors shall be determined by the majority in value of those present and entitled to vote" (s. 101). Every creditor who has produced a proper affidavit and voucher under the requirements of the Act is entitled to vote. Where a definite majority is required by the Act, a creditor who abstains from voting is counted as voting with the majority (*M'Kay*, 1864, 3 M. 74; see *Charles*, 1835, 14 S. 139; *Sturrock*, 1851, 13 D. 762). In reckoning votes by numbers where required, claims under £20 are not counted (s. 101). Where the number of creditors present does not admit of a prescribed statutory majority by numbers being obtained with exactness, the nearest possible majority has been taken (*Buchanan*, 1829, 8 S. 201; cf. *Brown*, 10 July 1817, F. C.; see Bell, *Com.*, 5th ed., ii. 463). Where votes are objected to, the rule seems to be that on an appeal to the Court objections may be stated to any vote, whether raised at the meeting or not (see *Miller*, 1858, 20 D. 803; cf. *Robertson*, 1842, 5 D. 304; *Somerville*, 1859, 21 D. 467). A creditor is not debarred from voting by having a personal interest in the matter under consideration. Secured creditors, indeed, are entitled to vote on the full amount of their claims in questions affecting the subject of their security (s. 59).

The topics of business taken up at a meeting may include others than

the *agenda* in the notice thereof, except such as require a special statutory meeting for their disposal (*Leck*, 1855, 17 D. 1075; see *Fleming*, 1876, 4 R. 112). Resolutions if *intra vires* are binding on the trustee and whole body of creditors (Bell, *Com.*, 5th ed., ii. 411; see *Robertson*, 1871, 9 M. 741), and, though subject to review, will not be disturbed by the Court save where some clear prejudice to the general body of creditors is shown (*Davidson*, 1824, 2 Sh. App. 357; *Taylor*, 1833, 11 S. 250, 1 S. & M'L. 94; *M'Kay*, 1866, 4 M. 333; see *Somerville*, 1859, 21 D. 467; *Marshall & Aitken*, 1889, 16 R. 895). But resolutions involving a departure from the statute are invalid (*Gray*, 1821, 1 S. 96; *Turner*, 1822, 1 S. 444; *Farquharson*, 1830, 8 S. 752; *Henry*, 1832, 10 S. 239: *Crichton*, 1833, 11 S. 781).

The proceedings at meetings must be recorded in regular minutes, which must be signed by the preses, and should be written and signed at the meeting, although not invalidated if signed after it (B. A., 1856, s. 68; *Lea*, 1828, 6 S. 350; see *Brown*, 1869, 7 M. 595; *Lord Blantyre*, 1885, 13 R. 116; as to amendment, see *Martin*, 1857, 20 D. 55). The minutes form *primâ facie* evidence in any Court of the proceedings, which cannot be contradicted by parole (see *Ogilvie*, 6 Feb. 1810, F. C.; *Lea*, *supra*; Bell, *Com.*, 5th ed., ii. 352; Dickson on *Evidence*, ii. s. 1214).

3. Creditors as Individuals.—Although the direction of the management of the estate lies with the majority of the creditors, the majority cannot, by resolving to abandon a claim competent to them, preclude an individual creditor who offers to prosecute it from doing so (*Sprot*, 1828, 6 S. 1083; *Spence*, 1832, 11 S. 212; *M'Kay*, 1866, 4 M. 333; see *Marshall & Aitken*, 1889, 16 R. 895). In so suing, the individual creditor proceeds at his own risk; and, on the other hand, should he recover more than sufficient to pay his own debt in full, he must hand over the surplus to the trustee for behoof of the general body (*Spence*, *supra*; Bell, *Com.*, 5th ed., ii. 415). He is entitled to the use of the trustee's name in suing, on giving security to keep the trustee and the sequestrated estate *indemnis* (*Sprot*, *supra*). Or he may purchase the claim from the creditors and sue in his own name, taking from the trustee an assignation of his right (*Spence*, *supra*).

Individual creditors may lawfully purchase any estate sold publicly in virtue of the Act (B. A., 1856, s. 120). This rule applies to the case of a heritable creditor purchasing the security-subject when sold by the trustee with the creditors' concurrence (*Cruickshank*, 1849, 11 D. 614).

As to liability for expenses attending the sequestration, it is provided that "No person shall, by merely lodging an oath and claim, or being ranked or receiving payment of a dividend, or appearing or voting at a meeting in a sequestration as a creditor, be liable for any claim by the agent or other person employed by the trustee for money advanced, or expense incurred, or remuneration in relation to the affairs of the estate" (B. A., 1856, s. 57). Creditors may, of course, expressly agree to indemnify the trustee against the consequence of some particular course of action in connection with the estate which they desire to promote: and they may, further, by their actings impliedly undertake such an obligation of relief, or even expose themselves to claims by third parties (see *Ellis*, 1849, 11 D. 1347; *Reid*, 1830, 8 S. 793; *Cruickshank*, 1843, 5 D. 1198; *Kirkland*, 1838, 16 S. 860; *Smith*, 1877, 5 R. 147).

XX. Accountant of Court.

In order to provide for an official supervision of sequestration proceedings, a new office was established by the Bankruptcy Act, 1856, viz., that of

Accountant in Bankruptcy. By the Judicial Factors Act, 1889 (52 & 53 Vict. c. 39), this office was united with that of Accountant of Court, the holder of the united offices being called the Accountant of Court. The appointment of the Accountant is in the hands of the Crown.

It is the Accountant's duty to take cognisance of the conduct of all trustees and commissioners in sequestrations awarded under the Act of 1856, or in which proceedings have been had within five years of the passing thereof; and in the event of their not faithfully performing their duties and duly observing all rules and regulations imposed on them by statute, Act of Sederunt, or otherwise, relative to the performance of those duties, or in the event of any complaint being made to the Accountant by any creditor in regard thereto, he must inquire into the same, and, if not satisfied with the explanation given, he must report thereon to the Lord Ordinary on the Bills in time of vacation, or during time of session to either Division of the Court of Session, who, after hearing such trustees or commissioners thereon, and investigating the whole matter, decide regarding it, and may censure the trustee or commissioners, or remove them from their office, or otherwise deal with them as the justice of the case may require (B. A., 1856, s. 159). Creditors giving useful information upon which the Accountant acts are entitled to the expenses incurred by them out of the estate or against the party complained of, as the Court may direct (see *Accountant in Bankruptcy*, 1867, 6 M. 158).

The Accountant must at all times, when requisite, report to the Lord Ordinary on the Bills or either Division of the Court any disobedience by the trustee or commissioners of any requisition or order by him, and generally any matter which he may deem it necessary for the due discharge of his office to bring before the Lord Ordinary or the Court; and it is competent for the Lord Ordinary or the Court to deal summarily with the matter reported, as accords of law (s. 161).

If the Accountant 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 is entitled to give information to the Lord Advocate, who must direct such inquiry and take such proceedings therein as he may think proper (s. 162).

The Accountant has power, either on the application of one or more creditors or of his own accord, to require exhibition of the sederunt book in any sequestration, and of any vouchers or documents which he may think necessary (s. 160). He may also direct a meeting of creditors to be called to take into consideration any measures which he may judge requisite for the preservation or due management of the estate, or more speedy realisation and division of the funds, or winding up of the estate (see *ib.*).

The Accountant has no right to interfere with the creditors' right of controlling the administration of estates in bankruptcy; his power is one of control of trustees and commissioners, to the effect of providing for the performance of their duties. The power is official and not in any sense judicial. Useful "Notes for the Guidance of Trustees in Sequestrations" are issued by the Accountant, and may be obtained at his office (see also Parliament House Book; and Goudy on *Bankruptcy*, Appendix, p. 746).

The Accountant keeps a "Register of Sequestrations" in the form of Schedule G of the Act of 1856, which is patent to all concerned (s. 157). The details to be entered therein are prescribed by sec. 157 of the Act. He receives the sederunt books transmitted by trustees on discharge, and gives directions for depositing unclaimed dividends in bank. A "Register of

Unclaimed Dividends" is kept in his office (s. 153; see *ante*, p. 227). The Accountant also receives the annual returns of sequestrations made up by trustees and transmitted by the Sheriff Clerks, which are bound up and preserved, and are patent to all concerned (s. 158). He frames an annual report to the Court of Session showing the position of each depending sequestration returned to him (s. 160).

A right of appeal to the Accountant against the commission allowed to trustees is given by the Judicial Factors Act, 1889 (52 & 53 Vict. c. 39, s. 17).

The Accountant is not entitled to charge fees for acting under remits from the Court in sequestrations under his control (*Burt*, 1863, 1 M. 1122).

FORMS IN SEQUESTRATION.

1. *Petition for Sequestration to the Lord Ordinary on the Bills by a Creditor.*

—— Division. [*Date.*]

Unto the Honourable the Lord Ordinary officiating on the Bills,

The Petiton of *C. D.* [*design.*], a creditor to the extent required by law, of *A. B.* [*design.*] [*or*, of *A. B. & Co.* [*design.*], and *A. B.* and *C.*, the individual partners of said firm, as partners thereof, and as individuals];—

Humbly showeth,—

That the Petitioner is a creditor of the said *A. B.* above designed [*or*, of the said *A. B. & Co.* above designed, and of the said *A. B.* and *C.*, the individual partners of said firm] to the extent of £ , conform to oath and bill [*or*, *as the case may be*,] herewith produced.

That the said *A. B.* has been rendered notour bankrupt within the last four months, and still remains in a state of notour bankruptcy, and has within a year before the date of the presentation of this petition resided [*or*, had a dwelling-house; *or*, had a place of business] in Scotland, and is subject to the jurisdiction of the Supreme Courts thereof.

[*Or, if a company, in place of the preceding sentence, say*, That the said *A. B. & Co.* have been rendered notour bankrupt within the last four months, and still remain in a state of notour bankruptcy, and have within a year before the date of the presentation of this petition carried on business in Scotland; and the said *A.*, partner of said company, has resided or had a dwelling-house in Scotland within said period, and said company and partners are subject to the jurisdiction of the Supreme Courts of Scotland.]

That in order to realise the estates of the said *A. B.* [*or* of *A. B. & Co.*, and the said *A. B.* and *C.*] for behoof of his [*or* their] creditors, the Petitioner is under the necessity of applying to your Lordship for sequestration of his [*or* their] estates in terms of the Bankruptcy (Scotland) Act, 1856, and Acts explaining and amending the same.

[*Should appointment of factor be desired under B. A.* 1856, *s.* 16, *here state grounds.*]

May it therefore please your Lordship to grant warrant for citing the said *A. B.* [*or* the said *A. B. & Co.*, and *A. B.* and *C.*] to appear before your Lordship on such *inducice* as your Lordship may direct, to show cause why sequestration of his [*or* their] estates should not be awarded; to direct intimation of the said warrant, and of the diet of compearance on such *inducice*, to be made in the *Edinburgh Gazette*; to grant diligence to recover evidence of the notour bankruptcy of the said *A. B.* [*or* of the said *A. B. & Co.*, and *A. B.* and *C.*], and of the other facts necessary to be established; and, on again considering this Petition, to award sequestration of the estates which now belong or shall hereafter belong to the said *A. B.* [*or A. B. & Co.* as a company, and *A. B.* and *C.* as partners thereof, and as individuals] before the date of his [*or* their] discharge, and to declare the said estates to belong to his [*or* their respective] creditors for the purposes of said statutes; and to appoint a meeting of the said creditors to be held within on the day of 18 , at o'clock noon, to elect a trustee on the estates of the said *A. B.* [*or* of the said *A. B. & Co.* and *A. B.* and *C.*, or separate trustees], or trustees in succession, and com-

missioners, and to do the other acts provided by the said statutes; also to remit to the Sheriff of the County of to proceed in manner mentioned in said statutes: [*Should a factor be necessary, add*: And further to nominate and appoint [*name and design.*], or such other suitable person as judicial factor on the said sequestrated estates, until a trustee shall be confirmed thereon, with the usual powers, he always finding caution before extract]; or to do otherwise in the premises as to your Lordship shall seem just.

According to Justice, etc.

[*Signed by Petitioner or his Counsel or Agent.*]

2. *Petition for Sequestration to Sheriff at instance of Debtor.*

In the Sheriff Court of .

A. B. [*design.*], with concurrence of *C. D.* [*design.*],—*Pursuer*;

AGAINST

His Creditors,—*Defenders.*

The above-named Pursuer submits to the Court the Condescendence and Note of Plea in Law hereto annexed, and prays the Court,

To award sequestration of the estates which now belong, or hereafter shall belong, to the Pursuer before the date of his discharge, and to declare the same to belong to his creditors for the purposes of the Bankruptcy (Scotland) Act, 1856, and Acts explaining and amending the same; and to appoint a meeting of the said creditors to be held in terms of said Acts within , to elect a trustee or trustees in succession upon the sequestrated estates of the Pursuer; and to do the other acts provided by the said statutes.

CONDESCENDENCE.

1. The Pursuer has for the year preceding the date of this Petition carried on business [*or* resided] at , and is subject to the jurisdiction of the Court of Session.

2. The Pursuer having sustained business losses [*or, as the case may be,*] is now insolvent [*or* is in embarrassed circumstances], and finds it necessary to apply for sequestration of his estates under the Bankruptcy statutes.

3. The said *C. D.* is a creditor of the Pursuer to the extent of £ , conform to oath and bill herewith produced.

PLEA in LAW.

The Pursuer being insolvent [*or* in embarrassed circumstances], is entitled to have sequestration of his estates awarded.

In respect whereof.

[*Signed by Petitioner or his Agent.*]

3. *Oath by a Creditor for ordinary unsecured Debt.*

At Edinburgh, the day of 18 , in presence of *X.*, one of Her Majesty's Justices of the Peace for the of .

Compeared *C. D.*, merchant in Edinburgh, who being solemnly sworn and interrogated, depones, That *A. B.*, merchant in Edinburgh [*if a company, say, A. B. & Co.*, merchants in Edinburgh, and *A. B.* and *C.*, the individual partners of that company], was [*or* were] at the date of the sequestration of his [*or* their] estates, and still is [*or* are], justly indebted and resting-owing to the deponent the sum of £96, 10s., being the amount contained in and due under a bill drawn by the deponent upon and accepted by the said *A. B.* [*or A. B. & Co.*], dated day of 18 , and payable three months after date. Depones, That no part of said sum has been paid or compensated, and that the deponent holds no other person than the said *A. B.* [*or*

A. B. & Co. and individual partners] bound for the debt, and no security for the same.—All which is truth, as the deponent shall answer to God.

(Signed) *C. D.*

X., J. P.

NOTE.—*When the oath is to be used solely for petitioning, leave out the words "was* [or *were] at the date of sequestration of his* [or *their] estates, and still."*

4. *Oath by a Creditor in a Debt for which he holds Security over the Estate of the Bankrupt.*

At Edinburgh, etc. (*as in Form* 3, *supra*).

Compeared *C. D.*, merchant in Edinburgh, who being solemnly sworn and interrogated, depones, That *A. B.*, also merchant there, was, at the date of his sequestration, and still is, justly indebted and resting-owing to the deponent the sum of £1000 sterling of principal, contained in a bond and disposition in security, dated the 27th day of February 18 , granted by the said *A. B.* to the deponent, over that self-contained dwelling-house, No. Princes Street, Edinburgh, with the pertinents therein particularly described, together with the sum of £18, 12s. 7d., being the legal interest of the said principal sum from the term of Whitsunday 18 to the date of sequestration, amounting together to the sum of £1018, 12s. 7d. sterling. Depones, That no part of said sum has been paid or compensated, and that he holds no other obligant than the said *A. B.* bound for the debt, and no security than that above specified. Further, the deponent hereby values the security of the said house and pertinents contained in said bond and disposition in security at the sum of £750 sterling, which, being deducted from the foresaid sum of £1018, 12s. 7d., leaves a balance of £268, 12s. 7d., for which the deponent claims a right to vote, *and to be ranked in order to draw a dividend*, in the sequestration of the said *A. B.*—All which is truth, as the deponent shall answer to God.

(Signed) *C. D.*

X., J. P.

NOTE.—*When the oath is to be used merely for petitioning, it is sufficient to state the securities without valuing them. When the oath is to be used merely for voting, the words in italics will be omitted.*

5. *Oath by a Creditor in a Debt for which he has an Obligant bound with, but liable in Relief to the Bankrupt.*

At Edinburgh, etc. (*as in Form* 3, *supra*).

Compeared *C. D.*, banker in Edinburgh, who being solemnly sworn and interrogated, depones, That *A. B.*, merchant in Leith, was, at the date of his sequestration, on 1st November 18 , and still is, justly indebted and rest-owing to the deponent the sum of £300 sterling, being the amount of a bill drawn by the said *A. B.* upon and accepted by *E. F.*, grocer in Edinburgh, dated 30th June 18 , payable three months after date, indorsed by the said *A. B.* to the deponent, together with the sum of £1, 3s. 10d., being the interest at the rate of 5 per cent. from 3rd October 18 , when the said bill became due, to the date of the sequestration, the principal and interest amounting together to the sum of £301, 3s. 10d. Depones, That no part of said sum has been paid or compensated, and that he holds no other obligants than those above specified, and that he holds no security for the debt. *Further, the deponent hereby values the obligation of the said* E. F., *the acceptor of said bill, and as such liable in total relief to the bankrupt, the said* A. B., *at the sum of* £100, *which being deducted from the foresaid sum of* £301, 3*s.* 10*d., leaves a balance of* £201, 3*s.* 10*d., for which the deponent claims a right to vote in the sequestration of the said* A. B.—All which is truth, as the deponent shall answer to God. (Signed) *C. D.*

X., J. P.

NOTE.—*The words in italics may be omitted, if the object of the oath is to establish a right only of drawing a dividend, not of voting.*

6. *Oath of Credulity.*

At Edinburgh, etc. (*as in Form* 3, *supra*).

Compeared *A. B.*, chartered accountant in Edinburgh, *curator bonis* of *C. D.* [*design.*], conform to [*state appointment*], who being solemnly sworn and interrogated, depones, That to the best of the deponent's knowledge and belief, *E. F.* [*design.*] was at the date of the sequestration of his estates, and still is, justly indebted and resting-owing to the said *C. D.*, etc.

7. *Petition for Recall of Sequestration, and Gazette Notice.*

Unto the Honourable the Lord Ordinary officiating on the Bills,

The Petition of *E. F.* [*design.*] ;—

Humbly showeth,—

That on the day of , a petition at the instance of *A. B.* [*design.*], with concurrence of *C. D.* [*design.*], [*or*, at the instance of *C. D.*, as a creditor of *A. B.*] was presented to your Lordship [*or*, to the Sheriff of], praying for sequestration of the estates of the said *A. B.* under the Bankruptcy (Scotland) Act, 1856, and Acts explaining and amending the same, on which petition your Lordship [*or*, the Sheriff of], on the day of , awarded sequestration of the estates of the said *A. B.*

[*In the case where the estates of a deceased debtor have been sequestrated, insert here,*— That *G. H.* [*design.*], one of the successors of the said deceased *A. B.*, being furth of Scotland, was edictally cited, and the advertisement for payment of the first dividend has not yet been published.]

That the Petitioner is a creditor of the said *A. B.* to the amount of £ , conform to [*set forth grounds of debt*] herewith produced.

[*State here the particular grounds upon which the application is founded.*]

The said sequestration should therefore be recalled in terms of the 31st section of the Bankruptcy (Scotland) Act, 1856, and Acts explaining and amending the same.

May it therefore please your Lordship to order a copy of this Petition and of the deliverance thereon, to be served on [*the parties who petitioned or concurred*], or on their respective known agents, [and, *if already appointed*, on *E. F.* [*design.*], trustee in said sequestration], and to require them to lodge answers thereto, within a specified short time ; and to order a notice of the presentation of this Petition to be published in the *Edinburgh Gazette* ; and on the expiration of the time so fixed, with or without answers, to recall the said sequestration, and to order the judgment of recall to be entered in the Register of Sequestrations and on the margin of the Register of Inhibitions ; or to do otherwise as to your Lordship shall seem just.

According to Justice, etc.

Gazette Notice.

E. F. [*design.*] hereby gives notice that he has presented a Petition to the Lord Ordinary on the Bills, for recall of the sequestration of the estates of *A. B.* [*design.*], on which Petition the following deliverance has been pronounced [*state deliverance*].

[*Signed by Petitioner or his Counsel or Agent.*]

[*Place and date.*]

8. *Petition for Valuation of Contingent Debt.*

Unto the Honourable the Sheriff of ,

The Petition of *C. D.* [*design.*] ;—

Humbly showeth,—

That the estates of *A. B.* [*design.*] were sequestrated on the day of 18 , on the petition of , with concurrence of .

That the Petitioner is a creditor of the said *A. B.*, in respect of [*state nature of the debt*], and the said debt being thus contingent on [*state nature of the contingency*], the Petitioner makes this application to your Lordship to put a value on the said debt, in terms of the 53rd section of the Bankruptcy (Scotland) Act, 1856.

May it therefore please your Lordship to direct intimation of this Petition to be given to the said *A. B.*, and to the said [*petitioning and concurring creditors*], and on resuming consideration hereof to put a value on the said debt, in order that the Petitioner may be entitled to vote and draw dividends in respect of such value.

According to Justice, etc.

9. *Note of Personal Objections to Trustee, and Objections to Votes.*

Unto the Honourable the Sheriff of the County of Edinburgh,

NOTE of OBJECTIONS for *R. S.*, Trustee nominated by a majority of Creditors in value, and claiming to be Trustee on the Sequestrated Estate of *A. B.*

To the eligibility of *C. D.*, also claiming to be Trustee on said Sequestrated Estate, and to the Votes of sundry Creditors who voted for his election.

PERSONAL OBJECTIONS.

1. The said *C. D.* promised to communicate a share of his commission to *E. F.* and *H. J.*, in consideration of their agreeing to vote for his election.

2. The said *C. D.* is at present trustee on the sequestrated estate of *P. Q.*, who was engaged in a variety of joint adventures with the bankrupt, and accounts between the two estates being unsettled, the said *C. D.* would have conflicting interests to attend to were he elected trustee on the estate of the said *A. B.*

OBJECTIONS TO VOTES.

1. OATH by *F. G.*, claiming to be ranked and vote for the sum of £100.

The claimant omits to swear, as required by the 22nd section of the statute, whether he holds any other obligant than the bankrupt bound for the debt.

2. OATH by *I. K.*, claiming to be ranked and vote for the sum of £150.

The claimant's debt is constituted by a bill, dated 18 , payable three months after date, drawn by the bankrupt on, and accepted by *L. M.*, and endorsed to the claimant, and he omits to value and deduct the obligation of the acceptor as required by the 60th section of the statute.

10. *Note of Appeal against Deliverance of Trustee rejecting a Claim for a Dividend.*

[*Prefix the Trustee's Deliverance.*]

Unto the Honourable the Lord Ordinary officiating on the Bills [*or*, Sheriff of],

Note of Appeal for *C. D.* [*design.*] against the deliverance of *E. F.* [*design.*], trustee on the sequestrated estate of *A. B.* [*design.*].

On the day of 18 , the trustee issued the foregoing judgment on a claim by the Appellant to be ranked as a creditor on the said estate.

Against this judgment the said *C. D.* appeals to your Lordship, and craves that the same may be recalled, and that the trustee be ordained to rank the Appellant as a creditor on the said estate, and to make payment of the dividend corresponding to the debt for which the Appellant claimed to be ranked, with bank interest on the dividend from the time the same was or ought to have been deposited by the trustee, and that the trustee be found liable in the expenses of the Appellant.

According to Justice, etc.

11. *Note of Appeal by Creditor against Deliverance of Trustee admitting a Claim of a Co-Creditor.*

[*Prefix the Deliverance complained of.*]

Unto the Honourable the Lord Ordinary officiating on the Bills [*or*, the Sheriff of],

Note of Appeal for *C. D.*, a creditor on the sequestrated estate of *A. B.* [*design.*].

On the day of , *E. F.* [*design.*], the trustee on said estate, issued the foregoing judgment admitting a claim made by *G. H.* for the sum of £ , and included him in the list of creditors entitled to draw a dividend. At the same time, the trustee admitted the claim of the Appellant for the sum of £ .

The said *C. D.*, being dissatisfied with the decision of the trustee in admitting the claim of the said *G. H.*, now appeals to your Lordship against the same.

Your Lordship is therefore humbly moved to recall the decision of the trustee in admitting the claim of the said *G. H.*, and to order the trustee to reject the same, and to find him not entitled to a dividend.

The Appellant also craves to be found entitled to his expenses.

According to Justice, etc.

12. *Appeal against Deliverance of Trustee, or Resolution of Creditors.*

[*Prefix the Deliverance or Resolution appealed against.*]

Unto the Honourable the Lord Ordinary officiating on the Bills [*or*, the Sheriff of],

Note of Appeal for *C. D.* [*design.*], a creditor in the sequestration of *A. B.* [*design.*].

On the day of 18 , *E. F.* [*design.*], the trustee on the sequestrated estates of the said *A. B.*, pronounced the prefixed deliverance [*or, as the case may be*, a meeting of creditors in the said sequestration held at adopted the prefixed resolution.]

The Appellant is a creditor in the said sequestration, and as he considers himself aggrieved by the said deliverance [*or*, resolution], he respectfully appeals against the same, and craves the Court to recall the said deliverance [*or*, resolution] submitted to review, and to [*state special remedy desired, if any*].

The Appellant also craves expenses.

In respect whereof.

13. *Appeal to the Inner House against Judgment of the Sheriff.*

[*Prefix Deliverance complained of.*]

Unto the Right Honourable the Lords of Council and Session,

Note of Appeal for *C. D.* [*design.*], a creditor [*or, as the case may be*] in the sequestration of *A. B.* [*design.*].

That in the process of sequestration of the estates of the said *A. B.*, under the Bankruptcy (Scotland) Act, 1856, and Acts explaining and amending the same, presently depending in the Sheriff Court of , the Sheriff-Substitute was, on the day of 18 , pleased to pronounce the deliverance above copied, which the Appellant respectfully brings under the review of your Lordships, in terms of sec. 170 of the statute first above mentioned.

May it therefore please your Lordships to recall the deliverance complained of, find the Appellant entitled to the expenses of the process, both in your Lordship's Court and in the Sheriff Court; and do otherwise as to your Lordships shall seem proper.

According to Justice, etc.

14. *Petition for Bankrupt's Discharge without a Composition, with Minute of Concurrence of Creditors and Trustee's Certificate.*

Unto the Honourable the Lord Ordinary officiating on the Bills [*or*, the Sheriff of],

The Petition of *A. B.* [*design.*], one of the partners of the firm of *A. B. & Co.* [*design.*];—

Humbly showeth,—

That on the day 18 , the estates of the said *A. B. & Co.* as a company, and of *A. B.* and *C. D.* as partners of said company, and as individuals, were sequestrated by your Lordship [*or, as the case may be*] under the Bankruptcy (Scotland) Act, 1856, and Acts explaining and amending the same.

That six months have now expired from the date of the deliverance actually awarding sequestration, and the Petitioner is desirous of being finally discharged of all debts due by him as a partner of said company, and as an individual, before the date of the sequestration; he has, accordingly, procured the concurrence in this petition of a majority in number and four-fifths in value of the creditors who have produced oaths and claims to be ranked on said sequestrated estates, all conform to the Minute of Concurrence by the creditors, and certificate of *E. F.* [*design.*], trustee on the said sequestrated estates, herewith produced.

That the trustee has, in terms of the statute first above mentioned, prepared a report with regard to the conduct of the Petitioner, and as to how far he has complied with the provisions of the said Acts, which report is herewith produced.

The dividend which has been paid out of the individual estate of the Petitioner amounts to , being less than five shillings in the pound; but this has arisen from circumstances for which he cannot justly be held responsible.

May it therefore please your Lordship to appoint this Petition to be intimated by advertisement in the *Edinburgh Gazette*, and by circular posted to each of the creditors in the sequestration; and if at the distance of not less than twenty-one days from the publication of such intimation, there be no appearance to oppose the same, or in the event of appearance being made and objections stated against granting the discharge, if the same be repelled, to pronounce a deliverance finding that the failure of the Petitioner's estates, and the estates of the said company to pay a dividend of five shillings in the pound, has arisen from circumstances for which he cannot justly be held responsible, and to find the Petitioner entitled to his discharge as a partner of said *A. B. & Co.*, and as an individual; and on again considering this Petition, with the declaration or oath made by the Petitioner in terms of the 146th section of the said Bankruptcy (Scotland) Act, 1856, and on being satisfied with said oath or declaration, to pronounce a deliverance discharging the Petitioner of all debts and obligations contracted by him, or for which he was liable, as a partner of said *A. B. & Co.*, or as an individual, prior to the date of the sequestration; or to do otherwise in the premises as to your Lordship shall seem just.

According to Justice, etc.

MINUTE of CONCURRENCE by Creditors to Petition for the Bankrupt's Discharge, with Trustee's Certificate thereon.

[*Place and date.*]

We, being creditors, or mandatories for creditors, of *A. B. & Co.* [*design.*], and of *A. B.*, one of the individual partners of that company, having seen the report by the trustee on the sequestrated estates of said firm and partner, dated the day of 18 , do hereby concur in a Petition to be presented by the said *A. B.* to the Lord Ordinary, or to the Sheriff of , to be finally discharged of all debts contracted by him before the date of the said sequestration, in terms of and under the provisions of the Bankruptcy (Scotland) Act, 1856, and Acts explaining and amending the same.

[*Signed by Creditors.*]

TRUSTEE'S CERTIFICATE.

I, *E. F.* [*design.*], trustee on the sequestrated estates of the said *A. B. & Co.* and *A. B.*, one of the partners thereof, as an individual, do hereby certify that the creditors who have signed the foregoing Minute of Concurrence to a Petition by the said *A. B.* for his discharge, form a majority in number and more than four-fifths in value of those who have produced oaths and claims to be ranked on the said sequestrated estates.

(Signed) *E. F., Trustee.*

[*Place and date.*]

Sequestration for Rent.—See HYPOTHEC (vol. vi. 247).

Servant.—See MASTER AND SERVANT; HIRING; etc.

Service of Heirs.—The Service of Heirs Act, 1847, replaced the old practice regarding the service of heirs by much simpler procedure. The provisions of that Act were repealed, and with certain alterations re-enacted, by the Titles to Land Consolidation Act, 1868. Secs. 27 to 58 of the latter Act, read along with certain amending provisions of the Conveyancing Act, 1874, now regulate the procedure in the matter. It is no longer competent to issue brieves from Chancery for the service of heirs. Every person desirous of being served heir to a person deceased, whether in general or in special, and in whatsoever character, and whether the lands which belonged to deceased were or were not held by burgage tenure, must now present a petition of service to the Sheriff of Chancery or of the county, according to circumstances. (For present procedure,

jurisdiction, etc., see CHANCERY (SHERIFF OF); CHANCERY (DIRECTOR OF); APPEAL FROM SHERIFF OF CHANCERY.)

Special Service: General Service.—If the ancestor died feudally vested in the estate, the heir must complete his title by *special service*, and on this special service he must be infeft. Should the heir die after being served heir in special but before being infeft, then the next heir must disregard the special service, and enter to the person last infeft. Where the ancestor was uninfeft, but held personal rights to the subjects, the heir expedes a *general service*, the effect of which is that he acquires a right to the unexecuted procuratories and precepts, in virtue of which he may be infeft. If he die after being served heir in general but before being infeft, the personal rights are nevertheless completely transferred to him. These pass to his own heir-at-law, who must be served heir to *him* and not to the former proprietor.

For an account of the former procedure in service of heirs on brieves from Chancery, see Erskine, *Inst.* iii. 8, ss. 59 *et seq.*

Services, Personal.—See PERSONAL SERVICES.

Servitudes.—DEFINITIONS AND CLASSIFICATION.—A servitude is defined by Erskine to be a burden affecting lands or other heritable subjects by which the proprietor is either restrained from the full use of his property or is obliged to suffer another to do certain acts upon it, which, were it not for that burden, would be competent solely to the owner (Ersk. ii. 9. 1). Under this definition servitudes were divided into three classes: natural, legal, and conventional. A natural servitude was one which was constituted by the natural position of the burdened property, such as the burden of receiving the water which fell from a superior property (see *Campbell*, 1864, 3 M. 254). Among such natural servitudes may be included the burden of supporting the natural surface stratum of an estate imposed by the law of neighbourhood on the subjacent strata or adjacent properties (Rankine, *Landown.* 426 *et seq.*). Such natural burdens are not now included among true servitudes. A legal servitude was a burden constituted by statute or by long custom from the consideration of public necessity, such as a regulation limiting the height of buildings in cities. This is not now considered properly a servitude, though servitudes may be constituted by statute. Courtesy and terce have also been called legal servitudes; but these being personal rights, are not servitudes at all. A conventional servitude was a burden imposed by agreement, express or implied, and almost all true servitudes are conventional. Another old division of servitudes was into the classes of prædial or real and personal. Prædial servitudes were those which were constituted in favour of a tenement, and only by consequence of a person as the owner of that tenement. Personal servitudes were those constituted principally in favour of persons, and the only well-known examples of this class were liferents. But a liferent is not now considered to be a servitude (see Ld. Pres. Inglis in *Patrick*, 1867, 5 M. 699); so that the only true servitudes are prædial or real (Ersk. ii. 9. 2, 3, 5; Bell, *Prin.* 980, 981). A servitude may accordingly be said to be a burden imposed by agreement, express or implied, or by statute, on a tenement consisting of lands or other heritable subjects, in favour of a neighbouring tenement, whereby the owner of the burdened tenement is either restrained from the

full use of his property or is obliged to suffer the owner of the other tenement to do certain acts upon the burdened tenement which, in the absence of that burden, would be competent solely to the owner. Looked at from the point of view of the owner of the tenement in favour of which the burden is created, a servitude is a privilege whereby such owner can restrain the owner of the burdened tenement from exercising his full right of ownership, or is entitled to certain limited uses of the burdened tenement (Ersk. ii. 9. 1; Stair, ii. 6, ii. 7; Bell, *Prin.* 979).

The idea of servitude as defined involves that there must be two tenements (*Patrick*, 1867, 5 M. 683; Ersk. ii. 9. 5). These tenements must be distinct and owned by different persons: for *nulli res sua servit* (*Baird*, 1859, 21 D. 848; rev. 1861, 23 D. H. L. 5, 4 Macq. 127, applied 1861, 23 D. 1080; *Donaldson's Trs.*, 1839, 1 D. 449). If two tenements are owned by the same proprietor, though possessed by different tenants, no servitude can exist in favour of the one over the other (see *M'Donald*, 1871, 10 M. 94; cf. *Grierson*, 1882, 9 R. 437). The tenements must be neighbouring, but need not be contiguous. The only essential is that the distance between the two be not so great as to obstruct all benefit from the servitude (Ersk. ii. 9. 33; *Patrick*, 1867, 5 M. 683).

The burdened tenement is called the servient tenement, and its owner the servient owner, while the tenement in favour of which the burden is constituted is called the dominant tenement, and its owner the dominant owner (Bell, *Prin.* 979). Servitudes are divided into the two classes of urban and rural. Urban servitudes are those constituted in favour of tenements of houses though situated in the country; rural servitudes are those acquired for such subjects as fields, gardens, farms, including dwelling-houses and offices built for the use of a farm, even though situated in a city (Ersk. ii. 9. 6; Bell, *Prin.* 983). This distinction cannot, however, be said to be of universal application, for a servitude created in favour of an urban subject may in its nature be essentially a rural servitude (see, *e.g.*, *Inhabitants of Dunse*, 1732, Mor. 14517). Other divisions are into the classes of positive and negative, apparent and non-apparent, continuous and discontinuous. By a positive servitude the servient owner is compelled to allow the dominant owner to make certain uses of the servient tenement which otherwise he could prevent. By a negative servitude the servient owner is restrained in some way from exercising his full rights as proprietor of the subjects (Bell, *Prin.* 982). In the former case the burden is *patiendi*, in the latter it is *non faciendi*. Rural servitudes are all positive, urban are mostly negative, though some are positive. Apparent or manifest servitudes are those which furnish manifest signs of their existence, as the burden of allowing a door or a window to exist in a wall is manifested by the existence of the door or window. Non-apparent or non-manifest servitudes are those which have no such external proofs of their existence, as, *e.g.*, the prohibition from building above a certain height (Rankine, 375). Continuous servitudes are those which are exercised without the necessity of personal acts on the part of the dominant owner, as, for example, a servitude of aqueduct. Discontinuous or interrupted servitudes require for their exercise actual personal acts, and include such servitudes as rights of way (see *Code Civil*, 688).

General Rules regarding Exercise of Servitudes.—*Maintenance of the Subjects required for the Purpose of the Servitude.*—It follows from the nature of a servitude as a real and not a personal burden that it imposes no obligation on the servient owner to do anything (Ersk. ii. 9. 1). He is not bound, for example, to keep in repair for the use of the dominant owner a road or

a drain. Such an obligation would in general, unless appearing on record, be a mere personal obligation superadded to the servitude, and so not enforceable against singular successors of the servient owner (Bell, *Prin.* 984). It may, however, be an essential condition in the constitution of the servitude, so that the servitude cannot be enforced apart from it (*Tennant*, 1888, 15 R. 671). Even the owner of a wall subject to the servitude of support is not bound to maintain the wall unless he comes under that obligation in virtue of the law of common interest (Bell, *Prin.* 984; Rankine, 364; but see Bankt. ii. 7. 2). On the other hand, the servient owner must allow the dominant owner access for performing all operations required for preserving and making use of the servitude, but only when necessary (*Stevenson*, 1867, 3 S. L. R. 184; *Preston's Trs.*, 1860, 22 D. 366; *Middleton*, 1765, 5 Br. Sup. 904; Bell, *Prin.* 985). Where the dominant owner in a servitude of access had erected stiles and gates for the purpose of access, and had possessed them peaceably for seven years, the servient owner was held not to be entitled to remove them *brevi manu* (*Blackburn*, 1869, 6 S. L. R. 318). The dominant owner is liable to recompense the servient for any damage which may result to his property from neglect to keep in repair works pertaining to the servitude right, such as a mill lade (Rankine, 364; *Dundee Parson*, 1687, Mor. 14521; but comp. *Carlile*, 1731, Mor. 14524).

Servitude exercised for Benefit of Dominant Tenement only.—The proprietor of the dominant tenement cannot communicate the benefit of the servitude to any third party not possessing the dominant tenement or part thereof (*Murray*, 8 Dec. 1808, F. C.; but comp. Ersk. ii. 9. 5). Nor can he exercise the servitude for the benefit of another tenement owned by him, even though held by the same title (*Scott*, 6 July 1809, F. C.; *Anstruther*, 1861, 24 D. 149; *Stewart*, 1788, Hume, 731; *Magistrates of Dunbar*, 1829, 7 S. 672). Further, the benefit of the servitude is confined to the use of the dominant tenement which must be taken to have been in contemplation of the parties in creating the servitude (Ersk. ii. 9. 34; Bell's *Prin.* 986; *Gibb*, 1837, 16 S. 169; L. C. Hatherley in *Graham*, 1869, 7 R. 976; rev. 1871, 9 R. H. L. 98). Thus a proprietor of a servitude of casting and winning slate and stone is not entitled to exercise it for sale (*Murray, supra*; *Brown*, 1775, Mor. 14542); and one in right of a servitude of casting peats for fuel for himself and for sale cannot communicate it to feuars or tenants (*Carstairs*, 1829, 7 S. 607; see *Murdoch*, 1823, 2 S. 159), or extend it to an ironwork (Ersk. ii. 9. 34) or limework (*Leslie*, 1793, Mor. 14542) opened on his lands, or to any other manufacture which may require an extraordinary supply of fuel, and which was not erected till after acquiring the servitude (Ersk. ii. 9. 34). Where the right conferred by the servitude is not exhaustible, such as a right of way, it is more uncertain how far it can be communicated to others connected with the dominant tenement, such as tenants or feuars. The principle by which any such question must be answered is that the dominant owner cannot without the consent of the servient owner increase the burden intended to be imposed on the servient tenement by the constitution of the servitude (*Robertson*, 1825, 1 F. 126; 1829, 7 S. 344; *Magistrates of Dunbar*, 1829, 7 S. 672).

Burden not to be increased, and Servitude to be exercised in way least Burdensome to Servient Owner.—On the same principle, the dominant owner cannot, for example, in a servitude of support constituted by grant, lay a greater weight on the servient tenement than is expressly stipulated for in the grant (Ersk. ii. 9. 34; *Young*, 1831, 9 S. 500). If the deed constitut-

ing the servitude can be interpreted in more than one way, that way is chosen which is most favourable to the servient owner (*Clark & Sons*, 1898, 25 R. 919). If there are different degrees in a servitude, then, in the absence of anything to the contrary in the terms of the grant or in the state of possession by the dominant owner, that degree is presumed which is lightest on the servient tenement (*Dawson*, 1824, 3 S. 136; rem. 1826, 2 W. & S. 230; alt. 1827, 6 S. 19; rev. 1830, 4 W. & S. 81, per Ld. Wynford, p. 92; *Duke of Argyll*, 1831, 9 S. 763; rev. 1832, 6 W. & S. 98). The dominant owner must exercise his right in the way least burdensome to the servient (*Earl of Aboyne*, 22 June 1813, F. C.; affd. 1819, 6 Pat. 444; *Glasgow Magistrates*, 1776, 5 Br. Sup. 598; Ersk. ii. 9. 34), and the servient owner is not debarred from the use of his property further than the exercise of the servitude by the dominant owner requires (Ersk. ii. 9. 34; *Rattray*, 1868, 5 S. L. R. 219). Where there is a servitude of watering cattle, the servient owner may water his cattle along with those of the dominant owner (Bell, *Prin.* 987). The owner of a stream subject to a servitude of taking water may take as much water as he requires for primary uses, if sufficient is left for the dominant owner (*Donaldson*, 1877, 14 S. L. R. 587). The dominant owner of a servitude of dam and aqueduct cannot prevent the servient owner from utilising the surplus overflow, provided he does not interfere with the dominant owner's rights (*Scottish Highland Distillery Co.*, 1877, 4 R. 1118). In the case of a servitude of pasturage, the servient owner may pasture his stock along with those of the dominant owner (Bell, *Prin.* 1013); or may even plough up part of the property, so long as he leaves sufficient grass for the dominant owner, the servitude remaining in force over the ploughed portion, so that it can be exercised when the ground is again laid down in grass (Ersk. ii. 9. 34; *E. Southesk*, *supra*). A proprietor may similarly cultivate part of his ground notwithstanding the existence of a servitude of taking fuel (*Watson*, 1667, Mor. 14529; *Dunnikier Vassals*, 1670, 2 Br. Sup. 466, 1 Br. Sup. 615). He may also, in spite of a servitude of fuel or of pasturage, open up the surface of the ground for the purpose of getting at minerals (Ersk. ii. 9. 34), or he may grant further servitudes (*Dunnikier Vassals*, *supra*).

The servient owner may make such repairs and alterations as will lighten the burden, provided he does not interfere with the dominant owner's right (Bell, *Prin.* 987, *Murray*, 1715, Mor. 14521; *Ferguson*, 12 Nov. 1816, F. C.; *Robertson*, 1784, Mor. 14534; *Dennistoun*, 1824, 2 S. 784; *Gray*, 1825, 4 S. 104; *Pirnie*, 5 June 1819, F. C.). Thus the proprietor of a tenement subject to a servitude right of footpath (see Bell, *Prin.* 1010) may erect stiles, turnstiles, or swing-gates across it, but cannot lock the gates even though he gives the dominant owner a key (*Borthwick*, 1799, Hume, 513; *Oliver*, 1869, 8 M. 137; *D. Roxburgh*, 1713, Mor. 10883; but see *Mags. of Glasgow*, 1776, 5 Br. Sup. 598; and cf. *Sutherland*, 1876, 3 R. 485). He may put up swing-gates across a cart or carriage road (*Wood*, 9 March 1809, F. C.). He may alter the course of a servitude road or path if he gives a route equally convenient (*Bruce*, 1748, Mor. 14525; *Ross*, 1751, Mor. 14531; Elch. *v.* "Servitude," No. 5; *Mags. of Renfrew*, 1823, 2 S. 458; *Thomson's Trs.*, 1898, 25 R. 407; but cf. *Hill*, 1879, 6 R. 1363), but he may not make alterations of a material and extensive character on a servitude road unless with the authority of the Court or the dominant owner (*Bain*, 1871, 8 S. L. R. 539). He may have the route defined if indefinite (*Mackintosh*, 1872, 10 M. 517), and sometimes may even cover it over to a limited extent (*Allans*, 1801, 4 Pat. 269; see opinions in *Argyllshire Commrs. of Supply*, 1885, 12 R. 1255; and cf. *Richmond*, 1868,

5 S. L. R. 308; *Mackenzie*, 1869, 7 M. 419; *Bennett*, 1877, 4 R. 321). But a proprietor who has a servitude right, constituted by grant, of access to his property by a specified close through the property of another, can prevent the dominant owner from narrowing that access (*Ferrier*, 1832, 10 S. 317; *Grigor*, 1896, 24 R. 86; cf. *Crawford*, 1896, 4 S. L. T. 85; *Ferrier*, 1832, 10 S. 317; *Crawford*, 1874, 2 R. 20). This may seem inconsistent with the principle that the servient owner must exercise his right in the way least burdensome to the servient tenement, and that therefore all he can ask in a servitude road is just sufficient width for his access. But in these cases the grant was not a right of access merely, but a right of access by a particular passage. Ld. Young in *Grigor* doubted if the right was properly a servitude at all. The servient owner may cover over a watercourse although subject to a servitude of watering cattle, provided he leave sufficient access to the water for the servient owner's cattle (*Beveridge*, 18 Nov. 1808, F. C.).

What may be the Dominant Tenement.—Some difficulties arise as to what may be the dominant tenement in a servitude. It has not been settled whether an incorporeal right, such as a right of salmon fishing or of port, can be the dominant tenement (see Rankine, p. 369). The magistrates and council of a royal burgh may acquire, by grant or by prescription, servitudes over the property of other persons (*Sinclair*, 1779, Mor. 14519; *Murray*, 8 Dec. 1808, F. C.; *Mags. of Earlsferry*, 1829, 7 S. 755; 1832, 11 S. 74; *Mags. of Dundee*, 1843, 6 D. 12; 1858, 20 D. 1067; *Town of Falkland*, 1708, Mor. 10916), and the right may be vindicated either by the magistrates themselves or by any of the inhabitants (*Cleghorn*, 1805, Mor. 16141; rem. 1813, 2 Dow, 40; see *Jaffray*, 1755, Mor. 2340, 14517; rev. 1757, 1 Pat. 632). But in the case of a burgh of barony there is more doubt. It is difficult to distinguish, for this purpose, between royal burghs and burghs of barony. A burgh of barony is a *quasi* corporation (see *Home*, 1846, 9 D. 286; and Ld. Blackburn in *Smith*, 7 R. (H. L.) at p. 38). But in *Feuars of Dunse*, 1732, Mor. 1824, 14517 (approved in *Home*, *supra*, and *Dyce*, 1849, 11 D. 1266; affd. 1852, 1 Macq. 305), it was decided that the inhabitants of a burgh of barony cannot claim a servitude of pasturage over lands outside the bounds of the burgh unless in the character of proprietors of houses in the burgh. This case has been cited to support the view that burghs of barony, or their inhabitants, cannot possess servitudes at all; but it would rather seem that this depends on the nature of the servitude claimed. Thus, in the case of *Home*, Ld. Mackenzie said: "It is difficult to understand how a right of pasturage could belong to all the inhabitants of a burgh"; and in the case of *Dyce*, Ld. J.-Cl. Hope said that the ground of the decision in the *Dunse* case was that no such indefinite and general burden could be imposed on the property of a third party where there was no dominant tenement to which it could be ascribed. In another part of his opinion he said: "In the cases in which any support has been given to a claim by the inhabitants of a burgh (and I do not here draw any distinction between a royal burgh and a burgh of barony) to any general privilege of a personal kind over the property of another, it has been in cases in which the privilege claimed has been for the purposes of domestic use and comfort and necessity,—such as the use of water, of access to roads, of bleaching and drying linen, and the like,—and that on ground either within the burgh or so connected with it by occupation and position as in truth to be practically part of it." In the same case Ld. Cockburn expresses the view that an inhabitant of a burgh of barony may have a right

to a servitude over the property of another person, and has a title to enforce it, and he does not distinguish between the cases where the servient tenement is within and where it is without the burgh boundaries. An important distinction in this class of cases is referred to by Ld. J.-Cl. Hope in *Dyce*. He says: "I allude to the broad, important, and most discriminating distinction between the cases of burdens or servitudes attempted to be conferred on proprietors between whom and the claimants there is no connection whatever, either as to the relative rights of superior and vassal,—or of baron and inhabitants of a burgh of barony—or of corporation and burgess,—and the cases in which the inhabitants of a burgh of barony are maintaining certain privileges or rights as flowing from or part of the grant in the erection of the burgh of barony—or the burgesses or community of a burgh are contending that certain property belonging to the corporation is held merely for the purpose of the public use of the whole community—or in which vassals on large feuing grounds are contending that the common superior had truly devoted part of his ground, or wells, or water adjoining for the benefit of those taking feus from him, so that such privilege came to be a pertinent or adjunct of the feu, or a part of the plan on which they relied in taking their feus." To the latter class of cases may be assigned such cases as *Mags. of Kilmarnock*, 1776, 5 Br. Sup. 406; *Home*, *supra* (but see Ld. Cockburn in *Dyce*, 11 D. at p. 1285); *Sanderson*, 1859, 22 D. 24; *Paterson*, 1879, 7 R. 712; affd. 1881, 8 R. (H. L.) 117; *Grahame*, 1879, 6 R. 1066; 1881, 8 R. 395; affd. 1882, 9 R. (H. L.) 91. These cases may be looked on as cases of maladministration or breach of trust on the part of persons holding rights for the community which they are bound to protect (see Lds. Fullerton and Jeffrey in *Home*, and Ld. Chancellor in *Dyce*, 1 Macq. at p. 311), rather than as cases of servitude. In the cases of *Jaffray*, 1755, Mor. 2340, 14517; rev. 1757, 1 Pat. 632; *Dyce*, *supra*; *Harvey*, 1853, 15 D. 768; *Henderson*, 1860, 22 D. 1126, rights of alleged servitude were denied to inhabitants of burghs or villages, but the reason in each case was the peculiar nature of the servitude claimed, or the indefinite way in which it was claimed, or because the inhabitants had not established the ground of their claim to the servitude. In *Jaffray*, indeed, the Court of Session sustained the claim of a burgh of barony to a servitude of bleaching, and the House of Lords reversed the decision, apparently on other grounds than want of title in the burgh to hold a servitude (see Ld. Pres. in *Home*, and Ld. J.-Cl. in *Dyce*). In the case of *Sharp* (1829, 7 S. 679) the question was raised but not decided, whether the character of inhabitant merely of a burgh of barony was a sufficient title to pursue in a declarator of a servitude right to carry off sand and gravel from the bed of a river, and to draw water therefrom. The Lord Ordinary found that being a feuar or inhabitant gave a sufficient title. The defender reclaimed, but the Inner House found it unnecessary to decide whether inhabitancy was enough or not. In *Aikman* (1830, 8 S. 943; alt. 1832, 6 W. S. 64) the House of Lords found that the pursuer had a title only to insist in the action as one of the inhabitants of Hamilton (a burgh of regality), or as owner of certain lands therein, to the effect of having it tried by a jury whether or not he had a right of servitude to take sand and gravel from the ground of the defender in right of and for the use of his own properties, but the limitation appears to have been on account of the indefinite character of the claim in the summons (see Ld. Fullerton in *Home*). In *Mercer* v. *Rutherford* (1840, 2 D. 616) an inhabitant of a village was allowed an issue for proof before a jury of possession of a right of way by himself and the other inhabitants of the village, though he did not insist

on an issue for proof that it was a public footpath. In *Mercer* v. *Reid*, 1840, 2 D. 520, a similar issue was allowed, although in this case also what was claimed was not a public right of way, but a private right of way in favour of the portioners and inhabitants of a particular village. In *Thorburn*, 1841, 4 D. 169, although the pursuer claimed a right of access to and of taking water from a mill runner in respect of his proprietorship of lands in the neighbourhood, he was allowed to found on possession by the other inhabitants of the neighbourhood (but see *E. of Morton*, 1813, 1 Dow, 91). In *Beveridge*, 18 Nov. 1808, F. C., it was assumed that the inhabitants of the town of Kinross could acquire a servitude of watering cattle in a stream belonging to another party, and had a title to protect it apparently as such inhabitants merely. In *Home*, 1846, 9 D. 286, the inhabitants of Eyemouth, a burgh of barony, were held to have a title to defend their right to bleach on property of the baron. Ld. Pres. Boyle, however, considered it not a case of a servitude at all, but rather of trust property in the hands of the baron; but in *Dyce*, Ld. Cockburn, delivering a dissenting opinion, said he did not consider that the fact that the defender in *Home* was the baron was essential. He considered that the result of the case was that the inhabitants of the burgh were allowed to prove a servitude over the property of a third party. These cases seem to indicate that an inhabitant of a burgh of barony, or even of a mere village, may as such acquire and protect rights of servitude, provided these rights are suitable for exercise by the community. This view is strengthened by the case of *Smith*, 1879, 6 R. 858; affd. 1880, 7 R. (H. L.) 28. There it was admitted by Ld. Adv. Watson before the House of Lords, with the approval of the judges, that the inhabitants of Denny, an unincorporated village, had acquired a servitude of *aquæhaustus* from a well on the property of a neighbouring proprietor. In the Court of Session, Ld. Gifford said: "It is a right of servitude acquired by that portion of the estate of Cumbernauld on which the village of Denny stands, a right to use this well. The dominant tenement is that portion of Cumbernauld occupied by the village."

There is, however, a good deal of authority for the view that mere inhabitancy of a burgh of barony or of a village can give no right to acquire a servitude. In *Smith*, Ld. Ormidale said: "I must hold it to be also clear, on the authorities which were cited at the debate, and in particular, the cases of *Milne Home* (1846, 9 D. 286), *Mackenzie* (1849, 12 D. 132), and *Henderson* (1860, 22 D. 1126), that a servitude to the use of a well situated on the property of another could not be acquired by the inhabitants of a village simply as such. I could understand that a servitude might be acquired by a feuar or several feuars, for in that case the facts might be sufficient to show that there was a dominant tenement; but in the present case there is no dominant tenement in respect of which any servitude could have been acquired or could exist, at least none such has been mentioned or referred to in the record." In *Dyce*, Ld. J.-Cl. Hope said that while it was clear that there were no proper personal servitudes in the law of Scotland, the servitude claimed could only be exercised as a personal servitude if being the inhabitant of a burgh could give right to acquire such a servitude (see also *Mackenzie*, 1849, 12 D. 132; and Ld. Medwyn in *Fergusson*, 1844, 6 D. 1363, at p. 1370).

The servitudes which may be held by burghs or by similar communities partake of the nature of public rights. The only recognised public right of similar nature to a servitude is a public right of way (see RIGHT OF WAY), although attempts have been made to establish other public rights, such as a right to drove stances and of pasturing therein (*M. Breadalbane*, 1846, 9 D.

210; alt. 1848, 7 Bell's App. 43), *jus spatiandi* (*Mackintosh*, 1871, 9 M. 574, 10 M. 29 (1872), 517; *Jenkins*, 1866, 4 M. 1046), a right to curling, skating, and sliding (*Harvey*, 1853, 15 D. 768), to trout fishing (*Fergusson*, 1844, 6 D. 1363; *Montgomery*, 1861, 23 D. 635); to hold public markets, to quarry stones (*Mackintosh, supra*; *Henderson*, 1860, 22 D. 1126); to take away clay, feal and divot, to water and dry lint, to dry hay, to use ground for public games and exhibitions, and for a playground (*Henderson, supra*), and to pasture and bleach (*Mackintosh, supra*). Nor can there, strictly speaking, be a public right of drawing water (see *Mackenzie*, 1849, 12 D. 132; *Smith, supra*; *L. Melville*, 1842, 4 D. 1231; *Geils*, 1872, 10 M. 327).

What Burdens may be Servitudes.—An important question is whether the number of enforceable servitudes is limited or not. Stair says: "To descend now to the kinds of servitudes: there may be as many as there are ways whereby the liberty of a house or tenement may be restrained in favour of another tenement; for liberty and servitude are contraries, and the abatement of the one is the being or enlargement of the other" (Stair, ii. 7. 5 and 9); and Erskine makes a similar statement (Ersk. ii. 9. 2). This, however, has been thought too wide a statement. Bell says: "It has therefore been held essential that this burden should be limited to such uses or restraints as are well established and defined, leaving others as mere personal agreements" (Bell, *Prin.* 979; see also Ld. Gifford in *Alexander*, 1875, 3 R. 156). But new servitudes have been recognised by the Courts; and referring to this, in the case of *Home*, 1846, 9 D. 286, Ld. Ordinary Cuninghame said (p. 290) that there had been a great change and enlargement in modern times as to the principles on which claims of servitude or of qualified uses of property ought to receive effect. In *Dyce* (1849, 11 D. 1266; affd. 1852, 1 Macq. 305), however, Ld. J.-Cl. Hope denied this, pointing out that Stair's statement covered every case decided since his time. Ld. Cockburn, in the same case (11 D. at p. 1283), stated the point very clearly, saying: "Every party who has ever resisted the introduction of a new servitude has invariably argued that the whole possible class of them was already known and named, and that the introduction of a new one was proved to be illegal by the mere fact of its novelty. I am not aware of any authority for this principle, and it has been conspicuously refuted by the past history of the law. If it had been sound, we would never have got beyond the days in which land was only required for its simplest primary uses; and the admissible servitudes would all have been fixed and catalogued ages ago. But, in place of this, it is certain that new circumstances have been constantly changing and multiplying them. The recognition within no very distant period of bleaching and golfing as servitudes are examples, and our books are full of others. The law nowhere pretends to specify all possible servitudes prospectively. It only supplies the root from which they are to spring. This root is described by Stair, who, after mentioning some of 'the chief servitudes in use with us,' explains that 'the prædial or country servitudes whereby one ground or field is subservient to another may be as manifold as the free use of the one may be restrained or impaired for the profit or pleasure of the other.' It is under the operation of this general principle that many new servitudes have arisen and will continue to arise. No servitude (that I am aware of) has ever been introduced by statute, and they are certainly not all of the same age. What has introduced them? Just the principle that he who permits his land to be put under restraint for the rational use of another for forty years, exposes himself to have that use fixed upon him as a permanent servitude." In giving judgment on the appeal in *Dyce* the

Ld. Chancellor said: "There is no rule in the law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles. The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles." But the statement of Stair requires some qualification, for all limitations on the absolute use of property are not admitted as servitudes. The essential quality of a burden capable of becoming a servitude has been explained. Bell says: "What shall be deemed servitudes of a regular and definite kind is a secondary question, as to which the only description that can be given generally seems to be that it shall be such a use or restraint as by law or custom is known to be likely and incident to the property in question, and to which the attention of a prudent purchaser will in the circumstances naturally be called" (Bell, *Prin.* 979). In *Patrick*, 1867, 5 M. 683, Ld. Deas (p. 706) says: "'Neither,' as Mr. Erskine observes (ii. 9. 33), 'does the law give servitudes countenance unless they have some tendency to promote the advantage of the dominant tenement'; that is, as I understand it, the peculiar advantage of the dominant tenement in contradistinction to that general and slighter advantage which would equally accrue to any other tenement on which the privilege might be conferred. A right or privilege which does not fall naturally to be attached to the particular tenement to which it is granted, and with which it is unusual to burden the servient tenement, and which is of a nature vexatious to the servient proprietor as interfering with the common law rights and enjoyment of property, and forming an obstacle to free commerce in land, cannot be made effectual against singular successors however explicitly it may have been granted in the titles of the dominant tenement." Ld. Ardmillan said (p. 709): "In every case of a prædial servitude there must be a *prædium serviens prædio*, a dominant and servient tenement, and the burden to which the servient tenement is subjected must be of a proper prædial character for the benefit of the dominant tenement. I do not deny the possibility of the introduction of a new prædial servitude. The habits and requirements of life, varying and extending with advancing civilisation, improved agriculture, and multiplying necessities, may render the introduction of a new servitude possible and legitimate. But it must, in my opinion, be of a truly prædial character, similar in nature and quality to the prædial servitudes which the law has already recognised." (See also Ld. Young in *Johnston*, 1893, 20 R. 539, and Ld. Watson in *The Park Yard Co.*, 1897, 24 R. 1148; rev. 1898, 25 R. (H. L.) 47). On these principles a servitude of bleaching has been recognised in the law of Scotland (*Jaffray*, 1755, Mor. 2340, 14517; rev. 1757, 1 Pat. 632, probably not on the ground stated in Mor. 14517, that no such servitude was acknowledged by the law of Scotland (see L. P. Boyle in *Home*, *infra*); *Sinclair*, 1779, Mor. 14519; affd. 1780, 2 Pat. 554; *Home*, 1846, 9 D. 286) after having been at first denied (*Falkland*, 1708, Mor. 10916). Similarly, a servitude of steeping flax in a mutual stream was recognised (*Durham*, 1793, Hume, 735). But servitudes *spatiandi* (*Cochran*, 1759, Mor. 14518; *Mackintosh*, 1871, 9 M. 574; 10 M. 29, (1872) 517; *Jenkins*, 1866, 4 M. 1046; *Dyce*, 1849, 11 D. 1266; affd. 1852, 1 Macq. 305), of trout fishing (*Patrick*, 1867, 5 M. 683; and see *Fergusson*, 1844, 6 D. 1363; *Montgomery*, 1861, 23 D. 635), of a privilege of one tide's salmon fishing in a season (*Murray*, 1880, 7 R. 804), of hunting or shooting (*E. Aboyne*, 22 June 1813, F. C.; affd. 1819, 6 Pat. 444; *E. Aboyne*, 16 Nov. 1814, F. C.; affd. 1818, 6 Pat. 380; *Pollock*,

Gilmour, & Co., 5 July 1828, F. C.; *Marquis of Huntly*, 1858, 20 D. 374; *Marquis of Huntly*, 1896, 23 R. 610), of curling, skating, and sliding (*Harvey*, 1853, 15 D. 768), of exclusive use of a common subject (*Leek*, 1859, 21 D. 408), and of contributing to the upkeep of a roof (*Nicholson*, 1708, Mor. 14516; *Luke*, 1695, 1 Fount. 665), have been denied, though such a right as a *jus spatiandi* may be established by express grant or reservation (see *Magistrates of Dundee*, 1843, 6 D. 12, and Ld. Chancellor in *Dyce*, 1 Macq. at p. 312). On the same principles, golfing cannot be considered a servitude (but see *St. Andrews Ladies' Golf Club*, 1887, 14 R. 686), although burgh property may be subject to a customary right of golfing in favour of the inhabitants (*Kelly*, 1812, note in 9 D. 293; *Cunningham*, 1847, 9 D. 1469; *Sanderson*, 1859, 21 D. 1011, 22 D. 24; *Magistrates of Earlsferry*, 1829, 7 S. 755; 1832, 11 S. 74); and the inhabitants of a burgh may have title to enforce their right to golf on ground feued by the magistrates under reservation of such right (*Cleghorn*, 1805, Mor. 16141; rem. 1813, 2 Dow, 40). Taking growing sea tangle for the manufacture of kelp is not considered a servitude, as it is not taken for the benefit of a dominant tenement. It is rather looked upon as evidence of ownership of the foreshore (*E. Morton*, 1760, Mor. 13528; *Ld. Reay*, 1781, Mor. 5151; *M'Taggart*, 1867, 5 M. 534; *Agnew*, 1873, 11 M. 309). But taking drift sea-ware for manure is a recognised servitude (*Fullerton*, 1697, Mor. 13524; *E. Morton, supra*; *Ld. Reay, supra*; *Baird*, 1859, 21 D. 848; rev. 1861, 4 Macq. 127; 23 D. (H. L.) 5; see *M'Taggart, supra*). It is only in reference to positive servitudes that such questions have arisen. In the case of negative servitudes effect will not readily be given to servitudes not already known and recognised. Negative servitudes being mere prohibitions, are not made manifest in the exercise of the right conferred on the dominant owner, and therefore it is impossible for a purchaser of the servient tenement to be on his guard against them. But positive servitudes are more easily detected by a purchaser, as they require either sasine or possession (Bell, *Prin.* 990: Rankine, 367).

Constitution of Servitudes.—(1) *Positive Servitudes.*—(*a*) *Grant.*—A positive servitude may be created either by grant or by prescription. If constituted by grant, it may be contained in any holograph or tested writing, whether such writing be part of the title of the dominant or of the servient tenement (Bell, *Prin.* 992, and authorities there cited). It is usually contained in the titles of the servient tenement (see, *e.g.*, *Cleghorn*, 1805, Mor. 16141; rem. 1813, 2 Dow, 40; *Dinwiddie*, 1821, 1 S. 164; *Davidson*, 1822, 1 S. 411; and see Ld. Young in *Johnston*, 1893, 20 R. 539, at p. 547). It is essential that the intention to create a permanent servitude be clear (*Park Yard Co. Ltd.*, 1897, 24 R. 1148; rev. 1898, 25 R. (H. L.) 47; and see for similar rule in case of negative servitudes, Bell, *Prin.* 994, and authorities there cited). Such intention may be discovered from the terms of the document taken as a whole, or from the circumstances of the case; and it is not conclusive against the constitution of a servitude that the deed constituting the burden is in terms appropriate for creating a mere personal obligation (Ld. Watson in the *Park Yard Co., supra*). The servitude may be constituted by a separate writing, such as a contract agreement or missive, or perhaps articles of roup (Bell, *Prin.* 992, and cases there cited); even, it is thought, though these should be followed by charter or disposition making no mention of the servitude (*Turnbull*, 1622, Mor. 14499). This would appear to be inconsistent with the established rule that a disposition, on being delivered and accepted, "becomes the sole measure of the contracting parties' rights, and supersedes all previous

communings and contracts however formal" (*Orr*, 1892, 19 R. 700, rev. 1893, 20 R. (H. L.) 27; *Lee*, 1882, 10 R. 230; affd. 1883, 10 R. (H. L.) 91; *Croall*, 1870, 9 M. 323). The distinction may, however, be drawn that the principle involved in these cases is that the stipulations in the superseded writing must be held to have been abandoned; while in the case of a servitude not mentioned in the charter or disposition, and therefore not appearing on record, the possession necessary to validate the right would redargue abandonment (Rankine, 375; and comp. *Campbell*, 1867, 5 M. 636). The grant may be from one whose title has not been completed; and if so, subsequent completion of the title will validate the grant *accretione* (*Sivright*, 1828, 7 S. 210). The grant may be by an heir of entail having power to sell under the Entail Statutes (*Bowman Ballantine*, 1883, 10 R. 1061). It cannot be obtained compulsorily in terms of the Lands Clauses Act, 1845 (8 Vict. c. 19) (*Pinchin*, 1854, 5 De G., M. & G. 851; *Metropolitan District Railway*, 1880, L. R. 13 Ch. D. 607, per Jessel, M. R., at p. 616); but may be taken in virtue of special powers in an Act of Parliament (see, *e.g.*, *Lord Blantyre*, 1886, 13 R. 636; rev. 1888, 15 R. (H. L.) 56), or may be acquired by such an undertaking as a railway company by agreement (*Caledonian Railway Co.*, 1876, 4 R. 140). A right to a servitude may fall under a clause of parts and pertinents as explained by previous possession (*Borthwick*, 1668, M. 9632; Ersk. ii. 9. 16; and see *Preston's Trs.*, 1860, 22 D. 366). For a form of a grant of servitude, see *Jurid. Styles*, i. 47.

If *rei interventus* follow on an agreement to grant a servitude not in itself binding, this may bar the servient owner from challenging the right of the dominant owner (Bell, *Prin.* 946; *Aytoun*, 1800, Mor. App. "Property," No. 5; *Aytoun*, 1801, Mor. App. "Property," No. 6); but, except in this case, a servitude constituted by grant not in the form of a probative writing is not binding (*Kincaid*, 1750, Mor. 8403; Elch. *v.* "Servitude," No. 4).

There has sometimes been difficulty in distinguishing between grants of servitude and commonty. A servitude of pasturage only is constituted by possession following on a grant of land "*cum communi pastura in commune de B.*," or "*cum privilegio communitatis*," or "with pasturage of cattle and privilege of commonty," or "with parts, pertinents, and pendicles, with common pasturage," or "with the liberty and privileges of the commonty of B." (Bell, *Prin.* 1089; Rankine, 525). If the grant is in such terms as these, no higher right than a servitude can be acquired by possession; but possession on a simple grant with or without a clause of parts and pertinents may bestow a right of commonty or of servitude according to its extent (Rankine, 525, and authorities there cited).

To be valid against singular successors, the servitude must further either appear on record or be followed by such possession or use as it admits of, called *quasi* possession (see Ersk. ii. 9. 3; *Garden*, 1734, Mor. 14517; *Pitarro*, 1673, Mor. 14503; *Blair*, 1686, Mor. 14505; *Turnbull*, 1622, Mor. 14499; *Eddie*, 1869, 6 S. R. L. 363; *The Park Yard Co.*, 1897, 24 R. 1148; rev. (H. L.) 1898, 25 R. (H. L.) 47). Where, however, two persons had personal titles to adjoining tenements flowing from the same author, and the prior right constituted a servitude over the property disponed by the posterior right, the servitude was held to be effectual without possession (*Greig*, 1829, 7 S. 274). As regards the nature of the possession necessary, the same rules will probably apply as those regarding the nature of the possession required for constituting servitudes by prescription (see *infra*). The object of the rule as to registration or possession is that a purchaser may be protected against latent burdens.

He is safe against all positive servitudes which do not appear on record or which cannot be found out either by inspection or by inquiry in the neighbourhood. But while, theoretically, a purchaser may discover all servitudes against the property which appear on record, practically some might escape his notice. If they are contained in the titles of the servient tenement, then of course an inspection of the titles discloses them. But if they are contained in the titles of the dominant tenement, then, while theoretically they are published in the records, they may escape the notice of a purchaser of the servient tenement, for they will not be referred to in a search against the servient tenement and its proprietors, and therefore the only way to discover them will be to refer to the record *ad longum* of all deeds granted by former proprietors of the servient tenement. If they are constituted by separate recorded deeds, they will be disclosed by a search against the former proprietors of the servient tenement. It may, however, be necessary to examine the record for a period extending more than forty years back in order to discover a servitude, for a servitude created more than forty years ago may still be binding if not extinguished by the negative prescription.

(*b*) *Implied Grant or Reservation.*—A servitude cannot be constituted *rebus ipsis et factis* (*Cochrane*, 1860, 22 D. 358; affd. 1861, 4 Macq. 117, overruling *Preston's Trs.*, 1860, 22 D. 366). It may, however, be constituted by implied grant or reservation. If the ownership of minerals is separated from the ownership of the surface, the proprietor of the minerals has an implied right to such uses of the surface as are reasonably necessary for his use of the minerals (see Rankine, 161, and authorities there cited). If a proprietor of an estate conveys part of it to a disponee, the part conveyed being either built upon or disponed for the purpose of being built upon, there is an implied grant of a servitude of support affecting the parts retained, whether they consist of mineral strata lying under the part conveyed or of lands contiguous to it (see, *e.g.*, *Caledonian Railway Co.*, 1854, 16 D. 559; rev. 1856, 2 Macq. 449, and other cases referred to by Rankine, 431 *et seq.*). If a proprietor of two neighbouring tenements conveys away one of them and retains the other, the grantee is entitled to such accessory rights of servitude over the tenement retained as are essential for the use of his property. The most common example of implied grant is the way of necessity. If there is no other way of access to the tenement conveyed, the purchaser is entitled to access across the tenement retained. In *Walton Brothers*, 1876, 3 R. 1130, Ld. Pres. Inglis said: "No one can possess a piece of ground without having a right of ish and entry; and the way that is to be obtained, if the conveyance is silent, is just the existing way." The necessity must be referable to the use to which the subjects were put at the date of the conveyance, or to the use to which it was at that time understood by the parties they were to be put (*London Corporation*, 1880, L. R. 13 Ch. D. 798; *Gayford*, 1868, L. R. 4 Ch. 133, per Ld. Cairns, at p. 136; *M'Laren*, 1878, 5 R. 1042). If more than one way exists, the dominant owner is only entitled to one, and that one may be chosen by the servient owner (*Bolton*, 1879, L. R. 11 Ch. D. 968; *Pucker*, 1658, 2 Sid. 111). If none exists, probably the Court would appoint a man of skill to define its course (Rankine, 378). The existence or non-existence of the access claimed at the date of the grant may be of great importance in deciding whether or not there is an implied grant of the right of access. In *Cullens*, 1896, 23 R. 209, Ld. Low (Ordinary) said: "The *Union Heritable Securities Co.*, 1886, 13 R. 670, so far as I know, is the only case in which an access not actually in existence at the date of the conveyance

was held to be included by implication in the grant. The circumstances, however, were very peculiar; and although the result undoubtedly met the equity of the case, it is difficult, as Ld. Rutherfurd Clark remarked, to find a ground of judgment." In *Cullens* an unsuccessful attempt was made to found on the use, subsequent to a grant, of an access not in existence at the date of the grant as explaining the grant to include that right of access. The implied grant of access was claimed for the use of a bakehouse on the further ground that the land was sold to be used as a bakehouse, and that a suitable access was implied. The Court held that the road was not necessary for the purpose the purchasers had in view in buying the land, and that, in any case, the erection of a bakehouse was not an essential part of the bargain so as to bind the grantor to supply an access suitable for a bakehouse.

But, further, the grantee is entitled to those uses of the tenement retained which, though not so essentially necessary that his property could have no value without them, are reasonably necessary to his convenient and comfortable enjoyment of the tenement granted to him, "and have been and are at the time of the grant used by the owner of the whole for the benefit of the part granted" (*Wheeldon*, 1879, L. R. 12 Ch. Div. 31; *Union Heritable Securities Co.* and *Cullens, supra*). It is a question of circumstances what uses of one tenement are necessary for the convenient and comfortable enjoyment of another. In one case a servitude of taking water was held to be so necessary (*Preston's Trs.*, 1860, 22 D. 366, as explained in *Cochrane, infra*); in another, a servitude of maintaining a drain and cesspool for the drainage of a tanyard (*Cochrane*, 1860, 22 D. 358; affd. 1861, 4 Macq. 117); in a third, a servitude of access by a lane which was not the only means of access to the dominant tenement (*Walton Bros.*, 1876, 3 R. 1130; but cf. *M'Laren*, 1878, 5 R. 1042). On the other hand, no such necessity was recognised in the case of a signboard belonging to one flat of a building and encroaching on the wall of the flat above (*Alexander*, 1875, 3 R. 156). In *M'Laren, supra*, it was held that a railway company purchasing land under compulsory powers were not entitled to claim as a servitude right the existing right of access through the seller's remaining property, as they had sufficient access by other property belonging to them and adjoining the subjects purchased. The ground of the decision was that whether a grant of servitude of this nature is to be implied or not is always a question of circumstances, depending on the presumed intention of the parties to the sale, and that in this case the circumstances did not indicate any intention that the railway company should have access otherwise than through their own property (see also *Cullens*, 1895, 23 R. 209; and *Campbell*, 1890, 27 S. L. R. 1000). In *Gow's Trs.*, 1875, 2 R. 729, a servitude right of access through property retained by a seller, by a passage which had been used by him for the benefit of both the part sold and that retained, was refused to a purchaser on the ground that he had a sufficient means of access through the property purchased by him, and that, looking to the nature of the two properties, the claim for another access was neither necessary nor reasonable. In *Cullens*, where an implied right of access was claimed by a grantee who had another practical access, Ld. Trayner said: "The access claimed was not and is not necessary to the defenders in the reasonable use and enjoyment of their subjects. That it might be very convenient may be admitted, but that it is not necessary is, I think, clearly established." If the two tenements were at one time in the hands of separate owners, it may be of importance to ascertain whether the right claimed was then exercised or not, as this is of

great value in deciding whether or not the right is necessary to the extent required for establishing an implied grant (*Gow's Trs.* and *Walton Bros.*, *supra*). Only those servitudes can be constituted by implied grant which are apparent, "including those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject" (Rankine, 381, and authorities there cited). Professor Rankine says that continuity can scarcely be said to have been strictly demanded either in Scotland or in England, but the presumption in favour of implied grant will be stronger in the case of continuous servitudes (see Ld. J.-Cl. Moncreiff in *M'Laren*, *supra*).

Similar questions may arise in the case where the owner of two adjoining tenements, who has been in the custom of exercising rights of the nature of servitudes over one of them for the benefit of the other, alienates the servient tenement. In this case the seller or his successor in the tenement retained will not be allowed to claim any implied right of servitude over the alienated tenement other than servitudes of absolute necessity, on the principle that no one may derogate from his own grant. If the proprietor of the two tenements dispones them to two different persons, either simultaneously or by carrying into effect one arrangement, the rules are the same as where he retains the servient tenement (*Wheeldon*, 1879, L. R. 12 Ch. D. 31, overruling *Pyer*, 1857, 1 H. & N. 916; and see Rankine, 382 *et seq.*, and cases there referred to). If the servient tenement has been disponed in security merely, though by an *ex facie* absolute disposition, this will not prevent the implied constitution of a servitude by the subsequent alienation of the dominant tenement (*Union Heritable Securities Co.*, 1886, 13 R. 670).

(*c*) *Prescription.*—A positive servitude may further be said to be acquired by prescription, though it may be more correct to view the prescription as proving the right rather than constituting it (see Ld. Young in *Macnab*, 1890, 17 R. 397, and *Grierson*, 1882, 9 R. 437). No further title is required than infeftment in the dominant tenement (Stair, ii. 7. 2; Ersk. ii. 9. 3; Bell, *Prin.* 993). It is not easy to see why even this should be necessary, as the servitude is acquired for the dominant tenement itself, it being immaterial who is the owner. In the case of servitudes acquired for inhabitants of burghs or villages merely as such, so far as that is possible, infeftment in the dominant tenement cannot of course be demanded. The dominant owner need not have in his title a clause of parts and pertinents (*Beaumont*, 1843, 5 D. 1337; but see Stair, ii. 7. 2, and cf. *Saunders*, 1830, 8 S. 605), although it has been said that in order to prescribe a right of pasturage he must have in his title words sufficient to sustain it (Bell, *Prin.* 1013); and even though he possess on a bounding charter, he may prescribe a right to a servitude over lands without his boundaries (*Beaumont*, *supra*; *Liston*, 1835, 14 S. 97, per Ld. Fullerton). He does not require to possess in *bonâ fide* (Stair, ii. 12. 6, 11, and 19; Ersk. iii. 7. 15; Rankine, 50; see Bell, *Prin.* 2004, 2008). His possession must be as in right, and not by mere tolerance (*Purdie*, 1749, Mor. 14511; *Macnab*, 1890, 17 R. 397; *D. of Athole*, 1890, 17 R. 457; see *Grant*, 1677, Mor. 10876); and it must be manifest to the servient owner that the possession is in exercise of a right claimed (*D. of Athole*, *supra*). The dominant proprietor may possess either personally or civilly through another person, who need not derive a title of possession from the dominant owner (*Drummond*, 1890, 17 R. 316). In this respect a distinction may be drawn between the prescription of a right of property and prescription of a servitude; for in the former case the possessor must possess on a title derived from the person prescribing

the right, as, for example, his lessee his feuar or his creditor, or as liferenter, the person prescribing the right being fiar (see Rankine, p. 35, and authorities there cited). Possession may have originally begun upon a title which would not found prescription, as, *e.g.*, a tack, yet prescription will take place if the requisite period have elapsed subsequent to some indication having been given of the change in the title of possession (*Grant*, 1677, Mor. 10876; and see *Rome*, 1884, 11 R. 653). If prescription is to constitute a servitude, the possession must not be ascribable to a lower right than the servitude, as, *e.g.*, a right under an Act of Parliament (*Cameron*, 1848, 10 D. 446; *Hoyle*, 1858, 21 D. 96; *De la Warr*, 1881, 17 Ch. D. 535), or a right to cross another's land to bring back strayed sheep (*D. of Athole*, 1890, 17 R. 456; affd. 1891, 18 R. (H. L.) 46). It must be commensurate with the right claimed (Ersk. ii. 9. 4; Bell, *Prin.* 993); but changes in circumstances may justify a claim to extend the right beyond the former extent of possession. Thus a proprietor in right of a dam was allowed to extend it farther into the property of the servient owner in order to restore its efficiency, which had been destroyed by the washing away of the banks of the stream (*L. Gairlton*, 1677, Mor. 14535). A proprietor of a colliery had a right to a dam for draining his coal, and was found entitled to raise it from time to time as became necessary for the drainage of the colliery (*Bruce*, 1741, Elch. *v.* "Servitude," No. 2; cf. *Forbes*, 20 Feb. 1829, F. C., 7 S. 441; *Mackenzie*, 1868, 6 M. 936). These apparent exceptions to the rule that the dominant owner cannot increase the burden on the servient tenement were based on the principle that the change was necessary to make the servitude available to the dominant owner for the purpose for which it was originally granted or prescribed. The burden cannot be increased merely for the profit of the dominant tenement (Bell, *Prin.* 988; but see Ersk. ii. 9. 4).

The period of prescription necessary to establish a servitude is and has been, at least since the Act 1617, c. 12, forty years. The Conveyancing Act, 1874, s. 34, while shortening the period of positive prescription applicable to titles to land, expressly declared that the section should have no application to servitudes or to public rights of way or other public rights. But where possession for forty years prior to any interruption cannot be proved, but as far back as the evidence goes there is proof of possession and no sign of any change having taken place, such proof of immemorial possession may be sufficient to establish the servitude by prescription (Rankine, p. 50, and authorities there cited). The period begins to run from the first act of use of the nature of a servitude which the servient owner could have prevented, and ends with any effectual interruption. Interruption may be judicial, *i.e.* by citation or by action called in Court, or extrajudicial. Extrajudicial citation may be either civil, *i.e.* by notarial instrument, or natural, *i.e.* by exclusion of the dominant owner from the use of the subjects (see PRESCRIPTION, and Rankine, 53), or it may be by confusion where both the dominant and the servient tenements have come under the ownership of the same person (*Gow's Trs.*, 1875, 2 R. 729; and see *Extinction of Servitudes, Confusione, infra*; Rankine, 388). What exclusion is necessary to constitute interruption is a question of circumstances. Professor Rankine states the principle generally thus: "Interruption may consist of such acts or omissions of the possessor as show that he had not been possessing under the right he now claims, or by such acts of his opponent as prove the maintenance of adverse right" (Rankine, 55). Thus turning off cattle and preventing the casting of peats once a year has been held sufficient to prevent the acquisition of servitude rights of pasturage and casting peats (*Nicholson*, 1662, Mor. 11291), and "tilling and labouring sundry parts of a

muir," and "debarring" the cattle of the person claiming the servitude and "poinding the same in diverse years," was similarly held to interrupt the prescription of a servitude of pasturage (*Sheriff of Carers*, 1629, Mor. 10874). In a thirlage case it was held that to interrupt the prescription of this right there must be abstraction of a whole year's crop (*Henderson*, 1677, Mor. 10867). It is not enough to go to other mills occasionally (*Henderson, supra*; *Keithick Mill*, 1665, Mor. 11292).

It is not necessary that the possession should be adverse to some one who is *valens agere* (*M'Neill*, 1858, 20 D. 735; Rankine, 56; Bell, *Prin.* 2023). Minorities, however, are deducted from the period of prescription (1617, c. 12; *Campbell*, 1836, 14 S. 798; *Baird*, 1859, 21 D. 848; rev. 1861, 23 D. (H. L.) 5, 4 Macq. 127; applied 1861, 23 D. 1080. See *Craufurd*, 1849, 11 D. 1127; *Black*, 1881, 8 R. 497). The minor must be the true owner of the servient tenement having a vested right to it dependent on no contingency (Stair, ii. 12. 18; Ersk. iii. 7. 35; Bell, *Prin.* 2022). There will be no deduction where the servient owner is a children's hospital (*Fisher*, 1695, Mor. 11149), or several minor beneficiaries in one trust (*Maclellan*, 1756, Mor. 11160), or for the period during which a parent holds a fiduciary fee for his children in whom a title to the servient tenement has not vested (*Black*, 1881, 8 R. 497). In *Baird, supra*, Ld. Deas expressed the opinion that where possession was used to construe a clause of pertinents, the years of minority must not be left completely out of account (23 D. 1080, and see Ld. Chan. Campbell in 4 Macq. 138).

What amount of possession is necessary to constitute a servitude by prescription is always a question of circumstances (see, *e.g.*, *Macnab*, 1890, 17 R. 397). In the case of continuous servitudes there is no difficulty, but it is impossible to lay down a definite rule in the case of non-continuous servitudes. If the servitude has been used on all occasions when required, this will probably be enough even though these were not frequent. The essential seems to be only that the use should have been sufficient to indicate that it was exercised in assertion of a right (see *D. of Athole*, 1890, 17 R. 456; affd. 1891, 18 R. (H. L.) 46). In a case where a servitude of access to a well and of drawing water therefrom was claimed to have been established by prescriptive use, Ld. J.-Cl. Kingsburgh laid down that these essentials must be proved: (1) that the use made of the access by those claiming the right has been continuous and uninterrupted; (2) that this use has been made in the direct assertion of a right; (3) that this use in the assertion of a right has been acquiesced in by those having interest to object (*Macnab*, 1890, 17 R. 397).

Changes in the manner of use and possession may not prevent the acquisition of the right by prescription, if such changes are acquiesced in (Bell, *Prin.* 993; *Hozier*, 1884, 11 R. 766). A right of servitude constituted by grant may be increased by prescriptive possession (*Forbes*, 1724, Mor. 14505). Long possession of a servitude right may do more than merely establish the right to the servitude. It may be evidence of a right of property (*Mathieson*, 1874, 12 S. L. R. 134; *Scoullar*, 1832, 10 S. 241).

A superior has a title to interrupt the prescription of a servitude against his vassal, and therefore a servitude acquired by prescription is valid against the superior (*M. Breadalbane*, 1851, 13 D. 647; Stair, ii. 4. 36; ii. 7. 3; Ersk. ii. 9. 4). A servitude constituted by the grant of a vassal is not enforceable against his superior in the event, for example, of the feu being irritated (*Tenants of Dalmorton*, 1666, Mor. 5005; Duff, 136; Stair, ii. 4. 36, ii. 7. 3; Ersk. ii. 9. 4). In the case of a servitude constituted by prescription, the rule is *tantum prescriptum quantum possessum*. The extent of

possession is, as Bell says, the measure as well as the badge of the right. In the case of a servitude constituted by grant, on the other hand, the measure of the right is the terms of the grant, possession being merely the badge of the right (Ersk. ii. 9. 4; Bell, *Prin.* 993; *Munro*, 1760, Mor. 14533).

(*d*) *Acquiescence.*—A positive servitude may further be constituted by acquiescence on the part of the servient owner, in acts done by the dominant owner at great cost to himself, or in acts which cannot be undone (Bell, *Prin.* 946, 947, 1103; *Munro*, 1821, 1 S. 161; *Aytoun*, 1800, M. App. "Property," No. 5; *Houldsworth*, 1887, 14 R. 920).

(*e*) *Decree, Statute, etc.*—A positive servitude may be created by a decree of ranking and sale (*Hilson*, 1895, 23 R. 241). It may be created by statute (*Mackenzie*, 1870, 7 S. L. R. 333), or in virtue of powers given by statute (*Caledonian Rwy. Co.*, 1854, 16 D. 559, 955; rev. 1856, 2 Macq. 449; *Caledonian Rwy. Co.*, 1857, 3 Macq. 56; *M'Culloch*, 1863, 1 M. 334). It may be established against a superior and co-feuars by a feuing plan, if the plan is validly imported into the contract between the superior and the feuar (*Henderson*, 1846, 2 D. 869; *Crawford*, 1874, 2 R. 20; *Newport Rwy. Co.*, 1879, 7 R. 179; affd. 1883, 10 R. (H. L.) 30; *Union Heritable Securities Co.*, 1886, 13 R. 670; *Cullens*, 1895, 23 R. 209). A servitude may be constituted in favour of an estate in return for an annual money payment created a real burden over that estate (*Stewart*, 1877, 4 R. 981).

(2) *Negative Servitudes.*—Negative servitudes are constituted by grant only (Ersk. ii. 9. 35; Bell, *Prin.* 994). The grant may be in any of the forms competent for constituting a positive servitude, and must be authenticated in like manner (see *Gray*, 1792, Mor. 14513, 7 S. 212; *Argyllshire Commissioners*, 1885, 12 R. 1255; *Banks*, 1874, 1 R. 981; *Cowan*, 1872, 10 M. 735; *Mearns*, 1800, Hume, 736; *M'Gown*, 1808, Hume, 740; but see *Mutrie*, 26 June 1810, F. C.; *Johnstone*, 1829, 7 S. 732; Dickson on *Evidence*, 550, Note (*a*)). A form of grant of a negative servitude will be found in *Juridical Styles*, i. 50. If the servitude is constituted in a missive which is superseded by a charter or disposition making no mention of the servitude, it falls; for there can be no possession to redargue abandonment as in the case of positive servitudes (*Sivright*, 1828, 7 S. 210; *Cowan*, 1872, 10 M. 735; *Pollock*, 1827, 5 S. 195; *Croall*, 1870, 9 M. 323). It is not necessary that the servitude should appear on record (authorities cited in Bell, *Prin.* 994, and in Rankine, 374, notes 11 and 12), and it does not admit of possession (*Gray, Mearns, Cowan, supra*). Prescription of the right is therefore impossible (Ersk. ii. 9. 35; Bell, *Prin.* 994; *Dundas*, 1886, 13 R. 759; but see Stair, ii. 7. 9). The rules stated regarding the title of the granter of a positive servitude apply also in the case of a negative servitude. The granter had not before 1874 to be entered with his superior though infeft on an *a me* holding (*M'Gown*, 1808, Hume, 740), but it is not certain that a servitude granted by one not infeft would be valid against his singular successor (see Ld. President in *Sivright, supra*). A negative servitude cannot be conferred by acquiescence or tolerance, as, for example, by allowing a neighbouring proprietor to open a window in his gable (*Morris*, 1830, 8 S. 564; *Dundas*, 1886, 13 R. 759, and other cases cited in Bell, *Prin.* 994, note (*d*)). It may be constituted by distinct reference in a valid writing to a building plan (Bell, *Prin.* 994, 868, and cases there cited, and Rankine, 409 *et seq.*, and see Ld. Young in *Johnston*, 1893, 20 R. 539); but it cannot be inferred from the terms of a feu-contract and the plan relative thereto (*King*, 1896, 24 R. 81, 34 S. L. R. 54). It has been said that a negative servitude may be constituted by implied grant

on the authority of *Heron*, 1880, 8 R. 155; but the later case of *Dundas*, 1886, 13 R. 759, is against that view, Ld. Pres. Inglis remarking there that *Heron* was decided on the law of tenement not of servitude. In *Dundas* it was recognised that a negative servitude can only be constituted by writing, and if we except the case of *Heron* all the cases in which servitudes have been held to be constituted by implied grant were cases of positive servitude (see Rankine, 373, 384). A negative servitude may be constituted by statute (see, *e.g.*, *Bird*, 1885, 29 L. R. Ch. D. 1012). The servient owner in a negative servitude cannot dispute that it is binding on him, although he is not restrained from doing acts more offensive to the dominant owner than those prohibited by the servitude (*Greenhill*, 1825, 4 S. 160, wrongly stated in Bell, *Prin.* 989).

From the method of constituting a negative servitude it follows that a purchaser of land has no security that the land is not affected with negative servitudes. Duff says, however, that a purchaser is protected in some degree against the consequences of a negative servitude by the implied obligation on the seller to make known its existence (Duff, 185; *Urquhart*, 1835, 13 S. 844). Montgomerie Bell says that warrandice does not authorise the purchaser of lands affected by servitudes of an ordinary or common description to make any claim on the seller when such servitudes are light, but that a servitude may be so heavy as to authorise a claim (Bell, *Lect.* i. 218; *Sandilands*, 1672, Mor. 16599; *Symington*, 1780, Mor. 16637; *Reid*, 1822, 1 S. 334).

Extinction of Servitudes.—(1) *Discharge.*—Servitudes may be extinguished by express discharge granted by the dominant proprietor. This, like the writ constituting a servitude, must be either holograph or tested (Stair, ii. 7. 4; Ersk. ii. 9. 37; Bell, *Prin.* 988), unless followed by *rei interventus* (Bell, *Prin.* 946). A form of discharge will be found in *Juridical Styles*, i. 52.

(2) *By Force of Statute.*—The discharge may be in terms of a statute. Thus by the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 19, ss. 93 *et seq.*), provision is made by which the promoters of a public undertaking involving the acquisition of land of the nature of commonty may convene a meeting of those having rights of property, servitude, etc., over the lands taken. This meeting must number five at least if there be so many entitled to the rights in question, and it may, by majority, appoint a committee, not exceeding five in number, having full power to enter into an agreement with the promoters for the extinction of such rights. If they fail to agree with the promoters as to the amount of compensation to be paid, the proceedings between the promoters and the committee for ascertaining the amount are the same as in a question between the promoters and the proprietors of land. If no committee is effectually appointed, the amount of compensation is fixed by a valuator appointed by the Sheriff, in terms of secs. 56 *et seq.* of the Act. On payment, or tender to the committee or any three of them, or on deposit in bank if there be no committee, of the compensation ascertained by agreement or otherwise, the promoters may execute a disposition in the manner provided for the case of the purchase of lands, and thereupon the lands vest in them, freed from all the rights of servitude, etc. From the analogy of sec. 76 of the Act it would rather appear that the Legislature had intended to provide for a disposition being granted in the case where the rights are extinguished by agreement, and for a notarial instrument being expede where no agreement can be arrived at; but in terms of the section, where an agreement cannot be concluded, the promoters would apparently have to execute a disposition in

favour of themselves, reciting the steps which have been taken to vest the lands freed of the rights of servitude, etc., in themselves. This procedure need only be used where the multiplicity of persons having interests of the nature of property in the lands would cause difficulties. In *Cunningham*, 1847, 9 D. 1469, Ld. Jeffrey expressed the opinion that secs. 93–98 of the Lands Clauses Consolidation Act are intended only to provide a means of extinguishing subordinate rights burdening a previously vested right of property, and that a right of property could not be acquired under them. This he held to be the explanation of the use of a disposition to vest the lands in the promoters freed of the subordinate rights. On the other hand, Ld. Fullerton indicated a doubt if the lands could have been previously vested; for he said: "If it were a case of servitude, there would be great difficulty in holding that the servient proprietor could agree to dispose of the lands; for the statute provides that all parties having rights of servitude shall be dealt with, as to the compensation to be paid for the extinction of their rights, in the manner mentioned in the 93rd section of the Lands Clauses Act." And in *Fife and Kinross Ry. Co.*, 1859, 21 D. 187, 1205, it was assumed that in taking lands held by several proprietors *pro indiviso*, a committee appointed in terms of the Act by the proprietors was the proper party to deal with, and that the committee could serve a notice of claim, and have the compensation assessed like an ordinary proprietor (Deas on *Railways*, 175). In *MacGregor*, 1893, 20 R. 300, it was held that secs. 93–98 of the Lands Clauses Act did not apply to land merely because there were servitude rights over it. There must be some higher rights to make it possible to describe it as being of the nature of commonty. But if there are merely servitude rights affecting the land, this procedure is unnecessary, for if the promoters take the land from the proprietors under the appropriate clauses, any servitudes affecting it are thereby extinguished (*Town Council of Oban*, 1892, 19 R. 912; and see *MacGregor, supra*), subject to the obligation on the promoters to pay compensation. Such rights as a public right of way may, however, be expressly protected by statute (see, *e.g.*, sec. 46 of the Railway Clauses Consolidation Act, 1845, 8 Vict. c. 20; *MacGregor, supra*; and *Cole*, 1888, 57 L. J. M. C. 132). The promoters cannot, in order to reduce the amount of compensation payable by them, compel the owner of the land taken to retain over it a right of servitude in favour of the land left to him (*Oswald*, 1883, 10 R. 472; affd. 8 App. Ca. 623). But if the promoters so extinguish a servitude, they must, in the absence of any statutory provision to the contrary, pay compensation (*Glover*, 1851, 16 Q. B. 912; *Clark*, 1874, L. R. 9 Ch. 120; *Ld. Blantyre*, 1886, 13 R. 636; rev. 1888, 15 R. (H. L.) 56; and see *D. Buccleuch*, 1872, L. R. 5 H. L. 418). A proprietor may not be entitled to compensation for interference with the access to his property by operations carried out by a railway company on land taken by them under the Lands Clauses Act where such access to his property is by a public road (*Newport Railway Company*, 1879, 7 R. 179; affd. 1883, 10 R. (H. L.) 30). The dominant owner is not entitled to a notice to treat. He can only claim compensation (Gale on *Easements*, 500, and cases there cited). The promoters cannot use secs. 17 *et seq.* of the Lands Clauses Act to extinguish a servitude. It has been held that the dominant owner has no interest in the servient tenement in the meaning of sec. 17. His interest, which is injuriously affected, is in the dominant tenement (*MacGregor*, 1893, 20 R. 300; *Don*, 1878, 5 R. 972; *Hammersmith*, 1869, L. R. 4 H. L. 171; and see *Macey*, 1864, 33 L. J. Ch. 377; *Metropolitan District Railway*, 1879, L. R. 13 Ch. D. 607, 616, per Jessel, M. R.).

The question may arise whether a servitude so extinguished will revive

on the sale by the promoters, of the land which was subject to it before the compulsory purchase. In an English case a servitude constituted by Act of Parliament over land which was subsequently taken by a railway company, and thereafter sold by them as superfluous land, was held to have revived (*Bird*, 1885, 29 L. R. Ch. D. 1012). In this question it may be of importance that compensation has not been paid to the dominant owner, for then there is no practical reason why land, on coming into the possession of an ordinary proprietor, should not revert to its former state of subjection to the servitude. If compensation has been paid, it has been paid for extinction. Still, if compensation has not been paid, it is due, while the promoters hold the servient tenement, on the footing that the servitude has been extinguished. In this view it is difficult to draw any distinction between the cases where compensation has been paid and where it has not. To put the matter in another way, it is difficult to hold that total extinction takes place only on payment of compensation, and that there is only suspension till then.

(3) *Confusione.*—Servitudes may be extinguished *confusione* when the dominant and servient tenements come under the ownership of the same person, even though they continue to be possessed by different tenants. If they merely come to be possessed by the same tenant while owned by different proprietors, no confusion takes place (*Laird*, 1859, 21 D. 848; rev. 1861, 23 D. (H. L.) 5, 4 Macq. 127; applied 1861, 23 D. 1080; *Walton Bros.*, 1876, 3 R. 1130; Ersk. ii. 9. 36). Instead of being extinguished, the servitude is only suspended where a separation or disunion of the two properties may be anticipated. That is, for example, where one property is held on an unlimited title and the other in liferent or entail, or where the two estates are entailed on different lines of heirs (Bell, *Prin.* 997; *Donaldson's Trs.*, 1839, 1 D. 449). A servitude of necessity may be considered to be merely suspended when the two tenements come to be owned by the same proprietor (see Lord President in *Walton Bros., supra*). Where the servitude would in any case be reconstituted in virtue of the doctrine of implied grant, it is not of much consequence whether it is looked upon as reviving or being reconstituted. Except in such cases, the servitude does not revive on separation of the estates (Dirleton, ii. 7. 6; Ersk. ii. 9. 16, 36, 37; Bell, *Prin.* 997).

(4) *Prescription.*—A servitude may further be extinguished by the long negative prescription. If the servitude is positive, the prescription begins to run from the date of its last exercise by the dominant owner (Ersk. ii. 9. 37). Servitudes are not properly *res meræ facultatis* (see Millar on *Prescription*, 87), but if a right of the nature of a servitude be a *res meræ facultatis*, it will not prescribe *non utendo* (*Monro*, 1760, Mor. 14533; *Smith*, 1884, 11 R. 921; Ersk. ii. 9. 37; Bell, *Prin.* 999, 2017, and authorities there cited). If the servitude is negative, prescription begins to run from the date of the first act done by the servient owner in contravention of the dominant owner's right (Ersk. ii. 9. 37; *Wilkie*, 1688, Mor. 11189). A negative servitude is not lost by neglect to engross it in the titles of the servient tenement for forty years (*Boswell*, 1849, 6 Bell's App. 427), and even if it is so engrossed it may be lost by the negative prescription (*Graham*, 1735, Mor. 10745; and cf. *Skene*, 1774, Mor. 10746). Years during which the dominant owner is minor (1617, c. 12), or *non valens agere* (see Millar on *Prescription*, 102), are not counted, unless in the latter case the disability is due to the dominant owner's own fault (*Earl of Fife*, 1887, 15 R. 238). In *Cheap*, 1785, Mor. 14520, the dominant owner of a servitude of pasturage had not exercised it for forty years, yet he was held not to

have lost it as his lands were part of a barony of which the servitude was a pertinent and the servitude had been kept up by the other parts of the barony (but see Rankine, 46, on this case; and comp. *Ld. Adv.* v. *Cathcart*, 1871, 9 M. 744; *Munro*, 1760, Mor. 14533). Possession, though not so extensive as the servitude granted, may preserve it to its full extent (*Monro*, 1760, Mor. 14533), but not if the possession be ascribable to a lower right (*Macfarlane*, 1865, 4 M. 257). Interruption may be in the same ways as those mentioned in dealing with the constitution of a servitude by prescription. If the interruption is *via facti*, it will be in the case of a positive servitude by resuming the acts of use, and in the case of a negative servitude it may be, for example, by restoring the property to the condition in which it was before the inconsistent act.

(5) *Acquiescence.*—Interruption of the dominant owner's right, if not extending over the prescriptive period, will not be effectual to deprive the dominant owner of his right, unless acquiesced in by him (Rankine, 386; *Rodgers*, 1826, 4 Mur. 25; 1827, 5 S. 917; affd. 1828, 3 W. & S. 251; *Borthwick*, 1677, Mor. Sup. Stair, 66; and see other cases on public rights of way, to which the same principles apply, Rankine, 299). But acquiescence on the part of the dominant owner in acts done by the servient owner which are inconsistent with the full operation of the servitude, may itself be sufficient to extinguish the servitude, and the length of time over which such acquiescence has extended will be an important factor in determining its effect, even though not extending to forty years (*Hill*, 1810, 5 Pat. 299; *Campbell Douglas*, O. H. 1878, 16 S. L. R. 14; see *Davidson*, 1890, 17 R. 287). Acquiescence does not take effect where the dominant owner has not been made aware of the scope of the acts, and that they interfere with his servitude, or where he has made no objection to a contravention of a general feuing plan, in which his servitude is contained, on some point as to which he has no interest to interfere (*M'Gibbon*, 1871, 9 M. 423; *Gould*, 1869, 8 M. 165). Abandonment may be inferred from acts done by the dominant proprietor himself, coupled, it may be, with disuse of the servitude for a period less than forty years. Thus where a proprietor closed up his access to a servitude road and used another access only for more than twenty years, he was held to have abandoned the right (*Mags. of Rutherglen*, 1886, 13 R. 745; but cf. *Robison*, 1831, 9 S. 627). Again, where persons possessing a servitude under leases entered into feu-contracts superseding the leases and making no mention of the servitude, they were held to have abandoned the servitude, on the ground that "when a person possessing as a lessee of lands acquires afterwards a title of property to the subject of the lease, there is an implied renunciation of the lease" (*Campbell*, 1867, 5 M. 636). But in considering the extinction of servitudes by acquiescence it is necessary to keep in view the distinction between extinction and mere suspension. Thus in *Muirhead*, 1864, 2 M. 420, where the dominant proprietor in a servitude of light and *non altius tollendi* had acquiesced in the erection by the servient owner of buildings inconsistent with the servitude, his singular successor was held not to be entitled to have the buildings removed; but it was expressly stated by the judges that the servitude was only suspended and not extinguished. A servitude may be changed into the burden of payment of a sum of money by acquiescence on the part of the dominant owner, for a large number of years in the conversion (*Cockburn*, 1682, Mor. 10742).

(6) *Change of Circumstances.*—A servitude may be destroyed by change of circumstances brought about by the act of neither dominant nor servient proprietor. Thus a servitude of prospect may be lost by the erection of buildings by a third party, or a servitude of way for the watering of cattle

by the drying up of a spring. It may further be destroyed by the extinction of either the dominant or the servient tenement (Ld. Mure in *Winans*, 1888, 15 R. 540). But in these cases if the exercise of the servitude may again come to be possible, the servitude must be looked on as merely suspended, and will revive when it can again be exercised (Bell, *Prin.* 995, 996).

(7) *Extinction of Temporary Rights of Servitude.*—A servitude of necessity ceases on the necessity coming to an end (see Rankine, 378, and cases there cited). A servitude may be granted for a limited time. Thus one constituted by a lease comes to an end on the expiry of the lease (*Campbell*, 1867, 5 M. 636). A servitude granted by a liferenter or lessee is of course only valid against himself, and ceases with the termination of his right (Ersk. ii. 9. 37). A servitude may be subsidiary to another right or obligation, and, if so, comes to an end along with that right or obligation (see Ld. Mure in *Winans*, 1885, 15 R. 540).

Distinctions between Servitudes and other Rights.—The distinctions between servitudes and certain other rights are worth noting. Bell distinguishes between a servitude and a right of property by saying that a servitude is only an accident of property "*non pars substantiæ sive fundi sed accidens*" (Bell, *Prin.* 979). It is a pertinent of the right of property (Bell, *Prin.* 745; *Borthwick*, 1688, Mor. 9632).

A public right wherein the whole public is interested, and of which the only proper example is a public right of way, differs in many important respects from a servitude right in which only the owner of the dominant tenement is interested. The points of difference between a servitude of road and a right of public road were stated thus by Ld. Deas in *Thomson* 1862, 24 D. 975: "In the first place, the title to pursue is different. In the one case, the title is in every member of the public. In the other case, the title is only in the owner of the dominant tenement. Secondly, the effect of the action is different. An action at the instance of any member of the public for the vindication of a public road if fairly tried, is *res judicata* for or against the whole public. In the case of a servitude road the result is *res judicata* only between the parties to the action and their successors as owners of the dominant and servient tenements. Thirdly, the jurisdiction is different. A judgment by the Sheriff in the case of a servitude road may settle the matter of right just as would be done in a declarator; while in the case of a public road the Sheriff can settle only the matter of possession till a declarator is brought in this Court; and consequently the proof allowed is different in the two cases—being of forty years' possession in the one case and of seven years' possession in the other—facts beyond the seven years being no further regarded than as they may indicate the character of the possession (as by tolerance or otherwise) within the possessory period. Fourthly, the very nature of the two rights is essentially different. A right of servitude road excludes the public; while a right of public road admits the public. In the one case the dominant proprietors are the only parties interested, and they must use the right in the manner least burdensome to the servient tenement, the proprietor of which may with that view alter the direction of the road or apply to the Judge Ordinary for authority to do so; whereas in the case of a public road, the servient proprietor could not well convene all parties interested (viz. the public generally) in such an application, although he may get the line of road regulated incidentally if a competent process happens to be in dependence. Fifthly, the characteristics to be proved are quite different. The Sheriff here says it is settled law that if one terminus be a public place,

the road may be a public one. That may be law, but I doubt whether it is settled law, and I do not wish to give any opinion upon it. But in the case of a servitude road, it is not necessary that either terminus be a public place" (see *Lyell*, 1867, 3 S. L. R. 299; RIGHT OF WAY).

The distinction between servitude and commonty, as stated by Bell, is that commonty is not a burden, but is of the nature of limited property (Bell, *Prin.* 1088). Commonty is, however, nearer to a right of servitude than an ordinary right of property, as it is in principle merely a right of joint perpetual use, although those having right to commonty have been empowered by statute to have it divided. Commonty is distinguished from a servitude of pasturage in respect that the owner of a servitude of pasturage is not entitled to share in the division of a commonty over which his right extends, while he is not obliged to give up his right of pasturage (*Gordon*, 1850, 13 D. 1; Bell, *Prin.* 1088). Another difference is that a right of commonty cannot be acquired by prescription beyond the limits of a bounding charter, while a right of servitude may (*Hepburn*, 1823, 2 S. 525; *Gordon, supra*; *Beaumont*, 1843, 5 D. 1337).

Common interest is very similar to a servitude right, but comes nearer to a right of property. The main distinction between common interest and servitude is that in the former the proprietor of the subjects in which others have a common interest is bound to keep them in repair; while, as explained, there is no such obligation in the case of a servitude (Bell, *Prin.* 1086; see *Mackenzie*, 1869, 7 M. 419; *Bennett*, 1877, 4 R. 321; *Taylor's Trustees*, 1896, 23 R. 738, 945).

Thirlage is ordinarily classed among servitudes, but it is not properly one, servitudes proper never consisting *in faciendo* (see Bell, *Prin.* 1017; Rankine, 364; *Macdowall*, 1798, Hume, 737; *Harris*, 1863, 1 M. 833; *Stobbs*, 1873, 11 M. 530).

Many real burdens are very similar in their nature to servitudes, but do not possess the necessary qualities of a servitude already explained. It may be of importance to distinguish whether a burden can be classed as a servitude or not, for servitudes are much more easily constituted than other real burdens, and a burden which would be otherwise invalid might be binding if it could be brought within the class of servitudes.

PARTICULAR SERVITUDES.—The ordinary recognised servitudes may now be shortly mentioned, reference being made to the separate articles dealing with them. Under urban servitudes are classed: support, stillicide, and flumen, light, air, and prospect, *altius non tollendi* and *non ædificandi*. Support is the right to rest part of a building on the property of another. It includes the servitude *tigni immittendi*, which is the right to insert the end of a beam in the wall of another person. The right of the proprietor of the surface stratum of an estate to have his buildings thereon supported by the subjacent and adjacent properties may be looked on as an example of the servitude of support (see Rankine, 431 *et seq.*), though it is not usually classed among such servitudes. Stillicide is the right of a proprietor to let the eavesdrop from his roof fall on his neighbour's land, while flumen is the right to collect the roof water in rhones and discharge it by spouts on his neighbour's land. The servitudes of light, air, and prospect give the right to prevent a neighbour from erecting buildings which will interfere with these benefits. *Altius non tollendi* is the servitude whereby a proprietor may be restrained from building above a certain height; *non ædificandi* is the restriction against building at all. As to whether the prohibition to build except according to a plan is a servitude, see Ld. Young in *Johnston*, 1893, 20 R. 539, and cases referred to by him. The privilege of

building in spite of, or as an exception to, a general prohibition, has been called a servitude *altius tollendi*, but it is not properly a servitude (Bell, *Prin.* 1008; Ersk. ii. 9. 10). A servitude may be created to prevent a proprietor opening a window in his wall so as to overlook his neighbour (Bell, *Prin.* 1006). Rural servitudes include: way, aquæhaustus, aqueduct, pasturage, fuel, feal, and divot, and materials for building. The servitude of way or passage includes the right to footpaths, horse roads, drove roads, and cart or carriage roads. Aquæhaustus is a servitude giving right to take water for cattle, domestic purposes, etc., from a well or stream on the property of another. Aqueduct gives a proprietor the right to take water through his neighbour's land by pipes or other channels. This sometimes includes the right to maintain a dam. Pasturage is the servitude whereby one is entitled to pasture his sheep or cattle on another's land. The servitude of fuel, feal, and divot is the right to cut peats or turf for fuel, fences, etc. The servitude of materials for building entitles a proprietor to take from the land of another such materials as stone, slates, wood, etc. It has been doubted whether the right to cut growing timber can be a servitude, on the ground that it would not be permanent without action on the part of the servient owner (Rankine, 368), but in *Garden*, 1734, Mor. 14517, such a servitude was recognised. The right to take sand and gravel is a servitude of the same description as the right to materials for building (*Aikman*, 1830, 8 S. 943; alt. 1832, 6 W. & S. 64; *Sharp*, 1829, 7 S. 679). Other positive servitudes are the right of bleaching on another person's land, of taking sea-ware for manure, and of steeping flax in a mutual stream. (See on particular servitudes, Bell, *Prin.* 1000 *et seq.*; Rankine, 390 *et seq.*, 367, 368, 461, 498, 572.)

Actions and Jurisdiction.—As servitudes consist always *in patiendo* or *in non faciendo*, the pursuer in an action relating to a servitude nearly always desires to have the defender restrained from doing some act, and seldom to have him ordained to do anything, unless indeed it is to restore a condition of things which has been destroyed by an act of the defender. In the majority of cases, therefore, the action will be one for interdict, either coupled with a declarator or in the form of a note for suspension and interdict. In the case of a positive servitude, if the action is at the instance of the dominant proprietor it may conclude to have the defender restrained from doing acts inconsistent with or offering any obstruction to its exercise; and if it is at the instance of the servient owner it may be to have the dominant owner restrained from exercising it. In the case of a negative servitude, if the action is at the instance of the dominant owner it may be to have the defender restrained from doing acts inconsistent with the servitude. In an action by the servient owner relating to a negative servitude, he generally wishes liberty to do some act, and therefore his action will be one of declarator. In the other cases too, if there is doubt or dispute as to the matter of right, a declarator will in general be used, coupled with an interdict; and the declarator alone may be used if a decision on the question of right only is wished. Actions relating to servitudes may, as indicated, be directed to having the defender ordained to restore the property to the state in which it was before a wrongous act done by him; and they may claim damages for the interference with the right of property or of servitude, as the case may be. Examples of declarators of servitude rights, and of immunity therefrom, will be formed in M'Kechnie and Lyall's *Styles*, pp. 58 to 68.

Some recent cases may be referred to as illustrating the different classes of actions. Among these actions may be, declarators of servitude right

only (*Malcolm*, 1885, 12 R. 843; *Winans*, 1888, 15 R. 540; *Town Council of Oban*, 1872, 19 R. 912); declarators of immunity only (*Walton Eros.*, 1876, 3 R. 1130; *M'Laren*, 1878, 5 R. 1042; *Winans, supra*); declarator of servitude with conclusions for interdict against interference with the right for having erections inconsistent with the right removed, and for damages (*Lawson*, 1897, 24 R. 649); declarators of immunity with conclusions for interdict against use of the alleged servitude right (*Macnab*, 1890, 17 R. 397; *Rome*, 1884, 11 R. 653; *Cullens*, 1895, 23 R. 209); declarators of immunity with conclusions to have the defenders ordained to remove erections placed on the ground in terms of the alleged right (*The Park Yard Co. Ltd.*, 1897, 24 R. 1148; rev. 1898, 25 R. (H. L.) 47); declarator of extent of right (*Marquis of Huntly*, 1896, 23 R. 610); note of suspension and interdict against interference with servitude right (*Union Heritable Securities Co.*, 1886, 13 R. 670; *Macgregor*, 1893, 20 R. 300); note of suspension and interdict against use of alleged servitudes (*Smith*, 1884, 11 R. 921; *Smith*, 1879, 6 R. 858; affd. 1880, 7 R. (H. L.) 28).

Servitude questions have very frequently been raised in the first instance in the Dean of Guild Court (*Johnston*, 1893, 20 R. 539; *Dundas*, 1886, 13 R. 759; *King*, 1896, 24 R. 81). If the action is raised in the Sheriff Court it may be in the form corresponding to any of the Court of Session actions mentioned, the petition for interdict taking the place of the note for suspension and interdict. Whether simple declaratory conclusions are competent in the Sheriff Court under the Sheriff Court Act of 1838 (1 & 2 Vict. c. 119, s. 15), to be afterwards referred to, is doubtful (*Grierson*, 1882, 9 R. 437; *Stobbs*, 1873, 11 M. 530); but declaratory conclusions coupled with other clearly competent conclusions, such as for interdict or the removal of obstructions, do not make the action incompetent (see Dove Wilson's *Sheriff Court Practice*, p. 59, and cases there cited). If the Act of 1838 does not make declarators competent, they may be considered competent where the value of the subject in dispute does not exceed £50 per annum or £1000 value, under the Sheriff Courts Act, 1877 (40 & 41 Vict. c. 50, s. 8 (1)), subject to the conditions imposed by that Act. Some recent examples of cases raised in the Sheriff Court are these: declarators of servitude with conclusions for interdict against interference with the right (*Hood*, 1884, 12 R. 362; *Grigor*, 1896, 24 R. 86); declarators of servitude with conclusions to have obstructions or erections inconsistent with the right removed (*Heron*, 1880, 8 R. 155; *Taylor's Trs.*, 1896, 23 R. 945); action for interdict against use of alleged servitude (*Grierson*, 1882, 9 R. 437); action for interdict against interference with servitude (*Commissioners of Supply of Argyllshire*, 1885, 12 R. 1255); action to have obstruction to use of servitude removed and for interdict against further obstruction (*Hill*, 1879, 6 R. 1363).

The dominant owner is probably not entitled to enforce restrictions under a servitude right unless he has a distinct interest to do so (see Ld. Pres. Inglis in *Gould*, 1869, 8 M. 165; and see *Russell*, 1882, 9 R. 660; *Boswell*, 1881, 8 R. 986; *M'Gibbon*, 1871, 9 M. 423).

In certain circumstances the Court may refuse to order that buildings erected in contravention of rights of the nature of servitudes be removed. In *Grahame* the House of Lords found it was not expedient that decree should be granted for the removal of buildings erected by the magistrates of a burgh in contravention of a right of bleaching and recreation vested in the inhabitants of the burgh, in respect that the action, though at the instance of one of the inhabitants, was really in the interest of the community, that therefore the interests of the community on both sides of

the litigation must be considered, and that such interests would best be served by the acceptance of an offer by the magistrates to lay out and dedicate to the use of the community a piece of ground in lieu of that which had been wrongfully appropriated by them (*Grahame*, 1879, 6 R. 1066; 1881, 8 R. 395; rev. 1882, 9 R. (H. L.) 91; see also *Stevenson*, 1867, 3 S. L. R. 184).

A declarator of right to a servitude may be tried before a jury in preference to the Lord Ordinary (*Malcolm*, 1885, 12 R. 843). (For form of issue, see *Malcolm, supra*; *Steele*, 1832, 10 S. 857; *Jurid. Styles*, iii. 819; *Rattray*, 1867, 5 M. 944). A feuar is not entitled to enforce building restrictions undertaken by the superior, of the nature of servitudes, by withholding payment of his feu-duty until the servitude is complied with (*Cockburn*, 1825, 4 S. 128; rev. 1826, 2 W. & S. 293).

By the Sheriff Courts Act, 1838, the jurisdiction of Sheriffs was extended to all actions relative to questions touching either the constitution or the exercise of real or prædial servitudes, and it was provided that all parties against whom such actions might be brought should be amenable to the jurisdiction of the Sheriff of the territory within which the servitude should be situated (1 & 2 Vict. c. 119, s. 15; and see *Brown*, 1843, 5 D. 463; *Stobbs*, 1873, 11 M. 530; *M'Laren's Trs.*, 1873, 1 R. 60). The section has been held not to apply to an action about a public right of way (*Thomson*, 1862, 24 D. 975). As stated before, it is not clear that it makes declarators of rights of servitude competent in the Sheriff Court (*Stobbs, supra*). If the question of right is raised in the Sheriff Court, the Sheriff must decide it, and a possessory judgment is incompetent (*Gow's Trs.*, 1875, 2 R. 729; *St. Andrews Ladies' Golf Club*, 1887, 14 R. 686; see also *Lowson's Trs.*, 1864, 3 M. 53).

Session, Court of.—Prior to the institution of the Court of Session, several attempts had been made to establish a Supreme Civil Court in Scotland, but the results were inadequate and unsatisfactory. From an early date justice had been administered throughout Scotland chiefly by local judges,—Judges Ordinary,—as Sheriffs in counties and bailies in burghs. Causes were also heard in the first instance, and by way of appeal from the decisions of the Judges Ordinary, by the king in person, as well as by the Justiciar and Chamberlain, who went on circuit throughout the whole kingdom. Parliament and the King's Council also exercised jurisdiction, original and appellate, of a somewhat ill-defined and often arbitrary character.

In 1367 the experiment was tried of devolving the duties of Parliament upon committees, and in the following year the legislative and judicial committees, known later as Lords of the Articles and Lords Auditors, were instituted. To the former were delegated the legislative powers of Parliament, and to the latter its judicial functions. This delegation of authority was of a more or less imperfect kind, and Parliament itself frequently exercised the powers of both committees. The system continued for many years, and the Judicial Committee (and in vacation the King's Council) formed practically a Supreme Civil tribunal, but its jurisdiction was of a limited kind. It had no jurisdiction in questions of heritable right, or in ecclesiastical causes; and while appeals from all Judges Ordinary, and even from the Justiciar, were competent, they were not entertained usually, except upon certain special grounds, as excess of jurisdiction. The Lords Auditors, however, were not scrupulous to confine themselves to the exercise of their proper functions; they frequently exceeded their jurisdiction,

and encroached upon that of the Judges Ordinary—an irregularity which was finally forbidden by James I. (Act 1424, c. 45).

Another important change was introduced by James I. when, in 1425, he instituted the Court known as "The Session." This Court was a Committee of Parliament, but was independent of it, as it sat during the parliamentary vacation as well as during session, and its decisions were not subject to appeal. The Session was ordained to sit three times in the year, in such places as the king should appoint, and by Act 1457, c. 61, Edinburgh, Perth, and Aberdeen were fixed as the three places, with a session of forty days at each. This Court had a possessory jurisdiction in questions of heritable right, and a concurrent jurisdiction with Judges Ordinary in certain other matters; but it seems never to have taken root in the judicial system, and soon became of little account, so that we find that later Acts (1469, c. 26; 1475, c. 62; and 1487, c. 105), while they regulate actions before the Judges Ordinary, and provide for appeals to the King's Council, ignore the Session altogether.

In 1503 the Session was superseded by the Daily Council (*q.v.*), which was appointed to sit continually in Edinburgh. But this Court also proved unsatisfactory, and was in turn superseded by the Court of Session established by James V.

The Act of Institution of the Court of Session was passed on 17th May 1532, and proceeds upon the preamble that "our Sovraine is maist desyrous to have ane permanent ordour of justice for the universal wele of all his lieges and therefore tends to institute ane college of cunning and wise men baith of spiritual and temporal estate, for the doing and administracioun of justice in all civil actions, and tharfor thinks to be chosen certane persones maist convenient and qualifit therefor to the nowmer of xiiii persones half spiritual half temporal with ane president." These fifteen senators of the College of Justice were to sit and decide upon all civil actions, their decrees to have the same "strength force and effect as the decretis of the Lords of Sessioun had in all tymes bigane." It was also provided that "my Lord Chancellar being present in this toun or uther place he sall have voit and be principale of the said Counsell, and sic uther lordis as sall pleis the kingis grace to enjone to them of his Gret Counsell to have voit siclik to the nowmer of thre or four."

The Court thus established, while it was a development of previously existing tribunals, is believed to have been modelled largely upon the Parliament of Paris, from which it derived the mixture of lay and ecclesiastical judges, the extraordinary lords, the exemption of its members from taxation, the method of leading evidence before the Court without a jury, and the recognition of the civil and canon laws where there was no common law applicable to the circumstances. Roman and papal influences are also directly traceable in the original conception and form of the Court.

From the date of its institution down to the present time, the Court of Session has existed as the Supreme Civil Court; its sittings have never been interrupted, except when occasionally prevented by war or pestilence, and when during the Protectorate of Cromwell, from 1650 to 1661, it was superseded. The constitution of the Court has, of course, been greatly altered during this period. The arrangement of the Courts, as the result of successive statutes, is entirely changed.

Originally the whole fifteen judges sat collectively in what was known as the Inner Chamber, or Inner House, but the Ordinary Lords, in addition to their duties in the Inner House, sat week about in the Outer House to hear

certain causes which they determined in the first instance. An appeal against their decisions lay to the whole Court. By 48 Geo. III. c. 151, the judges were required to sit in two Divisions; permanent Lords Ordinary for the Outer House were introduced by 50 Geo. III. c. 112, and other important changes were brought about by the Judicature Act, 1825 (6 Geo. IV. c. 120), and the Act 1 Will. IV. c. 69. See COLLEGE OF JUSTICE; SENATORS; ADVOCATE.

PRESENT CONSTITUTION.

As now constituted, the Court of Session consists of thirteen judges. The Inner House is divided into two Courts, called the First and Second Divisions, while five Lords Ordinary sit permanently in the Outer House.

The Inner House.—The two Divisions are Courts of co-ordinate authority. They each consist of four judges. The Lord President presides over the First Division, and the Lord Justice-Clerk over the Second. In each, three judges are necessary to form a quorum; but in the absence of any of the members of one Division, judges from the other Division, or from the Outer House, may be called in to make up a quorum (2 Will. IV. c. 5, s. 2).

Except in a few special cases, the appellate jurisdiction of the Court of Session is exercised by the Inner House. When an ordinary cause originates in the Court of Session, the pursuer selects either Division he pleases to be the Court of Review in the event of an appeal from the judgment of the Lord Ordinary. In appeals from judgments pronounced in inferior Courts, the appellant has his choice of Divisions. In any case, the Lord President has power to transfer causes from one Division to the other (20 & 21 Vict. c. 56, ss. 1–3, 7). See RECLAIMING NOTE; APPEAL; BILL OF EXCEPTIONS; NEW TRIAL; REPORT TO INNER HOUSE.

While the two Divisions of the Inner House are chiefly Courts of Appeal, they also exercise an original jurisdiction in certain classes of cases. Actions of Proving of the Tenor, Division of Commonty, Division of Runrig Lands, Ranking and Sale, and Cognition and Sale (*q.v.* under their respective headings) are appropriated to the Inner House. In their initial stages a Lord Ordinary deals with these actions, but he afterwards transfers them to the Inner House by making "great avizandum." Applications to the Court to exercise its *Nobile Officium* (*q.v.*) are made directly to the Inner House. All summary petitions are technically Inner House processes, but by statute they are now for the most part appropriated to the Junior Lord Ordinary (21 & 22 Vict. c. 56, s. 4). See PETITION. Special Cases (*q.v.*) brought under the Act 31 & 32 Vict. c. 100, s. 63, must be brought in the Inner House.

When a case which has been tried by a jury comes before the Division upon a Bill of Exceptions or motion for a new trial, the judge who presided at the trial hears the case along with the Division.

Where the judges of the Division are equally divided in opinion upon a question of fact or upon a question of law not involving any legal principle of importance, the case may be reheard before the judges of that Division, with the addition of such other judges as may be necessary to bring the number up to five, and judgment will be pronounced in accordance with the opinion of the majority of the Court so constituted (31 & 32 Vict. c. 100, s. 59). In other cases of equal division, or in any case of difficulty or importance, the cause may be determined by getting the opinions in writing of three other judges, who have the printed papers in the cause laid before them, or by a rehearing before the Division and such other judges as may be necessary to bring up the number to seven (13 & 14 Vict. c. 36, s. 35,

and 31 & 32 Vict. c. 100, s. 60). In cases of difficulty and importance, the whole Court may be consulted upon questions of law stated in writing, or the case may be reheard before the whole Court (48 Geo. III. c. 151, s. 10; 6 Geo. IV. c. 120, ss. 23, 24).

Outer House.—In the ordinary case an action originating in the Court of Session is brought, in the first instance, before any one of the five Lords Ordinary who sit in the Outer House. These judges have co-ordinate jurisdiction, and the pursuer has his choice as to which of them shall try his case. The judge whom he selects alone can consider and dispose of the cause, unless it is transferred by the Lord President in virtue of a power conferred upon him by the Act 20 & 21 Vict. c. 56, s. 1. Certain causes, however, are appropriated to particular judges. The *Junior Lord Ordinary* has exclusive jurisdiction in Summary Petitions not incident to pending actions, and as Lord Ordinary on the Bills during session, he performs the whole business of the Bill Chamber (20 & 21 Vict c. 56, s. 4; 53 Geo. III. c. 64, s. 2). The *Second Junior Lord Ordinary* exercises the jurisdiction in Teind causes, so far as appropriated to the Outer House under the Acts 53 Geo. III. c. 64, s. 3, and 6 Geo. IV. c. 120, s. 54. To him also lie appeals from the Sheriff in cases relating to church building and repairing, etc. (31 & 32 Vict. c. 96). To the Third Junior Lord Ordinary is assigned the Outer House jurisdiction in Exchequer causes (19 & 20 Vict. c. 56).

There are also special Courts specially constituted for the disposal of certain definite classes of cases. 1. Two judges are appointed by Act of Sederunt to hear and determine appeals against *Valuations* of lands and heritages (31 & 32 Vict. c. 80, s. 8; 20 & 21 Vict. c. 58, s. 2; and 42 & 43 Vict. c. 43, ss. 7–9). 2. Three judges are appointed to form a *Registration Appeal Court* (31 & 32 Vict. c. 48, s. 22). 3. Two judges are appointed to try *Election Petitions* (Parliamentary) (31 & 32 Vict. c. 125, s. 58; 42 & 43 Vict. c. 75; and 46 & 47 Vict. c. 51). *The Bill Chamber* (*q.v.*) is that department of the Court of Session which during the whole year discharges summary and preliminary business. *The Teind Court* (*q.v.*) is distinct from the Court of Session, having a special jurisdiction and a separate establishment of clerks and officers, but the Commissioners are the judges of the two Divisions of the Court of Session and the Lord Ordinary on Teinds, five being a quorum (2 & 3 Vict. c. 36, s. 8; 31 & 32 Vict. c. 100, s. 6). *Sessions of the Court.*—The Court has a Winter and a Summer Session; the former lasting from 15th October till 20th March, and the latter from 12th May till 20th July. The Court has power (invariably exercised) to adjourn for a fortnight at Christmas time, and for a week in February, and also to observe any general holiday. It does not sit on the term days, 15th May and 11th November (C. S. Act, ss. 4, 7). The Sessions may be extended (2 & 3 Vict. c. 36, ss. 10, 11; C. S. Act, s. 5). Monday is not a sederunt day.

Jurisdiction.

I. *Persons.*—Civil actions against foreigners must be brought in the Court of Session, which is the proper *commune forum.* The Sheriff Court, though it has a large and gradually increasing concurrent jurisdiction with the Court of Session, has no jurisdiction over foreigners except in a few special cases (*White*, 1846, 8 D. 952; *Piric*, 1867, 5 M. 497; 1 Will. IV. c. 69, s. 22; 39 & 40 Vict. c. 76, s. 47; 40 & 41 Vict. c. 50, s. 8). For cases in which foreigners are subject to the jurisdiction of the Scottish Courts, see Jurisdiction; Domicile.

II. *Causes.*—The general rule is that the Court of Session has jurisdic-

tion, original and appellate, in all civil causes cognisable in a Scottish Court, except where it is expressly excluded. It can "set aside or suspend the sentences of all inferior Courts, unless where that power is denied them by special statute" (Ersk. i. 3. 20). To exclude this power, the right of review must be taken away expressly or by necessary implication; and even where appeal is so excluded, the Court of Session may set aside the judgments of inferior Courts where there has been excess of jurisdiction. It has also power to compel inferior Courts to exercise their jurisdiction.

PRIVATIVE JURISDICTION.—Certain classes of causes can be determined only in the Court of Session.

(1) *Exchequer Causes.*—The jurisdiction formerly exercised by the Court of Exchequer (*q.v.*) is now vested in the Court of Session by 19 & 20 Vict. c. 56. This jurisdiction embraces all questions relating to the revenues of the Crown as defined by 6 Anne, c. 26, and the appointment and control of tutors-dative.

(2) *Maritime* and other causes formerly competent to the *Admiralty Court* (*q.v.*), transferred to the Court of Session by 11 Geo. IV. and 1 Will. IV. c. 69; but certain of these cases are under the Act competent to the Sheriff Court.

(3) *Teind Causes.*—The jurisdiction of the Commissioners of Teinds is now exercised by Court of Session judges sitting in the Teind Court (*q.v.*) (6 Anne, c. 9; 2 & 3 Vict. c. 36, s. 8; 31 & 32 Vict. c. 100, s. 9; 6 Geo. IV. c. 120, s. 54).

(4) Actions relating to Rights of *Status.*—The jurisdiction in consistorial causes formerly exercised by the *Consistorial* and *Commissary Courts* (*q.v.*) was transferred to the Court of Session by 11 Geo. IV. and 1 Will. IV. c. 69, s. 33. While all actions which involve a determination of a right of *status*, such as actions of declarator or nullity of marriage, divorce, and separation, must be brought in the Court of Session, the Sheriff may entertain actions incident to the right, *e.g.* interim aliment.

(5) Questions of *Heritable Right.*—Actions of declarator of property in heritage and other competitions of heritable right can be determined in no other Court, except where the value of the subject in dispute does not exceed £50 by the year, or £1000 value, in which case actions, excluding adjudications and reductions, relating to a question of heritable right or title may be brought in the Sheriff Court. So also may all actions of division of commonty and of division and sale of common property (Sheriff Courts Act, 1877, s. 8). The Sheriff can also entertain possessory actions relating to heritable property (*Maxwell*, 1866, 4 M. 454), and can determine actions dependent upon heritable title where the title itself is not in dispute, *e.g.* actions for rent. The Sheriff has also jurisdiction in actions of straightening marches (1661, c. 41), division of runrig lands (Ersk. iii. 3. 59), and actions relative to questions of nuisance or damages through undue exercise of rights of property (1 & 2 Vict. c. 119, s. 15), and relating to praedial servitudes (*Gow's Trs.*, 1875, 2 R. 729; *Lowson's Trs.*, 1864, 3 M. 53; *Stobbs*, 1873, 11 M. 530).

(6) Actions of *Declarator*, except so far as the jurisdiction of the Sheriff is authorised by the Sheriff Courts Act, 1877, s. 8 (*M'Laren's Tr.*, 1897, 24 R. 960), and in a limited class of cases where the Sheriff has by statute power to declare the existence or forfeiture of rights (1 & 2 Vict. c. 119, s. 15, and 16 & 17 Vict. c. 80, s. 32). But a Sheriff Court petition, otherwise competent, is not invalidated by a declaratory conclusion.

(7) Actions of *Reduction.*—The Sheriff cannot reduce a deed, but he may decide on the validity of a deed brought before him by way of exception

(Sheriff Courts Act, 1877, s. 11); and he has a statutory power to set aside certain deeds (Bankruptcy Acts, 1856, s. 10, and 1857, s. 9; Employer and Workmen's Act, 1875, ss. 3, 4, 5, 6; see *M'Laren's Tr.*, 1897, 24 R. 960).

(8) *Suspensions*, except in the case of charges for sums under £25 (A. of S., 10th July 1839, ss. 116, 117).

(9) *Adjudications* (1672, c. 19).—It is thought, however, that adjudications *contra hereditatem jacentem* may be brought in the Sheriff Court (Ersk. ii. 12. 53; Bell, *Com.* i. 714).

(10) Certain *Equitable Causes.*—All Courts in Scotland administer equity in the ordinary sense of the term, but the Court of Session alone has jurisdiction in exceptional cases. In virtue of its *nobile officium* the Court of Session may supply omissions or defects in statutes or statutory procedure and in certain deeds, as trust deeds, so as to carry out their true purpose; and afford other remedies, on petition to the Inner House, in cases which are competent neither to the Outer House nor the Sheriff Court. See NOBILE OFFICIUM; EQUITY.

JURISDICTION EXCLUDED.

A. Both the ORIGINAL AND APPELLATE jurisdiction of the Court of Session is excluded in (1) *Criminal Causes.* In order to obviate the difficulty of determining what class of cases are of a criminal nature in respect to proceedings by way of summary complaint, it is provided by sec. 28 of the Summary Procedure Act, 1864, that "in all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes as are herein before mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature when, in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint, under the authority of any Act of Parliament, the jurisdiction shall be held to be civil" (see *Smith*, 1866, 4 M. 671; *Scott*, 1868, 7 M. 270; *Lang*, 1869, 7 M. 473; *Forbes*, 1871, 10 M. 244; *Ledgerwood*, 1868, 7 M. 261).

Certain old statutes confer a criminal jurisdiction on the Court of Session, which, however, is never exercised (Ersk. i. 3. 21). The Court has jurisdiction at common law and by statute to punish its own officers, inferior judges and the officers of inferior Courts for malversation. It has also power to punish for contempt of Court—a power most frequently exercised in cases of breach of interdict. The Court is not debarred by its want of jurisdiction in criminal causes from entertaining actions or considering defences founded upon criminal acts where these have resulted in civil or patrimonial loss, but it cannot set aside a decree of a criminal Court should such be founded on in the civil suit.

(2) *Spiritual or Ecclesiastical Causes.*—Sentences and proceedings of Church Courts cannot be reviewed by the Court of Session, unless the Church Court has acted maliciously or outwith its jurisdiction, and even then the Court will not interfere unless some civil right has been invaded. The Court has an express statutory jurisdiction in causes relating to teinds, disjunction and erection of parishes, ecclesiastical buildings, etc., in connection with the Established Church. See CHURCH COURTS.

(3) *Causes of Small Value.*—Where the value of a cause is not more than £25, it cannot come into the Court of Session (50 Geo. III. c. 112, s. 28, and 16 & 17 Vict. c. 80, s. 22). There is an exception to this rule in appeals in a few cases under sec. 9 of the Sheriff Courts Act, 1877. The value of the cause is determined by the conclusions of the summons or other initial writ. Where the decree asked for is *ad factum prestandum*, the value of the cause is not measured pecuniarily, and therefore the £25 limit is inapplicable. See APPEAL TO COURT OF SESSION FROM SHERIFF COURT. Even in causes of less value than £25 the Court of Session has jurisdiction where the jurisdiction of the Sheriff is excluded, *e.g.* in the case of a foreign defender (*Brown*, 1852, 24 Sc. Jur. 646; *Macbeth*, 1873, 11 M. 404).

(4) *Claims to Peerages.*—Such claims must be determined by the House of Lords.

(5) *Summary Removals* under the Sheriff Courts Act, 1838, s. 8.

(6) Under certain special statutes expressly excluding jurisdiction (Mackay, *Manual*, 121).

B. ORIGINAL BUT NOT APPELLATE.—Jurisdiction is excluded in—

(1) *Service of Heirs.*—Original jurisdiction lies with the Sheriff of the county in which the lands are situated, or with the Sheriff of Chancery, but the judgment of the Sheriff may be appealed to the Court of Session (31 & 32 Vict. c. 101, ss. 27–30, 41, 42). See SERVICE OF HEIRS; CHANCERY.

(2) *Questions of Heraldry.*—The Lyon King has exclusive jurisdiction in the first instance in proper questions of heraldry, as in competitions between claimants of particular arms, admission of messengers-at-arms, etc. (Acts 1587, c. 46; 1592, c. 127; and 30 Vict. c. 17). The Court of Session can review the judgments by way of appeal and reduction (*Cunninghame*, 1849, 11 D. 1139; *Macdonald*, 1826, 4 S. 374; *Lindsay*, 1724, M. 8889). See LYON KING OF ARMS.

(3) *Actions of Removing* under the Sheriff Court Act, 1853, s. 29, and A. of S., 14th December 1756, must be brought in the Sheriff Court, but may come into the Court of Session by way of suspension or reduction. In summary removings under the Sheriff Courts Act, 1838 (1 & 2 Vict. c. 119, s. 8), the decree of the Sheriff is final.

(4) Certain statutes ordain that proceedings brought under their provisions in the Sheriff Court may be afterwards reviewed by the Court of Session, *e.g.* The Employers' Liability Act, 1880, and Workmen's Compensation Act, 1897.

APPEAL from the Court of Session.—See APPEAL TO HOUSE OF LORDS.

ACTS OF SEDERUNT.—The judges of the Court of Session have power to make rules of procedure for the conduct of causes, which have the force of statutes. At one time this power was occasionally exceeded, and matters of law were dealt with; but the Court for many years has not exceeded its proper functions. See ACT OF SEDERUNT.

[Stair, bk. IV. tit. 1; Ersk. bk. I. tit. 3; Bankt. ii. 508; Shand, *Practice*, i.; Mackay, *Practice*, i. 1, *Manual*, 1.]

Sessions of the Peace.—Sessions of the Peace is the name applied to the Court held by the Justices of the Peace for a county. It is not a Court "wherein writs are usually registered," and would not, therefore, fall under the definition of the term *Court of Record* as used by Stair (ii. 3. 63). It is, however, a Court of Record in so far as the procedure of the Court is regularly entered in a sederunt-book by the clerk, and authenticated by the subscription of the presiding justice; proofs are generally taken in writing; extract judgments are given out; and all processes are preserved.

That the character of the Justices' Court in Scotland might not be affected at the Union, it was provided by 6 Anne, c. 6, that in the Sessions of the Peace the methods of trial and judgment shall be according to the laws and customs of Scotland.

The Quarter Sessions is the meeting of the Justices of the Peace for a whole county. Extensive counties were usually divided into districts, for the more frequent meeting and speedy administration of justice. Such division is now required by the Licensing and Small Debt Acts. The times of their meeting are prescribed by statute (1661, c. 38, s. 3). "The Justices of Peace in each shire shall meet and convene together four times in each year, on the first Tuesday in May, on the first Tuesday in August, on the last Tuesday in October, and on the first Tuesday in March, with power to continue the said sessions, or to adjourn the same to such days as shall be most convenient." The custom is to meet on the day specified, and if it be for a special reason inconvenient, to appoint a day certain to which to adjourn. If no quorum attend on the day appointed, the Quarter Sessions may be held on any other day during that quarter of the year. The Quarter Sessions are held at the head burgh of the county, even when it is an incorporation having its own justices. The Court is called by the clerk; formerly, on important occasions, intimations used to be issued by a prominent justice—for instance, the Lord Advocate was in use to summon the justices for the county of Edinburgh.

Besides the regular district meetings, justices with us have always been in the practice of holding Courts at any time, though not by way of adjournment of the Quarter Sessions. They may sit at all times, except Sundays, in matters which concern the public peace.

The Act 1617, c. 8, s. 20, enacts that three justices shall be a full number and session to decide in matters betwixt the four Quarter Sessions, but the Commission expressly assign to *two or more* of the justices the powers committed. That number was held sufficient in *Reid* v. *Finlayson* (1730, Dict. Decis. tit. "Jurisdiction"). One Justice of Peace cannot act judicially.

At the first meeting of the Sessions after a new Commission arrives in the county, it is read in Court. Each meeting elects its own chairman, who has no casting vote. The procurator-fiscal prosecutes or gives his concurrence to prosecution by a private party.

The Quarter Sessions have the power of reviewing the judgments of the justices in Petty Sessions. More than the necessary quorum of two are therefore usual in Quarter Sessions for the hearing of appeals, and in some counties a practice exists of requiring more than a specified number to be present. An equality of votes may be got over by one justice withdrawing or another justice being brought in. Where the equality arises on an appeal, the judgment appealed against ought to be affirmed, or preferably the cause should stand adjourned for a further hearing at a future meeting, or by a bench composed of different justices. Justices in Quarter Sessions, on appeal, must rehear the evidence led before the justices in Petty Sessions. Should the Quarter Sessions refuse, their judgment is liable to suspension (*Muckersie*, 11 Dec. 1874, 3 Coup. 54).

See JUSTICE OF PEACE, and authorities there quoted.

Set-off.—See COMPENSATION.

Settlement—This term denotes the relation which a pauper has to the particular parish which is bound to relieve the rest of the community

of the burden of supporting him. The poor entitled to relief are by law chargeable only on the parish in which they have a settlement, and this depends on residence, parentage, birth, or marriage (Bell, *Prin.* s. 2195).

History.—The first statutory enactment with regard to the particular parish liable for the support of the indigent poor was the Act 1535, c. 22, which ordained that "na beggars be thoiled to beg in ane parochin that ar born in ane uther; and that the headsman of ilk parochin make takinnes, and give to the beggars thereof, and that they be susteined within the bounds of that parochin; and that nane uthers be served with almous within the bounds of that parochin but they that bearis that takinne allanerlie." It will be observed that this early enactment, which initiated the law of settlement, instituted a settlement by birth merely, and took no account of those paupers who in early life had left the parish of birth, and made their permanent home elsewhere. This omission was remedied by the Act 1579, c. 74, which, in addition to repeating the enactment quoted above, that "na beggars be thoiled to beg in ane parochin that ar born in ane uther," directs all "pure people to repayre to the parochin quhair they were borne, or had their maist common resorte or residence the last seven years by past, and there settil themselves." The Act goes on to provide for an inquisition of the poor being taken: "The provost and bailies in burrowes or townes, and the saidis judges in the parochines to landwart, sall give ane testimonial to sik pure folk as they find not borne in their awin parochin, or making residence therein the last seven zeiris, sending them or directing them to the next parochin, and so fra parochin to parochin quhill they be at the place quhair they were borne, or had their most common resorte or residence during the last seven zeiris preceding." The settlements introduced by these two Acts were only two, namely, the parish of birth and the parish where the beggar had his most common resort for seven years, but, as the principle of not separating members of the same family was early recognised in the administration of the law of settlement, and with a view of overcoming the statutory difficulty, the legal fiction of what is called a "derivative settlement" was introduced, whereby the wife takes her husband's settlement, and the children their father's. By the Act 1672, c. 18, the duration of residence necessary to acquire a settlement was reduced to three years, at which it remained till 1845, when, by the Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83), the period of residence was increased to five years, being again reduced to three years in 1898 by the Poor Law (Scotland) Act, 1898 (61 & 62 Vict. c. 21), to be noticed *infra*.

The subject can be most conveniently treated under the following heads:—

I. Settlement by Birth.
II. Settlement by Parentage.
  (*a*) Legitimate Children.
  (*b*) Illegitimate Children.
  (*c*) Forisfamiliation.
III. Settlement by Marriage.
IV. Settlement by Residence.
V. Settlement of Pauper Lunatics.

I. Settlement by Birth.

The settlement by birth is the settlement which a person has by the fact of his birth in a parish, and, failing other grounds of settlement, a pauper is entitled to relief from such parish. This settlement can never be extinguished, though it may be suspended during the subsistence of a

derivative settlement, such as by parentage or marriage, or a residential settlement. If such settlement be lost, the birth settlement at once revives. As the birth settlement of every child is in the parish in which such child is born, it is of no consequence that the presence of the mother in such parish at the time of the child's birth was merely casual, *e.g.* with a view to being delivered outwith the knowledge of her friends (*Craig*, 1867, 39 Sc. Jur. 390; *M'Donald*, 1863, 9 P. L. M. 348). This was held even in the case of a child of a pauper who was born in the poorhouse of the parish to which his mother was chargeable, and which was situated in another parish (*Russell*, 1881, 8 R. 440). The law thus does not recognise a *constructive* birth settlement. As regards the mode of proof, declarations made by the parents are admissible (*Hay*, 1854, 16 D. 364); but in one case it was held insufficient to prove birth where the sole proof adduced was that of the pauper, aged sixty-nine, and of his sister, who deponed that their mother, now deceased, had frequently told them that the pauper was born in the defending parish (*Wallace*, 1891, 19 R. 233). Parents are competent witnesses, and registers of birth and baptism and entries in family Bibles can competently be adduced as adminicles of evidence. An infant found exposed is presumed to have been born in the parish where it is found so exposed, and the *onus* is on that parish to show that it was not born there (*Thomson*, 17 Nov. 1808, F. C.; *Wilson*, 1860, 2 P. L. M. 633, per Ld. Neaves).

II Settlement by Parentage.

(*a*) *Legitimate Children.*—Legitimate children during nonage are to be considered as so far identified with their father that it is to his place of settlement, *however constituted*, that they are to look for relief, when they are so circumstanced as to be entitled to relief at all (per Ld. Chan. Cranworth in *Adamson*, 1853, 1 Macq. 376). The decision in the case of *Adamson*, just cited, proceeded on the principle that the family should be kept together; and in delivering his judgment the Lord Chancellor (Cranworth) quoted with approval the opinion of Ld. Jeffrey in the case of *Hume*, 1849, 12 D. 411, to the following effect: "The branches are held to be where the root is; though they may overhang and drop into other parishes, the true parish is that where the root is." A pupil child, therefore, follows the settlement of its father, whether that settlement has been acquired by birth or by residence. The *onus* is on the relieving parish to prove the father's parish of settlement; and so in the case of relief being granted to the pupil child of a Scotchman, the relieving parish were not entitled to recover advances made to the child against the parish of the child's birth although they were unable to prove the parish of the father's birth (*Hopkins*, 1865, 3 M. 424). After the father's death, pupil children follow the settlement of their mother. The mother, being bound to aliment her children, is the pauper, and if she falls into poverty the parish of her settlement is bound to support both her and her dependants. Pupil children whose father, a foreigner, had not acquired a settlement by residence, and had deserted his wife, were held to follow their mother's settlement (*Gibson*, 1854, 16 D. 926). An Englishman married in Scotland and lived there for some time, but before he had acquired a settlement he deserted his wife and child. After the lapse of nearly three years the wife fell ill, and for a few days before her death was in receipt of parochial relief. It was *held*, in conformity with the opinion of the majority of the whole Court, that the child who was still a pupil, fell to be supported by the parish not of its own but of its mother's birth (*Carmichael*, 1863, 1 M. 452). The following important statement of the law was made

by Lds. Benholme and Kinloch: "The question is whether, the mother having died, the primary settlement of the child is the same derivative settlement of the mother's birthplace, on which, if she had been in life, his support would unquestionably have been thrown. We are of opinion it must be so held. We think the question is answered by the analogy between the death and desertion of the husband alluded to. When a husband dies, leaving a wife and pupil children living in poverty with her, we consider it to follow from the authorities that the settlement of the mother, when coming into operation on the failure of the father's settlement, enures to the children so as to form their own proper settlement. In the first instance the settlement derived from the father must be the settlement of both mother and children. But if this settlement fail or be lost, and the mother is thrown on her own settlement, we conceive that this is equally the settlement of her pupil children after her death as before. All the principles which apply in the case of the father appear to us equally to hold in that of the mother. She is now the head of the house. The children are part of her family. She is liable to support them out of her own means if she can. We can see no ground on which, in such a case, the settlement of the father shall be held to have become inherent in the children which does not equally apply in the case of the surviving mother. If the surviving mother die, we think the primary settlement of the pupil children left by her is the settlement derived from her first, as in the case of the father." A mother, after the father's death, can acquire a residential settlement which enures to the pupil children living with her (*Crieff*, 1842, 4. D. 1538). When a woman marries again, she loses the settlement of her first husband and acquires that of her second husband for herself alone; and in the event of supervening poverty, she being the pauper, such parish must relieve her and her pupil children (*Greig*, 1865, 3 M. 575). The rubric in *Greig's* case is apt to mislead, as it is stated in too absolute and unqualified terms (per Ld. Mure in *Beattie*, 1878, 5 R. 737). It is as follows:—The widow of a man, who had a settlement in Scotland at the time of his death, having married again, became chargeable, on the desertion of her second husband, along with the pupil children of her former marriage. *Held* that by her second marriage the woman had lost the settlement of her first husband, and acquired that of her second husband not only for herself but also for the pupil children of her previous marriage, and that the parish of her second husband's settlement was the parish liable. This rubric is not warranted by the judgment or by the opinions of the learned judges. The mother did not acquire the settlement for her pupil children, but she being the pauper, the parish of her settlement was bound to relieve both her and her pupil children (per Ld. Kinnear in *Muir*, 1888, P. L. M. for 1889, 134; *Beattie*, *supra*, *cit.*; per Ld. Monereiff in *Campbell*, 1894, P. L. M. for 1894, 416; per Ld. Adam in *Shotts Parish Council*, 1896, 24 R. 169). A pupil cannot acquire or lose a settlement during pupilarity. On reaching puberty, *i.e.* twelve years of age in the case of a boy, and fourteen in the case of a girl, he will, if forisfamiliated (see *Forisfamiliation*, *infra*), take the settlement of his father, if it be residential; but if his father has not at the time a residential settlement, then the child will take his own birth settlement (*Craig*, 1863, 1 M. 1172; *St. Cuthbert's*, 1873, 1 R. 174; *Simpson*, 1883, 10 R. 928; *Allan*, 1864, 3 M. 309).

(6) *Illegitimate Children.*—An illegitimate pupil child takes the settlement of its mother however acquired, whether by birth, residence, or marriage (*Hay*, 1856, 18 D. 510). In that case the Lord President (M'Neill) observed:

"In the case of illegitimate children, they follow the settlement of the mother, and that is admitted at all hands to be the rule applicable to cases where the settlement of the mother happens to be her birth settlement, and in cases where the settlement of the mother happens to be the settlement acquired by residence. But it is disputed that the rule is applicable to cases where the settlement of the mother is what is called a derivative settlement. . . . We have nowhere a clear definition of the expression 'derivative settlement.' . . . The general meaning of it is, that it is a settlement which the party derives, not by his own birth or residence, but through another. Such a settlement may be acquired through parentage, and in the case of a female, through marriage . . . The general question is: 'Whether a settlement so obtained is an exception to the general rule, or whether it is not?' The opinion which I have formed upon that point is, that a settlement so acquired is not an exception to the general rule. I think that the rule that the mother's settlement regulates the settlement of the illegitimate child applies to this case as well as to others, and I do not see any principle of any strength, or any ground for holding that, when her settlement appears to be derived through marriage, and to be in a parish different from that of her own birth, and from that of her child's birth, it is to form any exception. When she has acquired a settlement, it becomes hers to the exclusion of all others, so long as it lasts. It may be a settlement defeasible, so to speak, like any other settlement—by reason of residence, for example. But the law of settlement through the mother being the rule is not altered in any way; and the circumstance that her settlement by marriage might cease by a subsequent marriage, or by her acquiring a settlement elsewhere, is not a pressing consideration, for settlement by residence might cease in a similar manner." When the mother of an illegitimate child acquires an industrial settlement, that settlement is the settlement of the child, and will continue to be so after the child has attained puberty until it is lost by non-residence, under sec. 76 of the Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83).

(*c*) *Forisfamiliation.*—"Forisfamiliation," or, as it is called in England, "Emancipation," is the act by which a child ceases to be a member of his father's family, and takes up an independent position for himself. On reaching puberty (twelve years of age in the case of a boy, and fourteen in the case of a girl) a child is capable of being "forisfamiliated"; but the mere fact of reaching puberty, in the case of a child whose father is alive, does not of itself operate forisfamiliation, and whether a minor has become forisfamiliated is a question of fact in each individual case, involving in many cases points of considerable delicacy and nicety. In a recent case (*Elgin Parochial Board*, 1893, 20 R. 763), Ld. Trayner observed: "There are three conditions always material in considering the question of forisfamiliation. 1st, Is the person in minority? 2nd, Has he ceased to reside in his father's house? 3rd, Has he been supporting himself? I do not say that all these things must concur in order to prove forisfamiliation, or that any one of them is absolutely essential, but they are all considerations which, if affirmed, would lead to the view that the child has been forisfamiliated." In the case of persons of weak mind, either incapable of earning anything or capable of earning very little, even though they have reached majority, the Court has by a series of decisions held such persons to be non-forisfamiliated (*Fraser*, 1867, 5 M. 819; *Lees*, 1891, 19 R. 6; *Mackay*, 19 R. 396). Where, however, a pauper of weak mind has not been certified as a lunatic, and where it is not proved that she is, in point of fact, a dangerous lunatic, or an absolute idiot, the Court will not inquire

too closely into the precise degree of imbecility, but if she is proved to possess a certain amount of intelligence and power of work, though under supervision, the Court will, as a general rule, hold that she is not in such a mental condition as to be incapable of having a settlement of her own (*Edmiston*, 1895, P. L. M. 1896, 75). A pupil whose father dies during his pupilarity becomes *ipso facto* forisfamiliated on reaching puberty (*Craig*, 1863, 1 M. 1172).

III. Settlement by Marriage.

A woman, on marriage, loses any settlement she may hitherto have had, and has no settlement except that of her husband. It was long a subject of controversy whether the wife by the mere fact of marriage did not only lose her maiden settlement, but acquire a new settlement for herself (*Hay*, 1870, 12 D. 1019). But it is now settled law that the effect of marriage is not to create a new settlement for the wife, but merely to extinguish the old one, on the principle that by marriage the wife's person is merged in that of her husband's, and that in the event of supervening poverty it is not she that is the pauper, it is her husband, on whom constructively she forms a burden (per Ld. Kinloch in *Kirkwood*, 1871, 9 M. 693). A woman, therefore, born in Scotland who marries a foreigner who has no settlement in this country, and who is still alive and not in desertion, is in the position of having no settlement. "A married woman is in law incapable *stante matrimonio* to have any settlement in her own right, or independently of her husband. If her husband has a settlement, that also is her settlement. If her husband has no settlement, just as little has she" (per Ld. Pres. Inglis in *M'Crorie*, 1862, 24 D. 72). If, however, he dies or deserts her, her own settlement revives; and if before marriage she had a residential settlement, she will take that settlement rather than her own birth settlement (*Reid*, 1890, 18 R. 25). If she was not in possession of a residential settlement before marriage, she becomes chargeable to her own birth settlement (*Gibson*, 1854, 16 D. 926). On her husband's death a widow takes the settlement which belonged to her husband, whether by birth or residence (*Hay*, 1854, 16 D. 994). This settlement, however, may be lost by the widow. If the settlement of the husband at the time of his death was a birth settlement, and the widow, by residence, acquires a residential settlement, she loses the derivative birth settlement of her husband; and in the event of her subsequently losing, by absence, such residential settlement, the derivative birth settlement of her husband does not revive, but she becomes chargeable to the parish of her birth (*Hay*, 1860, 22 D. 872). If the settlement which the husband had at the time of his death was a residential settlement, the widow may lose such settlement by absence under sec. 76 of the Poor Law Act, 1845; and in that event her own birth settlement, and not her husband's, is liable to maintain her (*Hay, supra*). This is even the case when the absence from the parish was commenced before the husband's death. "The parish is entitled to take up this position: You left us more than four years ago, and we have never heard of you since. You have not kept up your connection with us, and we are no longer responsible for you" (per Ld. J.-Cl. Inglis in *Allan*, 1864, 3 M. 309). If a widow marries again, she loses the settlement she derived from her first husband, even if her second husband has no settlement of his own (*Kirkwood*, 1871, 9 M. 693). The desertion of a husband is equivalent to his death, and the settlement of a deserted wife is her husband's settlement at the date of desertion (*Greig*, 1876, 3 R. 642). If at the time of his desertion he has no settlement in Scotland, the wife becomes chargeable to her own birth settlement. The desertion only

remains equivalent to death so long as the desertion lasts. The deserting husband may return, and then a new rule may come in to fix the parish which is bound to maintain him or his wife and family. He may revive a settlement which, during his desertion, cannot be gone against for the support of the wife and family, or he may put an end to a settlement which has enured to the wife and family (per Ld. Pres. Inglis in *Greig, supra*).

IV. Settlement by Residence.

This is now regulated by sec. 1 of the Poor Law (Scotland) Act (61 & 62 Vict c. 21), which enacts that "no person shall be held to have acquired a settlement in any parish in Scotland by residence therein unless such person shall, either before or after, or partly before and partly after, the commencement of this Act have resided for three years continuously in such parish, and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any such parish shall be held to have retained such settlement if, during any subsequent period of four years, he shall not have resided in such parish continuously for at least one year and a day: Provided always that nothing herein contained shall, until the expiration of four years from the commencement of this Act, be held to affect any persons who, at the commencement of this Act, are chargeable to any parish in Scotland." This enactment takes the place of sec. 76 of the Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83). By that section the duration of residence necessary to acquire a settlement was five years, and such settlement was lost to the person who had acquired it if, during any subsequent period of five years, he had not resided continuously in the parish for at least one year. It is not clear what is meant by the proviso at the end of sec. 1 of the new Act. It is probably meant to prevent a pauper, who at the passing of the Act was receiving relief from a settlement acquired by five years' residence or by birth, changing to a settlement previously acquired by three years' residence.

In order to acquire a settlement in a parish, the first requisite is that the person must have resided in the parish for three years continuously. For a considerable period after the passing of the Poor Law Act, 1845, the residence necessary to acquire a settlement required to be personal, and the circumstance that a person had a house in a parish in which his wife and family resided, and to which he returned, after longer or shorter periods, was held to be immaterial, *e.g.* a man who rented a house and lived with his wife and family for eight months or so every year, being absent for the remainder of the year as a groom or game-watcher in other parishes, was held not to have acquired a settlement (*Hewat*, 1866, 4 M. 1033). It is now, however, settled law by a series of decisions, that where a man has a house in one parish, where his wife and family reside, and he himself, in the pursuit of his calling, has to be absent from that parish for longer or shorter intervals, the parish where his wife and family reside is his parish of settlement. The criterion, according to these decisions, is whether the parish from which there has been absence, more or less continued, can be viewed as the place of the pauper's abiding residence or home with which the pauper has connected himself, and to which, when the temporary absence is at an end, he might naturally be expected to return (*Hutchison*, 1858, 20 D. 545). The doctrine of "constructive residence," beginning with the case of a sailor who, if it were held he had not a residential settlement in the place where his wife and family resided, had no residential settlement

at all (*Greig*, 1867, 5 M. 1132), was gradually extended till the late Lord President (Inglis), who had always protested against the theory of "constructive residence," said, in the case of *Beattie*, 1879, 6 R. 956, that the Court had decided that "residence does not necessarily mean actual residence, but may mean also constructive residence," and when the case arises "the Court will arrive at the conclusion that the residence may be constructive merely for the whole five years." The case of *Nixon*, 1884, 11 R. 945, is instructive as showing the length to which the theory of "constructive residence" may go. In that case an Irishman, who had a residential settlement in the parish of Port-Glasgow, went abroad in 1876, leaving his wife and family in a house in Port-Glasgow. He intended, on his departure, to remain abroad for two years, and then, if successful, to bring his wife and family out to him; if unsuccessful, to return home. He died abroad in 1882 without having ever returned to this country, and his wife and family became chargeable to Greenock, to which parish they had removed in 1879. Yet it was held that his settlement in Port-Glasgow had not been lost by absence. The Lord President (Inglis) in that case said: "That an Irish emigrant in Australia, who had been earning a livelihood there for six years, and has, nevertheless, been all the time residing constructively in the parish of Port-Glasgow, is a hard saying, but it is the logical sequence of the judgments of the Court." The nature and character of the absence and non-residence, rather than its mere duration, are what is to be looked to (per Ld. Gifford in *Allan*, 1875, 2 R. 463). The theory of "constructive residence" applies not only in the acquisition of a residential settlement, but also in retaining one (*Nixon, supra*). The theory of "constructive residence" has recently been carried a step further in the case of the *Kilmarnock Parish Council*, 1898, P. L. M. 1899, 26, where it was held that the residence of a wife and family in an adjoining parish for a temporary purpose for a short period interrupted the acquisition by the husband of a residential settlement in the parish where he was pursuing his industry, and in which his wife and family had been resident with him for some years prior to their going to the adjoining parish. Involuntary absence, such as that of a soldier on foreign service (*Mason*, 1865, 3 M. 707), or imprisonment on a criminal charge (per Ld. Neaves in *Beattie*, 1 M. 434), do not operate an interruption of the acquisition, or the loss, of a residential settlement. Although it has not been the subject of judicial decision, it is thought that a person can acquire a residential settlement in the parish of his birth. Where a person applies for parochial relief, and is offered the poorhouse, which he declines, it has been held that such application breaks the continuity of residence necessary to acquire a residential settlement (*Govan Combination Parish Council*, 1897, P. L. M. 1897, 199). The acquisition of a settlement by industrial residence in a parish will not be interrupted by the parish being combined with other parishes into a new parish by an Order of the Secretary for Scotland under sec. 46 of the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58), but the settlement, when acquired, will be in the united parish. When an entire parish is, by an Order of the Secretary for Scotland, combined with other parishes into a united parish, an industrial settlement acquired in it prior to the Unification Order may be retained by the statutory residence in the united parish in place of the original parish (*Edinburgh Parish Council*, 1898, 25 R. 385).

V. Settlement of Pauper Lunatics.

By sec. 75 of the Lunacy (Scotland) Act, 1857 (20 & 21 Vict. c. 71), it is

provided that every lunatic pauper detained in a district asylum shall be deemed and held to belong and be chargeable to the parish which was the parish of his legal settlement at the time the order for his reception in the asylum was granted, his residence in the district asylum being deemed to be the residence of the lunatic in the parish legally chargeable with his maintenance. By sec. 95 (*ib.*) it is provided that every pauper lunatic shall be sent to the asylum for the district in which is situated the parish of his settlement, but in special circumstances the Parish Council, with the consent of the Local Government Board, may dispense with this; and it has been held that the rule laid down as to settlement under sec. 75 will apply where the pauper, instead of being sent to a district asylum, has been otherwise provided for under sec. 95 (*Palmer*, 1871, 10 M. 185; *Farquharson*, 1894, 21 R. 583). The fact of an able-bodied man's wife or child being sent to a lunatic asylum does not pauperise him, and he may during the confinement of his wife and child in such an asylum lose or acquire a settlement (*Palmer*, *ib.*; *Milne*, 1879, 7 R. 317), but in that event the parish of the settlement of his wife or child remains chargeable during the whole period of the lunacy. A lunatic, though not a pauper, is not capable of acquiring a settlement, and this has been held to apply to the case of a lunatic not placed in an asylum, but boarded out (*Watt*, 1857, 20 D. 342). It has been held that a lunatic who is not a pauper can, by absence, even in an asylum lose a settlement (*Crawford*, 1862, 24 D. 357; *Thomson*, 1881, 9 R. 37). "There is no doubt that to acquire a settlement something active is required on the part of the pauper. But that is equally required in order to retain a settlement. He must do something to acquire a settlement—he must reside within the parish; and he must also do something to retain a settlement—that is, reside within the parish, but for a different period; and I hold that the kind of residence required in either case is the same, and it is a residence which neither an idiot nor an insane person can have" (per Ld. J.-Cl. Inglis in *Crawford*, *ib.*). (See *Forisfamiliation supra.*)

See Lunacy Acts; Poor Law.

Settlement.—See Will.

Sheep.—In addition to the rules of common law affecting owners of moveable property generally, owners of sheep are placed under certain liabilities, and are entitled to certain protection by statute. By sec. 123 of the Roads and Bridges Act of 1878 (which see), incorporating sec. 103 of 1 & 2 Will. IV. c. 43, the person having charge, or if he cannot be found, the owner, of sheep found straying or pasturing on any turnpike road is liable in a penalty of five shillings for each sheep. By the Winter Herding Act (which see) certain civil liabilities are imposed on account of sheep straying on to private lands. On the other hand, by the Act known as the Sheepworrying Act of 1863 (26 & 27 Vict. c. 100), the pursuer of an action of damages for injury done to his sheep by a dog does not require to prove a previous propensity in such dog to injure sheep (see Animals, Liability for Damage caused by). The Dogs Act, 1871, 34 & 35 Vict. c. 56, also contains provisions which afford sheep-owners, among others, a protection against dangerous dogs. Under its provisions stray dogs may be detained or sold (s. 1); dangerous dogs may be destroyed under warrant from any Court of summary jurisdiction (s. 2); the local authority may, if danger from rabies is apprehended, make an order placing restrictions on dogs being at large (s. 3); penalties may be recovered for contravention of the statute (s. 4). (See also Burgh Police Scotland Act, 1892, ss. 389, 390.)

Sheriff; Sheriff Court.

Introductory.

With the rise of monarchy in Scotland, the Crown, to increase and protect its own power, found it necessary to curb that of the earls and barons and other local dignitaries. One means to this end was the establishment of the Sheriff, as the representative within the county of the power of the Crown. As much as possible the local dignitaries were induced to accept the office, the holding of which made them the administrators and representatives, instead of the rivals and enemies, of the royal authority. The office was hereditary, the Crown, though claiming the right to appoint or dismiss the Sheriff, not being sufficiently powerful to make good its title to do so. This state of matters existed until, in 1748, the hereditary Sheriff as a judicial functionary was finally abolished, and the Crown effectively asserted its complete control over the office. It had, however, for a long time previously been the custom to divide the Sheriff's duties into non-legal and legal, the former being performed by the hereditary Sheriff, who appointed a Sheriff-Depute to attend to the latter, or judicial, functions of the post; though this right of appointment, even in comparatively early times, was subject to the approval of the Court of Session (1592, c. 126). By the Heritable Jurisdictions Act of 1748 the Crown took from the hereditary Sheriffs all their judicial functions and conferred them on the Sheriffs-Depute, whose appointment it took wholly into its own hands, while it required that they should have a legal qualification for the post, viz. that they should be advocates of three years' standing (20 Geo. II. c. 43, s. 29). The Deputes, in the time of the hereditary Sheriffs, had been paid, not by salary, but by such fees as they could exact. On their establishment by law they were paid salaries, but only on the footing that their services would be required for a short portion of the year, and they were allowed to retain their practice at the bar. It followed that they hardly ever resided in their sheriffdoms, and this it was that caused the Sheriff-Substitute to rise into prominence. This official had existed previously, for the purpose of filling vacancies caused by the temporary absence of the Deputes, and by the Act of 1748 the power of appointing him was transferred from the hereditary Sheriffs to the Deputes. The Sheriffs-Substitute did not at first require any legal qualification; their duties were vague and their salaries nil. Their duties, however, increased and became more definite with the increasing rarity of the Deputes' appearances in the sheriffdoms, while the Deputes gradually assumed their present position of judges of appeal. It became necessary that the Substitute should have a salary, and the duty of paying this, at first incumbent on the Deputes, was taken over by the Crown in 1787. It was thereafter made essential to his being appointed, that the Sheriff-Substitute should be either an advocate or law agent of not less than five years' standing (6 Geo. IV. c. 23, s. 9; 40 & 41 Vict. c. 50, s. 4). He was debarred from following any other employment (1 & 2 Vict. c. 119), and his office was given him for life, with liability to removal for inability or misconduct (40 & 41 Vict. c. 50, s. 5). Finally, in 1877, the power of his appointment was taken from the Sheriffs-Depute or Principal (the term Depute being now obsolete, 9 Geo. IV. c. 29, s. 22) and vested in the Crown (40 & 41 Vict. c. 50, s. 4); and the offices of Sheriff-Principal and Sheriff-Substitute thus came to be established on their present basis.

In the counties the Sheriff Courts had for long to contend with the Courts of the Regalities. These were the representatives in historic times of the old Barony Courts which existed for the various districts of the

counties; and which, for long after the Sheriff (who at first was generally himself a baron) had become a recognised official, continued to exercise an equal jurisdiction with him, within their own districts, though nominally the Sheriff judged the whole county. From time to time, as regalities lapsed by disuse or forfeiture, they were not re-established as such, but were merged in the sheriffdoms; but it was not till 1748 that they, in common with other heritable jurisdictions, were entirely swept away.

In the towns the Burgh Courts, older than the Sheriffs, exercised with them a concurrent jurisdiction, and succeeded in resisting their encroachments to a still later period. A gradual course of restricting the powers of burghs by granting to, or forcing on them, charters limiting their rights, and a continued neglect of their Courts by the Legislature, which, at the same time, devoted its energies to the development of the Courts of the Sheriffs, ended, but not till the present century, in entirely subordinating the Burgh Courts, and leaving the Sheriffs masters of the field.

The only other serious rivals of the Sheriff Courts were the Courts of the Bishops, or Commissary Courts. Confined in their origin to matters arising out of legitimacy, birth, marriage, and death, they arrogated to themselves in time a much wider jurisdiction, and flourished long after the bishops themselves had ceased to be recognised by the State. Although by Acts passed in 1824 and 1830, by which part of their jurisdiction was transferred to the Court of Session and part to the Sheriff Court, the old Commissary Courts were suppressed, they still existed in theory; and it was not till 1876 that they were finally abolished, and their whole powers and jurisdictions transferred to the Sheriff Courts (39 & 40 Vict. c. 70, s. 35).

While thus prospering at the expense of the other local Courts, the jurisdiction of the Sheriff Court, both criminal and civil, has, on the other hand, been much encroached on by the Supreme Court, which, beginning by asserting a concurrent jurisdiction, ended by making it privative to itself in some of its most important points. Thus in criminal jurisdiction the four pleas of the Crown, once competent in the Sheriff Court, were confined to the High Court, though wilful fire-raising and robbery may now again be tried by the Sheriff (Criminal Procedure Act, 1887, s. 56); while in civil matters the jurisdiction of the Sheriff in heritable causes, never perhaps exercised to any great extent, was for long entirely taken away, to be restored to a very limited extent by the Act of 1877.

The Court of Session has a cumulative jurisdiction in the great bulk of the questions competent to be tried in the Sheriff Court, the chief restriction being that in actions under the value of £25 the jurisdiction of the Sheriff Court is privative, and its decisions final. (See Dove Wilson's *Practice*, Introduction.)

Sheriff-Principal.

The term "Depute," often used in place of "Principal" to distinguish the Sheriff from the Sheriff-Substitute, is inappropriate and obsolete (9 Geo. IV. c. 29, s. 22). The Sheriff-Principal is appointed by warrant under the sign-manual of the Crown; he must be an advocate of at least three years' standing, and holds his office *ad vitam aut culpam* (20 Geo. II. c. 43, s. 29). He must, at the time of his appointment, have been either in practice before and in habitual attendance upon the Court of Session, or acting as a Sheriff-Substitute (1 & 2 Vict. c. 119, s. 2; 50 & 51 Vict. c. 41). With the exception of the Sheriffs of Edinburgh and Glasgow, who must reside within six miles of these places respectively (3 Geo. IV. c. 49), Principal Sheriffs are not required to reside, but must hold periodical Courts

annually, within their sheriffdoms (1 & 2 Vict. c. 119, s. 2; 16 & 17 Vict. c. 80, s. 46; 33 & 34 Vict. c. 86). The Secretary for Scotland has power with regard to the Sheriffs appointed after 1870, to prescribe the number of Courts they shall hold, and the times and places at which they shall hold them, and also to prescribe the duties they shall perform personally (33 & 34 Vict. c. 86, s. 13; 50 & 51 Vict. c. 52, s. 2). The Sheriff is mainly a judge of appeal from the Sheriff-Substitute, but it is always open to him to judge in the first instance when he so chooses, and in some instances he is bound to do so, as in the Small Debt Circuits (16 & 17 Vict. c. 80, s. 46).

To provide for the case of a Sheriff being disabled or necessarily absent, the Secretary for Scotland has power, on an application made by the Sheriff, or on his behalf, for leave of absence on account of temporary illness or other reasonable cause, to grant the application for so long as he thinks proper, and to appoint an interim Sheriff. The interim Sheriff must be either a Sheriff of another sheriffdom or an advocate of not less than five years' standing. The Secretary fixes the proportion of the Sheriff's salary which is to be paid to the interim Sheriff. The interim has all the powers of the regular Sheriff, and should he be a Sheriff himself he does not vacate his office by accepting the interim appointment (39 & 40 Vict. c. 70, s. 51; 50 & 51 Vict. c. 52, s. 2).

Sheriff-Substitute.

The Sheriff-Substitute is vested with and entitled to exercise (except when it otherwise appears either from statutory declaration or fair and necessary inference) all the power, jurisdiction, and authority pertaining to the office of Sheriff (*Fleming*, 1862, 1 M. 188). He must be an advocate or a law agent of not less than five years' standing in his profession; his appointment is by the Crown, on the recommendation of the Secretary for Scotland; and his office is for life, though he may be removed for misconduct or inability (40 & 41 Vict. c. 50, ss. 3, 4, 5; 50 & 51 Vict. c. 52, s. 2). Sheriffs-Substitute must reside within their sheriffdoms (1 & 2 Vict. c. 119, s. 5; *Smith*, 1890, 18 R. 340), and are prohibited from engaging in other business (21 Geo. II. c. 19, s. 10; 6 Geo. IV. c. 23, s. 10; 1 & 2 Vict. c. 119, s. 5). The Secretary for Scotland has power to fix the places at which Sheriffs-Substitute may be required generally to reside and attend for the performance of their duties, and also the number of Courts to be held by them, and the times and places of holding such Courts (33 & 34 Vict. c. 86, s. 14; 50 & 51 Vict. c. 52, s. 2). The Scotch Secretary also fixes the number of Sheriffs-Substitute, and their commissions are effectual throughout the whole sheriffdom (*ib.*; 16 & 17 Vict. c. 80, s. 40; 33 & 34 Vict. c. 86, s. 12; *Thomson*, 5 S. L. Rev. 105; *Tait*, 1891, 18 R. 606). The Secretary may also, if he think fit, direct a Sheriff-Substitute of one county to perform the duties of Sheriff-Substitute in another county, if conterminous (38 & 39 Vict. c. 81, s. 2; 50 & 51 Vict. c. 52, s. 2).

Honorary Sheriff-Substitute.

It is customary in all sheriffdoms to have honorary Sheriffs-Substitute to take the place of the ordinary Sheriff-Substitute when the latter is temporarily unable to act. The appointment is in the hands of the Sheriff-Principal (20 Geo. II. c. 43), and is during his pleasure, though the commission does not fall by reason of his demitting office (1 & 2 Vict. c. 119, ss. 3, 4, and 5). The honorary has the same powers as the salaried Sheriff-

Substitute (*Mann*, 1892, 20 R. 13), and his commission is co-extensive (16 & 17 Vict. c. 80, s. 40; 33 & 34 Vict. c. 86). The regulations as to qualification for the office apply only to salaried and not to honorary Sheriffs-Substitute (40 & 41 Vict. c. 50, s. 4; 9 Geo. IV. c. 29, s. 22); consequently the latter require no special qualification, and are of course not restricted from doing other work. He may be an agent (*Henderson*, 1845, 17 Sc. Jur. 271); but if so, he could not try a case in which he was personally interested, and some Sheriffs now avoid the appointment of agents. The sheriff clerk was at one time, but is not now, considered eligible (*Binning*, 1711, Mor. 7662; *Stewart*, 1857, 29 Sc. Jur. 344; 2 Irv. 614).

Ordinary Sheriff Court.

I. Jurisdiction: subject-matter.

The jurisdiction of the Sheriff Court is of a very extensive character. At one time there is reason to believe that it covered the whole field, both of heritable and moveable rights, though there is no reason to think that it ever had jurisdiction in questions of status. Its jurisdiction may now be said to cover everything, with the exception of questions of status and, except to a limited extent, of heritable title.

1. Moveables.—In moveable rights the jurisdiction is without limit. All actions arising out of contracts having regard to moveables, whether the conclusion be for specific implement or for money, may be tried in the Sheriff Court. Thus all actions having regard to bills, sales, landlord and tenant, partnership accounts, etc., and mercantile transactions generally, are competent.

2. Damages.—Also all actions of damages or for reparation may be brought in the Sheriff Court, though one or two of these may be removed to the Court of Session before the merits are entered upon.

3. Maritime.—There is a large jurisdiction in maritime cases. The Sheriff at one time exercised this under a separate commission as a deputy of the old High Court of Admiralty, now he exercises it simply as Sheriff (2 Geo. IV. and 1 Will. IV. c. 69, ss. 21–29; 1 & 2 Vict. c. 119, s. 21). The jurisdiction comprehends all questions connected with shipping, such as charter-parties, bills of lading, insurance policies, freights, bottomries, etc. (Ersk. i. 3. 33), and questions of salvage and of damages for collision. The Sheriff can try such questions when arising within his sheriffdom, including the navigable rivers, ports, harbours, creeks, shores, and anchoring grounds in or adjoining such sheriffdom (11 Geo. IV. and 1 Will. IV. c. 69, s. 22). The jurisdiction applies to persons residing furth of Scotland (*ib.*), but only if the defender is on legal grounds amenable to the jurisdiction of the Sheriff (1 & 2 Vict. c. 119, s. 21; and see Neill's *Forms*, p. 19). The jurisdiction may be founded by arrestment *jurisdictionis fundandæ causa* (*Bruhn*, 1864, 2 M. 335). In this case the sum arrested must not be illusory (*Shaw*, 1869, 7 M. 449). Where a ship or other vessel belonging to a foreigner is arrested, the foreigner is amenable to the Sheriff's jurisdiction not only as regards maritime actions but as regards all actions competent against Scotchmen subject to the jurisdiction (40 & 41 Vict. c. 50, s. 8 (4)). The ship must be within the jurisdiction when arrested (*Carlberg*, 1878, 5 R. (H. L.) 217). The application for arrestment is by an ordinary petition, which may be combined with the original action. As to the issue, use, and loosing of such arrestments, see *Craig*, 1896, 23 R. 500; *Wall's Trs.*, 1888, 15 R. 359; *Black*, 1887, 14 R. 678; *Stewart*, 1882, 10 R. 382; *M'Phedron*, 1888, 16 R. 45; *Malone*, 1884, 11 R. 853.

Special power to detain a foreign ship in cases where injury has resulted from the want of skill of the master or mariners of the ship is given to the Sheriff by the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 527, but is seldom used, resort being usually had to arrestment *jurisdictionis fundandæ causa*.

Where counties are divided from each other by a river, firth, or estuary, the Sheriffs of the counties adjoining have a cumulative jurisdiction over the whole intervening space of water, provided that if the defender reside in one of such counties, the pursuer must bring his action in the Court of that county (11 Geo. IV. and 1 Will. IV. c. 69, s. 24). There is a power of remitting such cases from one Sheriff Court to another *ob contingentiam*, or for other sufficient cause (*ib.*). The procedure in maritime cases is as nearly as may be the same as in ordinary actions (1 & 2 Vict. c. 119, s. 21), and where the value is under £25 there is no appeal.

Seamen's wages, when not exceeding £50, may be sued for summarily in the Sheriff Court, and the Sheriff's decision is final (Merchant Shipping Act, 17 & 18 Vict. c. 104, ss. 88 and 91). The action may be before the Sheriff of the place at which the service has terminated, or at which the seaman has been discharged, or at which any person upon whom the claim is made is or resides (*ib.*). For the procedure in such an action, see Dove Wilson, *Practice*, pp. 450, 451.

Salvage actions, where the amount claimed does not exceed £200, or where the property salved is not worth more than £1000, may be sued in the Sheriff Court in the same summary manner as seamen's wages (17 & 18 Vict. c. 104, s. 531, and Amending Act, 25 & 26 Vict. c. 63, s. 59 (8)). The jurisdiction extends only to disputes between the salvors and the owners of the salved ship (*Summers*, 1891, 18 R. 879). The application is to the Sheriff as arbiter (17 & 18 Vict. c. 104, s. 460; 25 & 26 Vict. c. 63, s. 49 (6, 7, 8)); in the case of wreck, to the Sheriff resident at or near the place where it is found; and in the case of services rendered in connection with a ship, to the Sheriff residing at or near where it is lying, or at or near the first port to which it is taken immediately afterwards (*Summers, supra*; 17 & 18 Vict. c. 104, s. 460). There is appeal to the Court of Session, but only where the sum in dispute exceeds £50. Up to this limit the Sheriff is final (*ib.*, s. 464).

For procedure, see Dove Wilson, *Practice*, p. 452.

Where the claim exceeds £200, or where the value exceeds £1000, the case is not competent in the Sheriff Court, except with the consent of the parties. If the sum recovered does not exceed £200, costs cannot be recovered unless the Sheriff certify that the case is a fit one to be tried in a superior Court (*ib.*, s. 460).

The action of set and sale of ships (*q.v.*) is also competent in the Sheriff Court. As to the power of appointing assessors in cases arising out of or relating to collisions, salvage, towage, or any other maritime matter, see Nautical Assessors (Scotland) Act, 1894, 57 & 58 Vict. c. 40.

4. Status.—The Sheriff has no jurisdiction to try questions of status, such as marriage, divorce, or legitimacy.

5. Aliment.—In all actions of aliment the Sheriff has full jurisdiction (*Tait*, 1802, Mor. App. "Aliment," No. 3; *M'Kissock*, 1817, Hume, 6; *Wilson*, 1825, 3 S. (O. E.) 547), limited only by this, that there is no jurisdiction if it be necessary in order to establish the right to aliment, to enter upon the merits of any question of status (*Benson*, 1854, 16 D. 555; *Braick*, 1829, 8 S. 284; but see *M'Leod*, 1820, Hume, 10; *Wylie*, 8 July 1824, F. C.; *Reid*, 1814, Hume, 5). In such cases he can award interim aliment only

(*Smith*, 1874, 1 R. 1010; *M'Donald*, 1875, 2 R. 705; *Niven*, 1877, Guthrie's *Select Cases*, 30; 11 Geo. IV. and 1 Will. IV. c. 69, s. 32).

6. Custody of Children.—The Sheriff can deal with the custody of children, but only to the extent of regulating the interim custody (Fraser on *Parent and Child* (Cowan), 81; *Hood*, 1871, 9 M. 449; *Stewart*, 3 S. L. Rev. 405), or of giving a person whose legal right to custody is not disputed, possession as against a person who has no legal title (*Brand*, 1888, 15 R. 449). The question of the permanent custody of children (*Mackenzie*, 1892, 19 R. 963), and of whether a person has or has not a legal title to the custody, belongs to the Court of Session. The Guardianship of Infants Act, 1886, gives the Sheriff the power, on the application of the mother, to make such order as to the custody of and right of access to a child as he may think fit (49 & 50 Vict. c. 27, s. 5).

7. Heritable.—(*a*) The jurisdiction of the Sheriff Court in this respect, once complete, was for long entirely in abeyance, but is now revived to the small extent made competent by the Sheriff Courts Act of 1877. By that Act the Sheriff now has jurisdiction in all actions (excluding adjudications, except so far as already competent, and reductions) concerning heritable property—including questions of title—where the property does not exceed £50 by the year, or £1000 in all (40 & 41 Vict. c. 50, s. 8 (1)). If there is any question as to the value of the subject in dispute, the Sheriff's determination is final as to the competency of bringing the action in the Sheriff Court (*ib.*, s. 10). (As to the expediency of proceeding in the Sheriff Court when the value is in doubt, see *Bowie*, 1887, 14 R. 649, where there was also a question as to whether the value is to be determined by reference to the pursuer's or defender's interest. The words "value in dispute" appear to cover both.) The action must be brought in the Sheriff Court of the county in which the property in dispute is situated, and all parties against whom the action is directed are subject to the jurisdiction of that Court (*ib.*, s. 8). The jurisdiction is limited by this, that it is in the power of the defender to remove the action to the Court of Session at any time within six days of the closing of the record (*ib.*, s. 9 (1)).

(*b*) *Nuisance and Servitude.*—The Sheriff has full jurisdiction in these matters, even though questions of heritable title be involved. If it were necessary in such a matter to have an action of declarator, it might for that reason be necessary to go to the Court of Session, but practically all questions of nuisances and servitudes may be effectually tried in the Sheriff Court in the form of an action of interdict, and in such an action the Sheriff could entertain in the case of a servitude the question whether it was properly constituted, and to that end consider the titles to the property and take evidence of possession during the full prescriptive period, forty years. See 1 & 2 Vict. c. 119, s. 15; *Brown*, 1843, 5 D. 463; *Thomson*, 1862, 24 D. 975; *Gow's Trs.*, 1875, 2 R. 729.

(*c*) *Feu-Duties.*—All actions for the recovery of feu-duties and for the recovery of casualties are competent, provided no question of title be involved.

There is also a limited jurisdiction in removals for non-payment of feu-duty. Where the subject does not exceed £25 in yearly value, and the feu-duties are in arrear for two years, the vassal may be removed in the Sheriff Court *ob non solutum canonem*. The vassal may, however, within a year of removal raise an action of declarator in the Court of Session for vindication of the subject on any ground proceeding on challenge of the superior's title (16 & 17 Vict. c. 80, s. 32). Other irritancies *ob non solutum canonem* are competent only when within the scope of the Act of 1877.

(*d*) Two actions for enforcement of heritable rights are competent: action of *maills and duties*, and *poinding of the ground*. By the first of these a heritable creditor can enter upon the possession of a heritable subject that is secured to him, to the effect of himself collecting the rents and duties in payment of his interest or what is due to him. By poinding of the ground he can take possession of all the moveable subjects that are upon the heritable subject to the extent to which he is entitled to take them by law. See MAILLS AND DUTIES; POINDING OF THE GROUND.

(*e*) *Regulation of Marches, Division of Commonty, and Division of Common Property.*—In all questions connected with the first of these, the Sheriff has practically sole jurisdiction (*Kintore*, 1886, 11 M. 137). In the others, by the Act of 1877, he has jurisdiction where the value of the subject does not exceed £50 by the year or £1000 in all (40 & 41 Vict. c. 50, s. 8 (3)). See DIVISION AND SALE (SHERIFF COURT).

(*f*) Actions of *adjudication* and of *adjudication* in implement, whereby a heritable estate is taken in payment of a debt, are competent but not common (see Dove Wilson, *Practice*, p. 394).

(*g*) *Leases and Rents.*—All questions as to these, in so far as not raising any question of the title to the land, are competent in the Sheriff Court. The true import of leases, as, for instance, their duration, if in dispute, may be settled (*Robertson*, 1875, 3 R. 21), and implement of the legal obligations incurred in them may be enforced (*Horn*, 1830, 8 S. 329; *Wright*, 1875, 3 R. 68), as also a duty of leaving the premises in proper order (*Dickson*, 1877, 4 R. 717; *Gordon*, 1870, 8 M. 906). All questions as to rent are competent; and the Sheriff Court may interfere during the currency of a lease to protect property which is in danger of injury owing to the absence or desertion of the tenant (*Gibson*, 1895, 23 R. 294; *Brock*, 13 D. 1069).

(*h*) *Entails*—Certain proceedings in connection with these are competent. See ENTAILED ESTATES, APPLICATIONS AS TO; SHERIFF COURT.

(*i*) *Possession.* — In other cases connected with heritable subjects, which cannot be brought under the Act of 1877, the jurisdiction of the Sheriff is limited to pronouncing possessory judgments for the purpose of protecting or regulating the right of possession without reference to title. Such actions are founded mainly on the possession that has been had for the preceding seven years (*Sutherland*, 1876, 3 R. 485; *Bridges*, 1822, 1 S. (N. E.) 351; *Nisbet*, 1866, 4 M. 285; *Pitman*, 1882, 9 R. 444; *M'Kerron*, 1876, 3 R. 429; *Carswell*, 1878, 6 R. 60). Where titles are in dispute, the Sheriff can regulate possession pending the final settlement of the dispute in the Court of Session (*Maxwell*, 1866, 4 M. 447; *Johnston*, 1862, 24 D. 709; *Liston*, 1835, 14 S. 97); but only if there be an *ex facie* valid and unambiguous title (*Cruickshank*, 1854, 17 D. 286; *Lowson's Trs.*, 1864, 3 M. 53).

8. SUCCESSION.—In addition to the jurisdiction in this respect, so far as exercised in the ordinary forms of action, the Sheriff entertains questions of service of heirs, of appointments and confirmations of executors, and of the making up of a legal title in heritable or moveable succession (31 & 32 Vict. c. 101; 21 & 22 Vict. c. 56; A. S., 19th March 1859; 39 & 40 Vict. c. 70, Part VIII.). Certain facilities in the case of small moveable successions, that is, where the personal estate does not exceed £300, are given by 38 & 39 Vict. c. 41; 39 & 40 Vict. c. 24, as extended by 44 & 45 Vict. c. 12, s. 34.

9. JUDICIAL FACTORS.—At common law Sheriffs have no jurisdiction to appoint judicial factors, further than where it is necessary to extricate some other part of their jurisdiction, as, for instance, to take temporary charge of

property during a litigation (*Drysdale*, 1842, 4 D. 1081; *Rowe*, 1872, 9 S. L. R. 492), or of property which has been deserted (*Gibson*, 1895, 23 R. 294). They have jurisdiction, as representing the old Commissaries, in moveable succession to appoint factors to act for persons who, though entitled to the office of executor, are unable for any reason to perform the functions. By statute, in the case of estates the yearly value of which from all sources is not more than £100, the Sheriff can appoint factors to pupils or to insane persons (43 & 44 Vict. c. 4).

The Sheriff can also, on the petition of anyone who is interested, appoint a factor to take interim custody of property where the appointment of a person having a proper title cannot immediately be made, *e.g. Campbell*, 1895, 23 R. 90.

10. Bankruptcy and Insolvency.—The Sheriff has considerable jurisdiction in questions of bankruptcy and insolvency, mercantile sequestrations and cessios. See Bankruptcy; Cessio; Insolvency; Sequestration.

11. Poor Law and Lunacy.—The Sheriff has power to determine the right of a pauper to relief, but not the amount of relief to which he is entitled (8 & 9 Vict. c. 83, s. 73; A. S., 12th Feb. 1846). Under the Lunacy Acts he decides as to the commission of lunatics to asylums. See Lunacy Acts.

II. JURISDICTION: FORMS OF ACTION.

1. Petitory.—Petitory actions are competent to the fullest extent, and include the ordinary actions for payment of money and those actions in which there is a conclusion that the defender shall be ordained to do or to refrain from or discontinue doing some act.

(*a*) *Actions for payment of money* may conclude for payment immediately or at a future time, in one sum or by instalments.

(*b*) *Actions ad factum præstandum.*—These seek to have the defender ordained to do some act, or specifically to implement some contract, *e.g. Corbet*, 1808, Hume, 346; *Earl of Aberdeen*, 1822, 1 S. 273; *Earl of Moray*, 1842, 4 D. 1411; *Riddell*, 1821, 1 S. 160. They may deal with heritage provided no question of heritable right is raised (*Corbet* and *Earl of Aberdeen, supra*); if there is, it is incompetent (*Cox*, 1873, 1 R. 60; *Anderson*, 1871, 43 Sc. Jur.). Contrary to the rule in England, where specific implement may be refused when damages would be an adequate remedy, a pursuer in Scotland has his choice of specific implement or damages, and is entitled to the former unless the defender, on whom the *onus* is, can show that it would be unjust to grant it (*Stewart*, 1890, 17 R. (H. L.) 1; see Lds. Macnaghten and Watson). For an exception to the power of the Sheriff Court to order specific implement of a contract in the case of arbiters, see *Sinclair*, 1884, 11 R. 1139; *Forbes*, 1886, 13 R. 465.

The action of Count and Reckoning is, at least in its first stage, an action *ad factum præstandum*, the thing to be done being the production of accounts.

(*c*) *Interdicts* are actions to restrain the defender from doing some action complained of. A form of these is

(*d*) *Suspensions*, which seek to prevent the carrying out of legal diligence. Suspensions are competent in the Sheriff Court only where a charge has been given for payment of a sum not exceeding £25, exclusive of interest and expenses (1 & 2 Vict. c. 119, s. 19; A. S., 1839, ss. 116–118).

2. Possessory.—These are actions in which the judgments affect merely the right to the possession of heritable subjects, and do not affect the title itself. They take the form of actions of interdict, in which, by pronouncing

interim interdict, the Sheriff preserves, until finally deciding thereon, the *status quo* existing previous to the dispute; by giving final interdict he decides, upon a consideration of the state of possession during the seven years previously, what possession is to be maintained thereafter, till the question of title, if in dispute, is settled in the Court of Session. See *supra*, JURISDICTION: SUBJECT-MATTER, *Heritable, Possession.*

3. DECLARATORY.—(1) *Declarators.*—The Sheriff Court has no common law jurisdiction in declarators, that is, in actions in which it is sought to have it declared that some particular relationship exists in law, or that a person is entitled in law to the exercise of some right. By statute declarators are competent where the value at stake does not exceed £1000 in the case of moveables, and, in the case of heritables, £50 by the year or £1000 in all (40 & 41 Vict. c. 50, s. 8). In all other cases declarators are incompetent. The mere introduction, however, of a declaratory conclusion in a petitory action, as leading up to and as a reason for granting the petitory conclusion, does not invalidate the action (*Taylor*, 1824, 2 Sh. App. 30; *Hall*, 1831, 9 S. 612; *Murdoch*, 1832, 10 S. 445); but it is not a good form of process, and, unless the declaratory conclusions are competent under the statute, should be avoided (*Wilson*, 1885, 13 R. 21).

(2) *Proving the tenor* of a deed or other writing which has been lost is a form of declarator, and is competent only within the limits within which other declarators are competent (see *supra*).

(3) *Actions of Division.*—These are competent in regard both to (*a*) heritables, and (*b*) moveables.

(*a*) *Division of Commonty, Division, and Division and Sale* of common property are competent actions in the Sheriff Court where the value of the property in dispute does not exceed £50 by the year, or £1000 (40 & 41 Vict. c. 50, s. 8 (3)). See DIVISION AND SALE (SHERIFF COURT).

(*b*) *Multiplepoinding.*—This is the form of action where a subject, either goods or money, is in the possession of one person and is claimed by more than one other. The subject of a multiplepoinding is called the fund *in medio*, and must be wholly, not partly, subject to the competing claims (*Macnab*, 1894, 21 R. 827), and must also be ready for immediate division on the conclusion of the action (*Nimmo*, 1863, 1 M. 791). The fund *in medio*, in the Sheriff Court, cannot be heritable unless within the limits of the Act of 1877 (40 & 41 Vict. c. 50, s. 8). Multiplepoinding is not competent where a simpler form of action is possible. It cannot, for instance, take the place of proceedings under the Bankruptcy or Cessio Acts for the winding up of insolvent estates (*Kyd*, 1880, 7 R. 884). See MULTIPLEPOINDING.

4. RESCISSORY.—*Reductions.*—These are actions in which it is sought to have some deed or other writing quashed and reduced and declared to be of no avail, and at common law are not competent in the Sheriff Court (*Young*, 1830, 9 S. 59; *Fleshers of Glasgow*, 1824, 3 S. 305; *Porteous*, 1830, 8 S. 908; *M'Laren*, 1857, 20 D. 48). The ends which an action of reduction would serve may, however, be attained in the Sheriff Court, in certain cases, in other ways. By the Act of 1877, when, in any action competent in the Sheriff Court, a deed or writing (as to what these words cover, see *Nivison*, 1883, 11 R. 189; *Scott*, 1886, 24 S. L. R. 34) is founded on by either party, all objections to it may be stated and maintained by way of exception, without the necessity of bringing a reduction (40 & 41 Vict. c. 50, s. 11). A thing arises by way of exception when it arises by way of reply. Thus a defender can plead any exception to a deed founded on by the pursuer, such as that it was obtained by fraud, and can state this

defence before the Sheriff. Similarly, the pursuer can take exception to any deed or writing produced and founded on by the defender (*Mackie*, 1896, 23 R. 1030). In both cases reduction is unnecessary. The Sheriff may, however, direct anyone objecting by way of exception to a liquid document of debt, to find such caution or consign such sum as he may ordain (40 & 41 Vict. c. 50, s. 11). Also, by the Bankruptcy Acts, deeds or alienations of property void by these Acts, or voidable by statute or at common law, may be set aside in the Sheriff Court (19 & 20 Vict. c. 79, s. 10; 20 & 21 Vict. c. 19, s. 9). Where in the course of an action the validity of such a deed is challenged, the question may be settled for the purposes of the particular action, but the action is incompetent if it is solely for the purpose of reducing the deed (*Dickson*, 1866, 4 M. 797). If there are conclusions otherwise competent, the introduction of a reductive conclusion will not render the action incompetent. But no reductive decree can follow on it, and a conclusion of this sort is better avoided (*Moroney*, 1867, 6 M. 7; cf. *Cook*, 1896, 23 R. 925).

5. Competent Special Remedies.—(*a*) With regard to heritage, the following forms of action are competent, and have been already referred to:—*Recovery of Feu-Duties and Casualties, Maills and Duties, Poinding of the Ground, Straightening of Marches, and Adjudications;* see *supra*, JURISDICTION: SUBJECT-MATTER, *Heritable* (*c*), (*d*), (*e*), (*f*).

(*b*) *Actions of Constitution.*—These are simply actions for payment of money, but the term is used specially to denote actions raised against representatives of deceased debtors (see *Smith*, 1860, 22 D. 1495; *Forrest*, 1863, 1 M. 806; *Davidson*, 1867, 6 M. 151). Actions of constitution against heirs, with a view to afterwards adjudging heritage, are competent.

(*c*) *Actions of Exhibition*, whereby deeds or other writings are sought to be delivered up or exhibited, are a form of actions *ad factum præstandum*. Where for examination only, the order is for exhibition in the hands of the sheriff clerk (*Clark*, 1880, 8 R. 81). If no question of heritable title is in question, the action is competent in regard to heritage (*Burnet*, 1864, 2 M. 929).

(*d*) *Removings and Ejections.*—The former are actions at the instance of landlords against tenants whose term of occupancy is alleged to have come to its stipulated close; the latter are directed against those who can assert no title, or whose title has been interrupted and terminated by decree or otherwise (*Robb*, 1895, 22 R. 885). Removings are either solemn or summary. Solemn removings are those in which forty days' warning is required. They are either ordinary, *i.e.* at the natural termination of the lease, or extraordinary, where the currency of the lease is terminated by a legal or conventional irritancy, and apply both to agricultural and non-agricultural subjects (A. S., 14th December 1756; 46 & 47 Vict. c. 62, s. 27). Summary removings require less formality, and deal with the cases of houses let for less than a year (1 & 2 Vict. c. 119, s. 8), or those cases where the tenant has come under an obligation, express or implied, to remove (16 & 17 Vict. c. 80, ss. 29, 30, 31, 32), or where verbal warning is enough. Ejection is the method by which a decree of removing, if not obeyed, is enforced.

(*e*) *Sequestrations for Rent.*—Sequestration by a landlord of the effects over which he has a right of hypothec is of two kinds, either in payment of past-due rents (30 & 31 Vict. c. 42, s. 4), or in security of rents not yet due (*Donald*, 1886, 13 R. 790; *Dow*, 1784, Mor. 6202; *Wells*, 1800, Hume, 225; A. S., 10th July 1839, s. 152; *Oswald*, 1851, 13 D. 1229; *Watson*, 1878,

5 R. 843; *Gordon*, 1836, 14 S. 954). The landlord has, however, no right of hypothec for the rent of land, including the rent of any buildings on it, of greater extent than two acres, let for agriculture or pasture, except in the case of rents due under leases current at 11th November 1881 (43 Vict. c. 12, s. 1).

(*f*) *Furthcomings.*—The action of furthcoming is the step by which an arrestment is made available. The arrestee and the common debtor are both called as defenders, and it is enough if the arrestee only is subject to the jurisdiction (39 & 40 Vict. c. 70, ss. 47, 12 (1), 8; see Lee's *Handbook of Styles*, pp. 144, 275; *May*, 1825, 4 S. 76; *Houston*, 1849, 11 D. 1490; *Lucas' Trs.*, 1894, 21 R. 1096).

6. Accessory.—(*a*) *Meditatio fugæ.*—*Meditatio fugæ* warrants are granted to prevent a debtor escaping from his liabilities by leaving Scotland. They are not now of the importance they once were, and are competent only in respect of debts upon which civil imprisonment may follow, *i.e.* alimentary debts, rates and assessments, and taxes, penalties, or fines due to the Crown (*Hart*, 1890, 28 S. L. R. 133; *Kidd*, 1882, 9 R. 803; 43 & 44 Vict. c. 34; 45 & 46 Vict. c. 42). They are granted on the application of the creditor, who must swear to the truth of the debt and of his belief that the debtor is about to abscond (*King*, 1832, 10 S. 544; *Laing*, 1789, Mor. 8555; 2 Bell's *Com.*, 5th ed., 560). This oath should, if possible, be made before the Sheriff to whom the application is made (see *Anderson*, 26 November 1814, F. C.). The application may be either to the Sheriff within whose jurisdiction the debtor may happen to be at the time (2 Bell's *Com.*, 5th ed., 559; *Barrowfield*, 1727, Mor. 8549), or to the Sheriff within whose jurisdiction he resides, even though absent for the time being (see *Mantle*, 1856, 18 D. 395). If the debtor is furth of Scotland, the warrant is not available to bring him back (*Adam*, 1887, 14 R. 800), but it may be put in force if he returns (*Crowner*, 1832, 6 W. & S. 271). The warrant can issue against foreigners for debts incurred in Scotland (Ersk. i. 2. 21), and, if the foreign debtors are themselves in Scotland, for debts incurred to foreign creditors (*Ray*, 1763, Mor. 2051; 2 Bell's *Com.*, 5th ed., 563; *Irvine*, 1869, 7 M. 723). If the debtor really intends to leave Scotland, it is not necessary that it should be to avoid payment (*Laing*, 1789, Mor. 8555; *Jackson*, 1865, 4 M. 72). If his absence is only to be temporary, or if ordered abroad on public duty, the warrant cannot be granted (*Gorman*, 1827, 5 S. 291; *Service*, 25 May 1811, F. C.; *Bryson*, 10 March 1812, F. C.). The possession of property sufficient to meet the debt is no ground for refusing the warrant (*Heron*, 1773, Mor. 8550).

(*b*) *Transference.*—When a pursuer or defender dies and his representatives refuse to come in his place, they may be compelled to do so by an action of transference, which is an ordinary action, the only question being the competency of transferring. To raise the action in the Sheriff Court, the Sheriff must have jurisdiction as well over the representatives as in the original action (*Cameron*, 1838, 16 S. 907). As representatives who take up the succession must eventually appear, they seldom or never refuse to do so by minute, and the action of transference is accordingly very rare in practice.

III. JURISDICTION PRIVATIVE TO SHERIFF COURT.

As to subject-matter, the Sheriff Court has, properly speaking, no exclusive jurisdiction, the Court of Session having a cumulative jurisdiction in practically all cases. This cumulative jurisdiction has, however, a pecuniary limit. The decision of the Sheriff Court is final in all civil

actions below the value of £25, and such actions cannot be raised in or appealed to the Court of Session (16 & 17 Vict. c. 80, s. 22; *Singer Manufacturing Co.*, 1881, 8 R. 695; *Bruce*, 1889, 17 R. 276; *Stirling Par. Council*, 1898, 25 R. 964). This provision is, however, very strictly construed, as appeal is competent in actions of interdict and actions *ad facta præstanda* (where there are no alternative pecuniary conclusions under £25, which are held to determine the value), even though the value of the subject in dispute is manifestly below £25 (*Robertson*, 1857, 19 D. 594; *Purves*, 1867, 5 M. 1003; *Henry*, 1881, 8 R. 692). There is also appeal where the sum claimed, though under £25, arises as the balance of a larger claim (see *Inglis*, 1859, 21 D. 822; *Brydon*, 1864, 3 M. 7; *Drummond*, 1869, 7 M. 347; *Cunningham*, 1883, 10 R. 441; *Buie*, 1863, 2 M. 208; *Fleming*, 1881, 9 R. 11; *Robertson*, 1857, 19 D. 594). See APPEAL TO COURT OF SESSION FROM SHERIFF COURT.

As to forms of remedy, there are only a few restricted to the Sheriff Courts, and these are of the nature of diligence. In removings and ejections the jurisdiction of the Sheriff is privative, and there is no appeal in a case between landlord and tenant to the Court of Session; the review must be by suspension. But appeal is competent where the person ejected is not a tenant, or where decree has been obtained on the ground of no title to possess (*Clark*, 1890, 17 R. 1064; *Barbour*, 1891, 18 R. 610; *Robb*, 1895, 22 R. 885). So in bankruptcy, the Sheriff has almost the exclusive jurisdiction under mercantile sequestrations and cessios, and there are some miscellaneous duties which are his because there is no one else to perform them, such as taking temporary charge of property in danger of injury from neglect, on the petition of any person interested (*e.g. Gibson*, 1895, 23 R. 294; *Brock*, 13 D. 1069).

IV. JURISDICTION, PERSONAL.

Any person, native or foreigner, may be pursuer, and questions of the personal jurisdiction of the Sheriff Court arise only in the case of defenders.

A defender, subject to the jurisdiction, must be summoned to the *forum competens*. Where, in a sheriffdom, owing to the union of counties, or owing to the statutory division of counties, there is more than one Court, it is a matter for the discretion of the Sheriff in which Court of the sheriffdom the defender is to be called (*Tait*, 1891, 18 R. 1295); the pursuer may select his *forum*, but the *forum non conveniens* may be rejected (*Sim*, 1892, 19 R. 665).

Jurisdiction over a defender may be established (1) by residence, (2) by his having a place of business within the territory, (3) by reason of his having entered into a contract which is to be performed within the sheriffdom, (4) by his having committed a wrong or delict within the sheriffdom, (5) by the thing in dispute being situated within the sheriffdom, (6) by prorogation, and (7) by reconvention.

1. *Residence.*—A person is subject to the jurisdiction by reason of residence within the sheriffdom for forty days. The nature of the residence, whether paid for, or as a guest, does not matter, and it may be for the express purpose of creating jurisdiction (*Joel*, 1859, 21 D. 929; Ersk. i. 2. 16). Where, however, residence is taken up *animo remanendi* with the intention of making it home, jurisdiction begins with residence, and it is not necessary to wait for the lapse of forty days (*Home*, 1725, M. 3704). Nor in such a case need the residence be uninterrupted (*Irvine*, 1707, M. 3703). Jurisdiction may be acquired by more residences than one, such as a town and a country house (*Spottiswood*, 1701, M. 4790), in which case the principal

residence, or the one at which the defender is actually residing at the time, should be selected (*Gordon*, 1702, M. 3702). Soldiers, and sailors, if they have a house of their own, may be cited there, and if not, at the dwelling-place they are at the time occupying, whether as guests or lodgers, and even though they may not have been there forty days (*Brown*, 1845, 7 D. 423). All persons who have no fixed residence may be cited personally where they can be found (*Linn*, 1881, 8 R. 849; *M'Niven*, 1834, 12 S. 453; *Lees*, 1709, M. 4791).

The jurisdiction is lost at once if the residence is given up with the view of acquiring a permanent residence in another sheriffdom, and if such a permanent residence is in fact taken up. If, however, a person leaves for foreign parts or to go about Scotland without acquiring another fixed abode, it was held that absence must be for forty days, and that his former residence, though untenanted, remained for that time the proper place to cite him (*International Exhibition*, 1891, 18 R. 843 (Ld. Stormonth Darling); but this has been overruled (*Corstorphine*, 1898, 36 S. L. R. 174; see *Johnston*, 23 D. 758; *Joel*, 1859, 21 D. 929 (Ld. Kinloch); *Calder*, Fac. Col. 55, 124).

Wives are subject to the jurisdiction of their husbands' residence (*Ringer*, 1840, 2 D. 307). Persons under age, unless maintaining themselves apart and having a residence of their own, follow the jurisdiction to which the parents are subject (*Steel*, 1881, 9 R. 160). Trustees or executors of a person deceased, though some of them should be non-resident in the sheriffdom, are subject to the jurisdiction of the sheriffdom where the deceased had his residence, and his property, or where he lived and his estate is wound up and confirmation granted (*Black*, 1827, 6 S. 261; *Thompson*, 1895, 22 R. 866; *Halliday's Exrs.*, 1886, 14 R. 251). In the Court of Session it has been held that it has jurisdiction over trustees though none of them is in Scotland (*M'Gennis*, 1891, 18 R. 817).

2. *Place of Business within the Territory.*—At common law this is a ground of jurisdiction only in cases of companies and partnerships—the partners, irrespective of where they may reside, being subject, while the partnership subsists, to the jurisdiction of the sheriffdom in which the place of business is situated (*Bishop*, 1830, 8 S. 558; *Young*, 1860, 22 D. 983; *Harris*, 1875, 2 R. 1003; *M'Eachern*, 1824, 3 S. 211). This jurisdiction has been extended by the Act of 1876. Any person carrying on a trade or business and having a place of business within a county is subject to the jurisdiction of the Sheriff thereof in any action, notwithstanding that he has his domicile in another county, provided he is cited personally or at his place of business (39 & 40 Vict. c. 70, s. 46). He must be actually "carrying on" a business (see *Ferguson*, 1882, 9 R. 671), and not merely by an agent or traveller (*Laidlaw*, 1890, 17 R. 544). Doubts, which hardly appear to be warranted, have been expressed as to whether the provision covers the case of a farmer (*M'Bey*, 1879, 7 R. 255); as to what is a "business," see *Muat*, 1890, 17 R. 371. There must be either personal citation, whether within or without the county, or citation at the place of business, by leaving the summons there, or by sending it there by post. The case of *Mouat*, 1891, 18 R. 876, would make it seem that it would be sufficient to send it to the residence in another county, but the rubric of the case goes too far; it would only be sufficient in the event of the person choosing to appear (39 & 40 Vict. c. 70, s. 12 (2) and (3)). The jurisdiction extends to "any" action, whether arising out of the particular business, or within the sheriffdom, or not (*Jack*, 1885, 12 R. 1029). At common law, unless the place of business be a principal one, the jurisdiction is restricted to

cases arising within the sheriffdom (*Edward*, 1862, 4 Irv. 185). By the Act it is in the power of the Sheriff, upon sufficient cause shown, to remit any action to the Court of the defender's domicile in another sheriffdom (39 & 40 Vict. c. 70, s. 46).

3. *Contract to be performed within the Sheriffdom.*—A person entering into a contract which is to be performed within a sheriffdom is subject to the jurisdiction of that sheriffdom, provided he is personally cited within it (*Bird*, 1887, 2 S. L. Rp. 1 (J. C.)). It does not matter if the person is a foreigner, if cited within the territory (*Pirie*, 1867, 5 M. 497). The jurisdiction is co-extensive with, and based on the same grounds as that of the Court of Session. It covers only actions to enforce, or arising directly out of breach of, the contract (*Sinclair*, 1860, 22 D. 1475; see *Logan*, 1859, 3 Irv. 323).

4. *Delict committed within the Sheriffdom.*—A delict committed within the territory, combined with personal service, will give jurisdiction in an action of damages arising out of the delict (*Kermick*, 1871, 9 M. 984).

5. *Property situated in Sheriffdom.*—(*a*) Where it is the property that is in dispute. The Sheriff has jurisdiction in actions whose subject-matter relates to heritable matter within the sheriffdom, *ratione rei sitæ* (*Mouat*, 1891, 18 R. 876; *Culross Water Supply*, 1891, 19 R. 58). Actions relating to questions of heritable right or title, or to division of commonties, or division, or division and sale, of common property, if raised in the Sheriff Court, must be raised in the Court of the county in which the property in dispute is situated, and all persons against whom such an action is brought are subject to the jurisdiction of the Sheriff of such county (40 & 41 Vict. c. 50, s. 8). An action of furthcoming or of multiplepoinding may be competently raised in the Sheriff Court to whose jurisdiction the arrestee or the holder of the fund or subject *in medio*, as the case may be, is subject, although the common debtor may not reside within such jurisdiction (39 & 40 Vict. c. 70, s. 47). There is also at common law, jurisdiction in some cases of disputes as to the possession or interim disposal of property situated within the territory, *e.g. Bannatyne*, 1841, 3 D. 429; *Williamson*, 1635, M. 4815; *Scottish Central Ruy. Co.*, 1863, 1 M. 750 (Ld. Deas).

(*b*) Where the property is not the subject of the dispute. The possession of moveable property of itself gives no jurisdiction, except by means of arrestment *ad fundandam jurisdictionem*, which is competent only in two cases. The arrest within the sheriffdom of a ship or other vessel belonging to a foreigner, or of which he is part owner or master, founds jurisdiction, in any action, over that foreigner provided that the action is one which would be competent in a Sheriff Court against a Scotchman subject to the jurisdiction thereof (40 & 41 Vict. c. 50, s. 8). The arrestment of any kind of property will give jurisdiction over a foreigner in maritime actions (11 Geo. IV. and 1 Will. IV. c. 69, s. 22; 1 & 2 Vict. c. 119, s. 21; Price, *Neill's Forms*, p. 19; *Shaw*, 1869, 7 M. 449; *Bruhn*, 1864, 2 M. 335). An arrestment against a foreigner, without personal citation in Scotland, does not found jurisdiction at common law (*Harvey Hall & Co.*, 1831, 9 S. 785; *Burn*, 1828, 7 S. 194; but see *White*, 1846, 8 D. 952).

The possession of landed property of itself gives no jurisdiction (*M'Bey*, 1879, 7 R. 255), except in the case of special services.

6. *Prorogation.*—Though a person may not be subject on any of the above grounds, he may prorogate the jurisdiction, that is to say, consent to it. So long as the objection is merely personal to the defender, it may be waived either expressly or by implication, by written consent (*Longmuir*,

1850, 12 D. 926; *Wright's Trs.*, 1891, 18 R. 841), or by craving to be sisted as defender (*Gill*, 1895, 23 R. 371), or by appearing and pleading without taking objection (*Service*, 1627, M. 7305; *White*, 1846, 8 D. 952). But no amount of consent will enable the Sheriff to judge in matters which are not competent to be tried in the Sheriff Court (*Wylie*, 1871, 10 M. 253; cf. *Burgess* v. *Morton*, [1896] A. C. 136), or to dispense with statutory formalities (*Forrest*, 1845, 4 Bell's A. C. 197; Ersk. i. 2. 30). If the matter is one not competent to be dealt with in the Sheriff Court, the prorogation must amount to a reference, and the matter must be one which it is competent to refer.

7. *Reconvention.*—When a defender is convened in an action by a stranger, he may by reconvention call on the stranger to answer, in the Court in which the original action is pending, all claims that he may have against the stranger, arising out of the same transaction; that is, not only counterclaims or claims of compensation, but all claims *ejusdem generis* or arising *ex eodem negotio*. The object is to place pursuer and defender on equal terms, as if both were living in the sheriffdom, and to ensure that the defender shall suffer no disadvantage from the pursuer being a foreigner. The claims must be either of the same kind or rising out of the same course of dealing (see *Russ*, 1888, 4 S. L. Rv. 309). If the transactions are entirely separate, there is no jurisdiction by reconvention (*Thompson*, 1862, 24 D. 331). The jurisdiction is intended to put parties on the footing of both being resident in the sheriffdom, and is not, therefore, available to give a defender a remedy against a foreign pursuer that he would not have had if he had been a native (*Barr*, 1879, 7 R. 247). To found jurisdiction by reconvention, it is essential that the action by the foreign pursuer should be still in Court (*M'Ewan's Trs.*, 1852, 15 D. 265; *Longworth*, 1868, 7 M. 70); though it is enough if it is only on the question of expenses (*Baillie*, 1852, 15 D. 267; *Allan*, 1894, 21 R. 866). It is doubtful if the jurisdiction continues after decree; the foreign pursuer must at least be making use of the machinery of the Court to recover his debt; but see *Black and Knox*, 1805, M. (App. 1, "Foreign," No. 7). It is not always, though it is so in most cases, necessary that the *actio conventionis* should precede the *actio reconventionis*; for, where an action was raised against a foreign defender, and he, without objecting, at once raised a counter action, it was held too late for him to object thereafter to the jurisdiction (*Morrison*, 1866, 5 M. 130). All the rules of reconvention in the Court of Session are applicable in the Sheriff Court in the case of foreigners outwith Scotland, but in the case of pursuers outwith the sheriffdom, but resident in Scotland, the jurisdiction is confined to the case of counter actions arising out of the same facts (see *Barr*, *supra*; *Thompson*, *supra*; *Vans*, 1765, M. 4840; *Goodwin*, 1871, 10 M. 214; *Stewart*, 1873, 17 Jour. Jur. 607; but see *Graham*, 1896, S. L. T. No. 75).

V. EXEMPTIONS FROM JURISDICTION.

1. *The Crown.*—The only exemption of any importance is the Crown, which, with all persons acting under its authority (*Black*, 1833, 11 S. 378), is exempt altogether from the jurisdiction of the Sheriff (*Somerville*, 1894, 20 R. 1050). All actions relating to the revenue, or to the proceedings of officers of the revenue, etc., were confined to the Court of Exchequer by 6 Anne, c. 26, s. 6, and if such an action is raised in the Sheriff Court, the remedy is by application to the Lord Ordinary in Exchequer Causes to restrain by interdict the pursuer from proceeding with it (19 & 20 Vict. c. 56, s. 14).

2. *The College of Justice.*—Members of the College of Justice formerly were but are not now exempt from the jurisdiction (13 & 14 Vict. c. 36, s. 17; 16 & 17 Vict. c. 80, s. 48).

3. *County and Town Councils and other similar Corporations.*—So long as these confine themselves to acting within their statutory powers, they are exempt (*Hunter*, 1886, 14 R. 135; see *Porter*, 1889, 5 S. L. Rv. 430), but not otherwise (*M'Tavish*, 1876, 3 R. 412). When they come to administrate their property, or to be parties to contracts, etc., they are just as subject to the jurisdiction in questions arising out of these matters as any private person (*Lyall*, 1859, 21 D. 1136; *Kintore*, 1802, M. 7673; *Lawson*, 1581, M. 4811; *Robertson*, 1823, 5 S. 511).

4. *Other Inferior Judges.*—These, in discharging their judicial or administrative functions, statutory or at common law, are exempt from the jurisdiction of the Sheriff, to whom there can be no appeal (see *Buchanan*, 1854, 17 D. 155).

See Dove Wilson, *Practice*; Jurisdiction; Appeal; Sheriff, Executive Powers; Declinature; Small Debt Court; Debts Recovery Court; Action (in Sheriff Court); Admiralty; Commissary Court; M'Glashan on *Sheriff Court*; Ersk. bk. i. tit. 4, s. 1; Bank. ii. 551; Mackay's *Practice*, i. 190, 204 *et seq.*, 227, 263.

VI. CRIMINAL JURISDICTION.

The general principles of jurisdiction in criminal cases have already been treated of in the article on Justiciary, High Court of (*q.v.*). Reference is also made to the article on Criminal Prosecution, vol. iii. 386.

Sheriff, Executive and Administrative Duties of Office.—The Sheriff is an Anglo-Saxon office which reached Scotland moulded by Anglo-Norman law. It is possible, though not likely, that there may have been Sheriffs in the Anglo-Saxon districts of Scotland during the very short period between the Celtic Kingdom and the commencement of Norman influence. But if so, no trace of them has been preserved. The shire reeve, in Anglo-Saxon England, was the king's Steward of the district, called the shire, and the shire seems to have been a district of varying extent into which the larger unit of a kingdom was sheared or divided for administrative purposes. The Sheriff, from his earliest origin, discharged executive, including military, administrative, and financial functions, as well as civil and criminal jurisdiction. This combination existed before the separation of the departments of government had been defined, and has continued, notwithstanding the many changes of more than ten centuries, down to the present day. In Scotland the Sheriff Principal of a county or counties retains this combined character in a remarkable degree. It has been doubted by some whether his executive and administrative duties do not exceed in number and importance those he discharges as a judicial officer. In truth, the two departments are so variable in extent in different districts, and so disparate in character, that they cannot be contrasted by any quantitative measure.

The present article is confined to a brief history of the office and its executive and administrative business, although there are points in which the latter and his judicial business very nearly approach each other. It is necessary to give a sketch of the history of the office in order properly to understand its present position and duties.

The Saxon Sheriff combined the various functions of his modern representative. He presided in the County Court, usually along with the

alderman and the bishop, but sometimes alone, and tried both civil and criminal causes. As leader of the levy of freemen, he was responsible for the peace of the Shire, and personally or by subordinate officers carried the law into execution, when resisted, by the necessary force. He presided over the execution of criminals, as well as of writs or decrees. He was the principal local fiscal officer, collecting and accounting for the king's fines and dues. He may have been originally elective, but so far as records show, he was appointed by and represented the king. Prior to the Norman Conquest, Yorkshire was the only part of the Northumbrian kingdom which had a Sheriff. The office was Southern and Midland English, and this increases the improbability that it was known in Scotland until the Norman period. The etymology of the word is contested; but as it is parallel to "the Steward," who, in Scotland at least, was distinguished from Sheriff only as the administrator and local judge of the royal domain lands, while the Sheriff was the local judge and administrator of the royal revenues in districts where the land was held by his vassals and not by the king directly, it seems probable that the Sheriff owed his name to being the king's reeve (Anglo-Saxon, *Gerefa*, the grieve). Whatever may be the derivation, its meaning is identical with steward (Kemble, *Saxons in England*, ii. p. 151; Stubbs, *Constitutional History*, i. p. 111; Schmid, Glossary in *Gesetze der Angel Saxen*). The Norman kings adopted the Anglo-Saxon Sheriff, but organised the office after the model of the Norman Vice Comes, and to some extent extended his jurisdiction. The inquest, adapted by Norman law to so many purposes, judicial and fiscal, was directed to the Sheriff, although he was assisted by a local jury in making his returns. The Sheriff became definitely the king's representative in all matters "judicial, military, and financial in his shire," and his importance increased, as the Norman kings were more powerful than the Anglo-Saxon. The office became hereditary from the time of William the Conqueror, and probably down to the date of the Inquest of Sheriffs in 1170, when the whole Sheriffs were removed by Henry II., as they were a second time by Richard I. Their position was regulated and restricted by Magna Charta. Their office was made annual by Henry III. in 1258, and this, though evaded by renewal of appointments, was acknowledged in the reign of Edward III. in 1340, and again in 1376. A contest between royal nomination and popular election went on with varied issues, but the right remained finally with the king.

The Sheriff passed into Scotland at an early period of the Norman influence. He first appears in the case of the Sheriff of Scone, of which Malcolm is said to have been Sheriff in the reign of Alexander I., and Ewayn was Sheriff in 1164, when he witnessed the charter of Malcolm IV. to the Abbey (A. of P., i. 365*b*). Several charters of David I. are directed *Vice-Comitibus*, and the office is often mentioned under that name in the *Regiam Majestatem*. They were called *Vice Comitis* not as representing the Courts, for they always represented the king, but because they had certain duties within their sheriffdoms similar to that of the Courts within his earldom. In the reign of Alexander III. the office extended over nearly the whole of Scotland, and inquests or other writs of this reign exist addressed to the Sheriffs of Edinburgh, Linlithgow, Haddington, Roxburgh, Berwick, Lanark, Wigton, Dumbarton, Dumfries, Selkirk, Peebles, Perth, Fife, Kinross, Stirling, Forfar, Kincardine, Banff, Elgin, Inverness, Cromarty, and Aberdeen. Somewhat meagre accounts of Sheriffs are to be found in the earliest Exchequer Rolls of 1263–6, and following years. But the full

accounts do not exist until after 1358. In these accounts the Sheriff debits himself with the rents of Crown lands, the escheats of malefactors, the casualties of Crown vassals, and the issues dues and fines of his Courts, and credits himself with his own fee, possibly some fines, and the payments he was authorised to make out of the Crown revenues, accounting for the balance, fixed by the Auditors of Exchequer, to the Great Chamberlain, an office introduced by David I. The ordinance of Edward I., in 1305, for the government of Scotland provided that:—"The Sheriffs (Viscontes) who live on the land shall be learned men, natives of Scotland or England, appointed and removable by the Lieutenant and Chamberlain of the king, and should do the duty of collecting escheats, and should be the most sufficient, suitable, and profitable men that could be found, and the most profitable for the king, the people, and for maintaining peace." It then gives the names of the Sheriffs in the counties: Edinburgh, Haddington, Linlithgow, Peebles, Selkirk, Dumfries, Wigton, Ayr, Lanark, Dumbarton, Stirling, Clackmannan, Auchterarder, Kinross, Fife, Perth, Forfar, Kincardine, Aberdeen, Banff, Elgin, Forres, and Inverness, Cromarty. In the case of Auchterarder the name is blank. The Sheriffs of Selkirk, Kinross, Cromarty, are said to hold the office in fee (de fee), that is, in heritage as part of their estate.

Although appointments by the English king could not hold after the independence of Scotland was established, the ordinance is important as showing how nearly complete the division of Scotland into sheriffdoms was, and how identical the offices were in England and Scotland at the beginning of the 14th century. The index of the Acts of Parliament has more than five folio columns on the changes made on the office of Sheriff by Scotch Kings and Parliaments prior to the Parliamentary Union. It is possible only to refer to the most important relating to his executive and administrative duties. The remaining sheriffdoms not mentioned before Alexander III. or in the list of Edward I. were created on or before the following dates:—Argyll in 1326, but there had been earlier Sheriffs of Kintyre, Lorne, and Skye in 1292. Bute, formerly included in Kintyre, in 1388. Renfrew before 1481. Ross was separated from Argyll and Inverness, and Caithness from Inverness, in 1503. Orkney and Shetland was made a sheriffdom in 1581, when the office was granted to the Earl. Sutherland was created a distinct sheriffdom in 1633, but the Earl of Sutherland had earlier rights of regality, sheriffship, and crownership over a large part of the present county, which he then surrendered. The jurisdiction of the Lords of Regality, who answered to the English palatine earls and bishops, and were much more numerous, excluded the Sheriff's jurisdiction, and the parts of Sutherland not within the regality were till 1633 included in the Sheriffdom of Inverness. The earlier statutes relating to the Sheriff are chiefly occupied with his judicial duties in criminal law. But his administrative duty as fiscal officer, who collected and accounted for every branch of the royal revenue in the county, is recognised in the end of the 13th century, both in the Exchequer Rolls and Acts of Parliament, and no doubt existed from the origin of the office. It was his duty as chief executive officer to proclaim the king's laws, and to see that both these and the decrees of the king's Courts were duly executed. His right and duty to call out the muster of the shire was recognised as early as James I. and James II., whose Acts relating to the Sheriff almost amount to a small code, amongst which it is singular to observe the duty of choosing an oversman in arbitrations, and, what was specially Scotch, to provide advocates for the poor. At a very early date the office in Scotland became

hereditary, as it was in some cases at the time of Edward First's ordinance of 1292, and continued, except during the Commonwealth (1649, c. 85), until the abolition of heritable jurisdiction after the Jacobite Rebellion, notwithstanding an express Act in 1455 prohibiting hereditary offices. The Scotch nobility, many of whom held the office, were too strong for the king, and hence the Scotch Sheriffship became not merely hereditary, but saleable with the estate to which it was attached, while the parallel English office became annual, as the English High Sheriffship now is. An indirect result of this was that the hereditary Sheriff, generally incapable of discharging the duties of the office, had to be authorised to appoint a depute as early as 1357 (Act Parl. i. 492*a*), for whom he was responsible (1469, c. 2; 1540, c. 8). These deputes were chosen from the legal profession, after that profession became organised (Act Parl. 1587, c. 81; Act Parl. 1592, c. 28; Act Parl. iii. 554). By the last Act the Sheriff-Deputes and their clerks were to be examined by the Court of Session. When hereditary jurisdiction was abolished, the Sheriffs-Depute, having no superior officer, succeeded to the position and duties of the principal Sheriff, and were required to be advocates of three years' standing (20 Geo. II. c. 43). Although the Crown retained power to appoint a High Sheriff, which it has not exercised, the name of Sheriff-Depute was unfortunately still used, but has now given place to Sheriff Principal, which is recognised as the proper designation (9 Geo. IV. c. 29). From an early date the Sheriff-Depute had occasionally delegated some of his duties to an unpaid substitute, who was first recognised by Act of Parliament in 1825 (6 Geo. IV. c. 23, s. 9), which required him to be an advocate of three years' standing, or a practising agent of the same standing. He was appointed by the Sheriff from 1748 until 1877, when the appointment was transferred to the Crown (40 & 41 Vict. c. 50), and must be an advocate or law agent of not less than five years' standing. The Sheriff-Substitute is required to reside within the sheriffdom (1 & 2 Vict. c. 119; 33 & 34 Vict. c. 86). The Sheriff Principal, with the exceptions of the Sheriffs of Midlothian and Lanark, is not, and may practise in cases not arising in his own sheriffdom. The presumption is that any duty imposed on a Sheriff may be discharged by either Sheriff (*Fleming* v. *Dickson and Others*, 1 Macpherson, 188). In the ordinary case the Sheriff-Substitute acts as judge of first instance and of summary criminal business, while the appellate jurisdiction, criminal jury trials, and the administrative and executive functions of the Sheriff are discharged by him unless he delegates them to the Sheriff-Substitute. The practice on this point varies. Where the county is remote from Edinburgh, or the Sheriff Principal undertakes much private practice, it is common to leave the discharge of some of his functions to the resident Sheriff-Substitute which are discharged in other counties by the Sheriff Principal.

The executive, including administrative and fiscal, duties of the Sheriff may be conveniently divided into, I., what may be called the original, in most cases customary or common law, functions, recognised and modified in many cases by Act of Parliament; and, II., the miscellaneous duties which have been imposed on him by Act of Parliament since the Union, but for imposing which some justification has been found in his common law functions. This latter class of duties has in England and Ireland been attached to other officials created for the purpose, and separately paid, owing to the fact that the Sheriff Principal or High Sheriff in England and Ireland discharges only the ceremonial duty of receiving the judges on circuit, and the executive duty of enforcing writs by a depute, who

takes the fees, and gives a bond of indemnity to the High Sheriff if sued for damages.

I. The original or common law duties of the Sheriff are (1) to preserve the peace of the county by superintending the police, and, in cases of riot or extreme risk of riot, calling in the military.

The superintendence of the police is one of the ordinary duties of the Sheriff Principal. The chief constable acts under his orders, and in most counties renders him returns of all apprehensions within the county (see 20 & 21 Vict. c. 72). The Sheriff is the authority to determine in what Court minor criminal cases are to be tried (*County Council of Dumfries* v. *Phyn*, 1895, 22 R. 538), and as member of the standing joint committee of the county council, acts with the council in all matters relating to the finance of the police. The calling in the military, derived from the old duty of calling out the muster or *Posse Comitatus*, is fortunately now rare, but instances have been known in recent times, as in the case of the Sheriff of Lanark at the time of the riot of the cotton spinners, and the Sheriff of Inverness at the time of the riot of the Skye crofters.

(2) To render the accounts of the county to Exchequer. This, at one time one of the most onerous duties of the Sheriff Principal, and which led to pecuniary loss through defalcations of subordinate officers, is now comparatively unimportant, as most of the accounts due to or by the Crown in the counties are paid direct to or by the Exchequer or other Crown department. But the Sheriff has still to account for the fines of his Court, and to pay salaries and disbursements of a few officials.

(3) To appoint Honorary Sheriff-Substitutes and sheriff-officers, and overlook the proper discharge of their duties. The Honorary Substitute supplies the place, in temporary illness or absence, of the Sheriff-Substitute. But in case of longer absence a legal Substitute requires to be appointed and paid, as the Honorary is rarely qualified to do more than urgent summary business.

(4) To preside at the Fiars Court, by which the average fiars or market prices for the year in the county are fixed (1584, c. 22; 1689, c. 24).

(5) To receive writs and conduct the proceedings at parliamentary elections (Wight on *Parliaments*, p. 304).

(6) To superintend the preparation of the register of parliamentary electors. This was originally done in the head Courts of the Sheriff, which the freeholders were bound to attend (see Wight, p. 59 and pp. 131 *et seq.*), but now by the Sheriffs in their Registration Courts, in some by the Sheriff Principal and in others by the Sheriff-Substitute.

(7) The Sheriff Principal has to attend the circuit of the judges to which the sheriffdom belongs, unless his attendance is dispensed with. He has no longer to attend Parliament, as in the Parliament of Scotland before the Union, but is, on the contrary, disqualified from sitting in Parliament (21 Geo. II. c. 19), or from voting at an election within the county.

(8) The Sheriff Principal is in some counties consulted by the procurators-fiscal in difficult cases, and the Sheriff-Substitute is occasionally called in to superintend criminal precognitions; but these are survivals of an older condition of the law, under which the whole business of the preliminary investigation was conducted by the Sheriffs, which has now been transferred to the office of the Lord Advocate, and the procurators-fiscal under the direction of that office. The Lord Advocate and Crown Counsel occasionally find it necessary to get reports from, or consult, the Sheriff in criminal matters.

II. The additions to the Sheriff's duties by legislation have been

numerous; and though it is difficult precisely to distinguish those which relate to the judicial department, and those which belong to the executive or administrative, the following attempt to give a list of the latter has been made. These additional administrative duties practically began in the middle of the present century, and have gone on rapidly increasing down to the present time:—

(1) To superintend the registers kept by the sheriff clerk, and to examine and certify them yearly. The duty of seeing that the ancient records of the Sheriff Court are preserved, undoubtedly also belongs to the Sheriff Principal in Scotland, and in some places urgently requires attention, although in others the records have recently been put in order. This is part of his customary or common law duties.

(2) To superintend the preparation of the Roll of Jurors (55 Geo. III. c. 42).

(3) To act as unpaid Commissioners on the Northern Lights Commission Prison Board and Fishery Board.

(4) To superintend the registers of births, deaths, and marriages, as to erroneous entries and the duties of the registrar (1855, 17 & 18 Vict. c. 80).

(5) To deal with closing of burial-grounds (1855, 18 & 19 Vict. c. 68), and formation of new burial-grounds (31 & 32 Vict. c. 96).

(6) The registration of irregular marriages after inquiry before the Sheriff (1856, 19 & 20 Vict. c. 96).

(7) A variety of proceedings under the Police (Scotland) Acts, 1850, 1862, 1892, and 1893, of which the most important are proceedings for adoption of the Acts, formation of police burghs, and revision of boundaries. The reporting with reference to Provisional Orders, after local inquiries by the Sheriff, both under these and other Acts.

(8) The making Orders as to removal of paupers (1862, 25 & 26 Vict. c. 113). Proceedings as to admission and discharge of lunatics (25 & 26 Vict. c. 54; 29 & 30 Vict. c. 51).

(9) Various proceedings under Public Health (Scotland) Acts, 1867 and 1897, of which the most important are the formation of special drainage and special water districts after public inquiry.

(10) Proceedings under Ecclesiastical Buildings Act, 1868, as to building and repair of churches or of manses, or designing sites for these, or glebes, or churchyards.

(11) Proceedings under Trades Union Act of 1871 of the nature of arbitration as to disputes between masters and servants.

(12) Proceedings under Education (Scotland) Act as to compulsory education (35 & 36 Vict. c. 62, and 41 & 42 Vict. c. 78).

(13) Proceedings or inquiries under Coal Mines Regulations Acts (50 & 51 Vict. c. 58, and earlier Acts).

(14) Proceedings under Factories and Workshops Act, 1878 (41 & 42 Vict. c. 116).

(15) Proceedings under Roads and Bridges (Scotland) Act, 1878, as to valuation of debts and otherwise.

(16) Inquiries as to wrecks under Merchant Shipping Act (39 & 40 Vict. c. 80; 42 & 43 Vict. c 72).

(17) Various proceedings under Local Government (Scotland) Act, 1889.

(18) Proceedings under Burgh Roads Act, 1891 (54 & 55 Vict. c. 32), to settle terms as to burgh assuming management of highways.

(19) Trials under Corrupt and Illegal Practices Act, 1890, as to local elections.

(20) Proceedings under the Fatal Accident Inquiry Act, 1895. By this Act the duties performed by the coroner in England, and formerly discharged by Crown Counsel in Scotland, as to inquiries in the first instance as to sudden deaths, have been transferred to the Sheriffs in Scotland.

The duties of the Sheriff have been increased also by amalgamation. There are now only fifteen Sheriff Principals for thirty counties. The Sheriff in Scotland discharges the duties discharged in England by (1) the High Sheriff and Depute; (2) County Court judge and recorder; (3) Petty and Quarter Sessions, except licenses; (4) revising barrister; (5) coroner; (6) Commissioners appointed by the Central Government Departments, though Special Commissioners are sometimes appointed; (7) Commissioners to inquire and report on Provisional Orders; (8) Court for trial of local election petitions. While he has no official like the County Court Registrar, he has the assistance of one or more substitutes, who act in civil cases as judges of first instance, subject to appeal to the Sheriff, and discharge the summary criminal business and such administrative or other business as may be assigned by the Sheriff.

Sheriff-Officer.—The persons by whom writs are served and executions are carried out in the Sheriff Courts are called Sheriff-Officers. They are appointed by the Sheriff, and hold office during his pleasure. They are required to find caution for the performance of their duties.—[Dove Wilson, *Sheriff Court Practice*, 44.] See Messengers-at-Arms.

Ship; Shipping.—This article proposes to deal very briefly with those parts of the subject not separately considered.

The law is the law maritime as administered by the Courts in Scotland; but that law is, in general, in substance that of the law of the United Kingdom (*Currie*, 24 R. (H. L.) 11). It is to a material extent codified and contained in the Merchant Shipping Act, 1894. It will be convenient to follow, when practicable, the order of the Act, but it is not proposed even to summarise the statutory provisions, as where questions arise the Act itself must be looked at, but only to indicate the matters which it regulates.

The Act is divided into fourteen parts—

I. Registry.
II. Masters and Seamen. (See Shipmaster; Seamen.)
III. Passenger and Emigrant Ships.
IV. Fishing Boats. (Fishings.)
V. Safety.
VI. Special Shipping Inquiries and Courts.
VII. Delivery of Goods. (See Charter; General Ship; etc.)
VIII. Liability of Shipowners.
IX. Wreck and Salvage. (See Wreck; Salvage.)
X. Pilotage. (See Pilot.)
XI. Lighthouses.
XII. Mercantile Marine Fund.
XIII. Legal Proceedings.
XIV. Supplemental.

A ship is defined, for the purposes of the Act, as meaning every description of vessel used in navigation not propelled by oars, while "vessel" has an even wider meaning (s. 742; see *Carse*, 22 R. 475).

Registers of shipping are provided, and are kept, at ports in the United Kingdom and Colonies. In certain cases the port of registry may be a foreign port (s. 87). All British ships, with unimportant exceptions, fall to be entered in the register (s. 3). The ships have to be surveyed, measured, and the tonnage ascertained preparatory to this, and various declarations have to be made, acts done, and conditions performed (ss. 6 to 11, 77 *et seq.*). In the case of the first registry of a British built ship, one of the conditions of registry is production of a certificate containing certain particulars from the builder.

The contract of shipbuilding is an executory contract of sale, the conditions of which are dependent on the bargain. In the ordinary case the builder retains the risk until he delivers the ship and insures for all concerned (see *Brewer*, 20 R. 230). At the same time it is bargained that the property passes as soon as the first instalment of the price is paid. This extends not only to the unfinished ship, but to materials appropriated to its construction. Prior to the Sale of Goods Act, the property in such materials did not pass because there was no delivery. The presumption is still against the property passing, in cases where the seller has work to do on the subject, until the work is done; but it is submitted that under the Sale of Goods Act, if the agreement clearly bargains that the materials, when appropriated, are to become the property of the purchaser, this agreement falls to be given effect to (see *Scath*, 13 R. (H. L.) 57). The builder only delivers his certificate when ready to make over the ship and part with his lien for the price.

On completion of the registry, the registrar delivers to the owner a certificate of registry, which is used in connection with the navigation of the ship (ss. 14 *et seq.*). The Act of course provides for changes in the registry due to altered circumstances (see *Duthie*, 20 R. 241).

British ships must be marked with (s. 7) and described by (s. 47) their registered name. The name, however, can be altered with consent of the Board of Trade, and after advertisement. They must use, as required by the Act, the Mercantile British flag (ss. 68 *et seq.*); and they must be owned by British subjects, as defined by the Act (s. 1); and if unqualified persons own an interest in them, that interest can be forfeited (s. 71). If such persons acquire the interest by succession, marriage, or will, provision is made for how they are to dispose of it (s. 28). Unqualified persons can be members of corporations, or hold shares in companies incorporated under the Companies Acts, which own British ships. These ships are divided into sixty-four shares, and no fraction of a share can be transferred; not more than five persons can be registered as joint owners of a share or shares (s. 5).

Ships or shares in ships must be transferred by bills of sale in the form prescribed under authority of the Act (ss. 24 *et seq.*), which have to be entered in the register, and are so entered in the order they are produced to the registrar. The result is that of two bills of sale granted by a registered shipowner, the one first produced to the registrar, even though second in date, takes preference, assuming *bona fides* on the part of the transferee.

Mortgages must also be granted on statutory forms, and be entered on the register (ss. 24 *et seq.*). They take precedence according to the date of recording them, notwithstanding notice (s. 33).

The registrar is prohibited from receiving notice of any trust with regard to ships; and it is provided that the registered owner shall have

power absolutely to dispose of the ship or share (s. 56). But in a question between the transferor or his creditors, an unregistered bill of sale or mortgage receives full effect (s. 57). So where the person entered on the register holds truly for some other person,—qualified to hold an interest in British ships,—the latter can enforce his interests (see *Duthie, ut supra*). He is also subject to liability as owner as regards offences against the Act (s. 58).

In cases where it is wished that an owner of a ship, or shares therein, should sell or mortgage his interest abroad, provision is made for his granting a certificate of sale or mortgage—truly a power of attorney—under which this can be done—the certificate being entered on the register (ss. 38 *et seq.*).

Mortgages of ships require further consideration. "Except so far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not, by reason of the mortgage, be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be the owner thereof" (s. 34). So long as the mortgagee does not enter into possession, he incurs no personal liability in respect of the ship, though, as we shall see, the ship itself may be subjected to various preferable charges which may impair the security. The mortgagor, notwithstanding the mortgage, can continue to use the ship in a reasonable and ordinary way. He is not bound to consider the mortgagee as regards the freight or hire he charges for carriage in the ship, and may charge a nominal freight, or carry his own goods freight free (*Keith*, 1877, 2 App. Ca., per Ld. Cairns, p. 645). So long as the mortgagee is not in a position to take possession, or does not do so, he cannot restrain the mortgagor using the ship as his own, *e.g.* he cannot restrain her being sent out of the jurisdiction (*The Fanchon*, 5 P. D. 173; see also *Collins*, 34 L. J. Ch. 196). Further, the mortgagor can in ordinary course have the ship repaired, and subject her to the lien of the repairer for his account preferable to the mortgage (*Williams*, 10 C. B. N. S. 417). Nice questions, however, arise when the mortgagee takes possession. This he can do in any reasonable way. The usual course is to put a representative on board; but when the ship was at sea, notice to the charterer to pay freight to the mortgagee was held equivalent to taking possession (*Rusden*, L. R. 3 Ex. 269).

On taking possession, the mortgagee to a large extent finds himself in the position of owner, and subject to his liabilities. The question how far he is bound to implement existing charters, lawfully made by the mortgagor, cannot be said to be clearly settled. He is clearly not bound by unusual engagements which impair the security (*The Celtic King*, [1894] P. 175, and cases there referred to). Farther, it seems difficult to say that, being under no personal contract to the charterer, he is under obligation to carry out a charter, by, *e.g.*, supplying provisions or coals at his own expense. It would rather seem that, in the ordinary case, if he elects to sell he can do so, and disregard at all events any charter not yet embarked on. The matter may be different where things are not entire—where the goods are on board or the voyage part performed. Suppose the mortgagor was in a position to offer to be at the expense of fulfilling a charter lawfully made, it may be the mortgagee would be bound to agree to this. It seems that the mortgagee can implement, if he choose, any charter made by the mortgagor. Moreover, it would seem that a mortgagee, in place of at once selling, may use in a reasonable and judicious way the subject of his mortgage, though it has been said by high authority that in this

matter he must act with great caution (Abbott, 13th ed., p. 45). If he elects so to use her, when she is subject to an existing charter lawfully made by the mortgagor, it is thought he must fulfil this charter, or at least can be restrained from using her otherwise (*Collins, ut supra*).

A mortgagee in possession has a preferable claim to an assignee to freight unpaid at the time he enters on possession—at all events if the freight has not then been earned (*Brown*, L. R. 3 Ch. App. 597: *Liverpool Marine*, L. R. 7 Ch. App. 507). Mortgagees of ships can in England sell their security publicly or privately. The practice in Scotland is the same; and though in general the holder of a security can only realise by public sale under warrant of the Court, it is submitted the practice will be upheld as lawful (see sec. 35). The mortgagees must act reasonably in the interests of all concerned, and if they do not, will be liable in damages.

Mortgagees of shares in a ship and not of a whole ship have more difficulty in realising their security. Second mortgagees of ships, as of other property, are in a more or less unsatisfactory position. In England they are held only to have an equitable interest, and are, *e.g.*, postponed to an assignee to freight (see Abbott both as to shares and second mortgagees, pp. 48, 49). In Scotland, it is suggested, the technical rules which bring about this result in England may not be held to apply, and a second mortgagee may be held to stand in the same position as a first mortgagee, subject only to his rights. Mortgages can be assigned.

A mortgagee cannot take possession until there has been default on the part of the mortgagor in payment, or a breach of his duty in respect of the mortgage by his unlawfully impairing the subject of security.

In many cases, apart from the mortgage, agreements are made which provide for insurance of the ship, the mode of payment, the maintenance of the ship in good order, the circumstances under which the mortgagee can take possession, etc. The Court will give effect to these agreements. So in one case where the owner had undertaken to keep the ship insured, interdict was granted against his sailing uninsured, even in a question with the charterer from the shipowner (*Laming*, 16 R. 828).

Apart from mortgages, ships may be burdened by various liens and hypothecs. In most cases these take preference over mortgages. (See HYPOTHEC.)

Bottomry bonds have already been treated of (see BOTTOMRY). Seamen have a preference for their wages (see SEAMEN). Shipmaster not only for wages, but for disbursements and liabilities properly incurred by him on account of the ship (see SHIPMASTER; also *The Ripon City*, [1897] P. 226). There is a maritime lien in respect of salvage (see SALVAGE). Where ships are in collision, there is a lien for the damage done against the wrong-doing ship, which affects a mortgagee (see COLLISION; also *Currie, ut supra*: *The Ripon City, ut supra*. Cf. Ld. Kinnear's dicta in *Clark*, 23 R. at p. 448. It is respectfully suggested Mr. Justice Barnes' judgment correctly explains the varying decisions). A similar preference is given by statutes—local and general—in cases of damage to harbours and docks, or of obstruction to channels; also for port, river, and other dues. Where the preference depends on statute, the exact terms need to be carefully examined, to ascertain the extent of the preference (see COLLISION; PORTS AND HARBOURS).

In England it has now been held that there is no preference for necessaries supplied to a British ship even in a foreign port. Necessaries

include necessary repairs, and such things as coals, provisions or other supplies to enable the voyage to be completed, and payments of dues without which the ship would not be allowed to leave the port. In many foreign countries, including the United States, the rule is, there is a maritime lien or preferable claim for necessaries, at all events where supplied to a ship at a foreign port. The weight of Scotch legal authority is in favour of this view, so far as a ship at a foreign port is concerned (Bell, *Prin.* s. 1398; *Com.* (M'Laren's ed.) vol. i. p. 575; Ersk. iii. 1. 34). But having regard to the view that the law maritime of the United Kingdom is in substance the same in Scotland as in England, it seems probable the English view will prevail. Two facts seem to favour this conclusion: (1) that in Scotland originally it was held the lien extended to a home port, but this was given up in deference to English authority, and (2) that the 164th section, subsection 2 of the Act, which gives the master a preference for his disbursements and liabilities, now extends to Scotland. Originally it was an English Act, which was passed partly to remedy the state of matters caused by the judgments declaring there was no maritime lien. In point of fact the operation of the statute does, in a number of cases, secure suppliers of necessaries who take orders from a master, as they make the master enforce his preference in their interests (see *The Ripon City*, *ut supra*, and cases there referred to).

Ship-repairers, dock-keepers, and other persons who have the ship in their possession, have a lien proper for their charges, so long as they retain possession (see *Ross & Duncan*, 13 R. 185).

Maritime liens, so long as these are reasonably soon enforced, affect all persons into whose hands the ship comes.

Questions of priority may arise between maritime liens and liens proper *inter se*, but for the rules on these points reference must be made to the article on HYPOTHEC and to text-books (see, *e.g.*, M'Lachlan on *Shipping*, 4th ed., pp. 738 *et seq.*).

Owners of shares in ships are part owners of a common subject. According to the common law of Scotland, in that case the consent of each, express or implied, is required to acts of management (see COMMON PROPERTY). This was, if it is not, the law as to part ownership in ships. In this view an owner of a single share in a ship could paralyse her use, and the only remedy open to his co-owners is by process of set and sale to get rid of him (see the case of *Anderson*, 22 R. 105, for recent example of action). That process is based on an offer by the pursuer to buy the defender's shares or sell his own at a price, and craves warrant to sell the ship failing acceptance.

In England a majority can use the ship—finding security to a dissenting minority that no damage shall accrue by the use. There is, so far as the writer knows, no precedent for similar practice here, but perhaps such might be made if occasion arose. There is no doubt that in practice, in Scotland as well as in England, majority shares in a ship carry with them the mangement, and so fetch a higher price (see cases of *Bennet*, 17 R. 800, and *Bennet*, 18 R. 955, as to majority and minority rights).

Whether a sale of a ship would be ordered in a case where the pursuers did not offer to sell to the defenders at a price, is another question which is open to doubt.

Part owners are, in any case, *quâ* owners, liable only for their own share of expense or liability incurred in connection with the ship, unless, expressly or by implication, they authorise their credit to be pledged jointly and severally. In general, they are liable for damage done by the ship jointly

and severally, *e.g.* in cases of collision. In the vast majority of cases part owners acquire shares in ships in order to join in making profit out of their use. In this latter object they are joint adventurers, and are liable jointly and severally for the debts of the adventure. A manager or managing owner is employed, who insures the ship, orders all necessary repairs, charters her, and carries on the business of the adventure. He renders accounts to the part owners, showing his transactions, and bringing out a profit or loss. In all these cases, so long as the agent acts within the mandate granted to him, expressly or by implication, the part owners are liable jointly and severally. Not unfrequently, on the bankruptcy of the managing owners, accounts for which they had money in hand are found unpaid, and large liabilities fall to be met by the solvent owners. The latter will, however, not be liable for extraordinary acts of the managing owners—for large structural alterations not authorised, *e.g.* (*Steele & Co.*, 3 R. 1003). The question, too, may be raised whether the act was done as part of the joint adventure or as a dealing with the common property, in which case each owner, as we have seen, is only in the ordinary case liable *pro rata*.

The powers of a manager or ship's-husband are separately treated of (see SHIP'S-HUSBAND). By the Act a managing owner falls to be registered for all ships (s. 59), but his authority depends on the agreement made; and the mere fact that he is registered managing owner does not entitle those dealing with him to assume that he has authority to pledge the credit of his co-owners (*Fraser*, 6 L. R. Q. B. D. 96). So the fact that a person is registered as owner or part owner of a ship does not involve him, in the general case, in liabilities for supplies to or engagements of the ship, or personally for acts done by her (*Clarke, ut supra*). He must be shown to have authorised the transaction in connection with which the claim is made on him (see *Hibbs*, L. R. 1 Q. B. 534, and cases there referred to).

The subjects of Shipmasters and Seamen are separately treated.

Ships are employed in every variety of service. Some are under engagement to aid, if called on, in naval defence, some carry mails, some are used as transports. There is a large fleet engaged in the fishing industries, another in towage of other ships. Many carry passengers. The bulk carry goods.

The contract of affreightment of goods in ships has been considered (see CHARTER; GENERAL SHIP; etc.). The seventh part of the Merchant Shipping Act, 1894, is there referred to (CHARTER; FREIGHT; LIEN).

The contract to carry passengers is, apart from statute, ruled by the same general principles as that to carry goods. In the absence of special stipulations, the shipowners will be answerable for loss or injury to the passengers due to any want of care on the part of those for whom they are responsible. In practice, they relieve themselves from liability to the same extent as with goods. The statute, however, makes special provision for the safety of passengers (ss. 267–368).

All passenger steamers carrying more than twelve passengers must be surveyed and certified as fit to carry passengers (s. 271). In the certificate the number of passengers the steamer is fit to carry is stated, and this must not be exceeded (s. 274). The Act has various further provisions with regard to the equipment of the steamers and other matters. It also makes enactments with reference to order on the part of passengers (ss. 287, 288). There are elaborate provisions with regard to emigrant ships. These ships include all ships which carry more than fifty steerage passengers (s. 268). Provision is made as to survey, equipments,

provisions, medical inspection, the form of contracts, the discharge of passengers and how they are to be dealt with in case of wreck, and various other matters.

The contract of towage rests on the bargain and is a contract of hire of power, to which the ordinary rules of law are applicable. Special questions have mainly arisen with reference (1) to cases of damage done by the tug or tow (see COLLISION), and (2) to cases where it is maintained that the towage has been turned into a case of salvage (see SALVAGE). The general rule is that the tug is not bound to continue the service if extraordinary circumstances intervene to make the towage unduly dangerous to the tug, and which circumstances were not contemplated when the bargain was made. In the absence of bargain, the tug is of course liable for any negligence; but it is now common for tug owners to exempt themselves from liability, and this is a lawful contract. If the tug was in the particular circumstances entitled to abandon the contract of towage because of the danger, and she renders service of value and involving risk to the tow, she will be entitled to salvage.

The law with regard to fishing has already been considered (see FISHINGS). But reference may be made to the provisions of the Merchant Shipping Act on the subject. Only secs. 373–375 of the fourth part of the Act can apply to Scotland (see s. 372). It does not seem clear that secs. 374 and 375 do so apply. The regulations for preventing collision at sea in force under authority of the Act apply to fishing boats in certain cases.

In Part V. of the statute provisions are made with the object of increasing the safety of ships. It is under authority of secs. 418 and 419 that the regulations for preventing collision at sea have statutory force (see COLLISION). It may be noted that since that article was written, new regulations have come into force which materially alter those dealt with in it. There are other enactments as to cases of collision (ss. 423, 424). Accidents to and loss of ships have to be reported (ss. 425, 426). Provision is made as to life-saving appliances (ss. 427 *et seq.*), general equipment (ss. 432, 433), signals of distress (ss. 434, 435), and inspection of lights and fog-signals (s. 420). There are important enactments on the subject of the draught and load-line (ss. 436 *et seq.*), and the carriage in ships of dangerous goods (ss. 446 *et seq.*), timber (s. 451), and grain (ss. 452 *et seq.*). Power is given to the Board of Trade to detain unseaworthy ships, and penalties are imposed on shipowners who are parties to sending their ships in an unseaworthy state to sea (ss. 457 *et seq.*). On the other hand, if the Board unreasonably detain ships they can be made to pay compensation (s. 460). An undermanned ship is now within the statute, and can be detained (Merchant Shipping (Liability of Shipowners) Act, 1897) (see SEAWORTHINESS). The Board of Trade has in certain cases power to detain foreign ships (s. 462).

The next part of the Act provides for special shipping inquiries and Courts, created for the purposes of the Act.

There are constant inquiries into shipping casualties. Under this term is practically included all cases of accident to or loss of ships where evidence can be got (s. 464). Wherever the Board of Trade deem it expedient, they order such inquiries, which in Scotland are now held before the Sheriffs. This part of the Act sets forth the procedure and the persons who can conduct the inquiries. The Courts have power to deal with the certificates of officers through whose fault the casualty has arisen (s. 470), but the Board may order a rehearing; and if a certificate is suspended or cancelled, the officer may appeal to either Division of the Court of Session

(s. 475 (3)). There have been several such appeals (see for a recent example, *Turner*, 22 R. 18). The owners, if parties to the inquiry, may be subjected in expenses, but have no appeal. The Court of Session can remove a master in any necessary case (s. 472). Apart from casualties, in cases where the Board of Trade consider a certificated officer guilty of misconduct, they can cause an inquiry to be held with a view to the suspension or cancellation of the certificate. Provision is also made for inquiries in the Colonies and abroad (ss. 478 *et seq.*).

This part of the Act creates the Courts of Survey, which under the Act fall to dispose of differences of opinion between the Board of Trade and shipowners as to seaworthiness (ss. 487 *et seq.*).

The legal proceedings for contravention of the Act are dealt with in Part XIII. By sec. 988 special power is conferred to arrest foreign ships which have done damage to British property.

We have now to consider the rules of law with regard to the liability of shipowners. Apart from the Merchant Shipping Acts, these rest on common law, and need not be separately considered. But the statutory law applies in the great majority of cases.

The statute first enacts that the owners of a British sea-going ship shall not be liable to make good to any extent damage happening without their actual fault or privity in the cases (1) of goods damaged by reason of fire on board the ship, (2) of damage by reason of robbery, embezzlement, making away with or secreting of gold, silver, diamonds, watches, jewels, or precious stones, the true nature and value of which have not at the time of shipment been declared by the owner or shipper to the owner or master of the ship in writing (s. 502).

It has been held this clause does not free the ship from contributing to general average for damage caused by water to extinguish fire (*Schmidt*, 45 L. J. (Q. B.) 646).

It is further enacted (s. 503) that the owners of a ship—British or foreign—shall not, where any of the following occurrences take place without their actual fault or privity, viz:

(1) loss of life or personal injury to any person carried in the ship;
(2) loss to goods on board the ship;
(3) loss of life or personal injury to any person carried in any other *vessel* by reason of improper navigation of the ship;
(4) damage to goods therein by reason of like improper navigation;

be liable to damages—

(1) in respect of loss of life or personal injury, either alone or together with damage to vessels and goods, beyond £15 for each ton of the ship's tonnage;
(2) in respect of loss or damage to a vessel or goods, £8 for each ton.

It is the registered tonnage of sailing ships which form the basis of calculation (s. 503, subs. 2 (a1)), and the gross tonnage of steamers, but subject to deduction in respect of space for seamen and apprentices. A double bottom is not included (*Zanzibar*, [1892] P. 233). There has been discussion as to further deductions, but the weight of authority is against allowing anything more (*Burrell*, 4 R. 177; *Umbilo*, [1891] P. 118; *Petrel*, [1893] P. 320). The register is not absolutely conclusive (*Franconia*, [1878] 3 P. D. 164; *Receptu*, 1889, 14 P. D. 131). The tonnage is that at the date of the event, not at the date of the limitation suit (*John M'Intyre*, 6 P. D. 209). Provision is made as to ascertaining the tonnage of a foreign ship (s. 503, subs. (2) (*b*) (*c*)).

Of course, to get exemption shipowners must be within the words of the

statute. Thus fire on board a hulk is not within sec. 502, for a hulk is not a British sea-going ship (see *The Salt Union*, [1893] 1 Q. B. 370). So damage to a dock or wall would have to be paid for in full, as not within sec. 503 (see *The Ettrick*, 1881, 6 P. D. 127; *Bernina*, 1886, 12 P. D. 36). On this principle, it was held that an unfinished ship which did damage was not a British ship within the section (*Andalusian*, 1878, 2 P. D. 231); but by the Merchant Shipping (Liability of Shipowners) Act, 1898, a ship after being launched is to be deemed a ship within the words of the principal Act for the purposes of this part of the Act. A builder, however, is only protected for three months after launching. A foreign ship purchased by British subjects, but not yet in a position to be registered, did damage. It was held the purchasers could claim the benefit of the Act, treating the ship as a foreign ship (Marsden on *Collisions*, 3rd ed., p. 173).

The mere fact that a part owner is on board at the time of the occurrence will not make him privy to it so as to deprive him of the benefit of the Act (*The Satinita*, [1897] App. Ca. 59). If one part owner is at fault or privy to the occurrence, this does not deprive other owners of the right to limit their liability (*Spirit of the Ocean*, 1865, B. & L. 336). Masters and seamen get no benefit from the Act (s. 508). Shipowners may waive their right to limit their liability (*Satinita, ut supra*).

The words "improper navigation" receive a liberal interpretation, to give full scope to the intention of the Act. "All damage wrongfully done by a ship to another while it is being navigated, where the wrongful action of the ship by which damage is done is due to the negligence of any person for whom the owner is responsible, is comprised within the statute" (*Warkworth*, 1884, 9 P. D. 145, per Brett, M. R., p. 147).

The statute provides the procedure by which shipowners take steps to limit their liability under sec. 503 (s. 504). The shipowners have to pay the expense of the proceedings; but in the event of a competition between claimants, the expense falls on them (*Carron Co.*, 13 R. 114).

The owners are liable for each act of damage arising on distinct occasions to the amount of the statutory limits, that is, each act unconnected with another (s. 503 (3); see *The Schwan*, [1892] P. 419). The shipowner can bring into account claims settled by him (*Rankine*, 4 R. 725).

The other parts of the Act can only be referred to.

Part XI. vests the management of the lighthouses of Scotland in the Commissioners of Northern Lighthouses (ss. 668), and confers the necessary powers. It also deals with local lighthouse authorities (ss. 634 *et seq.*).

Under the Act and the Merchant Shipping (Mercantile Marine Fund) Act, 1898, the Marine Fund is dealt with.

Part XIV. has various supplemental sections. Under this part of the Act the Board of Trade is formally charged with the superintendence of Merchant Shipping, and carrying out the provisions of the Act (s. 713).

Shipowners receive an allowance for wear and tear in calculating their profits for purposes of income tax. This does not entitle them to claim an allowance in respect their ships are becoming obsolete (*The Burnley S.S. Co.*).

[Abbott on *Shipping* (13th ed.); Scrutton, *Merchant Shipping Act*, 1894; Marsden on *Collisions*, 3rd. ed.]

See Bill of Lading; Bottomry; Charter; Collision; Freight; General Ship; Hypothec; Marine Insurance; Pilot; Ports and Harbours; Salvage; Seamen; Seaworthiness; Shipmaster; Ship's-Husband; Tug and Tow; Wreck; etc. etc.

Ship's-Husband.—A ship's-husband is "a confidential agent appointed by the owners to conduct and manage on shore whatever concerns the employment of the ship, and for that purpose has authority to give orders for the necessary repair, refitting, and outfitting of the ship, to see that she is properly manned, to procure a charter or freight for the vessel, and fix and accept the conditions of either (but not to cancel such engagement (as to this see *infra*)), to correspond with the master when abroad on the business of the ship, and to do what is needful for facilitating the prosecution of the voyage, to provide for the entry and clearance of the ship at her home port, to adjust and receive the freight, pay the necessary disbursements, and to account for and distribute the proceeds among the owners" (M'Lachlan on *Shipping*, p. 186; *Williamson*, [1891] 1 Ch. 390). When the owners disagree as to the appointment of the ship's-husband, the appointment of a majority in interest prevails. The ship's-husband is most frequently a part owner. When any person agrees to take shares in a vessel in return for an undertaking that he will be appointed ship's-husband, his appointment is not revocable at will (*Galbraith & Moorhead*, 1896, 23 R. 1011). The ship's-husband has only authority to provide for the ship in contemplation of an adventure or series of adventures. He has no authority to exercise any powers with reference to a ship belonging to his principals which is not being used. His power to bind the owners for repairs is not limited to those which are absolutely necessary to enable the ship to prosecute a particular voyage so long as they are reasonable (*Preston*, 1857, 26 L. J. Ex. 346; affd. 27 L. J. Ex. 192). But when a vessel is in a home port and the owners accessible, he has no authority to order extraordinary structural alterations which are not necessitated by a projected voyage (*Steele & Co.*, 1876, 3 R. 1003). When a ship's-husband ordered a vessel to be cut in two and lengthened, he averred special authority from all the owners (*Chappell*, 1860, 30 L. J. Ex. 24). From the nature of a ship's-husband's duties in managing everything with reference to the employment of the ship, it necessarily follows that he has power to pledge the owners' credit for the repairs required to fit her for the voyage. And a limitation in this respect will not be deduced from the facts that the ship is insured and the ship's-husband can collect from the underwriters enough to pay for the repairs (*The Huntsman*, [1894] P. 214). It is said by Bell (*Com.* i. 553; *Prin.* s. 449) that he has no authority to borrow money, and two cases are quoted by him in which it was held that a ship's-husband as such has no power to assign the whole freight in security of advances obtained (*Guion*, 1860, 29 L. J. Ch. 337; *Beynon*, 1878, 3 Ex. D. 263). On the other hand, the following statement of the law by Ld. Esher, M. R. (*The Faust*, 1887, 6 Asp. Mar. Law Cas. N. S. 102 at 128), is approved by the editors of Abbott on *Shipping* (13th ed., p. 105):—"As managing owner," said Ld. Esher, "he would as between himself and the lender have a right to borrow money if it was borrowed for the necessary purposes of the ship." The ship's-husband as such has no power to insure the ship, but if he is a part owner he may as partner in an adventure insure the property of the firm. It has been held that he has no power after entering into a charter-party, to pledge the credit of the owners to pay a sum of money to have it cancelled (*Thomas*, 1878, 4 Ex. D. 81); but it may be doubted whether this would be followed in Scotland, provided the arrangement was clearly beneficial to the owners (*Holman*, 1878, 5 R. 657). His power to do everything requisite to enable his vessel to prosecute its destined voyage has been held to entitle him to procure a bail-bond in order to release the ship from arrestment (*Barker*, 1863, 15

C. B. N. S. 27). Otherwise he has no authority to order legal proceedings on behalf of the owners (*Campbell*, 1818, 6 Dow, 116). He may delegate his authority when that is necessary to the execution of his duty (*Coulthurst*, 1866, L. R. 1 C. P. 649); and if he is a shipbroker, he may employ himself in broker's work when he is not empowered to do that work in the capacity of ship's-husband (*Williamson*, [1891] 1 Ch. 390). He may draw bills on the owners for repairs or supplies, but he may not without special authority take bills in payment of freight. If he ceases to be ship's-husband before the freight is due, he will have no right whatever in it. It is no longer his duty to collect the freight, and although his claim against his principals for repayment of disbursements subsists, he cannot make it good by any right of retention over the freight (*Beynon*, 1878, 3 Ex. D. 263).

It is the ship's-husband's duty to render accounts at the end of an adventure or at stated periods (*Manners*, 1884, 11 R. 899). The expense of fitting out and victualling a vessel for the voyage is a first charge upon the profits earned, and the ship's-husband or managing owner is entitled to be reimbursed what he has paid out before any division of them among the owners (*Holderness*, 1823, 8 B. & C. 612; *Green*, 1840, 17 L. J. Ch. 323; *Beynon, supra*). This applies to repairs as well as to furnishings, even although these repairs have not been exhausted by the voyage, but leave the vessel at the termination thereof in a better condition than before they were executed; and the right of retention which the ship's-husband has over the freight in his hands for repayment of his disbursements on this head takes precedence of the claims of a mortgagee who can be in no better position than the owner and mortgagor (*Green, supra*).

A ship's-husband, like any other agent, is not entitled to take payment from both contracting parties. If he is paid for his services by his principals, he must credit them with any rebates he may receive from their creditors (*Manners*, 1884, 11 R. 899). If he is remunerated by a stated sum of money, he cannot charge commission for work done by him in the capacity of a shipbroker, that work falling within his duty and authority as ship's-husband (*Williamson*, [1891] 1 Ch. 390).

The mere fact of a person's name appearing on the register of owners is not sufficient to subject him in liability for supplies or repairs properly ordered by the ship's-husband (*Steele & Co.*, 1876, 3 R. 1003; *Frazer*, 1886, 6 Q. B. D. 93). "It is perfectly settled now," said Parke, B., in 1855 (*Mitcheson*, 5 E. & B. 419 at 443), "that the liability to pay for supplies depends on the contract to pay for them, and not on the ownership of the ship." And if one owner takes no part in a particular adventure he incurs no liability for the expenses necessary for its prosecution (*Frazer, supra*).

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 59), requires the name and address of the managing owner or ship's-husband of every ship registered at a port in the United Kingdom to be registered at the custom-house of that port. And sec. 426 requires the managing owner or ship's-husband, on the apprehended loss of the ship, to give notice thereof to the Board of Trade.

Shipmaster.—A shipmaster is a general agent of the shipowners, on whom is devolved the care, navigation, and general control of the ship. He is appointed by the owners, or, in case of disagreement among them, by a majority in interest, and he may be a part owner. Under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 742), "master" includes every person (except a pilot) having command or charge of any ship. That Act

(ss. 92–104) requires that "every British foreign-going ship and every British home-trade passenger ship, when going to sea from any place in the United Kingdom, and every foreign steamship carrying passengers between places in the United Kingdom, shall be provided with officers duly certificated" under the Act; and provisions are made for granting the necessary certificates to the masters of such ships.

The case of a shipmaster is an exception to the general rule, that when an agent contracts with third parties, on behalf of a known principal, the principal only is bound, not the agent. A shipmaster is personally bound, as a party, in all contracts which he makes within the scope of his authority on behalf of the owners (Abbott on *Shipping*, 13th ed., p. 120; M'Lachlan on *Shipping*, p. 135). But he may of course stipulate with the other contracting party that he is to be free from any liability on the contract. Like any other agent, he must account to his principal for any rebates or commissions received, but he is not bound to give them credit for sums received as gratuities, *e.g.* from consignees of cargo for the efficient manner in which he superintended its discharge (*The Parkdale*, [1897] P. 53).

The shipmaster's authority in port, when the owners do not themselves undertake the duties, and no other agent is appointed for the purpose, extends to engaging the crew (and see Merchant Shipping Act, 1894, s. 113), a general survey of the vessel to secure that it is seaworthy and fit for the voyage (see SEAWORTHINESS), obtaining and receiving the cargo, and signing bills of lading therefor. Although the master does not generally himself receive and unload the cargo, that falling within the mate's duty, he is responsible for all that is done by his subordinate in those matters (*Howman*, 1897, 25 R. (J. C.) 8). His principals may place a limit upon his authority; but third parties contracting with him, without knowledge thereof, are entitled to assume that he has all the usual authority of a master. "His character and situation furnish presumptive evidence of authority to act for (the owners) in these cases," *i.e.* fitting out, victualling, and manning the ship, "liable, indeed, to be rebutted by proof that they, or some other person for them, managed the concern in any particular instance, and that this fact was actually known to a particular creditor, or was of such general notoriety that he cannot be supposed to be, because he ought not to have been, ignorant of it, or that they were by the terms of the contract expressly excluded" (Abbott on *Shipping*, 13th ed., 132). The shipmaster has no authority to sign bills of lading for goods which he has not received (*Grant*, 1851, 10 C. B. 665); or to sign bills of lading, making freight payable to others than the owners (*Reynolds*, 1865, 34 L. J. Q. B. 251); or to contract to carry goods freight free, unless they belong to the shipowner (*Keith*, 1877, 2 C. P. D. 163). He cannot annul a contract made by the owners of the ship in order to enter into another (*Burgon*, 1810, 2 Camp. 528); but he has been held to act within his authority in varying the terms of a charter-party when such variation was beneficial to the owners (*Holman*, 1878, 5 R. 657). His authority to procure freight only authorises him to do so according to the ordinary terms, and not to vary the usual conditions of carriage; and he has no power to discharge a claim for demurrage, except on payment (*Holman, supra*).

The master may pledge the owner's credit for necessaries or repairs to enable the vessel to proceed on its voyage; but not if there is another agent of the owner's in the port intrusted with the duty of providing the ship (*Gunn*, 1874, L. R. 9 C. P. 331). It was said in this case (per Ld. Esher, then Brett, J., 335), differing from a previous dictum of Dr. Lushington (*The Faithful*, 1862, 31 L. J. P. M. & A. 81; and see Abbott, 13th ed., 139),

that the knowledge of the third party was immaterial; but the jury had found that he could have become aware of the existence of the other agent had he made inquiry. The supplies must be reasonably fit and proper for the ship, or the owners are not bound. In using the word "necessaries," reference is implied not only to the requirements of the ship, but also to the presence or absence of an agent who can provide them (*Gunn, supra*). "Two elements are essential to the captain's authority" to bind the owners to pay for supplies or repay money advanced: "first, that the goods supplied should be such as it must be taken the owner, if present, would as a prudent man have thought necessary; and secondly, that neither the owner nor a recognised agent of the owner able to pay for the supplies, or to obtain them on credit, should have been present at the port" (per Ld. Esher in *Gunn, supra*, 337).

If the master cannot get the necessary supplies or repairs to his ship upon the owners' credit, he may hypothecate the ship and freight, and even the cargo (see BOTTOMRY; RESPONDENTIA). His authority to do this only arises when, owing to inability to communicate with the owners, there is an absolute necessity to borrow money to prosecute the voyage, and personal credit as a source of supply has failed, or, as has been said, "if there be no power to communicate, correspondent with the necessity, the power to raise the money exists" (per Sir J. Jervis, C. J., in *Wallace*, 1851, 7 Moore P. C. 398). In one case it was held that a master acted within his powers in selling the ship when there was urgent necessity (*Robertson*, 1824, 1 Bing. 445). "This principle," said Ld. Gifford, pronouncing the judgment of the Court, "may be clearly laid down, that a sale can only be permitted in case of urgent necessity, that it must be *bonâ fide* for the benefit of all concerned, and must be strictly watched. . . . I agree that it is not sufficient to show that the sale was *bonâ fide*, and for the benefit of all concerned, unless it be also shown that there was urgent necessity for its being resorted to."

The master has a duty at all times of maintaining order and discipline among the crew, and during the voyage he is responsible for the navigation of the ship. In his care and control of the cargo his duty is derived from his agency for the shipowners. His duty is to carry the goods safely from port to port; but the benefit to be derived from his labour in that respect is for the shipper as well as for his own principals. He is bound, therefore, to use all reasonable exertion to preserve the cargo. When a cargo which had suffered damage through collision (for which damage the shipowners were not liable to the shipper) became further deteriorated owing to want of such reasonable exertion on the part of the master, the shipowners were held liable to the shippers for this extra damage (*Notara*, 1872, L. R. 7 Q. B. 225; *Adam*, 1890, 18 R. 153). "The question whether active special measures ought to have been taken to preserve the cargo from growing damage by accident, is not determined simply by showing damage done, and suggesting measures which might have been taken to prevent it. A fair allowance ought to be made for the difficulties in which the master may be involved. . . . All circumstances affecting risk, trouble, delay, and inconvenience must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of an unfortunate result, unless it can be affirmatively made out that he has been guilty of a breach of duty" (per Willes, J., in *Notara, supra*, 237). A master may incur expense for the preservation of the cargo, and charge it against the shipper as particular average. He may become agent for the cargo-owners when the further carriage of the goods in his own ship has become impossible, and may tranship the goods if by so

doing he is able to earn the freight (*Shipton*, 1838, 9 A. & E. 314); or he may even sell the cargo when its preservation until the owners could be communicated with would result in its loss (*Australian Steam Navigation Co.*, 1872, L. R. 4 P. C. 222); or he may employ a third person to take charge of and preserve the cargo (*Hingston*, 1876, 1 Q. B. D. 367).

By the Merchant Shipping Act, 1894 (s. 167), the master of a ship, whether he is also a part owner or not (*The Feronia*, 1868, L. R. 2 Ad. & Ec. 65), has the same rights, liens, and remedies for the recovery of his wages as a seaman has (see SEAMEN); and similar rights, liens, and remedies are thereby given to him for the recovery of disbursements or liabilities properly made or incurred by him on account of the ship. The word "disbursements" means "disbursements by the master which he makes himself liable for in respect of necessary things for the ship, for the purposes of navigation, which he as master of the ship is there to carry out —necessary in the sense that they must be had immediately—and when the owner is not there, able to give the order, and he is not so near to the master that the master can ask for his authority, and the master is therefore obliged, necessarily, to render himself liable in order to carry out his duty as master" (per Ld. Esher, M. R., in *The Orienta*, [1895] P. 49, at 55). A master who has incurred a liability for necessaries to the ship, *e.g.* by granting a bill of exchange, is in the same position in the matter of his lien as he would be in if he had discharged it. Such a liability is equivalent to a disbursement (*The Feronia*, 1868, L. R. 2 Ad. & Ec. 65; *The Fairport*, 1882, 8 P. D. 48; *The Ripon City*, [1897] P. 226). But there can be no lien on freight when there is none on the ship (*The Castlegate*, [1893] App. Ca. 38). In addition to the tradesman's right of retention of goods in his possession for the purpose of putting work on them, no lien is created by the statute in favour of the person who repairs or provides necessaries for the ship (*The Heinrich Bjorn*, 1885, 10 P. D. 44; affd. 1886, 11 App. Ca. 270); and he has no lien at common law (*The Rio Tinto*, 1883, 9 App. Ca. 356). The master has no lien for wages beyond what is given him by statute.

The shipowners, or a majority in interest, may dismiss the master, as they may appoint him. But, in the absence of contrary stipulation, the master is bound to give, and is entitled to receive, reasonable notice before his engagement is terminated (*Green*, 1876, 1 C. P. D. 591). The Merchant Shipping Act, 1894 (ss. 469–474), provides for the suspension or cancellation of a master's certificate in the event of his conviction for any offence. If a ship changes ownership during a voyage, the master remains bound by all the instructions he received from those who appointed him, and is obliged to act in their interests until he receives notice of the change (*Mercantile & Exchange Bank*, 1868, L. R. 3 Ex. 233).

The extent of a master's authority is ruled by the law of the ship's flag.

Shop Hours Regulation Acts.—These are 55 & 56 Vict. c. 62, and 56 & 57 Vict. c. 67, ss. 3, 2.

Shore.—See SEA; SEASHORE.

Short Titles.—An Act of Parliament is cited by its full title. This mode of citation was early found to be cumbrous, and alternative modes of citation were permitted by various statutes.

In 1850, Lord Brougham's Act (13 & 14 Vict. c. 21) permitted the

citation in any Act of a former Act by the regnal year, the statute or session, the chapter, and the section.

Shortly thereafter the practice was introduced of embodying in every Act a section giving a short title by which such Act should be cited for all purposes. This practice increased, but was not universal.

By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 35, it is provided that "in any Act, instrument, or document, an Act may be cited by reference to the short title, if any, of the Act, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed, and where there are more statutes or sessions than one in the same regnal year, by reference to the statute or session as the case may require, and where there are more chapters than one, by reference to the chapter, and any enactment may be cited by reference to the section or subsection of the Act in which the enactment is contained." In this provision the word "statute" is used as equivalent to session, it having been occasionally used in this sense in the earlier English reigns.

Most of the modern Acts provide a short title, and to extend this facility of citation to Acts not so provided, an Act was passed in 1892. That Act, however, was incomplete, and was repealed and superseded by the Short Titles Act, 1896 (59 & 60 Vict. c. 14).

That Act gives a short title to upwards of two thousand Acts, and provides (s. 1) that each of these Acts may be cited by the respective short title.

It also gives collective titles to many groups of Acts, by which titles it provides (s. 2) that these groups may be cited, and, further, that if it is provided in any subsequent Act that such Act is to be cited with any of the said groups, or with any group to which a collective title has been given by any previous Act, the collective title shall be altered so as to include such subsequent Act. It further provides (s. 3) that notwithstanding the repeal of an enactment giving a short title to an Act, the Act may continue to be cited by that short title.

Short titles have been referred to for construction (*Justices of Middlesex*, 1884, L. R. 9 App. Ca. 772), but it seems doubtful whether those given by the Short Titles Act could be used for a similar purpose.

Signature.—See DEEDS, EXECUTION OF.

Silver and Gold Plate.—The Act 6 and 7 Will. IV. c. 69 regulates with microscopic minuteness of detail the standards of gold and silver which alone may be wrought or manufactured in Scotland; the intimation which each goldsmith, silversmith, or plate-worker must give to the Goldsmiths' Incorporation of Edinburgh or the Glasgow Goldsmiths' Company before he may commence business; the marks with which the articles are to be stamped; the assay which they must pass; and the penalties for forging or imitating the proper marks. By 17 & 18 Vict. c. 96, s. 1, there is substituted for the standard for gold wares a provision that Her Majesty may from time to time make an Order in Council allowing any standard for gold wares not less than one third part in the whole. The silver standard prescribed in the Act of William, viz. eleven ounces two pennyweights of fine silver in every pound weight troy, remains unchanged. Secs. 16 and 17 of the Act of William IV. give lists of the articles of gold and silver respectively which are exempt from being stamped. Secs. 25 and 23 and parts of secs. 22 and 19 have been repealed by the Statute Law Revision Acts, but otherwise this Act remains in force. By the Customs

and Inland Revenue Act, 1890 (53 & 54 Vict. c. 8, s. 10), the stamp duties and duties of customs on silver and gold plate were repealed.

By the Revenue Act, 1867 (30 & 31 Vict. c. 90, ss. 1–6), the following excise duties on licences to deal in plate were imposed:—

Every person trading in or selling plate in respect of each place of business—

Where the gold is above two pennyweights and under 2 oz. in weight, or the silver above 5 dwt. and under 30 oz. in weight, £2, 6s. per annum.

Where the gold shall be of the weight of 2 oz. and upwards, or the silver of the weight of 30 oz. and upwards, £5, 15s. per annum.

Hawkers and pedlars, the same duties per weight.

Pawnbrokers dealing in plate and refiners of gold and silver, for each place of business, £5, 15s. per annum.

Makers of watch-cases (33 & 34 Vict. c. 32, s. 4) and dealers in gold and silver lace (30 & 31 Vict. c. 90, s. 4) do not require a licence to deal in these articles.

A goldsmith holding a licence at the lower rate of duty is liable to a penalty if he sells an article as gold which weighs more than two ounces although it does not contain two ounces of pure gold (*Young*, 1877, L. R. 3 Ex. D. 101).

Any person trading in gold or silver plate without a licence is liable to a penalty of £50 (30 & 31 Vict. c. 90, s. 3). Two persons who had got up "watch clubs," and received commission from the licensed dealers on goods sold, were convicted of breach of the Act (*Killick*, [1896] 2 Q. B. 196).

By 36 Geo. III. c. 52, s. 14, legacy duty is not payable in respect of gold or silver plate of which one has just the liferent, without power of disposal.

Single Bills.—Cases and proceedings of any kind coming into the Inner House of the Court of Session, before either of the Divisions, are enrolled in the Roll of the Single Bills, which corresponds to the Motion Roll of the Outer House. They are then usually sent by formal motion to the Ordinary Roll or Summar Roll, to be put out for discussion later on. Simple motions are generally disposed of in the Single Bills, but if they are opposed, and a long discussion is probable, they are usually sent to the Summar Roll. Objections to the competency of a Reclaiming Note or Appeal should always be stated in the Single Bills, but discussion of such objections is frequently reserved till the case comes up for disposal on the merits. (Mackay, *Practice*, i. 546, *Manual*, 288.)

Singular Successors.—A singular successor is one who succeeds to the ownership of heritable estate in Scotland by purchase or adjudication from the last proprietor. His title is singular in the sense that it is limited to the particular subjects conveyed, while he who succeeds by inheritance, whether of line or provision, has a general or universal title to represent his predecessor. On this account an heir or gratuitous disponee takes the estate *tantum et tale* as it stood in his predecessor, subject to all the limitations and burdens, legal or equitable, to which his predecessor was subject. The singular successor, on the other hand, takes the estate free of any personal obligations which attached to his predecessor (except in the case of feus, to be presently noticed). He is bound only by the published conditions which attach to the soil, that is, which appear on the titles as real burdens, or are openly published by possession, as in the case of servitudes (*Tailors of Aberdeen*, 13 S. 226, 2 S. & M'L. 609; Robinson,

i. 296; *Marshall's Tr.*, 15 R. 762; *Gardyne*, 1 Macq. 358, 15 D. (H. L.) 45; *Millar*, 1 Macq. 345, 15 D. (H. L.) 38; *N. B. Rwy. Co.*, 25 R. (H. L.) 47). Thus in a contract of ground-annual the personal obligation to pay the ground-annual does not transmit against a singular successor in the lands, but the original debtor remains personally bound, notwithstanding that he has parted with the property in respect of which the payment is demanded (*Marshall's Tr., cit.*; *Gardyne, cit.*).

In a disposition of subjects held burgage there was a clause binding the disponees and their heirs and singular successors to grant, within six months of acquiring right to the subjects, personal obligations for performance of all the conditions of the titles, including payment of a ground-annual. It was held that the condition of perpetual liability was not a real condition of the right attaching to singular successors by the very fact of becoming proprietors of the subject, and that a singular successor had not by the special terms of the disposition undertaken this liability (*Leslie*, 43 Sc. Jur. 95). A feu is peculiar in this respect, that a condition properly made a condition of tenure of a feudal grant, will be enforceable against a singular successor of either the vassal or the superior personally (Bell, *Prin.* s. 700; *M. of Tweeddale's Trs.*, 7 R. 620; *Hope*, 2 M. 670; *Campbell's Trs.*, 4 M. 50). Whether the original obligant in a feu-contract remains bound after he has parted with the subject is a question of circumstances, depending largely on the wording of the deed (*Burns*, 14 R. (H. L.) 20; *Police Commissioners of Dundee*, 11 R. 586; *Henderson*, 4 M. 691; *King's College of Aberdeen*, 1 Macq. 526, 17 D. (H. L.) 30).

Another point in which singular successors in feus are peculiar is in respect of the casualty or payment which, apart from special stipulation, may be demanded by the superior on the entry of a new vassal. An heir succeeding to the estate pays "relief," which is one year's feu-duty in addition to the sum payable in ordinary course as feu-duty. But a singular successor pays "composition," which is a year's *rent* in addition to the feu-duty. When the feu-charter (or feu-contract) provides for the entry of singular successors at a fixed rate (as a year's feu-duty), the entry is said to be "taxed" (Bell, *Prin.* ss. 715–729) See SUPERIOR and VASSAL.

A singular successor is not bound by a servitude affecting the property unless such servitude has duly entered the titles, or unless the use which it is proposed to set up by prescription, or by missives which do not enter the record, is "capable of being brought under one or other of the known servitudes" (per Ld. Gifford in *Alexander*, 3 R. 156). In judging of such rights it is necessary to ascertain whether the intention of parties was to create a servitude on the property, or merely a personal obligation on the owner, which of course would not transmit against a singular successor (*N. B. Rwy. Co.*, 25 R. (H. L.) 47; *Cowan*, 10 M. 735; *Corbett*, 10 M. 329; cf. *Stewart*, 4 R. 981). See SERVITUDE.

Leases.—The question whether a lease is good against a singular successor of the lessor is one of much importance. It is dealt with in the Act 1449, c. 18, which is as follows: "It is ordained for the safety and favour of the puir people that labouris the ground, that they and all utheris that hes taken or sall take landes in time to cum fra lordes, and hes termes and yeires thereof, that suppose the lordes sell or annally that land or landes, the takers sall remain with their takes unto the ischew of their termes, quhais handes that ever they landes cum to, for siklike maill as they took them for." The effect of this enactment is to make the leases to which it applies real rights, whereas formerly they were only personal rights, and to secure the tenant against the singular successors of the landlord. There

are five conditions to be observed before the Act will apply: (1) the lease, if for a longer period than one year, must be in writing; (2) the subject let must be land or annexed to land; (3) the tenant must be in possession; (4) the lease must have a definite ish and entry; and (5) the rent payable must be expressly stipulated (Hunter, *Landlord and Tenant*, iii. 5. 1). To comment on these points in order: (1) A verbal lease for more than a year, or one constituted by an improbative writing, may be rendered valid *rei interventu* in a question between the tenant and the landlord or his heirs. But such a lease will remain ineffectual against singular successors, without possession (Bell, *Prin.* s. 1189). But a lease for ninety-nine years of a building lot with a cow's pasture was held to be proved by the tenant's acceptance of the advertised terms, followed by *rei interventus* (to wit, building the houses) and possession by occupation for the prescriptive period, and therefore to be good against singular successors of the landlord (*Campbell*, 8 M. (H. L.) 40; see also *Wilson*, 3 R. 527; *Arbuthnot*, Hume, *Decisions*, 785). (2) The subject must be land or its accessory (Ersk. ii. 6. 27). So formerly a lease of shooting was held not to fall under the Act (*Pollock, Gilmour, & Co.*, 6 S. 913), though this decision might not now be repeated. Where the tenant of a farm had the right to cut peats from a moss situated on another part of the estate, and this moss was sold, it was questioned whether the right fell under the Act of 1449 so as to transmit against the singular successor (per Ld. Young in *Duncan*, 21 R. 760). But this has not been the subject of explicit decision. The question has been raised, but not decided, whether an obligation to renew a lease of ninety-nine years at its termination, was good against singular successors under the Act of 1449, the learned Lords holding that the question properly fell to be settled by a future generation (*Campbell*, 8 M. (H. L.) 40). But though the object of the Act was clearly to benefit the poorer agriculturists, the principle is extended to urban subjects also (*Macarthur*, Mor. 15181; *Fraser*, 2 Sh. App. 37). (3) See cases of *Campbell*, 8 M. (H. L.) 40; *Wilson*, 3 R. 527; and *Arbuthnot*, Hume, 785. (4) A tack having no definite time or ish, but to continue till a certain sum be paid to the setter, will be sustained against the setter, but not against "a singular successor" (*Hardies*, 1627, Mor. 15190; *Stewart*, 1631, Mor. 15191). "A tack being let for an elusory tack-duty, and for an endurance of 2400 years, was found not to have the benefit of the Act of Parliament in favour of tenants, and therefore not good against singular successors" (*Alison*, 1730, Mor. 15196: cf. *Scott*, 1772, 3 Pat. 666; *Fraser*, 1762, 2 Pat. 66). (5) See *Wilson*, 3 R. 527; *Skene*, Bell on *Leases*, i. 313; *L. of Aiton*, 1625, Mor. 15167; *Alison, cit.*

Under this Act, when the above-mentioned points have been observed, a lease is good against: (*a*) Purchasers and adjudgers. (*b*) Heirs of entail when the lease is in accordance with the provisions of the entail: the conditions to be observed in granting leases of entailed estate are to be found in the Entail Acts (*q.v.*), but one condition at common law which may be mentioned here as illustrative, is that leases beyond the duration of the grantor's life cannot be granted for a consideration other than rent. Thus leases for a long period, granted by an heir of entail in possession in consideration of a grassum and a small rent, were found reducible by the succeeding heir of entail (*Eliott*, 1 Sh. App. 16; *Queensberry's Exors.*, 2 Sh. App. 54). But see ENTAILS. (*c*) A lease granted by a man in good faith and consistently with his powers of administration is good against his widow taking under her legal or conventional rights (*Laing*, 1827, 5 S. 903). (*d*) A lease granted by an owner whose estate is subsequently forfeited for treason is good against the Crown or its donataries (*Fraser*, 2 Pat. 66). *A fortiori* a

lease is good against the Crown succeeding to the estate as *ultimus hæres*. It was formerly stated that leases were protected by this Act against the superior under ward-holding, and liferent escheat, but not against non-entry. But the two former were abolished (in practice) by 20 Geo. II. c. 50, ss. 1 and 11, and the last by the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94, s. 4, subs. (4)); so no reference is now required to these points.

Other points which have been decided in regard to the rights and obligations of the singular successors of landlords may be stated very briefly. A singular successor is bound by a stipulation in a lease to pay to the tenant at the expiry of the lease the value of houses which were erected prior to his purchase of the property (*Fraser*, 2 Sh. App. 37). A purchaser was held bound by signed articles of set referring to the lease, though the lease contained no reference to the articles (*Macra*, 6 S. 935). Where a tenant had failed to implement a condition of the lease requiring him to put a certain quantity of lime on the land yearly, a singular successor of the landlord was held entitled to claim damages for the neglect in the years after he had bought the estate, but not in the years preceding his purchase (*Hamilton*, Hume, 787). A stipulation in a lease that the tenant was to be allowed a yearly deduction of £5 from the rent for acting as ground-officer, held not binding upon a singular successor who removed the tenant from the situation of ground-officer (*Ross*, 16 S. 1179). On the subject of singular successors to the landlord in leases, see LEASES

Sisting a Mandatary.—See MANDATARY.

Sisting Process.—By the Court of Session Act, 1868 (31 & 32 Vict. c. 100, s. 26), it is enacted "that it shall not be competent of consent of parties to prorogate the time for complying with any statutory enactment or order of Court, whether with reference to the making up and closing of the record or otherwise. Where both parties, or either, desire to stop the progress of a cause, the proper course is to move to have it sisted for a definite time, or until the occurrence of some event which will enable it to be more summarily or effectually brought to a conclusion" (Mackay, *Manual of Practice*, p. 264). The actions which it is competent to sist are usually petitory actions in which the pursuer ought to have taken the preliminary step of establishing his own right or reducing a document upon which the defender's right is based, or where the pursuer should have waited for the conclusion of some other action which is already in dependence or may be raised. It is, however, always in the discretion of the Court to grant or refuse a motion to sist process, and the sist will not be granted unless there is some clear expediency. If the motion is granted, the action does not fall asleep.

It is hardly possible to state general rules, but the following are examples of cases that have been sisted in order that one or other party might bring a *proving of the tenor* (*Officers of Ordnance*, 3 S. 629, N. E. 442)—a *declarator* (*Loudon*, 18 D. 856; *Smellie*, 6 M. 1024)—a *reduction* or *reduction improbation* (*M'Intyre*, 5 M. 526; *Birrel*, 29 Sc. Jur. 56; *Girdwood*, 11 S. 351; *Mason*, 10 S. 555; *Shedden*, 11 D. 1333). In Sheriff Court actions it is not now necessary to move for a sist in order that a reduction of a document may be brought in the Court of Session, for it is provided by the Sheriff Court 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" (*Nivison*, 11 R. 189). Actions have been sisted in order that an eik to an imperfect inventory might be procured (*Bridges*, 11 S. 335); that a judicial factor might be appointed to a trust estate (*Morrison*, 1 R. 116); that an action of relief by the defenders *inter se* might be brought (*Macritchies & Murray*, 5 S. 242, N. E. 226); that an action for bringing all parties into Court might be brought (*Duke of Abercorn*, 7 M. 875); that the arbiter's award in a reference might be issued (*Wilson & Macfarlane*, 25 R. 655). In counter actions for divorce, one was sisted till the other was ripe for judgment (*Brodie*, 8 M. 854). As a rule, an action to enforce a liquid claim will not be sisted to await the issue of one to constitute an illiquid claim (*M'Dougall's Trs.*, 11 D. 1113; *Pegler*, 4 R. 435), unless the illiquid claim is in the immediate course of being liquidated (Ersk. iii. 4. 16; *Munro*, 4 M. 687).

It used to be the practice of the Court to grant a sist when objection had been taken to a document on the ground of *insufficient stamping*, in order that it might be properly stamped (*Hatton*, 11 S. 727). Since the Court of Session Act (31 & 32 Vict. c. 100, s. 41), and the Stamp Act, 1870 (33 & 34 Vict. c. 97, s. 16), superseded by the Stamp Act, 1891 (54 & 55 Vict. c. 39, s. 14), the objection may be obviated in any Court by the party who founds on the document paying into Court the amount of the stamp duty with penalties, and it is probable that a sist on this ground would not now be allowed.

"Where the *relative action* is in dependence in an English or foreign Court, there will be greater difficulty in obtaining a sist (*Phosphate Sewage Co.* v. *Mollison*, 1876, 3 H. L. Sc. App. 77). . . . But where the foreign Court appears to be the more appropriate tribunal for deciding the questions raised, and in particular if the foreign sist was first brought, the Court of Session is in use to sist process, or even to decline to exercise its own jurisdiction (*Wotherspoon*, 9 M. 510)"—Mackay, *Manual*, p. 267. The Court has refused to sist an action on the ground that an *appeal* in a relative action is in dependence (*Phillips* v. *Johnston, Sharpe, & Co.*, 1820, Hume's *Decisions*, p. 17; *Baillie*, 8 D. 1129; *Livingstone*, 20 D. 1231); and even though the actions are related, the Court has refused a sist where expediency is the other way (*Mitchell*, 17 D 228; *Stephen's Tr.*, 33 Sc. Jur. 369; *M'Connochie*, 11 D. 1419).

Where there is another action in dependence raising the same question of law, and likely to be decided sooner, parties may move by joint motion that the later action should be sisted. Either party has a right to get a decision in his own case as soon as possible, so that the Court will not grant the motion except by consent of both parties.

Sisted actions may be revived on recalling the sist, which may be done either on the completion of the proceedings for which it was allowed, or on the failure of the proper party to proceed diligently with them.

[Mackay, *Manual of Practice in the Court of Session*, pp. 264–268; Dove Wilson, *The Practice of the Sheriff Courts*, pp. 61, 259–261; Balfour, *Court of Session Practice*, p. 55; Coldstream, *Procedure in the Court of Session*, p. 21.]

Si sine liberis.—See CONDITIO SI SINE LIBERIS.

Slains, Letters of—This obsolete legal writ, which was in common use two centuries ago in connection with the administration of Scottish criminal law, derived its origin from the primitive conception of crime as an injury done to the individual rather than to the State. Before

the infliction of punishment for the commission of crimes had come to be regarded as a public duty rather than a private right, and while criminal jurisdiction was still in its infancy, it was the custom for the kindred of a murdered man to institute a blood-feud or vendetta against the murderer, which was only expiated by the offender's blood. In course of time the more sophisticated practice arose of the murderer buying off the vengeance of his victim's representatives by making payment to them of a sum of money or other compensation, variously known as Cro, Wergild, or Eric. So inherent in the conception of the crime of homicide was this right on the part of the representatives of the murdered person to exact compensation, or, as it came to be termed, assythment, from the offender, that it continued to subsist concurrently with, and long after the institution of, public prosecution. Logically enough, in view of the origin of their claim, the kindred could not demand an assythment where the murderer suffered execution at the hands of the law, his blood being regarded as a full satisfaction to them, but where the criminal was not put to death they were held entitled to a composition in lieu thereof. In particular, the prerogative of pardon vested in the king as the supreme representative of the public interest, could only be properly exercised by him subject to the rights in this respect of the deceased's kinsmen, and the criminal Courts would not admit any royal remission unless it safeguarded these rights. It accordingly became the practice for persons who had committed homicide, and who desired to secure an effectual pardon from the Crown which would be recognised by the Courts, first to approach the deceased's next of kin and obtain from them a writ stating that their claims had been satisfied. These writs were known as Letters of Slains. They narrated the circumstances of the murder, the remorse of the perpetrator, the payment of the assythment, the forgiveness of the crime and the exoneration of the offender from all civil and criminal action in relation to the murder, and they concluded with a prayer to the Crown to grant a full pardon and remission to the murderer, and to dispone to him his moveable escheat forfeited by the crime. Letters of Slains were properly granted by the principal persons of the four branches of the deceased's next of kin, if known, or by the majority of his next of kin and friends, or by as many of them as were known, so that they might embrace all who could reasonably be regarded as injured by the deceased's death, or entitled to assythment therefor, and who in former times would have pursued a blood-feud against the murderer. Where Letters of Slains were not produced, the king could only grant remission on the prayer of the deceased's kinsfolk otherwise made to him, or subject to a proviso that their satisfaction should be a condition precedent of the pardon taking effect. Such royal remissions were appropriately granted only in cases of unintentional manslaughter, or of homicide without malice aforethought; but this principle was not strictly observed, and the royal prerogative of pardon was frequently abused. Although assythment was also due for other criminal wrongs short of homicide, Letters of Slains were only appropriate to the latter, and royal remissions of less serious crimes did not require such letters. A party who had obtained decree for an assythment was bound, before executing his decree, to deliver, or at least tender, sufficient Letters of Slains to the offender, or, in the case of mutilation or other crimes less serious than murder, sufficient Letters of Reconciliation.

[See article ASSYTHMENT; Kames, *Law Tracts*, 2nd ed., article I., esp. pp. 53–57; *Essays on Anglo-Saxon Law*, Boston, 1876, pp. 262 *seq.*; Bankt. i. pp. 246–248; Balfour, *Practicks*, pp. 516–518; Hume, i. 284–286, ii. 122–124; Alison, i. 91; More's Stair, i. 9. 7 and lviii; Ersk. iv. 4. 105; Bell, *Prin.*

s. 2029; Statutes 1592, c. 157; 1593, c. 173. Dallas gives the form of Letters of Slains at p. 862, and of Royal Remissions at pp. 655–657 of his *System of Stiles.*]

Slander.—See DEFAMATION.

Slander of Title.—A statement concerning title to property which is false, malicious, and the cause of special damage is actionable (*Bruce*, 1898, 6 S. L. T. 110). The law on this subject is, however, more developed in England (Addison on *Tort*, p. 258) than in Scotland, in which country there are few instances of such actions (Glegg on *Reparation*, p. 108). Allegations at sales of auction that the vendor's title is defective furnish the leading examples (*Philip*, 1816, Hume's *Dec.* 865; *Yeo*, 1868, 5 S. L. R. 253; *Gutsole*, 1836, 1 M. & W. 495, 501). A case in which the pursuer, an engineer, complained of defenders having raised an interdict against him in which they claimed the exclusive right of making certain machinery, failed from want of relevant averment of special damage and malice (*Harpers*, 1896, 4 S. L. T. 177). Actions of slander for statements concerning the quality or condition of goods and property are of a similar character. An action was sustained in which the pursuer averred that the defenders in their newspaper had represented that certain buildings of his were in danger of collapsing, that the defender had done so intending to depreciate their value, and that the value had, in fact, been depreciated thereby (*Bruce, supra*). Allegations against the quality of shopkeepers' goods, such as milk (*M'Lean*, 1888, 16 R. 175) and bread (*Broomfield*, 1868, 6 M. 563), have also been regarded as of this character, though in the cases cited the pursuer failed.

Slaughter-Houses; Knacker's Yards.—The establishment, licensing, and regulation of premises for slaughtering cattle and other animals, whether for human food or otherwise, are provided for in several statutes, viz. The Public Health (Scotland) Act, 1897; The Burgh Police (Scotland) Act, 1892; and The Cruelty to Animals (Scotland) Act, 1850; the last named applying only to knacker's yards. As these regulations cover to some extent the same ground, and are in similar, though not identical terms, a precise statement of the law is somewhat difficult. It will be convenient to deal with them as they affect

I. Licensing of Slaughter-Houses, etc.

II. Provision of Slaughter-Houses by local authorities.

I. LICENSING OF SLAUGHTER-HOUSES, ETC.

(*a*) UNDER THE PUBLIC HEALTH ACT, 1897.—This statute, which applies both to the burghal and landward districts, requires that a yearly licence, for which a fee of 5s. may be charged, must be obtained for all premises used as a slaughter-house or knacker's yard, under a penalty of £5. Twenty-one days' notice must be given of application for a new licence, and objectors heard (s. 33).

In addition thereto, all premises established as a slaughter-house or knacker's yard since 1st January 1898, fall under the regulations of the P. H. Act regarding offensive trades, and must receive the sanction of the local authority, under a penalty of £50, and £25 for each day's continuance after conviction. The sanction of the local authority, which must be given by order, after fourteen days' notice and hearing of objectors, does not require renewal. A fee of 40s. is exigible therefor (s. 32 (1), (2)). Such

licence or sanction does not amount to a warrant to commit a nuisance, and does not deprive a person injured of his remedy at common law (*Pentland*, 1855, 17 D. 542).

Appeal.—Appeal may be taken from the resolution of the local authority to the Board, whose decision is final, provided that in a landward district the appeal must be first dealt with by the county council. It is to be observed that in the case of a licence under sec. 33, the right of appeal is given only where a licence is refused to persons carrying on such businesses at the passing of the Act, or where a renewal is refused; while in the case of offensive trades, under sec. 32, any person aggrieved may appeal.

Bye-laws.—The L. A. may make bye-laws for regulating such businesses, which, in addition to a penalty of £5 for each offence, and 40s. for each day's continuance after written notice, may empower a Sheriff to deprive temporarily or permanently any licensee disobeying the same, under a penalty of £25 for disobeying such order; with appeal to the Lord Ordinary on the Bills (s. 32 (4)).

(*b*) Under the Burgh Police Act, 1892.—1. *Slaughter-Houses.*—As the Public Health Act (ss. 171, 190) expressly saves the provisions of the Burgh Police Act, it appears that slaughter-houses within a burgh must conform to the regulations contained in both Acts. By sec. 278 of the B. P. Act, Police Commissioners are empowered to license slaughter-houses within the burgh, the licence remaining in force until revoked or suspended (see *infra*). The penalty for using an unlicensed slaughter-house is £5, and a like penalty for each day's continuance after conviction (ss. 279, 283).

Bye-laws—The Commissioners may make bye-laws for the regulation of such premises, with regard to proper flooring, draining, water supply, etc., under sanction of a penalty of £5, and 10s. for each day's continuance (s. 281). Such bye-laws must be confirmed by the Board and the Secretary for Scotland (s. 318).

Any person convicted of killing or dressing cattle contrary to the Act or bye-laws, may, for a first offence, have his licence suspended for two months; and on subsequent conviction, it may be revoked. Thereafter the Commissioners may refuse to grant him a licence (s. 282).

2. *Knacker's Yards.*—Every place used for slaughtering horses, or deposit of carcases, must be licensed by the Commissioners, such licences being revocable at pleasure. (But note that under the Public Health Act, such licences endure for a year.) The penalty for contravention is £10, and £2 for each day's continuance (s. 285). But the fact that a knacker has on emergency kept the carcase of a horse for a night in unlicensed premises will not justify a conviction (*Simpson*, 1896, 2 A. 63). It is also an offence, under like penalties, to convey any dead horse within a burgh, unless sufficiently covered (s. 285); and by sec. 381 (5) a penalty of 40s. is imposed on anyone slaughtering or dressing cattle in any public place, except when for public safety or otherwise an animal ought to be killed on the spot.

Bye-laws.—The Commissioners are empowered to make bye-laws for inspection and regulation of knacker's yards; and also for reducing their noxious effects (s. 316 (*b*) (1) (6)). Such bye-laws must be confirmed as above.

(*c*) Under the Cruelty to Animals (Scotland) Act, 1850.—In addition to the licences already mentioned, every knacker's yard (whether in burghal or landward districts) must be licensed by the Sheriff of the county, in conformity with the above-named Act. It provides that the Sheriff must be satisfied of the suitability of the licensee, but it imposes no

conditions regarding the premises. Such a licence, for which a fee of 5s. is exigible, does not require renewal. The licensee is bound to exhibit over the door of his premises a notice, "Licensed for slaughtering horses, pursuant 13 & 14 Vict. c. 92," under penalty of £5, and a like penalty for each day's failure (s. 3). He must also enter in a book a description of the colour, marks, and gender of every beast received by him, and must produce or permit inspection of such book when required by magistrate's warrant, under penalty of 40s. (s. 4). And no licensee under the Act may at the same time be licensed, or trade as a horse-dealer; if he obtain both licences, the latter is declared void (s. 5).

II. Provision of Slaughter-Houses by Local Authorities.

(*a*) In Burghs.—The Burgh Police Act empowers Police Commissioners to provide slaughter-houses, within or without the burgh, to borrow therefor upon the security of the burgh general assessment, the dues levied for use of the slaughter-house and ground, or any of them (s. 278). It would seem that they must grant consent *qua* local authority, to the establishment of such premises, under secs. 32 and 33 of the Public Health Act.

Where they have provided slaughter-houses out of the police or other funds, they may make repayment out of the burgh general assessment, or moneys borrowed on security thereof; and may maintain slaughter-houses, and pay annual burdens thereon, out of any funds under their charge, if the dues levied be insufficient (*ib.*).

Where the Commissioners have made such provision, no person may slaughter or dress carcases except in such slaughter-house (unless for his own consumption), under penalty of £5; the dues chargeable, in case of difference, to be fixed by the Sheriff, whose decision is final. To prevent evasion, all carcases slaughtered within two miles of a burgh elsewhere than in a licensed slaughter-house, are chargeable with the current dues; and where before the Act, or within one year thereafter, any burgh has erected slaughter-houses, no other may be erected within two miles, unless with consent of the Commissioners or within another burgh (s. 284).

(*b*) In Counties.—Similar powers are given by the Public Health Act to local authorities in landward districts to provide and maintain slaughter-houses, either within or without their district, and to borrow therefor on security of the public health general assessment, the slaughter-house dues, and of the ground. Two or more local authorities may combine for this purpose (s. 34). In this case, as in that of burghs, it would appear that the licence and sanction required by secs. 32 and 33 should be obtained, in order that persons interested may have an opportunity of stating objections to the establishment of such premises.

Inspection.—The local authority and their officers are empowered to enter all slaughter-houses and knacker's yards, for purposes of inspection; and the medical officer of health of every burgh must report twice yearly to the Commissioners on the sanitary condition of all slaughter-houses therein (B. P. Act, s. 280; P. H. Act, s. 33 (6)).

The powers of the Board of Agriculture and of local authorities under the Contagious Diseases (Animals) Acts are not affected by the Burgh Police Act (s. 286).

Reference may be made to the Markets and Fairs Clauses Act, 1847, which contains certain regulations regarding slaughter-houses, where that Act has been adopted (ss. 17–20).

[MacDougall and Murray, *Handbook of Public Health*; Irons, *Burgh Police Act.*]

Small Debt Court (Sheriff).

I. Jurisdiction.
II. Conduct of Proceedings:
Proceedings, Summary.
Parties, how represented.
Court Days and Circuit Courts.
III. Competent Actions:
Value Limit.
Remitting to and from Ordinary Court.
IV. Procedure:
1. Ordinary Actions:
Summons.
Citation.
Arrestment.
Counter Claims.
Sisting Parties.
Witnesses.
Hearing.
Decree and Judgment.
Reponing against Decree in Absence.
Rehearing after Absolvitor in Absence.
Extract of Decree.
Execution.
Poinding and Sale.
Imprisonment.
2. Multiplepoindings.
3. Forthcomings.
4. Sequestrations.
5. Ejection.
6. Employers and Workmen Act, 1875.
(*a*) Workmen.
(*b*) Apprentices.
V. Appeal.

The Acts regulating the Sheriff Small Debt Court are the Small Debt Act of 1837, 1 Vict. c. 41 (as amended by the Act of 1853, 16 & 17 Vict. c. 80, s. 28, and 44 & 45 Vict. c. 33, s. 3), and the Small Debt Amendment Act of 1889, 52 & 53 Vict. c. 26.

I. Jurisdiction.

In the Small Debt Court the Sheriff has all the jurisdiction of the ordinary Sheriff Court, but exercises it according to the forms and with the additional facilities provided by the Small Debt Acts (see *Scott*, 1846, 5 Bell's A. C. 126; *Fraser*, 1867, 6 M. 170; *Wilson*, 1878, 5 R. 981; *Massie*, 3 S. L. T. No. 450). The only limit to the jurisdiction, as compared with that of the ordinary Court, is a value one. The debt or demand which can be sued in the Small Debt Court, or, in a multiplepoinding, the fund *in medio*, must not exceed the value of £12, exclusive of expenses and fees of extract: and the pursuer in all cases is held to have passed from and abandoned any remaining portion of any debt or demand beyond the sum actually concluded for (1 Vict. c. 41, s. 2; 16 & 17 Vict. c. 80, ss. 26, 28). By the

Act of 1889 the jurisdiction was extended by giving the Sheriff power to grant orders for the delivery of corporeal moveables, the value of which must be proved to the satisfaction of the Sheriff not to exceed £12, at the instance of any person claiming to be the owner or to be entitled to the possession, which is unlawfully withheld, of such moveables; or, where delivery is impossible, or where the value is alternatively concluded for, the Sheriff may give decree for their value to an amount not exceeding the sum of £12 (52 & 53 Vict. c. 26, s. 2). The Act of 1837 gave the power to prosecute for statutory penalties in the Small Debt Court, but this has been taken away (44 & 45 Vict. c. 33, s. 3).

Certain defenders not subject to the jurisdiction of the ordinary Sheriff Court are amenable to that of the Small Debt Court. Where the summons in any small debt case concludes against two or more defenders, and such defenders reside in different counties of Scotland, the Sheriff of the county in which one or more of such defenders reside may, on the motion of the pursuer, and on being satisfied that such course is expedient, grant warrant for the summons to be issued against any or all of the defenders to appear and answer at such time and place as he may appoint; and all such defenders become thereupon amenable to his jurisdiction (Act of 1889, s. 3). There is, however, no power of remitting to the Court of another sheriffdom, however expedient it may be to do so.

The provision of the Sheriff Court Act of 1876, whereby a person carrying on a trade or business, and having a place of business within a county, is subject to the jurisdiction of the Sheriff thereof in any action, notwithstanding that he has his domicile in another county, applies also to the Small Debt Court (39 & 40 Vict. c. 70, s. 46; Act of 1889, s. 5).

In such a case it is in the power of the Sheriff, on sufficient cause shown, to remit the case to the Court of the defender's domicile in another sheriffdom (*ib.*).

II. Conduct of Proceedings.

Proceedings, Summary.—The proceedings are conducted summarily. The only documentary pleading is the summons, which may be written or printed, or partly written and partly printed (Act of 1889, s. 5; Sheriff Court Act, 1876, s. 7). No record of the evidence is kept. The only record of the proceedings is contained in a book kept by the sheriff clerk, wherein all cases are entered, setting forth the names and designations of the parties, and whether present or absent at the calling of the case, the nature and amount of the claim and date of giving it in, and the mode of citation. The several deliverances or interlocutors, if any, and the final decree, with the date thereof, in each case are recorded in the book, which is signed at the conclusion of each Court day by the Sheriff (Act of 1837, s. 17). A roll of the cases is made up by the sheriff clerk, and must be exhibited to the public in some patent part of the Court-house at least one hour previous to, and continue there during the whole of, the sitting (*ib.*). The table of fees must be hung up in the Court-room during every sitting, and at all times in the sheriff clerk's office (*ib.* s. 33).

Parties, how represented.—Any party may now appear by or with a duly qualified agent (Act of 1889, s. 8) without first obtaining the leave of the Sheriff, which was formerly necessary. The Sheriff may award reasonable remuneration not exceeding five shillings an hour to such agents in giving expenses (*ib.*). A notary public may appear as agent (*Milne*, 1888, 15 R. 460).

At common law a party, if he so chooses, may appear by himself, and

by statute he may be represented by one of his family or by such person, not being an officer of Court, as the Sheriff may allow (Act of 1837, ss. 14 and 15).

Court Days and Circuit Courts.—There are no statutory dates for Court days. These may be fixed and adjourned at convenience (Act of 1837, s. 15; 1 & 2 Vict. c. 119, s. 12; *Weatherstone,* 1860, 3 Irvine, 589).

In addition to the ordinary Small Debt Courts, Circuit Courts for the hearing of small debt cases are held for sub-districts (Act of 1837, s. 26) of sheriffdoms on various occasions, in different places, throughout the year. The times and places of such Circuit Courts are regulated by the Act of 1837, s. 23, and may be altered, or the Courts discontinued, as expedience or necessity dictates (*ib.*, s. 24). They must be held either by the Sheriffs or their Substitutes; and by 16 & 17 Vict. c. 80, s. 46, each Sheriff must, once in the year, go on the Small Debt Circuit in use to be held by the Sheriff-Substitute. Subject to the power of adjourning, the Sheriff or Substitute must remain at the place of the Circuit Court till all cases ready for hearing are disposed of (Act of 1837, s. 23). The various districts for Circuit Courts are fixed, and may be altered, in terms of the Act of 1837, s. 26. All cases must be brought before the ordinary Small Debt Court, or any Circuit Small Debt Court within the jurisdiction of which the defender may reside, or to the jurisdiction of which he may be amenable (*ib.*); that is to say, the defender may in the option of the pursuer, be convened either in the principal or in the circuit Court (*M'Gregor*, 1868, 1 Couper, 92).

If there are in one case different defenders amenable to different jurisdictions, or if in any case the Sheriff, on cause shown, thinks it expedient, he may, on application by the pursuer, made either verbally in open Court or by writing lodged with the sheriff clerk, order the summons to be issued in and the case brought before either his ordinary Small Debt Court or any of his Circuit Courts as may appear most convenient (Act of 1837, s. 26).

Where parties fail to appear by themselves or properly represented, decree is given against them unless a sufficient excuse for delay is stated; on which account, or on account of the absence of witnesses, or any other good reason, it is always competent to the Sheriff to adjourn any case to the next or any other Court day (*ib.*, s. 15). Where the ends of justice and the convenience of the parties require it, the Sheriff may remove the further hearing of any case from his ordinary to any of his Circuit Courts or *vice versâ*, or from one Circuit Court to another, or to any diet of his ordinary Court (*ib.*, s. 27), or to any other time or place specially appointed (*ib.*; *Weatherstone*, 1860, 3 Irvine, 589).

III. Competent Actions.

Value Limit.—All claims for payment of money which would be competent in the ordinary Court are competent in the Small Debt Court, provided the sum sued for does not exceed £12 (Act of 1837, s. 2, Sched. A, No. 1). Actions for delivery of corporeal moveables not exceeding £12 in value are also competent (Act of 1889, s. 2, Sched. A).

The criterion by which it is judged whether a pecuniary action is within the £12 limit is the amount which is sought to be recovered in the action at the date of raising it. If the sum sued for is more than £12, it may be restricted, the pursuer being held to have passed from and abandoned any portion of his claim over and above that amount. But where such a sum has been restricted and further sums have been disallowed by the Sheriff, these latter are deducted, not from the sum so restricted, but from

the sum originally sued for (*Dalglish*, 1883, 20 S. L. R. 412). Separate claims on different grounds against one defender, though amounting together to more than £12, are competent if made in separate actions (*Fraser*, 1870, 42 Scot. Jur. 396). If the sum sued for is itself not over £12, the fact that the claim, if allowed, infers liability for a larger amount does not make the action incompetent (*Caldwell*, 1876, 3 R. (J. C.) 31; Guthrie's *Select Cases*, p. 417). The expenses of raising and carrying on the action are not taken into account in computing the value of the claim.

In the case of actions for the delivery of corporeal moveables, it is to be noticed that the value must in all cases be proved to the satisfaction of the Sheriff (Act of 1889, s. 2). Ordinary legal proof of value is necessary whether the case be defended or not. Proof may be by admission of the defender (parole is sufficient), or by the sworn testimony of witnesses, or by report on remit from the Sheriff; but there is nothing empowering the Sheriff to satisfy himself with anything less than ordinary legal proof.

Remitting.—In any case before the ordinary Court concluding for a sum not greater than £12, or where, if concluding for more, the sum has by interim decree or otherwise been reduced, previous to the closing of the record, so as not to exceed £12, the Sheriff may, with the pursuer's consent, remit the case to the Small Debt Court, either on his own motion or on that of any party in the cause, and the case proceeds as if it had originated there (Act of 1837, s. 4; *Philip*, 1868, 1 Coup. 87). The pursuer may refuse; but if he does so, the Sheriff may decline to allow him in the ordinary Court expenses greater than he could have recovered in the Small Debt Court (*ib.*, s. 36). The defender may appeal to the Sheriff against any such remit (*ib.*, s. 4). There is no similar power of remitting in the case of actions for delivery of moveables.

Any case in the Small Debt Court which the Sheriff considers unfitted, in consequence of its special circumstances or of any difficulty in point of law, for summary trial, may be remitted to the ordinary Court. It is sufficient to effect this that the Sheriff should order any of the pleadings to be reduced to writing. Every case in which such an order has been made must thereafter be conducted according to the ordinary forms and proceedings of the ordinary Court, as if it had originated there (*ib.*, s. 14).

In addition to these ordinary petitory actions, actions of multiplepoinding and furthcoming and sequestrations for rent are competent.

Actions under the Employers and Workmen Act of 1875 are competent where the sum claimed does not exceed £10, and, in the case of apprentices, where no premium is paid or where it is under £25 (38 & 39 Vict. c. 90).

IV. Procedure.

I. Ordinary Actions.—*Summons.*—The summons is in the form given in Sched. A of the Act of 1837. It contains a warrant to arrest upon the dependence, and states shortly the origin of the debt or ground of action (*ib.*, s. 3). Whenever possible, the date of the cause of action, or, where the action is founded on an account, the last date in the account, must be inserted (Sched. A). The ground of action must be relevantly set forth, though not necessarily in detail (*Glasgow and South-Western Railway*, 1855, 2 Irv. 162; *Mowat*, 1856, 2 Irv. 435; *Cox*, 1877, 4 R. 8; *Aitken*, 1855, 2 Irv. 156). If it is an account that is sued for, a copy of it must be delivered to the defender (Sched. A).

Where the action is for delivery of moveables, the subjects sued for are enumerated in a list annexed to the summons; the ground of action is shortly specified, and whenever possible the date of its occurrence is given

(Act of 1889, Sched. A). The conclusion for delivery may be combined with an alternative one for the value of the subjects, and in any case where delivery has become impossible, decree may be given for the value (*ib.*, s. 2).

In the event of the summons being lost or destroyed, a copy of it, proved in the action to the satisfaction of the Sheriff before whom the action is depending, and authenticated in such manner as he may require, may be substituted (*ib.*, s. 5).

The provisions of the Sheriff Court Act of 1876 with regard to amendments in the ordinary Court have been adopted in the Small Debt Court (*ib.*, s. 5; Act of 1876, ss. 13 and 24). See AMENDMENT OF RECORD.

The table of fees in use in the Small Debt Court must be printed on the summons; and the sheriff clerk, if he fail to see that this is done before issue of a summons, may be fined (Act of 1837, s. 33).

Citation.—Except in the respects undernoted, citation in the Small Debt Court is regulated by the rules of the ordinary Sheriff Court (Act of 1889, s. 5; Sheriff Court Act, 1876, s. 12). The defender is summoned to appear at the Court and on the date specified in the summons, which date must not be sooner than the sixth day subsequent to the citation. The fact that citation has been duly made may be established either by an execution or by the sworn testimony in Court of the officer, or, where postal, in terms of the Postal Citation Act, 45 & 46 Vict. c. 77; and all citations given by an officer alone without witnesses, and the executions thereof subscribed by such officer, are good and effectual (Act of 1837, s. 3; 34 & 35 Vict. c. 42, s. 4). For forms of citation and execution, see Act of 1837, Sched. A. Where citation is by officer, it may be given by any sheriff-officer of any county without the necessity of any indorsation (Act of 1889, s. 11).

In the case of a defender refusing access or concealing himself, or where he has within forty days removed from the premises occupied by him, leaving his whereabouts unknown, it is not sufficient for the officer to affix the citation to the gate or door, or leave it with an inmate. He must, in addition, send in a registered letter a copy of the summons, complaint, decree, or other writ to the address which, after diligent inquiry, he may deem most likely to find the defender, or to his last known address. The execution of such a citation must state that the officer endeavoured to effect service at the defender's last known dwelling-place, and the circumstances that prevented it, and must be accompanied by the Post-Office receipt for the registration (Citation Amendment (Scotland) Act, 1871, 34 & 35 Vict. c. 42, s. 3).

Arrestment.—The summons contains a warrant to arrest upon the depending action (Act of 1837, s. 3). Any sheriff-officer of any county may execute the warrant without the necessity of any indorsation (Act of 1889, s. 11), and no witness of the execution is necessary (Act of 1837, s. 3). All arrestments cease and determine after the expiry of three months from their date, without the necessity of any decree or warrant of loosing, unless they are renewed by a special warrant or order, or unless an action of furthcoming or of multiplepoinding has been raised, in which case they subsist till the termination of such action (Act of 1837, s. 6). Arrestments may be loosed by finding caution to his satisfaction in the hands of the sheriff clerk, or by consigning with him the amount sued for, with an additional sum of five shillings for expenses in actions for sums below five pounds, and ten shillings in cases of higher amount (Act of 1837, s. 8).

Wages cannot be arrested on the dependence (8 & 9 Vict. c. 39).

Counter Claims.—A copy of any counter claim which the defender means

to plead must be served on the pursuer at least one free day before the day of appearance, otherwise it cannot be heard or allowed without the pursuer's consent (Act of 1837, s. 11).

Sisting.—Where a pursuer dies or assigns his right as pursuer, or is divested of his estates under the Bankruptcy or Cessio Acts, his representatives, assignee, or trustee may, if the Sheriff sees fit, be sisted in his stead. The representatives, assignee, or trustee make verbal application to be sisted in Court; and the Sheriff, if he grants it, writes on the original summons the names and designations of the applicants and the character in which they are sisted (Act of 1889, s. 4).

So where a defender dies or is divested of his estates under the Bankruptcy or Cessio Acts, his representatives or trustee may in like manner be sisted in his stead.

Witnesses.—The summons contains warrant to cite witnesses, and, the proceedings being summary and adjournment granted only on cause shown, witnesses must attend the first calling. Witnesses duly cited are compelled to attend on pain of a fine not exceeding forty shillings for failure; and letters of second diligence may be issued to compel their attendance. A witness must be cited on a citation of at least forty-eight hours; and a warrant for citation is good all over Scotland, provided that, if citation is made in any county other than that in which it was issued, it must be indorsed by the sheriff clerk of that other county (Act of 1857, s. 12). No witness is necessary to the citation (*ib.*, s. 3; 34 & 35 Vict. c. 42, s. 4). Citation of witnesses may of course be postal (45 & 46 Vict. c. 77).

Hearing.—At the hearing, parties are heard *vivâ voce*, and where evidence is necessary the witnesses are examined on oath in the ordinary way. The parties themselves may be put on oath in case of oath in supplement being required or a reference being made, and if the Sheriff sees cause he may remit to a person of skill to report. Upon special cause shown, a remit may be made to a competent person to take and report in writing the evidence of any witness who may be unable to attend. But of all these proceedings no record is kept (Act of 1837, s. 13).

Decree and Judgment.—The judgment takes the form of an order which is minuted in the book of causes kept by the sheriff clerk, setting forth what sum of money must be paid, or the delivery that must be made, or absolvitor or dismissal, as the case may be, with the amount of expenses, if any (Act of 1837, s. 13); and such order is the authority to the sheriff clerk to issue the decree.

Where the Sheriff finds it expedient to make avizandum with the cause, with a view to subsequently giving final judgment thereon, he may pronounce decree on any day that he thinks fit, without requiring parties to attend, but the day must not be later than seven days from the hearing of the cause (see *Paterson*, 1895, 22 R. (J. C.) 45; Act of 1889, s. 10); or, where it is inconvenient for him to pronounce decree personally, he may communicate it to any other Sheriff of the sheriffdom, who may pronounce it for him (*ib.*).

The Sheriff may, if he think proper, direct the sums found due to be paid by instalments, weekly monthly or quarterly, according to the circumstances of the party found liable, and under such conditions as he may think fit (Act of 1837, s. 18). Where the debt sued for is such that decision may be pronounced for instalments to become due, they may be awarded for any period not exceeding twelve months (Act of 1889, s. 9).

The scale of expenses is regulated by the Act of 1837, s. 32. The expenses may include personal charges if the Sheriff think fit (*ib.*, s. 13);

and also, if he think fit, the Sheriff may decern for expenses in favour of an agent to the extent of his interest therein (Act of 1889, s. 12).

Reponing against Decree in Absence.—Where a decree has been pronounced in absence of a defender (*i.e.* where, having been duly cited, he has failed to appear either personally or properly represented—Act of 1837, s. 15), he may consign the amount of expenses decerned for, and a sum of ten shillings to meet further expenses, and thereupon obtain from the sheriff clerk a warrant sisting execution till next Court day. This warrant contains authority for citing the other party and witnesses and havers, is served on the other party in like manner as the summons is served on the defender, and, this having been done, is authority for the case being heard; and the Sheriff has no option but to rehear it (per Ld. Trayner, *Oliver*, 1898, 36 S. L. R. 62). This warrant can be issued at any time if no charge has followed on the decree; but in the event of a charge having been given, then only if no implement of the decree has followed thereon (see DECREE IN ABSENCE; REPONING), and provided no greater period than three months has elapsed from the date of the charge. The expenses which have been awarded and consigned are always paid over to the other party unless the Court specially orders otherwise (Act of 1837, s. 16).

Where a defender has appeared at the first calling, but failed to appear at an adjourned diet, and decree has been taken, there is a conflict of opinion as to whether the decree should be held to be one in absence or by default. Ld. Inglis and Ld. Deas thought it a difficult and open question (*Rowan*, 1863, 4 Irvine J. C. 377). Ld. Mure (*Worral*, 1885, 13 R. (J. C.) 4) and Ld. Wellwood (*M'Neil*, 1891, 28 S. L. R. 599) have held that it is a decree by default, and therefore final; while Ld. Trayner and Ld. Kyllachy have given opinions that it is a decree in absence, and that rehearing as above is therefore competent (*Montgomery*, 1891, 18 R. (J. C). 25). The determining consideration appears to be whether or not there has been litis contestation; if there has, it is a decree by default; and if not, a decree in absence (*Oliver*, 1898, 36 S. L. R. 62).

There is also a difference of opinion as to the competency of reponing more than once. In some sheriffdoms it is allowed a second time, in the discretion of the Sheriff, on strong cause shown; in Lanarkshire it has been held incompetent (*Harris*, 1877, Guthrie's *Select Cases*, 419).

Rehearing after Absolvitor in Absence.—Absolvitor in absence is granted where the pursuer fails to appear, either personally or properly represented (Act of 1837, s. 15). It is competent, however, for the pursuer, at any time within one month thereafter, to consign the sum of expenses awarded in the decree of absolvitor, and a further sum of five shillings to meet further expenses, with the sheriff clerk, and obtain from him a warrant to cite the defender and witnesses for both parties, and this warrant is authority for having the case reheard. Unless ordered otherwise by the Court, the expenses of the decree of absolvitor are paid over to the other party (Act of 1837, s. 16). As to whether absolvitor in absence at an adjourned diet is properly a decree in absence or by default, see *supra*, *Reponing against Decree in Absence.*

Extract of Decree—The decree, stating the amount of expenses found due, and containing a warrant for arrestment and for poinding and imprisonment when competent, is written or printed on the summons, conform to Sched. (A), No. 7, of the Act of 1837. This decree and warrant, being signed by the sheriff clerk, is sufficient authority for instant arrestment, and also for poinding and sale and imprisonment, where competent, either after the elapse of ten free days from the date of the decree, if the party against

whom it has been given was personally present when it was pronounced (see *Shiell*, 1871, 10 M. 58), or, if he was absent, or present only by representative, after a charge of ten free days (Act of 1837, s. 13).

The power to open lockfast places is implied in the decree (Act of 1889, s. 7).

Any party to a cause or any claimant in a multiplepoinding, or the agent of any such party or claimant, may, on payment of a fee of one shilling, obtain from the sheriff clerk an extract of the decree pronounced in the cause, to the extent of his interest therein (Act of 1889, s. 12).

Execution.—No witness is necessary to a charge on a decree (Act of 1889, s. 11). A charge is always necessary, even if not so originally, where a year has elapsed from the date of the decree without its being enforced; and where a charge is originally necessary, and a year has elapsed from the date of the charge, the decree cannot be enforced without a new charge (Act of 1837, s. 13).

Where any person has acquired right to an extract of a decree by assignation or otherwise, he may present it to the sheriff clerk, indorsed with a minute in terms of Sched. 9 of the Personal Diligence Act, 1838, and obtain authority to execute it (Act of 1889, s. 5; 1 & 2 Vict. c. 114, s. 12).

All charges on decrees when executed by a sheriff-officer may be executed, without the necessity of any indorsation or warrant of concurrence, by any officer of any county (Act of 1889, s. 11, repealing Act of 1837, s. 19).

The Inferior Courts Judgments Extension Act, 1882, provides for the enforcing of small debt decrees outwith Scotland (45 & 46 Vict. c. 31).

Arrestment in execution proceeds as in the case of an ordinary decree, and the same things may be arrested. Arrestments in the execution, like arrestments on the dependence, cease and determine on the expiry of three months from their date (Act 1837, s. 6; *ib.*, Sched. (A) 7).

Poinding and Sale.—Poinding and sale is carried out by the officer in a summary way. He gets the effects poinded duly appraised (on oath, *Le Conte*, 1880, 8 R. 175) by two persons, who may also be witnesses to the poinding. An inventory of the effects poinded is given to the owner thereof, and the sale is carried out not sooner than forty-eight hours thereafter, either by removing the effects to the nearest town or village, or if the poinding takes place in a town or village, then at the most public part thereof. The sale must take place between eleven o'clock forenoon and three o'clock afternoon, and previous notice of at least two hours must have been given by the crier. The Sheriff may, either by general regulation or by special order, if he think fit, appoint a different hour or place for the sale, or a longer or different kind of notice to be given of the time of selling. Any surplus of the price obtained which may be over after satisfying the amount and expenses decerned for and the expenses of the poinding is returned to the owner of the effects sold, or if the owner cannot be found, is consigned with the sheriff clerk. If the effects should not be sold, they are delivered over to the creditor at their appraised value to the extent of satisfying the sum and expenses decerned for, and the expenses of the poinding. In every case, either of sale or of delivery, a report of the proceedings must be made to the sheriff clerk within eight days thereafter (Act of 1837, s. 20).

If any person secretes, or carries off, or intromits with any poinded effects *in fraudem* of the poinding creditor, he is liable to summary punishment by fine or imprisonment, as for contempt of Court, either at the instance of the private party, with or without the concurrence of the

fiscal, or at the fiscal's instance, or *ex proprio motu* of the Sheriff, in addition to the ordinary civil liability (*ib.*).

Imprisonment.—The decree and warrant, being signed by the sheriff clerk, is sufficient authority for imprisonment where competent (Act of 1837, s. 13). It is therefore unnecessary to go to the Sheriff for any further warrant. It is necessary, however, before the decree and warrant can be followed by imprisonment, that ten free days shall have elapsed from the date of the decree if the party against whom it was given was personally present when it was pronounced, or if he was not so present, that there should have been a charge of ten free days (*ib.*).

2. Multiplepoinding.—A summons of multiplepoinding may be raised in the Small Debt Court in a case where a person holds a fund or subject which does not exceed the value of £12, and which is claimed by more than one person (Act of 1837, s. 10). The summons is raised in the Court to the jurisdiction of which the holder of the fund *in medio* (which is practically always a sum of money) is amenable, and is in the form of Sched. E annexed to the Act of 1837. The parties other than the raiser, who may be the holder of the fund or one of the claimants, are cited in the manner directed to be followed in actions of forthcoming under the Act of 1837 (see *infra*). If the Sheriff thinks that this has not secured sufficient intimation of the action, he may order such further intimation or publication as he may think proper, by advertisement in any newspaper or otherwise. In order that all parties may have an opportunity of lodging their claims, no judgment preferring any party to the fund *in medio* can be pronounced at the first calling of the case. The claims when lodged must be in the form provided by Sched. E of the Act of 1837, and the case is thereafter tried and determined like any ordinary action in the Small Debt Court (Act of 1837, s. 10).

3. Forthcoming.—The action of forthcoming is competent in the Small Debt Court where the sum sought to be recovered under the forthcoming does not exceed £12. The arrestee and the common debtor are summoned according to the form in Sched. D of the Act of 1837 to appear at the Court of the county in which the arrestee resides, not sooner than six days after citation. Double this time must, however, be allowed in the event of the common debtor (in the case of a multiplepoinding, *supra*, it will be a claimant or claimants) not being resident within the county in which the action is brought. The arrestee and the common debtor must be cited for the same Court day. By bringing the action in the Small Debt Court, the pursuer is not held to have restricted the debt due by the common debtor to the amount sued for in the action (Act of 1837, s. 9). Where a sale of goods or effects arrested is ordered by the Sheriff, the course of proceeding to be followed is the same as in the case of poinding and sale (*supra*, Act of 1837, s. 20). In other respects, the action is simply an ordinary action of Forthcoming (*q.v.*), heard and determined in the summary manner provided for actions in the Small Debt Court.

4. Sequestration.—Sequestration for recovery of rent is competent in the Small Debt Court provided the rent or the balance of rent sued for does not exceed £12, and may be for rent past due, or in security (Act of 1837, s. 5; 16 & 17 Vict. c. 80, s. 28). The form of summons and warrant of sequestration is given in the Act of 1837, Sched. B. The officer, when he executes the warrant, gets the effects appraised by two persons, who may also be witnesses to the sequestration, and an inventory of the effects appraised must be left with the tenant, with the citation. The summons contains a warrant to secure the effects, if need be, till the further orders of

the Court. Should the tenant improperly remove any of the effects, warrant may be granted to carry them back. A minute—which must state circumstances sufficient to show improper removal (*Johnston*, 1890, 18 R. (J. C.) 6)—craving such warrant must be put on the summons (Sellars' *Forms*, vol. i. p. 355). An execution of the citation and sequestration, with the appraisement of the effects, must be returned to the sheriff clerk within three days. On hearing the application, the Sheriff may either recall the sequestration in whole or in part if improper, or, if the action is one for rent past due, give decree for the rent found due, and grant warrant for the sale of the effects. If the sequestration is in security, it is usual to continue the case till after the date at which payment of the rent is due, to give an opportunity of payment. The sale is carried out in like manner as in the case of poinded effects (Act of 1837, s. 20). All sequestrations must be registered (30 & 31 Vict. c. 42, s. 7).

If after sequestration the tenant pays the rent claimed and the expenses, or consigns the rent with £2 to cover expenses, in the hands of the sheriff clerk, the sequestration is *ipso facto* recalled. In the one case the clerk writes "payment made" on the back of the warrant. In the other he writes the words "consignation made," and the fact is intimated to the sequestrating creditor by an officer of Court. In both cases the sheriff clerk must sign the writing (Act of 1837, s. 5).

5. Ejections.—Where a decree for rent has been obtained in the Small Debt Court, and a sale under the decree of the tenant's effects ordered (it matters not whether the sale be carried out or not), and the officer charged with executing, or who executed, the sale reports to the Sheriff that the premises for which the rent is owing have been displenished, the landlord may obtain a warrant to eject the tenant and relet the premises. Notice of the diet at which the application for the warrant to eject is to be heard must be given to the tenant at least forty-eight hours beforehand, and may be given by registered letter addressed to the tenant's last known address. After hearing the application, the Sheriff may pronounce any order as to ejection, reletting, expenses, security or otherwise that he may think just. Where warrant to relet is granted, the rent accruing thereafter is not exigible from the tenant except for such period as he may continue to occupy the premises (Act of 1889, s. 6).

6. Proceedings under Employers and Workmen Act, 1875.—(*a*) *Workmen.*—The powers given to the Sheriff in his ordinary Court by this Act may be exercised in the Small Debt Court, provided that in any dispute no jurisdiction is exercised where the amount claimed exceeds £10. No order can be made for the payment of any sum exceeding £10, nor can security to any greater amount be required from any defendant or his sureties (38 & 39 Vict. c. 90, s. 4). The proceedings, except that no notice is required of any set off or counter claim, are the same as in an ordinary action in the Small Debt Court (A. S., 29th January 1876), and all decrees and orders under the Act may be enforced in the same way and under the same conditions as any other decree or order in the Small Debt Court (38 & 39 Vict. c. 90, s. 14). The Sheriff's decision is final (*Wilson*, 1878, 5 R. 981).

(*b*) *Apprentices.*—The application of the Act is limited to apprentices to the business of a workman, as defined by the Act (s. 10), upon whose binding either no premium is paid, or if, where there is a premium, it does not exceed £25; and to apprentices bound under the provisions of the Acts relating to the relief of the poor (38 & 39 Vict. c. 90, s. 12); but it does not include apprentices to sea service (*ib.*, s. 13).

In disputes between masters and apprentices, the Court has the same

powers as if the dispute were between an employer and a workman with the indentures defining the contract between them. The Court may further make orders directing apprentices to perform their duties under their apprenticeships; or it may rescind the indentures and order the whole or any part of the premium to be repaid. If, after the expiration of a month from the date of an order directing an apprentice to perform his duties, the Court is satisfied that he has failed to comply, it may from time to time order him to be imprisoned for a period not exceeding fourteen days (*ib.*, s. 6).

7. Cautioners of apprentices may be summoned as if they were defenders, and ordered to pay damages to an amount not exceeding the limit (if any) to which they are liable under the indentures (*ib.*, s. 7). The Sheriff may also accept security from any friend of the apprentice instead of, or in mitigation of, punishment (*ib.*).

Any sum of money for which an order is made may be directed to be paid by instalments, and the Court may from time to time rescind or vary such order (*ib.*, s. 9). If an apprentice duly cited fails to appear, there is power to issue a warrant for his apprehension (*ib.*, ss. 9, 14).

Forms of proceedings under this Act are provided by A. S., 29th January 1876, but it is to be noted that imprisonment for failure to implement an order to pay is not now competent (43 & 44 Vict. c. 34, s. 4).

See MASTER AND SERVANT; APPRENTICE; Dove Wilson's *Practice*, pp. 408–410.

V. APPEAL.

Except in so far as authorised by the Act of 1837, no decree is subject to any kind of review, either on account of any omission or irregularity or informality in the citation or proceedings, or of any mistake on the merits or in law, or on any ground or reason whatever (Act of 1837, s. 30; *Scott*, 1885, 23 S. L. R. 273; *Wilson*, 1890, 18 R. 233). Exclusion of review in small debt cases implies that the case cannot be taken to the Court of Session in the guise of an action of damages (*Crombie*, 1871, 23 D. 333; *Gray*, 1892, 19 R. 692). But where a special form of review is provided by a special Act (*e.g.* Friendly Societies), it is not excluded merely because the proceedings are in the Small Debt Court (*Linton*, 1895, 23 R. 51).

Appeal is competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff (see *Reid*, 1894, 22 R. (J. C.) 12; *Johnston*, 1890, 18 R. (J. C.) 6; *Gordon*, 1891, 18 R. (J. C.) 18; *Macgillivray*, 3 S. L. T. 525), or on such deviations in point of form from the statutory enactments as the Court may consider to have taken place wilfully, or to have prevented substantial justice from having been done (see *Paterson*, 1895, 22 R. (J. C.) 47); or on incompetency, including defect of jurisdiction (see *Allison*, 1882, 10 R. (J. C.) 12; *Findlay*, 1886, 13 R. (J. C.) 53; *Russell*, 1892, 19 R. (J. C.) 61; Act of 1837, s. 31).

The appeal is either to the Circuit Court, or, if the case is from a district where there are no Circuit Courts, to the Court of Justiciary (*ib.*, s. 31). A note of appeal in writing is lodged in the hands of the Clerk of Court, either in open Court when the decree is pronounced, or at any time within ten days thereafter; and at the same time a duplicate of it must be served on the adverse party personally, or at his dwelling-house, or on his agent. This is sufficient summons to the respondent to oblige him to appear at the next Circuit or High Court happening not less than fifteen days after such service (*ib.*, s. 31; 20 Geo. II. c. 43, s. 34). Along with the note of appeal the complainer must lodge with the Clerk of the Court a bond, with a sufficient cautioner, for answering and abiding by the judgment of the Court of

review, and for paying any costs which that Court may award against him. For the sufficiency of this cautioner the Clerk is answerable (20 Geo. II. c. 43, s. 35). Further, there can be no sist or stay of execution except upon consignation of the whole sum and expenses decerned for (Act of 1837, s. 31). An appeal in the Court of Justiciary may be sent by it to be determined by the Court of Session (*Burrell*, 1868, 1 Coup. 103). From the Circuit Court it may be transferred either to the Court of Justiciary or to the Court of Session (20 Geo. II. c. 33, s. 47); from either Circuit or High Court it may be remitted back to the Sheriff, with instructions how further to proceed (*Russell*, 1892, 19 R. (J. C.) 61; *Maxwell*, 1886, 24 S. L. R. 12; *Spence*, 1885, 12 R. (J. C.) 43; *Glass*, 1876, 4 R. 108; Act of 1837, s. 31).

At the hearing of the appeal no document can be founded on which was not produced before, and initialled by the Sheriff, when the case was before him; nor can the evidence of any witness be referred to who was not examined before the Sheriff, and whose name was not written by him on the summons when the case was heard (Act of 1837, s. 31).

Except on remit from the Circuit or High Court, the Court of Session, as a general rule, has no jurisdiction in small debt cases (*Lennon*, 1879, 6 R. 1253; *Miller*, 1850, 12 D. 656; *Graham*, 1848, 6 Bell's A. C. 214; *Lowden's Trs.*, 1846, 9 D. 281); unless the proceedings have been null and illegal from the beginning (*Manson*, 1871, 9 M. 492). But where the ground of complaint is not the decree itself, but some irregularity or illegality following on it, the jurisdiction of the Court of Session has been admitted (*Gray*, 1892, 19 R. 696: *Le Conte*, 1880, 8 R. 175; *Shiell*, 1871, 10 M. 58; *Murchie*, 1863, 1 M. 800; *Scott*, 1846, 5 Bell's A. C. 126; but see *Wilson*, 1890, 18 R. 233 (Ld. President)).

See Dove Wilson's *Practice*, pp. 500–526, 581–591; Lees, *Small Debt Handbook* and *Small Debt Amendment Act*; Bell's *Dictionary*.

SMALL DEBT COURT (JUSTICE OF THE PEACE).

The Justice of the Peace Small Debt Court is regulated by the Act of 1825, 6 Geo. IV. c. 48, as amended by 12 & 13 Vict. c. 34. The proceedings are summary and similar to those of the Sheriff Small Debt Court, and only the more material points in jurisdiction or procedure, where the Justice of the Peace Court differs, are noticed here. The Court consists of any two or more Justices of the Peace in any county (Act of 1825, s. 2). Where only one justice is available, he may hold a Court for the purpose of hearing the roll called and pronouncing decrees in absence (*ib.*, s. 16).

Unlike the Sheriff, the Justices of the Peace sitting in the Small Debt Court are a purely statutory body, and have and can exercise no other jurisdiction than that expressly conferred on them by the statute. The pecuniary limit of their jurisdiction is £5, and, provided that the debt or demand does not exceed that value, they are directed to hear, try, and determine, as shall appear to them agreeable to equity and good conscience, all causes and complaints brought before them concerning the recovery of debts, or the making effectual of any demand. The jurisdiction does not extend, however, to cases where questions of heritable right and title are involved, or to cases concerning the validity of any will or contract of marriage. These are incompetent in the Justice of the Peace Court (*ib.*, s. 24; Act of 1825, s. 2).

There is no provision, as in the Sheriff Small Debt Court, that a pursuer shall be held to have passed from and abandoned any remaining portion of any debt beyond the sum actually concluded for.

Parties are prohibited from being represented by agents (*ib.*, s. 5). The justices may, however, allow a pursuer or defender to be heard by one of his family. Or, if the pursuer is not resident nearer than twenty miles from the place where the Court is held, he may, if the justices think fit, be represented by a mandatary with written authority. The mandatary must not, however, be a person practising the law (Act of 1825, s. 7).

If a decree has been pronounced in absence of the defender, he may obtain a warrant sisting execution to next Court day, and thereafter obtain a rehearing, upon consigning the sum decerned for at any time before the days of the charge elapse (Act of 1825, s. 8). There cannot, therefore, be a sist and rehearing where the charge has expired, or where the defender was present or properly represented, or where he does not consign the sum decerned for.

Contrary to the rule in the Sheriff Small Debt Court, a defender must pay a fee on his first appearance (6 Geo. IV. c. 48, s. 17), and each party must pay a fee for each witness he examines (*ib.*).

There is no provision in the Justice of the Peace Court for lodging counter claims by way of set off. Such claims must be stated in independent actions.

There is no power to issue warrants for arrestment on the dependence, and actions of sequestration for rent, or of multiplepoinding, or of furthcoming are incompetent.

Sale may follow immediately on poinding without the necessity of prior intimation thereof to the debtor (Act of 1825, s. 12).

No provision is made for awarding expenses to a defender.

Finally, no review of the decisions of the justices is competent except by an action of reduction in the Court of Session, which action of reduction can be founded only on the ground of malice and oppression on the part of the justices, and must be brought within one year from the date of the justices' decree (*ib.*, s. 14). Further, the pursuer in the action of reduction must find sufficient caution in the hands of the Clerk of Court for payment of such expenses as may be awarded against him (*ib.*, s. 15).

See Lees' *Small Debt Handbook*; Bell's *Dictionary*; Barclay and Chisholm's *Justice's Digest*.

Smoke.—See NUISANCE; and

Smoke Nuisance Abatement (Scotland) Acts, 1857, 1861, and 1865 (20 & 21 Vict. c. 73; 24 Vict. c. 17; 28 & 29 Vict. c. 102).—These Acts make provision for the abatement of nuisance arising from the smoke of furnaces in burghs. They apply to every burgh and town in Scotland having a population of not less than 2000.

Under secs. 1 and 2 of the Act of 1857, "every furnace employed or to be employed in the working of engines by steam, whether locomotive or otherwise," in any place to which the Acts apply, or "on board of any steam vessel stopping at or in any such place, or in or at any port, pier, landing-place, or harbour within the same, or when plying on any part of a river which at such part shall not exceed a quarter of a mile in breadth, and every furnace employed or to be employed in any mill, factory, distillery, brewhouse, sugar-refinery, bakehouse, gasworks, waterworks, (although a steam-engine be not employed therein), or in any public bath or washhouse within the same, although such public bath or washhouse shall not be used for the purposes of trade or manufacture," must in all cases be constructed

or altered so as to consume or burn "as far as possible" the smoke arising from such furnace.

A chemical work has been held to be a factory within the meaning of these sections (*Ward & Co.*, 1863, 1 M. 724). Where part of a river is more than a quarter of a mile broad, although within the limits of a burgh to which the Act applies, a smoke nuisance under this Act cannot be committed on board a vessel sailing thereon (*Campbell*, 1882, 10 R. (J. C.) 28). "As far as possible" means as far as possible consistently with carrying on in an ordinary manner the trade in which the furnace is employed, and with a careful use and management of a properly constructed furnace (*Cooper*, 1867, L. R. 2 Ex. 88).

Offenders.—Under sec. 1 of the Act of 1857, every person or company being (1) the owner or occupier of the premises, or (2) the owner of the locomotive engine in which such furnace is, or (3) the foreman or other person employed by such owner or occupier in connection with such furnace, or (4) the owner or master or other person in charge for the time being of any such steam vessel, who uses within any such place, or on board of any such steam vessel, any such furnace not so constructed, or so negligently uses any such furnace, that the smoke arising therefrom is not effectually consumed or burned, commits an offence against the Act. Under sec. 11, any one of two or more joint owners or occupiers may be proceeded against.

Penalty.—Under sec. 1 of the Act of 1857, the offender is liable on conviction to a penalty not exceeding £5 or less than forty shillings. On a second conviction the penalty is £10, and on each subsequent conviction the penalty is doubled. Under sec. 4, failure to pay the penalty within eight days may be followed by poinding and imprisonment for a period not exceeding fourteen days.

Those entitled to Prosecute.—Under secs. 3 and 14 of the Act of 1857, as amended by sec. 1 of the Act of 1861, proceedings may be taken by the procurator-fiscal, the police commissioners, or the owner or occupier of the premises with reference to which the furnace is so situate as to create an annoyance to the occupiers of such premises.

Proceedings under Acts.—Under secs. 1, 4, and 6 of the Act of 1857, the complaint must be brought by summary petition (1) before the Sheriff or Sheriff-Substitute, or (2) before a magistrate of the burgh or two justices of the peace, where the cost of the operations necessary to alter or amend the furnace will not exceed £25. Under sec. 7, where proceedings are begun before the Sheriff-Substitute and the cost of the operations will exceed £25, appeal is allowed to the Sheriff, and in similar circumstances appeal is allowed from him to the Lord Ordinary on the Bills, whose judgment is final.

Smuggling is the offence of making, importing, or exporting goods without paying Government duties, and with the intention of defrauding the revenue. If smuggled goods are sold in this country, no action lies for recovery of the price, provided that the seller knew that the goods sold had been smuggled. A foreign seller may recover the price of goods sold by him and smuggled into this country if he has not been accessory to the smuggling. Offences against the revenue have been dealt with by a long series of statutes (see 6 Geo. I. c. 21; 8 Geo. I. c. 18; 19 Geo. II. c. 34; 39 & 40 Vict. c. 36; 42 & 43 Vict. c. 21; 44 & 45 Vict. c. 12).

The Customs Laws Consolidation Act of 1876 (39 & 40 Vict. c. 36) contains various provisions dealing with smuggling offences. By sec. 172 it is

provided that vessels made use of in removal of uncustomed or prohibited goods shall be forfeited, and the owners and masters of such vessels shall each be liable in a penalty equal to the value of such vessel or boat, not in any case exceeding £500. Goods unshipped (s. 177) without payment of duty, and prohibited goods, goods illegally removed from warehouses without payment of duty, prohibited goods shipped or water-borne with intent to be exported, goods subject to duty concealed on board ship, and also goods used to conceal them, are all liable to forfeiture. Any vessel (s. 179) or boat arriving within the United Kingdom or the Channel Isles, or within three leagues thereof, having prohibited goods on board or attached thereto, is liable to forfeiture along with the contraband goods carried, and persons found to have been on board vessels with contraband goods may be detained and taken before any justice. Ships belonging to Her Majesty's subjects (s. 180) from which, during a chase by a revenue boat, goods are thrown overboard, are liable to forfeiture.

Ships not bringing to (s. 181) when required to by a revenue boat, or by one of Her Majesty's ships, are liable to a penalty of £20, and also to be fired into. Ships and persons may be searched in port by officers of customs, but any person before being searched may require to be taken before a justice or superior officer of customs (ss. 182–185). Every person (s. 186) guilty of illegally importing, unshipping, removing from quay or wharf, carrying into or removing from warehouse without authority, harbouring or concealing, carrying or removing contraband goods, or in any other way shall be guilty of fraudulent evasion of any duties of customs, shall, for each such offence, forfeit either treble the value of the goods, including the duty payable thereon, or £100, at the election of the Commissioners of Customs; and the offender may either be detained or proceeded against by summons. Every person (s. 187) who shall rescue or attempt to rescue goods seized by officers of customs, or persons apprehended for a revenue offence, or who shall assault, obstruct, or resist revenue officers in the execution of their duties, shall, for each such offence, forfeit a penalty of £100. Persons (s. 188) to the number of three or more assembling to run goods are liable to a penalty not exceeding £500 and not less than £100. Procuring (s. 189) or hiring persons to run goods is an offence punishable with imprisonment for any term not exceeding twelve months. Committing revenue offences armed and disguised, or being armed and disguised with contraband goods within five miles of the sea coast or any tidal river, entails a liability to imprisonment, with or without hard labour, for any term not exceeding three years. Persons (s. 190) signalling smuggling vessels may be detained and forfeit £100, or be kept to hard labour for one year. Persons (s. 193) shooting at boats belonging to the navy or revenue service are guilty of felony. Persons (s. 195) cutting adrift vessels belonging to the customs shall, for every such offence, forfeit the sum of £10.

As to the course of procedure for recovering penalties, enforcing forfeitures, and punishing offenders under the Customs Acts, see secs. 218–245 and 247–263 of the above-mentioned statute.

By the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21), it is provided (s. 12) that persons who have been previously convicted of any offence against the Customs Acts and who have been adjudged to pay a penalty of £100 or upwards may, on subsequent conviction, be sentenced to imprisonment, with or without hard labour.

By the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), it is provided (s. 12) that any officer of customs or other person duly employed

in the prevention of smuggling may search any person on board any ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or any person who shall have landed from any ship or boat, provided such officer or other person duly employed as aforesaid shall have good reason to suppose that such person is carrying or has any uncustomed or prohibited goods about his person.

A person shall be guilty of an offence—

(1) If he staves, breaks, or destroys any goods to prevent the seizure thereof by an officer of customs or other persons authorised to seize the same.

(2) If he rescues, or staves, breaks, or destroys, to prevent the securing thereof, any goods seized by an officer of customs or other person authorised to seize the same.

(3) If he rescues any person apprehended for any offence punishable by fine or imprisonment under the Customs Acts.

(4) If he prevents the apprehension of any such person.

(5) If he assaults or obstructs any officer of customs, or any officer of the army, navy, marines, coastguard, or other person duly employed for the prevention of smuggling, going, remaining, or returning from on board a ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or in searching such a ship or boat, or in searching a person who has landed from any such ship or boat, or in seizing any goods liable to forfeiture under the Customs Acts, or otherwise acting in the execution of his duty.

(6) If he attempts or endeavours to commit, or aids, abets, or assists in the commission of any of the offences mentioned in this section.

And a person so offending shall for each such offence forfeit the penalty of not exceeding £100, and he may either be detained or proceeded against by information or summons.

[Ersk. iii. 3. 3; Stair, ii. 2. 9; Bell's *Com.* i. 326, ii. 479; Macd. 240; Anderson, *Crim. Law*, 43.] See Excise, Defrauding Revenue.

Snipe.—In regard to statutory protection, snipe are on the same footing as Woodcock, and reference is made to the article under that head.

Socius criminis.—See Accessary.

Sodomy.—Sodomy is unnatural intercourse between two males. The passive party, if consenting, is equally guilty with the assailant. The offence may be prosecuted at common law or under the 11th section of the Criminal Law Amendment Act of 1885 (48 & 49 Vict. c. 69). Attempt to commit the crime is punishable (*Simpson* and *Dods*, 1845, 2 Broun, 671; 50 & 51 Vict. c. 35, s. 61).

Punishment.—At one time this was a capital crime. The punishment now is penal servitude (50 & 51 Vict. c. 35, s. 56).

(For forms of indictment, see Macdonald, 397.)

[Hume, i. 469; Alison, i. 566; Macdonald, 204; Anderson, *Crim. Law*, 93.]

Solatium is the compensation for wounded feelings or physical suffering, as distinguished from patrimonial loss actual or prospective, arising out of certain civil wrongs (Bell, *Prin.* s. 552). It is awarded in the following circumstances: (1) To the injured person himself in cases of slander, wrongous use of civil or criminal process, seduction, breach of

promise, assault, and bodily injury; (2) to the husband of a woman who has been seduced; (3) to certain near relatives of a person who has died from bodily injury due to the defender's negligence or misconduct.

In actions for *slander* the aggrieved person can sue for *solatium* in addition to recovering pecuniary losses, or even where no such loss has been sustained. It is not necessary in Scotland for the defamation to have been uttered publicly; words uttered or writing sent privately to the pursuer will entitle him to compensation for wounded feelings (*Mackay*, 10 R. 537; *Stuart*, 13 R. 299). A corporation and a class of persons have no individual personal feelings, and so cannot sue for *solatium*. The Court will not allow a large amount to be awarded unless special damage is proved, but more than nominal damages will be given for serious slander: £50 for calling a man a thief was considered not excessive (*Fletcher*, 12 R. 683). In slanders on business men, where no special damage was proved, the Court has reduced the damages awarded by the jury from £1275 to £100 (*Johnston*, 2 R. 836), and from £300 to £65 (*Ritchie*, 10 R. 813). In both cases the Court offered the pursuers the alternatives of modified damages or a new trial (Cooper on *Defamation*, p. 4; Glegg on *Reparation*, pp. 68, 146; see DEFAMATION).

The *abuse of civil and criminal processes* is closely allied to slander. If the process complained of be criminal, the pursuer must show malice; it is not always necessary for him to aver malice in order to get reparation for a wrongous use of civil process, directed against the person or the property. If the pursuer has suffered actual loss, he will recover substantial damages; and even if there has been no actual loss, he is entitled to *solatium* for the legal wrong. If malice is proved, the amount will be greater; but a technical irregularity will be a ground for only nominal damages (Graham Stewart on *Diligence*, pp. 785, 794; Glegg, *Reparation*, pp. 162–192; *Meikle*, 24 D. 720; see CIVIL PROCESS, ABUSE OF).

In *seduction* and *breach of promise* it has long been settled (*Hogg*, 27 May 1812, F. C.; *Rose*, 19 July 1816, 1 Murray, 82) that damages are due *in solatium* although no specific pecuniary loss be condescended on, or in addition to claims for out-of-pocket expenses and "loss of market" (Ersk. *Inst.*, 19th ed., vol. i. p. 138, note 136). In every case the amount will be a question of circumstances, and the Court will be slow to interfere with the award of the jury (Fraser, *H. and W.* i. 496, 505; *Linning* v. *Hamilton*, Mor. 13912).

In *seduction* the injured husband may sue the seducer for *solatium*, even though he has condoned his wife's offence (*Macdonald*, 12 R. 1327). For the possible converse case of an action at the instance of the wife for seduction of her husband, or at the instance of a man himself who has been seduced, see Fraser, *H. and W.* i. 504, and 26 *American Law Review*, p. 36. For the elements to be considered in assessing damages, see Walton, *H. and W.* p. 55; and *Keyse*, 1886, 11 P. D. 100. See SEDUCTION.

In actions for *assault* the civil claim is not merely for damage sustained, but *in solatium* for affront and insult. It is not discharged by the interposition of the penal law: the demand is for indemnification of the injury, not for punishment (Bell, *Prin.* s. 2032; *Cruickshank*, 1747, Mor. 4034; *Anderson*, 13 S. 1130; Glegg, *Reparation*, 91–95; see ASSAULT).

In cases of *bodily injury* due to the defender's negligence or misconduct, compensation will be given for the physical suffering which has been occasioned, whether temporary or permanent, in addition to the expenses of medical attendance and lodging, and to the resulting loss of business or business capacity. The award of the jury will not be interfered with unless

the Court is of opinion that the verdict ought not to have been for more than one-half of the sum awarded (*Young*, 10 R. 242, per Ld. Pres. Inglis). If the accident was due to malice, more will be awarded than if negligence was the cause (Ersk. iii. 1. s. 14). In calculating loss of business or professional income, the jury are not to impose upon the defender the liability to pay the pursuer an annuity equal to his income at the time of the accident (*Young, supra*; *M'Laurin*, 19 R. 346; *M'Kechnie*, 20 D. 551; Glegg, *Reparation*). See NEGLIGENCE; REPARATION.

TRANSMISSIBILITY OF ACTIONS.

Ld. Wood (*Neilson* v. *Rodger*, 16 D. 325) said: "When a claim for damages and *solatium* arises out of bodily injury, or from any other cause, the right vests *ipso jure* and *ipso facto*, prior to any proceeding or decree for its constitution; it is a moveable claim—is assignable either by positive conveyance or implied legal assignation, and passes to personal representatives." It would appear, however, that the law has been so far modified that a man's personal representatives can raise or carry on an action where the deceased suffered pecuniary loss, provided the deceased has not expressly or impliedly discharged the claim (*Wight*, 11 R. 217); but the maxim *Actio personalis moritur cum persona* will apply to prevent their raising or continuing a claim for mere *solatium* to the deceased (*Auld* v. *Shairp*, 2 R. 191, per Ld. J.-Cl. Moncreiff, at p. 213; Ld. M'Laren's opinion in *Bern's Executor* v. *Montrose Asylum*, 20 R. 859, at p. 862, where *Auld's* case is commented on, and Broom's *Legal Maxims*, 6th ed., p. 885, is quoted and approved). Though a claim for *solatium* alone does not transmit *to* representatives, it does transmit *against* representatives of the wrong-doer (*Evans*, 12 R. 1295).

ACTIONS COMPETENT TO RELATIVES IN THEIR OWN RIGHT.

In cases of *fatal bodily injury* due to another's negligence or misconduct, our Courts, "by a series of decisions which trench somewhat closely upon the province of the Legislature" (Ld. Watson in *Darling* v. *Gray & Sons*, 19 R. (H. L.) 31), have long recognised a claim on the part of certain near relatives of the deceased for *solatium*, and any pecuniary loss which they can qualify in respect of loss of support (*Guild*, 1605, Mor. 13903; *Dow*, 6 D. 534). Ld. Pres. Inglis (*Eistens* v. *N. B. Rwy.*, 8 M. 980) said: "The true foundation of this claim is partly nearness of relationship and partly the existence during life, as between the deceased and the claimant, of a mutual obligation of support in case of necessity." These relatives are the husband, wife, parents, and children of the deceased. Step-parents and step-children have not the right, but it is by no means clear whether it is competent to grandparents and grandchildren. They seem to satisfy the two conditions —nearness of relationship and mutual obligation to aliment—laid down by Ld. Pres. Inglis in *Eistens'* case; but in *Darling* v. *Gray & Sons* (*supra*) Ld. Watson, referring to the earlier case of *Clarke* v. *The Carfin Coal Co.* (18 R. (H. L.) 63), said: "The practical effect of your Lordships' decision was to limit the class to persons standing in the legitimate relation of husband, father, wife, mother, or child to the deceased." A bastard cannot claim for the death of his mother, nor the mother of the bastard for the death of her child (*Clarke*, *supra*; *Weir* v. *Coltness Iron Co.*, 16 R. 614). Collaterals have no such obligation of mutual support, and so have no title to sue either for *solatium* or for pecuniary loss (*Greenhorn*, 17 D. 860; *Eistens*, 8 M. 980). A married woman cannot raise this action with the mere concurrence of her husband (*Whitehead*, 20 R. 1015). A joint action at the instance of a

father and mother for reparation was dismissed as incompetent, the mother having no title to sue while her husband was alive (*Bell*, 1896, (O. H.) 4 S. L. T. No. 252, p. 166).

The damages in such cases are not to be estimated merely by the pecuniary advantages which the family derived from the exertions of the deceased in business; a *solatium* will be given when "the death of the sufferer, instead of being a loss to the family, might be regarded as a benefit on account of his bankruptcy and dissipated habits" (*Brown*, 26 Feb. 1813, F. C.; *Black*, 9 Feb. 1804, F. C.; 5 Paton, 567). In the case of *Horn* v. *N. B. Rwy.* (5 R. 1055, 1073), £550 was allowed to a father on account of the death of a son, who had been his partner in a business worth £700, the son's share being valued at £100. On the other hand, the Court reduced from £900 to £500 the damages awarded to a wife on the death of her husband, who was earning £150 per annum (*Wallace*, 15 R. 307).

In the case of an accident that has not been immediately fatal, the deceased's right of action may pass to his representatives who might also have been entitled to sue for *solatium* on their own behalf. The two claims are quite distinct in their origin, the latter only emerging on the death of the injured man; but it has been settled by the case of *Darling* v. *Gray & Sons* (19 R. (H. L.) 31), that where the injured man has raised an action himself, and his executors have sisted themselves in his place, a second action for *solatium* is incompetent. Ld. Watson said: "There is not a single instance in which the Court has allowed two actions to be brought in respect of the same negligent act leading to the injury and death of one person. Even in cases where the right of relatives to sue has been recognised, they must bring one suit and one only, in which the damages due to them respectively might be assessed" (Glegg, *Reparation*, pp. 68–71).

Under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), the dependants who are entitled to claim compensation in Scotland are those persons who can sue the employer at common law for damages and *solatium* in respect of the death of the workman, but it is necessary for them to prove loss of support, and they consequently cannot sue for *solatium* by itself. It is open to doubt whether they can claim for *solatium* in addition to patrimonial loss. The first Schedule I. (*a* (ii.)) sets forth that where the workman leaves dependants in part dependent on his earnings, an amount of compensation may be given "reasonable and proportionate to the injury of the said dependants." But these words would probably not support a claim for *solatium*, because (1) the Schedule is equally applicable to England and Scotland, and in England no claim for *solatium* is recognised. (2) Similar words in Lord Campbell's Act (English) have been held not to cover such a claim (*Blake* v. *Midland Rwy.*, 1852, 18 Q. B. 93). (3) The Act repudiates rather than follows the common law in disallowing a claim for *solatium* alone (Glegg on the *Workmen's Compensation Act*, pp. 8, 36, 41).

In England a claim for *solatium* is not recognised at common law, but the jury is allowed to give *vindictive* or exemplary damages in all cases where a claim for *solatium* by the injured person himself would be competent in Scotland; and in cases of fatal accident, Lord Campbell's Act, 1846 (9 & 10 Vict. c. 93), has given near relatives rights similar to those which they have at common law in Scotland. By sec. 5 "parent" and "child" are defined to include grandparents and grandchildren, and also step-parents and step-children.

See Reparation; Title to Sue; Damages, Measure of.

Soldiers.—See Army.

Solicitor.—In Scotland the generic name applied to all persons entitled to practise in Court, except members of the Faculty of Advocates, is "Law Agent," which see. But the term solicitor is now very generally used as synonymous.

Solicitors in the Supreme Courts.—It was not till the year 1754 that solicitors, as distinguished from advocates and their clerks, were officially recognised as entitled to practise in the Supreme Courts of Scotland (see Advocate and Law Agent). In 1797 the thirty-seven solicitors then practising obtained from the Crown a charter incorporating them and subsequent members of the society into a corporation entitled "The Society of Solicitors in the Court of Session, Commission of Teinds, and High Court of Justiciary in Scotland." This charter was confirmed and amended by a private Act of Parliament, passed on 13th July 1871, which, *inter alia*, regulated the qualifications of candidates for admission, and re-incorporated the society under the name of "The Society of Solicitors in the Supreme Courts of Scotland." The society has always required from applicants for admission high qualifications as regards both general knowledge and law; but it has taken advantage of the provisions of the Law Agents Act of 1873, sec. 19, entitling it to admit enrolled law agents as after mentioned. There are at present about three hundred and eighty members, and the greater part of the litigation in the Court of Session is conducted by them. The initial letters S.S.C. are generally used to designate members of the society. The office-bearers consist of a president, vice-president, treasurer, secretary, librarian, fiscal, and collector of the Widows' Fund. The same person may be appointed treasurer and collector. The affairs of the society are managed by a council, consisting of the office-bearers and of seven ordinary members elected by the society, two of whom go out of office in each year, two others being chosen in their stead. Three general meetings of the society are held in each year, viz. on the first Tuesdays of March, June, and December. The office-bearers, two examiners, two censors, and two auditors are elected annually at the general meeting in June. The agents for the poor in civil and criminal causes, the commissioners for adjusting the rate of interest on heritable securities, and the representative on the Board of the Edinburgh Royal Infirmary, are elected annually at the general meeting in December.

The society has recently erected, on a site adjoining the Parliament House, a handsome library, including a hall for meetings of the society and a suite of smaller rooms, at the cost of nearly £30,000. The collection of books, both in law and in general literature, is most valuable, consisting of about eighteen thousand volumes.

The following are the existing regulations for admission of members, approved of at a general meeting held on 1st June 1897:—

Enrolled law agents shall, on application, subject to the recommendation of the Council and to the following regulations, and to payment of all dues, be eligible for admission to the Society, provided no enrolled law agent shall be eligible who has been admitted as such in respect of his having been previously qualified as a notary public, and which qualification has been acquired subsequent to 14th August 1896. Applicants who have not passed the General Knowledge Examinations, or who do not possess one of the equivalents therefor, as provided by the Acts of Sederunt of 18th March 1893, 12th July 1893, and 29th January 1895, shall undergo such examination as shall be prescribed by the Council. Applicants who have not passed the examination in law required by the Law Agents (Scotland) Act,

1873, the Law Agents and Notaries Public (Scotland), Act, 1891, and relative Acts of Sederunt, or who do not possess one of the equivalents therefor recognised by the said Acts, shall undergo such examination as shall be prescribed by the Council.

The regulations for applicants are as follows :—

1. Every applicant shall lodge with the secretary a written application for admission as a member, and shall state therein his age and birthplace, his educational and professional training, what examinations he has passed, and whether he is in business on his own account, and the offices in which he has been employed.

2. Along with the application shall be lodged letters by two members recommending the applicant, and stating their personal knowledge of his moral character, business qualifications, and professional conduct to the date of the application.

3. There shall also be lodged with the secretary—(1) all certificates of examination; (2) extract of the applicant's act of admission as a law agent; (3) certificate of the registrar of law agents of his enrolment; and (4) certificate of the Clerk to the Lord President of the applicant's enrolment as an agent practising in the Supreme Court.

4. The secretary shall, in the first place, submit these documents to the Council, and, if the Council approve thereof, he shall forthwith transmit them to two of the examiners, before whom the applicant shall appear, and to whom he shall furnish any additional information they may require. Upon the examiners certifying that the applicant is duly qualified for admission, the secretary shall forthwith post up in the members' reading-room a notice of the application, as nearly as may be in the following terms :—

S.S.C. Society.

Application for admission by [*name*] , [*residence*] , [*business address*] .

[If applicant has been less than a year in business, state also office in which he was last employed.]

Recommended by Messrs. *C. D.* and *E. F.*

[*Date of notice.*] *G. H., Secretary.*

5. After the foregoing notice shall have been posted for fourteen days the secretary shall transmit the application and relative documents to the censors, before whom the candidate shall appear. The censors shall make such inquiry as they may deem expedient into his moral character and professional conduct, and shall report in writing to the Council the result of their inquiries. The secretary shall lay the papers before the Council at its next meeting, and (unless otherwise directed by the president) shall give the applicant notice to be in attendance at such meeting, in order that the Council may confer with him before considering his application.

6. If the Council shall recommend the application, notice of the same, in the form prescribed in Regulation 4, shall be given in the billet calling the meeting of the society at which the application is to be dealt with, at which meeting, unless by a majority of members present it shall be decided to delay, the applicant shall be balloted for.

7. No applicant shall be admitted unless the ballot shall disclose a majority in favour of admitting of at least two-thirds of the members present and voting at the meeting. The declaration by the chairman of the meeting as to the result of the ballot shall be conclusive.

8. All entry-money and other dues exigible from an entrant, including the dues payable to the Widows' Fund, shall be paid within ten days after

the ballot. No enrolment shall be made and no certificate of admission shall be granted to an entrant until such entry-money and dues are paid.

9. The dues payable by entrants on admission to the society are £65. Entrants also become contributors to the Widows' Fund, and pay on admission the entry-money of £35, and the dues fixed by the society's Act of Parliament, which vary in each case, and shall otherwise comply with the rules applicable to the Widows' Fund.

10. The annual subsidy as at present fixed is £3, 3s. for town members, and £1, 1s. for country members. The annual contribution to the Widows' Fund is £6, 6s.

Solicitor-General.—The Solicitor-General is one of the Crown Counsel in Scotland, and is next in dignity to the Lord Advocate. Since 1725 the privilege of pleading within the bar has been accorded to him. By the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35, s. 3), indictments may be at the instance of the Solicitor-General during a vacancy in the office of Lord Advocate.

Sovereign.—The history of the title to the Crown, the law at present in force regarding it, and the forms observed on the accession and coronation of a new sovereign, have been already referred to. (See CROWN.)

Constitutional Position.—The supreme executive power of the United Kingdom of Great Britain and Ireland and the dependencies thereof is vested in the sovereign. The present style adopted is: "Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India" (see 39 & 40 Geo. III. c. 67; 39 & 40 Vict. c. 10). Whether the sovereign be king or queen, the rights vest equally (1 Mary, sess. 3, c. 1; 1 Bell, *Com.* p. 218 *in notes*). The first duty of the sovereign is to govern according to law. This has always been recognised by the common law (*Tac de Mor. Germ.* c. 7; Bracton, *L.* 1, c. 8; *ib.*, *L.* 2, c. 16, s. 3; Fortescue, c. 9 and c. 34; see also in Year-Book, 19 Hen. VI. 63: "La ley est le plus haute inhéritance que le roy ad; car par la ley il même et touts ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inhéritance sera"). These provisions of the common law have also been embodied in statute (12 & 13 Will. III. c. 2). The counterpart of this duty of the sovereign towards his subjects is that of allegiance by the subjects towards the sovereign (see ALLEGIANCE).

Spouses of Sovereigns.—The position of the spouse of a sovereign is peculiar. In the case of the husbands of queens this position has differed. Thus Philip of Spain (Statute 1 Mary, sess. 3, c. 2) enjoyed the full rank of King during his marriage with the Queen, and jointly with her. The Prince and Princess of Orange, William and Mary, were declared (1 Will. and Mary, sess. 2, c. 2) to be King and Queen of England, France, and Ireland, "to hold the crown and royal dignity of the said kingdoms and dominions during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the Prince of Orange in the names of the Prince and Princess during their joint lives." The late husband of Her Most Gracious Majesty continued to be known by his own title of Prince Albert until 1857, when he was made "Prince Consort" by patent. He all along enjoyed immediate precedence next to Her Majesty. He was never, however, created a Peer. The wife of a reigning king is Queen Consort. Her position differs from that of married women in general, inasmuch as she

is considered in law as a *feme sole*. She is a public person, exempt and distinct from the King. She may purchase lands and convey them, make leases, grant copyholds, and do other acts of ownership without her husband's consent. This privilege dates from Saxon times (Seld. *Jan. Aug.* 1. 42). She may also take grants from the King, and she may sue and be sued in her own name, with the addition of Queen of England (32 Hen VIII. c. 51, 1540; 2 Geo. III. c. 1; 15 Geo. III. c. 33; 39 & 40 Geo. III. c. 88; 47 Geo. III. sess. 2, c. 45). Beyond this, the Queen Consort has certain exemptions and minute privileges. She pays no toll, and is not liable to any amercement in any Court (Co. Litt. 133; Finch, *L.* 185). But unless where specially exempted by law, she is otherwise in the same position as a subject. It is, however, high treason to compass her death or to commit adultery with her (25 Edw. III. st. 5, c. 2). The revenue of the Queen Consort is now regulated by statute (see *infra*, *Revenue* of the Sovereign). A Queen Dowager is the widow of a king, and retains most of the privileges which she enjoyed as Queen Consort. It is, however, no longer treason to compass her death or commit adultery with her, as the succession to the Crown is not thereby endangered. If she marry a subject she does not lose her regal style and dignity. Catherine, widow of Henry V., after marrying Owen Tudor, maintained an action against the Bishop of Carlisle by the name of Catherine "Queen of England" (cf. 2 *Inst.* 18).

The Royal Prerogative is the power and right which attaches to the Crown. This prerogative has very definite limits, which have been the subject of discussion and dispute in many pages of our history. It was claimed to be higher in the time of James I. than at any other period. It was laid down by him in the following terms: that "as it is atheism and blasphemy in a creature to dispute what the Deity may do, so it is presumption and sedition in a subject to dispute what a king may do in the height of his power; good Christians . . . will be content with God's will, revealed in His Word; and good subjects will rest in the king's will, revealed in his law" (King James' *Works*, 531, 577). The limitation of the regal power has been always, however, recognised in our constitution. This principle is embodied in the maxim: "Nihil enim aliud potest rex, nisi id solum quod de jure potest" (Finch, *L.* 84, 85; Bracton, i. 3, tr. 1, c. 9).

The prerogative of the sovereign relates to his political character, his royal authority, and his revenue.

1. (1) The King is supreme head of the State, clothed with imperial as well as royal dignity (24 Hen. VIII. c. 12; 25 Hen. VIII. c. 22).

(2) He is irresponsible. The maxim "Rex non potest peccare" embodies this. It does not mean that everything done by the Government is just and lawful, but only that no personal crime or misconduct can be imputed to the sovereign. When the rights of a subject have been infringed by the Crown or its officers, the remedy lies in a Petition of Right. In Scotland this process is not used, the Lord Advocate being sued directly. (For English practice, see Clode on "Petition of Right"; *Ency. of English Law*, PETITION OF RIGHT.) A defence always competent to the Crown when sued by an alien is that the conduct complained against was an act of State (*Poll* v. *Lord Advocate*, 35 S. L. R. 637).

2. The royal authority or power which is placed in the hands of the sovereign may be divided as follows:—

(1) The sovereign represents the State towards foreign Powers by sending ambassadors and receiving them.

(2) The sovereign makes treaties and alliances with foreign States and princes (*Com. Dig.* "Prerogative," B. 2, 3).

(3) He makes war or declares peace (Bac. Abr. "Prerog." D. 4).

(4) He is a constituent part of the supreme legislative power. All Bills passed by the two Houses of Parliament must receive the royal assent before they become law.

(5) He is head of the military system and commands the army and navy (for provisions for the defence of the country, see 23 & 24 Vict. c. 109.; *ib.*, c. 112; 51 & 52 Vict. c. 31; *ib.*, c. 32; 52 & 53 Vict. c. 8; and the Annual Supply Acts).

(6) He is the fountain of justice and appoints all judges, who can afterwards only be removed by him upon an address from both Houses of Parliament.

(7) He is likewise the fountain of honour.

(8) He is the arbiter in commerce. He establishes public markets and regulates weights and measures (9 Hen. III. c. 25; Plac. 35, Edw. I., *apud* Cowel's *Interpr.* tit. *Pondus regis*; 41 & 42 Vict. c. 49. For enactments *re* coinage, see 33 & 34 Vict. c. 10).

(9) The sovereign is also supreme head of the Established Churches of England and Scotland (26 Hen. VIII. c. 1; 1 Eliz. c. 1). See CHURCH.

3. *The Royal Revenue.*—The royal revenue is in the hands of the Lords Commissioners of the Treasury. The Exchequer and Audit departments are consolidated by 29 & 30 Vict. c. 39. The revenue of the Crown is either ordinary or extraordinary. The ordinary revenue is that which has subsisted from early times, or for which Parliament has made an exchange; while the extraordinary revenue is that which is supplied by Parliament as an addition to that properly attached to the kingly office. These sources of income are now paid into the national Exchequer for the support of army navy and the whole executive functions of the Crown, and, in exchange, a grant from Exchequer, called the Civil List, has been made in favour of the sovereign. At the commencement of the present reign, a Civil List was settled on Her Majesty for life, amounting to £385,000 per annum, to be paid quarterly out of the Consolidated Fund. Of this sum £60,000 is devoted to Her Majesty's Privy Purse, while the remainder is applied to the salaries and expenses of her household (1 & 2 Vict. c. 2). (For regulations applying to the private estate of the sovereign, see 25 & 26 Vict. c. 37, amended by 36 & 37 Vict. c. 61.)

Rights of the Sovereign in relation to Landed Property.—All the land in Scotland (with the exception of certain property in Orkney and Shetland) is held on the feudal system, *i.e.* "mediately or immediately" from the Crown. No land, therefore, can be without an owner; and where the succession of the last owner fails, it reverts to the sovereign as *ultimus haeres*. This applies also to moveables, *Quod nullius est fit domini regis*. It applies also to moveables in the case of treasure trove.

Land is presumed to fall under this category unless the possessor have a title in writing, and it may be claimed by the sovereign. The sovereign does not need to be "seised" in land. It vests in him *jure coronae*, although, in the event of his succeeding to the land of a subject, "service as heir" is necessary, but no sasine follows. For the actual land owned by the Crown in Scotland, see CROWN LANDS. Negative prescription runs against the Crown as against a subject (*E. Fife's Trs.*, 1849, 11 D. 889, and *Deans of Chapel Royal*, 1869, 7 M. (H. L.) 19), though this was doubted by Erskine (B. iii. tit. 7, s. 31), probably because of a mistake in Stair (B. ii. tit. 3, s. 33). Lands also fall to the sovereign by escheat. See ESCHEAT.

The Crown has certain rights called Regalia. These are classed as (1) Forestry, which may be conferred on a subject; (2) Salmon fishing; (3) Gold and silver mines; (4) Rivers, ports, and highways; (5) the seashore or foreshore. (See articles under these headings.) As to the rights of the sovereign in competition with the subject, see CROWN DEBTS.

The Paternal Power of the Sovereign.—Where a child is left without tutors or curators, the sovereign, as *pater patriae*, appoints these after calling the nearest of kin on the father's and mother's side. See TUTOR.

For the whole subject, see Stephen's *New Commentaries*, vol. ii. 394 to 595. Anson on the *Constitution*, Part "The Crown"; etc. etc.

Sowming and Rowming.—Where several persons enjoy a right of servitude of pasturage over a common, the amount of stock each is entitled to pasture thereon is determined by an action of sowming and rowming. By sown is meant grass for one cow or for five (in some places ten) sheep; while rown is an old word for a piece of land, and is still used to indicate a farm (Jamieson's *Dict.*; Innes on *Legal Antiquities*, p. 268; Stair, ii. 7. 14; Ersk. ii. 9. 15; Rankine, *Landownership*, 3rd ed., 398; 1606, c. 7; *Mackenzie*, 1825, 4 S. 146; *M'Neill*, 1828, 6 S. 422). The action of sowming and rowming has two objects: *first*, to sown the servient subject, *i.e.* to determine the amount of stock it can pasture; and *second*, to fix the proportion effeiring to each of the dominant tenements (rowms) according to their respective capacity for winter foddering. Even after the action the parties enjoy their rights in common, none having a right to insist on a division, "seeing it would frequently be to the disadvantage of severals of the parties interested: as when common pasturage is in a common muir, enclosed with a dyke, and so needeth none, at least but one, herd for them all, which, if it were divided, oftimes the several proportions of most interested could not be worth a several herd, especially when the property remains in another, though burdened with this servitude" (Stair, ii. 7. 14).

The owner of the servient tenement cannot be called as sole defender (*Dunlop*, 1679, Mor. 14531). He shares along with the dominant owners if he has possessed, or if there be a surplus (*Culross*, 1704, 4 B. S. 589), and he cannot by the action be prevented from tilling the ground, or breaking the surface for the purposes of mining and quarrying, if he has been in use to do so, or if he leaves sufficient unbroken surface for the requirements of the dominant owners (*E. Southesk*, 1680, Mor. 14531; *Culross, supra*; *Littlejohn*, 1693, 4 B. S. 42; see PASTURAGE).

Special Case.—Certain determinations of inferior judges, of Commissioners of Inland Revenue and others, if deemed erroneous in point of law, may be brought under review of the Court of Session by means of a case stated under the provisions of certain Acts of Parliament (see CASE). Cases so stated are sometimes called Special Cases, but by the term Special Case is usually understood a case brought into the Court under sec. 63 of the Court of Session Act, 1868 (31 & 32 Vict. c. 100), which provides that "where any parties interested, whether personally or in some fiduciary or official character, in the decision of a question of law shall be agreed upon the facts, and shall dispute only on the law applicable thereto, it shall be competent for them, without raising any action or proceeding, or at any stage of an action or proceeding, to present to one of the Divisions of the Court a Special Case signed by their counsel, setting forth the facts upon which they are so agreed, and the question of law thence arising upon which

they desire to obtain the opinion of the Court; and which case may set forth alternatively the terms in which the parties agree that judgment shall be pronounced according to the opinion of the Court upon the question of law aforesaid."

This mode of procedure has been found to be most useful and convenient, and is frequently adopted, especially for the settlement of questions arising upon the construction of provisions made by trust settlements and other deeds.

Parties.—A Special Case is a contract binding the parties to the statement of facts therein contained. Persons incapable of contracting, or not entitled to contract with each other, cannot enter into a Special Case (*Park*, 1876, 3 R. 850). Tutors or curators *ad litem* will be appointed to pupils and others when necessary (*Christie*, 1873, 1 R. 237; *Ross*, 1877, 5 R. 182). All persons interested in the judgment ought to be parties (*Mackie's Trustees*, 1875, 2 R. 621), otherwise the judgment (if obtained at all) is not *res judicata* against them. Persons who have no title or interest cannot be parties (*County Council of Roxburgh*, 1897, 24 R. 657). Two or more parties may be represented by the same agents and counsel, provided they have not conflicting interests; but if they have, then they must be separately represented (*Ellis' Trustees*, 1898, 6 S. L. T. 305, 1 F. 4).

Competency.—There must be a question of law stated (*Lawson's Trustees*, 1883, 10 R. 1278) about which there is a *bonâ fide* dispute (*County Council of Renfrew*, 1895, 23 R. 166) between parties having an interest (*County Council of Roxburgh, ut supra*). The Court will not answer hypothetical questions, nor give what is no more than an opinion of counsel, by which nobody would be bound (*Morton*, 1871, 9 M. 548). The question must be one which could have been competently entertained by the Court in some other known form of process (*Morton, supra*; *Parochial Board of Bothwell*, 1873, 11 M. 399; *Low's Trustees*, 1870, 8 S. L. R. 638; *Bruce*, 1889, 17 R. 276; *Thomson's Trs.*, 1897, 25 R. 19).

The following cases may be referred to as examples of questions which have been considered by the Court: *Greenock Harbour Trustees*, 1888, 15 R. 343; *Ramsbotham*, 1891, 18 R. 558; *Campbell's Trustees*, 1895, 22 R. 943.

Form and Process.—The case must set forth the facts upon which the parties are agreed, the contentions of the parties (*Stewart's Trustees*, 1895, 23 R. 93), and the questions of law upon which the opinion or judgment of the Court is asked. Questions stated but not argued to the Court will not be answered (*Mackinnon's Trustees*, 1897, 24 R. 981). The case must be signed by the counsel by whom it has been adjusted, and not by other counsel for them (*Hope*, 1870, 8 M. 699).

Special Cases, unless otherwise directed, are heard in the ordinary course of the rolls of the Division (A. S., 9th June 1870), and generally the procedure thereafter follows the usual course. When parties to a Special Case wish a judgment which can be extracted and appealed to the House of Lords, they must ask a judgment, and not merely an opinion (*Macdougall*, 1869, 7 M. 976; see also *Halliday*, 1869, 8 M. 117).

[Mackay, *Practice*, ii. 243, *Manual*, 465.]

Specific Performance.—The jurisdiction of the Scottish Courts to order specific performance of obligations by the pronouncement of decrees *ad factum prestandum* has never been doubted. "In Scotland specific implement is one of the ordinary remedies to which a party to a contract is entitled, where the other party to it refuses to implement the obligation he has undertaken" (per Ld. Herschell, in *Stewart*, 1890, 17 R.

(H. L.) 1). So, too, Ld. Watson, at p. 9: "In England the only legal right arising from a breach of contract is a claim of damages; specific performance is not matter of legal right, but a purely equitable remedy which the Court can withhold when there are sufficient reasons of conscience or expediency against it. In Scotland the breach of a contract for the sale of a specific subject gives the party aggrieved the legal right to sue for implement; and although he may elect to do so, he cannot be compelled to resort to the alternative of an action of damages unless implement is shown to be impossible, in which case *loco facti subit damnum et interesse*. Even where implement is possible, I do not doubt that the Court of Session has inherent power to refuse the legal remedy upon equitable grounds, although I know of no instance in which it has done so. It is quite conceivable that circumstances might occur which would make it inexpedient and unjust to enforce specific performance of a contract of sale. . . ." "The general rule of our law is that when a party has it in his power to fulfil an obligation which he has undertaken, the Court will compel him to do so. But it must always be in the discretion of the Court to say whether the remedy of specific performance or one of damages is the proper and suitable remedy in the circumstances" (per Ld. Shand, *Moore*, 1881, 9 R. p. 351).

Decrees *ad factum præstandum* are enforced by imprisonment (*Mackenzie*, 1883, 10 R. 1147). Accordingly, the Court will not order specific performance of impossible agreements, for that would amount to perpetual imprisonment (*M'Arthur*, 1877, 4 R. 1134); nor where performance would interfere with the rights of third parties, and so might be stopped by interdict (*Winans*, 1883, 10 R. 941); or where an unfair burden would be thrust upon the obligor, as where he had undertaken to run a road through ground belonging to a third party, in the belief that the third party would be inclined to sell at a reasonable price, whereas the price ultimately demanded was prohibitive (*Moore*, 1883, 10 R. 351). See *Sinclair*, 1898, 25 R. 703; *Clippens Oil Company*, 1897, 25 R. 370; and cf. Ld. Watson in *Grahame*, 1883, 9 R. (H. L.) p. 93).

Specificatio.—*Specification* in Roman Law was one of the recognised modes of acquiring property. The term was used to denote the formation by one man of a new subject or species out of materials belonging to another man. In the classical period of Roman law, it was a subject of dispute whether the new species belonged to the owner of the materials, or to the person who contributed the labour. One school of jurists held that, on the principle of *accessio* (*q.v.*), the new species belonged to the owner of the materials—the labour acceding to the materials. Another school of jurists held that, on the principle of *occupatio* (*q.v.*), the new species belonged to the maker (*specificans*)—the new species being regarded as a *res nullius* to which the principle *fit occupantis* applied. Justinian in the *Institutes* (*Inst.* ii. 1. 25) settled the question on the lines previously laid down by Gaius (*Dig.* 41. 1. 7. 7). If the new species can be again reduced to its original form, as plate into bullion, the property of the new species belongs to the owner of the material; but if the new species cannot be restored to its original form, as in the case of bread made from corn or wine from grapes, the property of the new species belongs to the workman. In order to a change of ownership, the change in the materials must be a genuine one, *e.g.* the threshing of corn, or the dyeing of wool, operates no transfer of ownership to the thresher or dyer. The better opinion is that the acquisition of property by *specificatio* was independent of the good or bad faith of the *specificans*. A man who has made wine out of grapes is owner of the

wine whether he took the grapes *dolo malo* or *in bonâ fide*, *i.e.* the owner of the grapes could in neither case vindicate the wine. If, however, the *specificans* took the grapes *dolo malo*, the owner of the grapes could bring against him an *actio furti* or *condictio furtum*; whereas, if the *specificans* took the grapes *in bonâ fide*, he was liable only in a personal action to indemnify the former owner of the grapes for their value, upon the principle *neminem cum detrimento alterius locupletari*.

In Scots law appropriation by specification is recognised, reparation being always made to the party who loses his interest, unless the presumption be strong enough to infer that the workmanship was performed *animo donandi*, by him who knew that the materials belonged to another (Stair, ii. 1. 41). See SPECIFICATION.

Specification, Acquisition of Property by.—The word "specification" is the English equivalent of the Latin *specificatio*, which, as a term of Roman law, signifies "the making of a new species or kind." In Roman law and Scots law, which upon this point has been directly borrowed from the Roman, *specificatio* is, under certain circumstances, a mode of acquiring property. As such it is treated by the institutional writers as a subdivision of *accessio*, and is closely analogous to *commixtio* and *confusio*. (See ACCESSION; CONFUSION; COMMIXTION.)

When one person by his labour produces out of materials belonging to another a new subject or species, the question arises, who, apart from contract, is the proprietor of this new subject which has been thus brought into existence? Is it the owner of the original materials or the workman who out of them has created something entirely different and new? Out of grapes belonging to A., B. makes wine. Out of gold belonging to A., B. makes a cup. Who in either case is the owner of the wine and the cup? Upon this point a famous controversy arose between the Sabinians and Proculeians, the former upholding the claims of the proprietor of the materials, the latter the claims of the workman who had transformed them by his labour. The rule adopted in the law of Scotland is the *media sententia* recommended by Justinian. Where the new species can be again reduced to the mass or matter of which it was made, *e.g.* a cup made out of bullion, the law considers the original subject as still existing, and the new one continues to belong to the proprietor of the old; but where the new species cannot be so reduced, *e.g.* wine made out of grapes, there is no room for such a *fictio juris*, and the maker of the new species is also proprietor. In the former case, the workman has a claim for work and indemnity against the owner *in quantum lucratus*; in the latter, the owner of the materials has a personal claim against the workman for their value. Erskine points out that this mode of acquisition is inadmissible where the new species made by one person is united to, and so made part of, an immoveable subject belonging to another. Hence a house built by C. upon land belonging to A. out of bricks belonging to B., does not belong to C. or B. by specification, but to A., the owner of the land, by accession. A person guilty of fraudulent conduct cannot avail himself of the plea of specification (Elchies, "Bankrupt," No. 9; Bell, *Com.* i. 296). The doctrine of specification is apparently also applicable to those cases of commixtion and confusion of the property of different persons which result in the production of a new species which cannot again be resolved into its former elements. He who made the mixture is the owner. (See, however, COMMIXTION; COMMUNION.) In the case of *Wylie & Lochead*, 8 M. 552, the law upon this subject was incidentally touched upon. While recognising the traditional rules about

specification, Ld. Pres. Inglis expressed his approval of the equitable principle of communion, for cases where a new subject of property is created by the combination of materials and industry contributed by different parties. The two or more persons who had contributed to the production of the new subject, either materials, or skill and labour, or both, should hold it in common property, in such shares as corresponded to the value of their several contributions. While not entitled to follow this philosophical doctrine to its just results, because restrained by the fixed rules of law as to *specificatio* and *confusio*, the Court, in cases which did not fall very clearly into any known category, was at liberty to apply this equitable principle "without inquiring too curiously or balancing too nicely to which of several categories the new case has most general resemblance." In actual practice, questions of this nature must generally depend for their solution upon the interpretation of contract, express or implied.

[See Stair, bk. ii. tit. 1. sec. 41; Ersk. bk. ii. tit. 1. sec. 16; Bell, *Com.* i. 294; Bell, *Prin.* s. 1298; Justinian, *Inst.* bk. ii. tit. 1. sec. 25.]

Specification and Diligence for Recovery of Writings.—To recover documents which are required by a litigant for purposes of his action, from those in whose hands they may happen to be, who are styled havers, and who may be third parties or the opposite party in the case, a motion must be made for Commission and Diligence. This is of like purpose and effect as the English motion for Discovery (Mackay, *Man.* 241). Early provisions regarding it are set forth in Act 1672, c. 16, s. 25. Before the motion can be made, an action must be in dependence: the English suit for the perpetuation of testimony having no counterpart in Scotland. But proof has been allowed, and documents recovered, in an undefended declarator of property brought solely to preserve evidence (*Russel's Trs.*, 1865, 3 M. 856). As with other motions, forty-eight hours' notice must be sent to the opposite party, together with a copy of the specification. In jury causes, thirty-six hours' notice is sufficient (A. S., 16th Feb. 1841, s. 9). A copy of the specification must also be sent to the judge's clerk, and the specification itself lodged in process. The specification is a writ which briefly sets forth what documents are called for under the diligence. Particular documents called for are, so far as knowledge permits, described by reference to their dates and to the names of the parties to them; and general classes of documents, in such terms as to be capable of identification. The names of the persons to be cited as havers are not set forth; but any persons reasonably believed to have the document in their possession may be cited under the diligence (see Mackay, *Man.* 242).

Diligence granted in all Actions.

While declaring (s. 1) that it shall not generally be competent in any cause depending before the Court of Session to grant commission to take proof, the Evidence (Scotland) Act, 1866, expressly provides (s. 2) that "it shall be competent to the judges of either Division of the Court or to the Lord Ordinary to grant commission to any person competent to take and report in writing the depositions of havers." It was, however, enacted (s. 6) that nothing in this Act contained should affect the Conjugal Rights (Scotland) Act; and under sec. 13 of this latter statute it remained doubtful whether in consistorial causes, and where the haver was within his jurisdiction, the Lord Ordinary had power to grant such commission. This power is, however, expressly conferred by the Court of Session Act, 1868,

s. 100, subs. 2, and accordingly power to grant Commission and Diligence now extends to all actions, and in vacation is exercised by the Lord Ordinary on the Bills (Court of Session Act, 1868, s. 93). A reclaiming note from an Interlocutor of a Lord Ordinary granting this diligence is incompetent unless with leave of the Lord Ordinary (*Stuart*, 1890, 17 R. 755), and in practice such leave is not readily granted. In jury cases application is to be made after issues have been adjusted, and the specification, etc., is to be lodged with the Clerk of Session in whose office the cause is (A. S., 16th Feb. 1841, s. 9, and 13 & 14 Vict. c. 36, s. 37). No production shall be allowed to be used at such trial unless it has been lodged eight days before the date of hearing, unless by special permission of the Court, which will be granted only upon satisfaction by oath of party that such production could not be lodged in time (A. S., *cit.* s. 18). In arbitration proceedings the arbiter, being a "private person in whom the law has not vested jurisdiction," cannot compel havers to produce documents before him (Ersk. iv. 3. 31). But at the suit either of the arbiter (*Ker*, Mor. 634) or of a party to the arbitration (*Stevenson*, Mor. 634), or, as is customary, of such party with concurrence of the arbiter (*Blaikies*, 1851, 13 D. 1307, and 1852, 14 D. 590), the Court will interpone authority to the appointment of commissioners by the arbiter, and grant warrant for production of documents before them. To obtain this, a petition is presented to the Court or to the Lord Ordinary, but is not competent in the Bill Chamber (*Harvey*, 4 S. 809). Before such petition can be presented, the arbiter's approval of the specification must first be obtained (*Crichton*, 15 R. 784). When havers are resident in a different county (*Gordon*, Mor. 634) or in England (*Highland Rwy Co.*, 1868, 6 M. 896), the Court will refuse such petition as incompetent. In such cases the proper course is to apply for a commission to take the depositions of havers, whose attendance in the latter case will be enforced under 6 & 7 Vict. c. 82 (*Blaikies*, 1851, 13 D. 1307). Should a haver who has been duly cited in an arbitration refuse to produce the document called for, and persist in refusal after the arbiter has overruled his objection, one of the parties may, without any recommendation of the arbiter, present a summary petition to the Sheriff praying him to ordain the haver to produce, or failing production to grant warrant for imprisonment (*Blaikies*, 1852, 14 D. 590). The Sheriff's course of action will proceed upon consideration of the merits of the haver's objection (*ib.*).

As regards proceedings before Church Courts, it was decided in *Presbytery of Lews*, 1874, 1 R. 888, that on application by a recognised judicature of the Established Church of Scotland, it was competent for the Sheriff to enforce attendance on the citation of the Church Court. *A fortiori* the Court of Session has such power (Mackay, *Manual*, 115). The decision proceeded on reasoning that a presbytery of such Church was a Court recognised by the law of the land. But Ld. Ardmillan was further of opinion that the same aid should be given even to the voluntarily constituted jurisdiction of Churches not established.

Diligence in the Sheriff Court is granted under A. S., 10th July 1839. To recover documents on which the applicant founds in his condescendence, it is granted at the time of lodging the pleadings (s. 51). If a party neglect to recover at this stage, recovery, subject to the Sheriff's discretion, will be afterwards allowed only on conditions (39 & 40 Vict. c. 70, s. 22). To recover documents required *in modum probationis*, diligence is granted after closing of the record (A. S., *cit.* ss. 66, 70, and 71). Havers residing in another sheriffdom are cited under 1 & 2 Vict. c. 119, s. 24. The

Sheriff's warrant is indorsed by the Sheriff Clerk of the county where the warrant is to operate.

It is not the practice of the Inner House to patch up a defective specification. Where an objection is sustained, their lordships will refuse the diligence and remit to the Lord Ordinary to proceed; and a remodelled specification may be presented before him (*Scott, Simpson, & Wallis*, 1897, 24 R. 877, per Ld. President).

When Diligence will be Granted.

The stage at which diligence is usually granted is after the record has been closed and proof allowed. But subject to the qualification that there must be an action in dependence (*supra*), the motion for diligence may be competently made at any stage of the cause: before the record is closed, in the course of an adjourned proof, or even after appeal on a preliminary plea to the House of Lords. Thus in *Baroness Gray*, 1874, 1 R. 1138, where a proof had been adjourned before the close of the defender's evidence, the Court, upon a report by the Lord Ordinary, allowed the defender a diligence at this stage. In *Forbes*, 1857, 20 D. 287, appeal was taken to the House of Lords after the competency of the action had been disposed of and issues adjusted by the Inner House. It was held that the Court was not by the appeal precluded from granting a diligence to recover documents which should be in process, and available for the trial in the event of the interlocutors appealed from being sustained, and the cause remitted for further procedure. Before closing of the record, diligence will be granted only on cause shown, and although competently moved for, is to be regarded as an indulgence (*National Exchange Co.*, 1849, 12 D. 249). As to documents to which the applicant has a title other than merely as a litigant, see *infra*. The reason of the reluctance shown by the Court to grant diligence at this stage appears to be twofold. (1) The production of such documents tends to encumber the record and create delay (*M'Ilquahan*, 1850, 13 D. 403). (2) The primary purpose of granting diligence is to enable the parties not to table a case, but to prove the case tabled. It is granted *in modum probationis* (*MacIntosh*, 1828, 6 S. 784). "To allow a party to probe into all sorts of correspondence to see if he can find out something to say, is a fishing diligence, which should no more be allowed than to grant a precognition" (per Ld. Glenlee). But if the applicant knows his case, and craves the diligence with the view, not of ascertaining whether he have a ground of action, but of making his statement specific, it will probably be granted (*Gray*, 1855, 18 D. 193). The decision of the Lord Ordinary will not lightly be interfered with (*M'Ilquahan, ut sup.*). Both parties should, in framing their averments, be put so far as possible on an equal footing (*Maconochie*, 1841, 3 D. 1261). And where hardship is clearly involved in refusal of diligence, later practice is more favourable to the application (*Marshall*, 1882, 19 S. L. R. 696). In a recent case the pursuer was, after service, but before calling of the summons, allowed a diligence to recover from the defender an agreement on which his action was founded, in order to have it stamped (*Brady*, 1896, 3 S. L. T. 509).

Who may be Commissioner.

The commission is usually granted to advocates or law agents. In *Maclcod*, 1856, 18 D. 778, where a diligence was to be executed in Isla, it was stated that there were no lawyers in the island, and commission was accordingly granted to any of Her Majesty's J.P.'s, and also *nominatim* to a Glasgow professor. When the diligence is to be executed abroad, com-

mission is issued to lawyers, consuls, or others in like official position; but persons acquainted with the law of Scotland will be preferred. When the documents are to be recovered in England, an advocate may be sent as commissioner, and a fee of £6, 6s. per day for thirteen days has been allowed (*Tannett, Walker, & Co.*, 1874, 1 R. 440). In *Owners of the Hilda*, 1885, 12 R. 547, the Court sustained the Auditor in allowing against the losing party a fee of £10, 10s. per day for three and a half days to H.M. Consul at Port Said for taking deposition of one witness. In this case also the Court sustained the Auditor in disallowing the expenses of a law agent going to London to be present at the examination of havers; but agents usually attend, though where both the Edinburgh and Glasgow agent attended, the charges of one only were allowed (*Alison*, 1856, 18 D. 851). That case being a very important one as regarded character, however, fees of one counsel were allowed. So also in *Renton*, 1846, 8 D. 1085, an action of reduction on ground of fraud,—"a case in which there might have been great nicety in the examination of a haver, and many important points to be attended to for his interest."

The Lord Ordinary may himself take the depositions of havers, and instead of moving for a diligence, witnesses may be cited to produce documents at the proof. Such examination by the Lord Ordinary is, however, discountenanced by the Court, as being likely to occupy too much time. But "if a witness is in the box under examination, and it is necessary, to make the case clear, that certain documents should be produced, he is examined as a haver to produce these documents" (see Opinions in *Baroness Gray*, 1874, 1 R. 1138). In proof taken before the Lord Ordinary, there is no provision, as there is in jury causes (*vide supra*), that productions must be lodged eight days before the trial. Styles for the use of commissioners are collected in Dickson, Appendix I.

What Documents may be Recovered.

In considering what documents can be recovered under a diligence, a distinction is to be noted between documents to which the applicant can qualify a right, and those to the exhibition of which he is entitled only as a litigant, *i.e.* for the purpose of proving his case. The former he can recover at any time, independent of proceedings pending in Court (*M'Kirdy*, 2 D. 949), or of the stage of an action depending (*Provan*, 1830, 8 S. 797; *Paton, infra*). So also with documents in which the applicant has a joint interest and the right of custody (Dickson, 1368 and 1378). Application may be made by summary petition to the Sheriff (*M'Kirdy, ut supra*). But if there be an action in dependence, application should be made by motion for diligence in the cause (*M'Clure*, 1827, 5 S. 229). The applicant may be required to qualify his interest in the document (*Paton*, 1668, Mor. 3963; *Crawford*, 1626, Mor. 3960). But a call in general terms will be allowed (*Ministers of Edinburgh*, 1763, Mor. 3969).

Documents, the title or joint-title to which is not in the applicant, can be recovered by motion for diligence in a depending process. The primary purpose for which recovery is allowed is that the documents may be made available *in modum probationis* (*M'Intosh*, 1828, 6 S. 781). The first requisite of such documents, accordingly, is that they be capable of being used as evidence. The Court requires to be satisfied of the reasonable probability of this before granting diligence (*Livingstone*, 1860, 22 D. 1333; *Porter*, 1867, 5 M. 533); and on this ground refused diligence (1) in an action of reduction of a *mortis causa* settlement on ground of facility and circumvention, to recover a diary containing entries as to the testator's

state of mind and health under the hand of his body-servant, who was alive (*M'Neill*, 1886, 7 R. 574; but contrast *Henderson*, 1892, 20 R. 95); (2) to recover the writ of a partner in a question that could only be proved by writ of the firm (*Catto, Thomson, & Co.*, 1867, 6 M. 54); (3) where it appeared that the purpose of the call was that the documents might be used in taking precognitions or in cross-examining witnesses (per Inglis, Ld. J.-Cl., in *Livingstone, supra*). And as the amendment to be allowed under the Court of Session Act, 1868, is such as can be stated at the bar and made forthwith, the party proposing to amend will not be allowed a diligence to enable him to make his statement specific (*Thomson*, 1869, 7 M. 687).

But the rule is that the Court do not determine beforehand whether the writings to be recovered will be admissible as evidence in the cause (*Livingstone, supra*). Notwithstanding that diligence has been granted to recover a document, parties are not precluded from taking objections to its admissibility at the proof. The right to recover may be clear, but the use to which the document is to be put may raise a question (per Hope, Ld. J.-Cl., in *Noble*, 1843, 5 D. 723). Such objection should be taken when the document is first produced in the proof, not when it is formally tendered on closing proof (*Robertson*, 1848, 11 D. 353). Contrary to the general rule, the Court may, however, decide the question of admissibility at the time of granting the diligence (*Brash*, 1845, 7 D. 539). If this has been done, any objection should be restated at the proof in order to keep matters open in the event of an appeal (per Hope, Ld. J.-Cl., in *M'Cowan*, 1853, 15 D. 496).

The purpose for which the document is wanted is in practice stated at the bar, but in *Kennedy*, 1830, 8 S. 1020, a condescendence was ordered thereon. In *Silver*, 1894, 21 R. 416, the Court refused a call as being excessive, without determining whether or not a more limited application would be granted.

The call should be specific in its terms; for if a general description were sufficient, one might, upon irrelevant or vague allegations, compel his adversary to expose to him his whole title deeds, with all their defects (*Scot*, 1735, Mor. 3965). But *nemo tenetur edere instrumenta contra se* (Ersk. iv. 1. 52). In an old case (*Foggo*, 1839, 1 D. 1138) the Court allowed a diligence calling for "generally all documents tending to instruct the averments and denials of the pursuer in the case." But this decision was held to have proceeded on special grounds, and not to establish a general rule (*Morton*, 1844, 6 D. 1105, where a call in identical terms was refused. See also *Pattinson*, 1844, 6 D. 944, where a general call was refused on the ground that the defender knew of no evidence in support of his averments, and only desired a fishing search among the pursuer's papers). In cases of fraud, however, the applicant will be found entitled to a wide diligence, and the Court will allow a somewhat general call, comprehending even documents which in general would be protected as being confidential (*M'Cowan*, 1852, 15 D. 229; *Tulloch*, 1858, 20 D. 1319; *Assets Co. Ltd.*, 1897, 24 R. 418). So also in cases where a party is sued for costs as having been the true *dominus litis* (*Fraser*, 1895, 3 S. L. T. 333). Nor will diligence be granted merely on the ground that the applicant has been able to condescend, by date and description, upon documents of the contents of which he is ignorant, and which he calls for on supposition only that they may chance to contain something unfavourable to his adversary's claim (see *Smith & Knight* v. *E. of Airly*, 11 March 1815, not reported, but referred to in Tait, 178). After averments have been admitted to probation, these averments constitute the measure which determines what diligence should

be granted; nor will the Court be deterred from allowing a specification by doubt as to the relevancy of the averments (*Duke of Hamilton's Trs.*, 1897, 24 R. 294). But where the Lord Ordinary had by interlocutor allowed the *pursuer* a proof of his averments and to the defender a conjunct probation, the defender was refused diligence to recover documents which could be evidence only of the substantive case tabled in defence, and could be of no avail for rebutting the case made for the pursuer (*Scott, Simpson, & Wallis*, 1897, 24 R. 877).

Besides being excluded from the operation of diligence when manifestly incapable of being adduced as evidence (*supra*), documents may also be protected from recovery on the ground of Confidentiality. See CONFIDENTIAL COMMUNICATIONS. Documents that are in use to be issued, are protected until the final act of issue. So letters not posted in *Livingstone*, 1831, 9 S. 757, and defences not lodged in *Gavin*, 1830, 9 S. 213. In *Ferrier*, 1827, 5 S. 332, private estate plans were protected, but judicial plans were allowed to be recovered. Plans of coal workings were recovered in *Wark*, 1855, 17 D. 526.

Business-books, including the books of third parties, will be recovered when bearing directly on the matter at issue in a case. Thus in a declaration and interdict brought to prevent paper-makers polluting a stream, diligence was granted to recover books showing the materials used by them in their works; but refused to recover books showing the sums expended on the buildings, with the view of impressing the jury with their increase in value, and remarked that this could be proved by putting defenders in the box (*Duke of Buccleuch*, 1866, 4 M. 475). In *Robertson*, 1875, 2 R. 935, however, where the question at issue was upon what terms and prestations the pursuer had become tenant of a farm, diligence was allowed to recover the pursuer's books in order to ascertain the true value of the farm, as this "would materially assist the jury in coming to a just decision between the parties." The general rule applies, that to be available for production books must be capable of being used as evidence. On this ground the diligence was refused in *Steven*, 1875, 2 R. 292, and allowed in *Porter*, 1867, 5 M. 533. The latter was an action on a policy of fire insurance, where the insured's own books had been destroyed. He was allowed to recover the books of third parties who had sold goods for him, with a view to proving the extent of his sales. In an action for damages for slander by a Birmingham firm against the publishers of a Glasgow newspaper, access to the defenders' books, in order to prove the extent of the paper's circulation in Birmingham, was refused (*British Publishing Co. Ltd.*, 1892, 19 R. 1008). In *Johnstone*, 1892, 20 R. 222, where the pursuer in an action for personal injury averred that his business had suffered in consequence, the Court allowed the defenders access to his business-books and recovery of his income-tax receipts for three years, distinguishing from *Craig*, 1888, 15 R. 808, where a similar diligence covering a period of four years was refused. In an action for breach of promise of marriage, diligence to recover the defender's business-books and bank-books was refused, but the Court gave opposite opinions as to the general competency of the motion in such circumstances (*Somerville*, 1896, 23 R. 576). In an action for reduction of a will on the ground of mental incapacity, diligence was granted to recover from the books of the testator's medical attendants all excerpts tending to throw light on his state of mental and bodily health (*Fraser*, 1897 (O. H.) 4 S. L. T. 326). Where great inconvenience would result from production of the books themselves, and where certain entries only come under the call, the proper course is to have excerpts taken at the

sight of the commissioner (Dickson, 1318; *N. B. Rwy. Co.*, 1893, 20 R. 397). Third parties from whom production is asked having no *locus standi* in the action, of course cannot resist the granting of the diligence. But they may raise any objection open to them before the commissioner (*N. B. Rwy. Co., supra*).

Diligence will not be granted to recover public documents in a foreign country, such as books of record and instruments in public custody. The proper course is to call the registrar or custodier, and examine him as a witness to entries (*Maitland*, 1885, 12 R. 899). Nor will the Court grant diligence to recover writings lodged in the offices of the Court of Chancery in England, but will grant a recommendation to the authorities there to allow access (*Richardson*, 1850, 22 Sc. Jur. 431). Written information given by the defender to the procurator-fiscal was recovered by the pursuer of an action for damages in respect of a malicious charge of perjury. The Lord Advocate declined to state that damage to the public service could arise through the diligence being granted, and the defender was held not to be entitled himself to plead this (*Henderson*, 1853, 15 D. 292). Confidential communications by an officer in the public service to his superior officer in the same department were protected in *Hastings*, 1890, 18 R. 244; but in *Halcrow*, 1892, 20 R. 216, a report by the procurator-fiscal to the County Council was recovered, the Court ordering the commissioner to seal up the document and transmit it, to lie *in retentis* and await the orders of the Court. In *Arthur*, 1895, 22 R. 417, the Lord Advocate declined to produce, on the ground that to do so would prejudice the public service, and the Court refused the diligence. A haver cannot be compelled to produce a document that would convict him of crime (Mackay, *Manual*, 248). But that discreditable matter will be disclosed is not a sufficient excuse (see *Don*, 1848, 10 D. 1046, where the documents were ordered to be produced to the commissioner, and lodged in process or not at his discretion). The statutory declaration of a bankrupt was recovered in an action of reduction of his assignation granted before sequestration at the instance of the trustee (*Emslie*, 1862, 1 M. 209). The Court will not order production of documents in the keeping of the Lord Clerk Register, but extracts will suffice (*Maclean*, 1861, 23 D. 1262). Third parties are entitled to refuse to produce their titles: if the applicant has a legal right to them, he may raise an action of exhibition (*Fisher*, 1827, 6 S. 330). Diligence to recover models of a ship was refused (*Her Majesty's Advocate*, 1864, 2 M. 1032). Where there is reason to fear that documents may be tampered with before they can be called for by diligence in course of process, the Court may on summary application take measures for their preservation (*Orrok*, 1847, 10 D. 35).

Procedure in Commissions to recover Documents.

When a commission has been granted to recover documents, the agents of the party who has obtained the commission send the commissioner a copy of the interlocutor granting the diligence, together with a copy of the specification and a copy of the record in the case, and ask him to fix a diet for the examination of the havers. Prior to the Court of Session Act of 1850 it was necessary to have a formal extract of the interlocutor granting diligence, but sec. 25 of that Act (13 & 14 Vict. c. 36) provided that a copy of the interlocutor, certified by the Clerk to the Process or his assistant, should have the same effect as a formal extract. The copy bears a stamp for two shillings and sixpence. In a commission to examine witnesses it is necessary to state the names of the persons to be examined, but the practice as to havers is different. No names are given, and the person who

has obtained the diligence is entitled to cite and examine any person whom he has reasonable grounds to suppose has the documents, or any of them, in his possession.

When the date has been fixed for the examination, the agent cites the havers to appear, which they are bound to do. If they fail to obey the citation, letters of second diligence will be granted against the haver. Such letters contain a warrant to apprehend the haver and put him in prison till he finds security to appear and depone. Such letters are granted by the Court or Lord Ordinary who granted the diligence (*National Exchange Company*, 1858, 20 D. 837). It is stated that where there is reason to presume that a haver will not appear, a first and second diligence will be granted at the same time (Shand's *Practice*, 372). By 6 & 7 Vict. c. 82, s. 5, provision is made for compelling the attendance of witnesses and production of documents before commissions to take evidence issued by Courts in one part of the United Kingdom, to be executed in another part. This is done by application to the Court of the part of the United Kingdom in which the commission is to be executed, which Court will issue an order commanding attendance. Provision is made for the punishment of persons refusing to obey the order of the Court (s. 6), but no person can be compelled to attend before a commissioner unless he is offered conduct money and payment of expenses (s. 7).

See also the provisions of 17 & 18 Vict. c. 34. The haver is cited to attend and to bring with him the documents which he is called on to produce. A copy of the specification, or the part of it with which he is concerned, is usually sent to him.

The duties of commissioners were laid down in recommendations contained in an Act of Sederunt of 11th March 1800. The Act applies to commissions for the recovery of documents. It is quoted, so far as still of use, in article on COMMISSION, PROOF BY.

The commissioner, either at the diet or before it, administers the oath *de fideli* to the clerk whom he has appointed. The haver is then sworn as a witness in ordinary form, and is then examined by the agent or counsel for the party who has obtained the diligence. As to what questions may be asked of havers, an Act of Sederunt was passed on 22nd February 1688 in the following terms:—"The Lords of Session considering the inconveniences of His Majesties subjects, by defenders called in exhibitiones or incidents for exhibition a production of wrytes, their deponeing only in generall termes, That they neither have, nor had the wrytes since the citation, or fraudfully has put the same away at any time; therefor they ordain, That in all time comeing, parties shall be obleidged to answer to all speciall pertenent interrogators, in relation to their haveing of the wrytes, or putting the same away, or as to their knowledge and suspicion, by whom the samen were taken away, or where they presently are, that the pursuar may thereby make discovery, and recover the same: Declaring always, that upon advyseing of the defender's oath, they shall not be otherways decerned against, as havers of the saids wrytes, unless it be found, that they had the same since the citation, or fraudfully put them away at any time."

In modern practice the general rule is that the agent asks the haver what documents he has to produce under each article of the specification. The questions usually put are: Have you the documents called for? Have you had them since the date of citation? Have you ever had them? Have you put them away or destroyed them? and if so: When, and where, and why? Do you know or suspect where the documents are now? Do

you know who took the documents away? It has been held incompetent to ask a haver whether he destroyed a document under instructions from anyone, and also whether he knew who had prepared the document which had been destroyed; but, on the other hand, the haver was allowed to be asked in three distinct questions: When, where, and why he destroyed the document? (*Cullen*, 1863, 1 M. 284). No questions as to the contents of the documents are allowed, nor questions as to the merits of the cause. The questions are strictly limited to those which relate to the recovery of the writing.

The evidence of the haver is taken down in writing, and, at the close of the examination, is read over to the haver and signed by him, and also by the commissioner and his clerk; but of consent of parties the evidence may be taken in shorthand, and the signature of the haver may be dispensed with. If the documents produced are not numerous, a short description of them is usually given in the deposition; but where a large number of documents are produced, the ordinary course is to state in the deposition the number of documents, conform to an inventory produced. The inventory is docqueted by the haver, the commissioner, and the clerk. The documents themselves are also usually docqueted as relative to the deposition (Shand's *Practice*, 372). This need not be done if the documents would be injured by such marking; and in modern practice the documents produced are not as a rule docqueted by the commissioner. The writings require to be specified in the deposition or the inventory, so as to render it easy to identify them.

A haver is bound to produce to the commissioners the documents called for. He cannot refuse to produce them on the ground that they have no bearing on the question at issue. He may, however, plead confidentiality. Although the Court will not grant a diligence for the recovery of documents which are obviously confidential, yet there are many cases where the question of confidentiality does not arise when the diligence is granted and has to be decided by the commissioner. Thus a haver who is not a party to the case does not appear when the diligence is granted. The procedure when a haver pleads that a document is confidential is that, instead of producing it to the party who has obtained the diligence, he exhibits it to the commissioner, who examines it and decides whether it is confidential. If an appeal is taken or intimated from the commissioner's decision, his duty is to seal the document up, and allow the matter to be decided by the Court when the appeal is heard (see *Munro*, 1858, 21 D. 106). It is the duty of the commissioner to apply his mind to decide the question of confidentiality. Where a commissioner had not decided the question, but had sealed up the document and reported the case to the Lord Ordinary, his Lordship remitted to the commissioner to state on what grounds he declined to deal with the question of confidentiality (*Stewart, Govan, & Co.*, 1897, 5 S. L. T. 226).

Diligence is frequently granted for the production of books or documents, that excerpts may be taken therefrom, on the sight of the commissioner, of all entries relative to a certain matter. In such a case the party who has obtained the diligence is not entitled of right to see the books, and can only do so with consent of the haver; nor is the haver obliged himself to make excerpts of the relevant matter in the books produced; nor is the party seeking the recovery bound to accept excerpts prepared by the haver. Failing an agreement between parties, the books are exhibited to the commissioner, who goes over them and directs his clerk what passages are to be excerpted, and afterwards compares the

excerpts with the originals. In most cases where books are to be produced, the diligence is limited by putting the words, "that excerpts may be taken therefrom at the sight of the commissioner"; but if these words are omitted, it does not follow that in all cases the haver is bound to hand over his books to be inspected by the other side. He may state that his books contain other matters not connected with the matter in dispute, and which are of a private nature; and if so, the proper course is for the commissioner to make excerpts, and not allow the opposite party to see parts of the haver's books in which they have no proper interest. There is no reported decision on this matter, but the question is one which is often argued before commissioners, and in one case it was held by a Lord Ordinary that the proper course was that a commissioner should rule excerpts from certain books, even though the diligence had been granted without anything being said about excerpts.

Spei emptio, or *spei venditio,* is the sale of an expectancy dependent upon mere chance, such as the pearls that may be found in a catch of oysters already landed, or the minerals that shall be taken from a mine to be opened. (Benjamin, *Sale,* 4th ed., p. 87, notes that the stock instance given in the *Digest,* xviii. 1. 8. 1, xix. 1. 11. 18, and xix. 1. 12, of the purchase from a fisherman of the fish to be caught in a cast of his net is rather a hire of his materials and labour, because the fish are *res nullius* at the date of the contract.) Pomponius (*Dig.* xviii. 1. 8. 1) treats *spei emptio* as an instance of a sale concluded without any subject sold (*sine re*), but the better view is that the chance (*alea*) is the true equivalent (*res*) for the price paid. The expectation may never be realised, or the results may be less than were anticipated or greatly in excess; but even if the chance turns out to be quite valueless, it is held to have had a money value at the time when the sale was concluded; and whereas the obligation of the seller is conditional upon the expectation being in some degree realised, the buyer is bound absolutely under the contract to pay the price in any case (*Dig.* xviii. 1. 8. 1), provided, of course, that the failure of the speculation was not due to fraud on the seller's part (*Dig.* xix. 1. 12, and l. 17. 161).

It followed, therefore, in the civil law that the seller could not rescind the sale on the ground of inadequacy of price (*læsio enormis*) even though the buyer's profits turned out to be worth more than double the purchase money, for in the absence of fraud it was impossible to rebut the presumption that the seller got what he thought the chance was worth at the date of the contract: conversely, the disappointed purchaser of a *spes* could not sue by the *actio redhibitoria* for rescission of the contract, nor by the *actio quanti minoris* for abatement of the price on the ground of undisclosed defects.

Spei emptio is to be distinguished from a somewhat different form of the contract, namely, *emptio rei sperata*, instances of which are the sale of the lambs to be born in a particular flock during the following spring, or next season's crop on a certain farm or vineyard. These cases are, in fact, the sale of future things conditionally on their coming into existence in the ordinary course of nature; the speculation extends to cover not the existence but only the quantity and qualities of the expected produce. If nothing at all is forthcoming, the sale is rescinded; but if there is some produce realised, the purchase money must be paid in full. [It might be inferred from one passage in the *Digest* (xviii. 1. 39. 1) that the buyer takes the risk of quality, but that the purchase money varies with the amount of

the actual produce. Mommsen, however, and other editors think that the text is corrupt.]

It was always a question of construction and sometimes a matter of difficulty to decide which of the two forms of the contract was intended by the parties. If the subject was a matter of pure chance, *spei emptio* was presumed; whereas if it had (to use the modern expression) a "potential existence," the presumption was for *emptio rei speratæ*; but in either case the presumption might be rebutted by evidence of a contrary intention.

Two forms of contingent sale were forbidden by the civil law. (1) *Emptio fugæ*, the purchase of a runaway slave, the purchaser taking the risk of recapture, was forbidden as contrary to public policy (*Dig.* xlviii. 15. 2). (2) A sale of the inheritance of a living third person was void, because it was in the eye of the law the sale of a non-existent subject, and not of a chance (*Dig.* xviii. 4. 1, and xviii. 4. 7). Justinian permitted it, provided that the presumed testator consented, but he was not thereby bound to leave the inheritance to the vendor (*Cod.* ii. 3. 30).

[Mackintosh, *The Roman Law of Sale*, pp. 24 *seq.*, 72, 83, 167; Moyle, *Contract of Sale in the Civil Law*, pp. 30 *seq.*, 186.]

Spei emptio is recognised in our common law. Erskine (*Inst.* iii. 3. 3) says: "Whatever falls under commerce may be the subject of sale, and even things not yet existing, but which are only in hope, as the draught of a net, or the hope of a succession." There is very little case law on the subject either here or in England. There are *obiter dicta* of Chief Baron Richards: "If a man will make a purchase of a chance, he must abide by the consequences" (*Hitchcock*, 4 Price, 135); and of Baron Martin: "No doubt a man may buy a chance of obtaining goods . . ." (*Buddle*, 1857, 27 L. J. Ex. 24).

The Sale of Goods Act (56 & 57 Vict. c. 71, s. 5 (2)) enacts that "there may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen." The Act, however, does not apply to *spei emptio* in Scots law; for the *spes* itself is the subject of the sale, and incorporeal subjects are not included in the term "goods" as defined in sec. 62 (1).

In English law, on the other hand, the present sale of a chance is impossible, and the transaction is an executory agreement to sell something else contingently upon its coming into existence, and if that thing is a corporeal moveable or "chattel personal" the Act will apply. Some English lawyers have held, on the strength of the old case of *Grantham* (1603, Hob. 132), that *emptio rei speratæ* is to be regulated as a "bargain and sale" to take effect as soon as the thing comes into existence. Benjamin, *Sale*, p. 82, says: "Things not yet existing which may be *sold* are those which are said to have a potential existence, that is, things which are the natural product or expected increase of something already belonging to the vendor." Chalmers, on the other hand, is definitely of opinion that "there is no rational distinction between one class of future goods and another, and the supposed rule has never been acted on. Indeed, *Langton* (1859, 28 L. J. Ex. 252), closely looked at, seems to negative it" (Chalmers on the *Sale of Goods Act*, p. 16).

The best modern illustrations of *spei emptio* are the sale of an expected inheritance, which is not illegal by our law (Bell, *Prin.* s. 37; *Ragg*, 1708, Mor. 9492; and *Cook*, 1850, 15 Q. B. 460), and of a goodwill, "the chance that the old customers will resort to the old place" (Ld. Eldon in *Cruttwell*, 17 Ves. 335).

The commonest modern form of *emptio rei speratæ* is the sale of "futures"

on the Exchanges. These contracts must not amount to a wager; for whether the Gaming Act, 1845 (8 & 9 Vict. c. 109), applies to Scotland or not, gambling contracts are void at common law, and the Courts will not entertain suits to enforce either delivery of the goods or payment of the price in these transactions. In the case of the sale of "futures," Benjamin (*Sale*, p. 526) draws the following distinction: "Such a contract is only valid where the parties really intend to agree that the goods are to be delivered by the seller and the price to be paid by the buyer. If, under the guise of such a contract, the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void under the statute" (*Watts*, 1830, 10 B. & C. 446; *Thacker*, 1878, 4 Q. B. D. 685; *Hale*, 1858, 4 C. B. 85).

[Ersk. *Inst.* iii. 3. 3; Bell, *Prin.* s. 91 (2); Brown, *Sale of Goods Act*, 1893, pp. 27, 29, 30; Benjamin on the *Law of Sale*, 4th ed., pp. 82, 83, 87, 526; Chalmers, *Sale of Goods Act*, 1893, 3rd ed., pp. 16–18; Ker and Pearson-Gee, *Sale of Goods Act*, 1893, pp. 54–57.]

See SALE; GAMING.

Spes successionis.—Any defeasible or contingent right to succeed to any property on the death of another, either under a testamentary deed or *ab intestato*, is called a *spes successionis*, or hope of succession. A *spes successionis* is contrasted with a *jus crediti* in Ld. Moncreiff's opinion in the case of *Goddard* (6 D. 1018), a passage from which is worth quoting as it illustrates clearly the principle that the same person may, in regard to the same subject, have a *jus crediti* in questions with one class of claimants and merely a *spes successionis* in questions with another class; in other words, that *spes successionis* is merely a relative term. "If the provision [in a marriage contract] is so conceived that the principal is not payable till after the father's death, and does not bear interest from any earlier term, and where no actual benefit or interest can be claimed or taken in his lifetime, there is no *jus crediti* vested in the children as against onerous creditors. In respect of the father and his heirs, they are no doubt creditors; but in respect of his creditors they are merely heirs, having no more than a *spes successionis*." In the same way, persons designated as heirs in a mutual settlement may have a *jus crediti* in questions with persons claiming under testamentary deeds of the survivor, but merely a *spes successionis in obligatione* in the question of alienation by the survivor onerously or gratuitously *inter vivos* (*Macfarlane's Trs.*, 22 R. 927). A good illustration of a *spes successionis* under a will is to be found in the old case of *Frog's Creditors*, 1735, Mor. 4262. The destination there was "to A. in liferent and the children to be lawfully procreated of his body in fee." The effect of the decision was that the fee was in A., and his children had no more than a *spes successionis*. Contrast with this the case of *Newlands*, 1794, Mor. 4289; affd. 4 Pat. 43, in which the destination was to A. in liferent *for his liferent use allenarly* and his children in fee, and the beneficial fee was found to be in the children. For examples of cases in which there is merely a *spes successionis*, see VESTING; but the following illustrations may be noted here in addition to those already quoted, viz.: *Melville*, 6 R. 1286; *Main, etc.*, 7 R. 688; *Beaton & M'Andrew*, 1 S. 49; *E. Wemyss*, 28 Feb. 1815, F. C.; affd. 6 Pat. 390; Bell, *Com.* i. 55.

Coming now to the right of affecting a *spes successionis*, by Scots law it is quite competent for a person to assign or dispose of his *spes successionis*, either absolutely or in security; but the assignation will be operative only when the right becomes vested (M'Laren on *Wills and Successions*, s. 1549; *Wood*, 12 D. 963). In this the Scots law differs from the Roman law, which forbade trafficking in the succession of a person still living (*pactum corvinum de hæreditate viventis*), on the ground that it was *contra bonos mores*.

But although a *spes successionis* may be voluntarily assigned or disposed of, it may not be adjudged by the creditors of the expectant successor (*Beaton & M'Andrew*, 1821, 1 S. 49); nor is the *spes successionis* carried by sequestration to the trustee in bankruptcy (*Reid*, 20 R. 510; *Trappes*, 10 M. 38). But while the bankrupt cannot be required under the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, s. 81), to grant deeds necessary to vest the trustee in property which he may have in expectancy, the question was reserved whether a bankrupt who refused to assign such rights to the trustee might not have his discharge delayed or burdened with conditions (*Reid*, 20 R. 510). On the other hand, a bankrupt may not defeat the *spes* of his creditors by alienation to another, and this was applied to the case of a Scotsman sequestrated by French law, who discharged his right of *legitim* in fraud of his creditors (*Obers*, 24 R. 719). See on the subject generally, SUCCESSION; VESTING.

Sponsio ludicra.—See GAMING.

Spring Guns.—The setting of spring guns to kill or maim poachers, or other persons, entering ground whether enclosed or unenclosed, for purposes whether lawful or unlawful, is illegal, and if harm result, the setter of the instrument may be prosecuted for homicide or unlawful wounding (*Craw*, 1826 and 1827, Syme, 188 and 210, also in Shaw (Just.), 194).

It is probably lawful, however, to set these instruments against burglars breaking into a dwelling-house, provided care be taken that none but burglars are exposed to the danger. In England the matter is regulated by statute (24 & 25 Vict. c. 100, s. 31); but the statute does not apply to Scotland, where the common law was considered to be sufficiently virile to deal with the matter. It seems doubtful whether in Scotland a prosecution could be sustained if no harm had resulted.

[Bell, *Prin.* 961; Hume, i. 219; Rankine, *Landownership*, 130; Irvine, *Game Laws*, 81.]

Spuilzie.—Spuilzie is the taking away or intermeddling with moveable goods in the possession of another, without consent of the owner, or without due order of law (Stair, i. 9. 16; Bankt. i. 10. 124; Ersk. iii. 7. 16). It is dealt with by Stair as one of the sources of the natural obligation of reparation, "obliging to restitution of the things taken away, with all possible profits, or to reparation thereof, according to the estimation of the injured, made by his *juramentum in litem*." The remedy provided by the older Scots law, for it is now practically obsolete, was an action of spuilzie. This action not only decreed restoration or restitution of the things spuilzied, or their value; it also carried with it liability for violent profits, that is to say, such profits as the despoiled owner might have made out of the goods (Stair, *v.s.*; Ersk. *v.s.*).

It may be noted that, like theft, spuilzie affixed a *labes realis* upon the goods spuilzied, enabling the owner to vindicate them even in the hands of *bonâ fide* purchasers (*Hay*, 1677, Mor. 10286; Bankt. i. 10. 130).

The action of spuilzie belongs to that class of possessory actions which, like the action of ejection,—from which indeed it differed in form only in respect that it dealt with moveables and not with heritage (Stair, iv. 30. 1),—proceeded upon possession alone, and required no title in writ. The pursuer needed to prove no more than that he was in lawful possession of the subjects libelled (Stair, i. 9. 17, iv. 26. 2; Ersk. iv. 1. 15; see *Maxwell*, 1676, Mor. 14729). See Possessory Action.

The action lay not only against the actual wrong-doer, but also against all others accessory to the spuilzie, as by taking delivery of or harbouring the spuilzied goods (*Cowprane*, 1629, Mor. 379; *Earl of Roxburgh*, 1628, Mor. 379). The liability thence arising, being a liability *ex delicto*, was *in solidum* and without relief (Stair, iv. 30. 3; Ersk. *v.s.*; Bankt. i. 10. 130). Payment by, or transaction with one, if for onerous cause, effected the liberation of all (*Douglas*, 1613, Mor. 14736; Bankt. *v.s.*).

The special privileges or benefits attaching to the action were: (1) That the pursuer needed not to debate with a defender as to the point of right. The brocard applied, *spoliatus ante omnia restituendus*. (2) In the absence of concurring testimony as to the extent of the goods spuilzied (see *Fea*, 1697, Mor. 9367), the pursuer had the privilege, the spuilzie being established in part, of supplementing the proof by his oath *in litem* as to the extent and value of the spuilzied goods (Stair, i. 9. 18, iv. 30. 2). Upon these he might put a *pretium affectionis*, subject always, however, to modification by the Court (*Brown*, 1628, Mor. 9361; *Jardine*, 1573, Mor. 9359). (3) A decerniture in an action of spuilzie carried with it the right to violent profits. Such profits, however, were not in "use to be extended further than to the profits of cattle or those things which, by their proper use, render a profit; and so corns, or other such goods, have not violent profits" (Stair, iv. 30. 7; Bankt. i. 10. 133). These also were subject to taxation at the discretion of the Court (*Home of Linthel*, 1668, Mor. 13985), and extended only to direct, not consequential losses (*Kerr*, 1706, Mor. 16460).

Various defences were open to the action. It was, of course, a complete defence to an action for spuilzied goods that they were lawfully attached under legal diligence or judicial warrant; that the goods were voluntarily delivered by the former possessor; or that they had been restored *re integra*, and accepted and kept by the pursuer (Stair, i. 9. 20, 21, 23). These defences were just different ways of stating the plea of "not guilty."

On the other hand, there were other defences which merely went to elide the action *quoad* its penal consequences, leaving the defender still subject to the obligation to restore and repair the damage caused by his act. This second class of defences fall under one or other of the following heads:—

1. That the alleged spuilzie was an act done in virtue of some title or warrant, public or private, which, while proving insufficient in the result to warrant the act complained of, afforded some probable or colourable excuse for the defender's actings. So, although a warrant of poinding was subsequently reduced, the warrant was still held sufficient to elide an action for spuilzie of the goods pointed, unless (*a*) the proceedings of the poinder were tainted by *mala fides*, oppression, or illegality, as where the price of the goods pointed was offered to the messenger and refused (*Herdman*, 1620, Mor. 10507), or (*b*) the attached moveables were protected under statute, as being "plough goods" (Stat. 1503, c. 98; Stair, iv. 30. 5, iv. 47. 34; *Gibson*, 1630, Mor. 10512). The same held good though the title under which the defender proceeded was not of a judicial, but of a private character,

such as a disposition, the defender having acted throughout in the *bonâ fide* but unfounded belief of its validity and sufficiency in law. To such cases the maxim applied, *Quilibet titulus excusat a spolio* (Stair, i. 9. 19; Ersk. iv. 1. 15). Such cases are very numerous; reference may be made to the following: *Kirkwood*, 1633, Mor. 2117; *Irving*, 1662, Mor. 14750; *Berfoord*, 1665, Mor. 1817; *Sinclair*, 1702, Mor. 14755; see *Menzies*, 1635, Mor. 1815; *Thin*, 1683, Mor. 14753.

2. That the action where not raised within three years had suffered the statutory prescription (Stat. 1579, c. 81; Stair, i. 9. 24, iv. 30. 4; Ersk. iii. 7. 16). See TRIENNIAL PRESCRIPTION.

It will be observed in this second class of cases that, though the spuilzie was elided, this was only to the effect of depriving the pursuer of the benefits of violent profits and of his oath *in litem*; the pursuer might still insist in the action for wrongous intromission, and to the effect of simple restitution and ordinary damages, to which the action of spuilzie might always be restricted (Stair, *v.s.*; Ersk. *v.s.*; *Sinclair, v.s.*). In the latter case, however, the defenders were no longer liable *in solidum*, but only *pro rata* (*Strachan*, 1687, Mor. 14710). Accordingly, action for simple restitution and ordinary damages was not barred by the triennial prescription, but would lie against the despoiler any time within forty years (*Hay*, 1627, Mor. 11069; Ld. Moncreiff, *Baillie*, 1835, 13 S. 472, at 475).

The action of spuilzie being penal in its consequences did not transmit against heirs, unless there had been litiscontestation with the deceased (*Lewars*, 1711, Mor. 10348; Bankt. i. 10. 132).

See VIOLENT PROFITS; VITIOUS INTROMISSION.

Stamps.—As regards all instruments executed on and after 1st January 1892, the regulative Acts are: (1) the Stamp Act, 1891 (54 & 55 Vict. c. 39, as amended by 56 Vict. c. 7, ss. 3, 4; 57 & 58 Vict. c. 30, s. 40; 58 Vict. c. 16, ss. 9–16; 59 & 60 Vict. c. 28, ss. 12, 13; 60 & 61 Vict. c. 24, s. 8; and 61 & 62 Vict. c. 46, ss. 7, 8); and (2) the Stamp Duties Management Act, 1891 (54 & 55 Vict. c. 38, as amended by 61 & 62 Vict. c. 46, ss. 10–13). See (15) below.

(1) *Interpretation Clause of the Stamp Act*, 1891.
(2) *Construction of Statutes and Instruments.*
(3) *Stamping of Instruments; General Provisions.*
(4) *Impressed Stamps; Adhesive Stamps; Cancellation; Fraudulent Removal; Defacement.*
(5) *Appropriated Stamps.*
(6) *Denoting Stamps.*
(7) *Adjudication Stamps; Letter of Satisfaction; Appeal.*
(8) *Production of Instruments in Evidence; Expense of After-stamping.*
(9) *Stamping after Execution.*
(10) *Entries upon Rolls, Books, etc.*
(11) *Supplemental Provisions—*
  (*a*) *Duty on the Capital of Companies.*
  (*b*) *Composition for Certain Stamp Duties.*
(12) *Miscellaneous Provisions—*
  (*a*) *Assignment of Policy to Insurance Company.*
  (*b*) *Instruments relating to Crown Property.*
  (*c*) *Instruments charged with Duty of* 35*s.*
(13) *Recovery of Penalties.*
(14) *Sale of Stamps; Discounts to Purchasers; Stamp Offences; Recovery of Money received for Duty; Allowance for Spoiled Stamps.*

(15) *Stamp Duties imposed by Acts other than the Stamp Act*, 1891, *and Amending Acts.*

(16) *Stamp Duty on Instruments, Forms of which are given in the Conveyancing (Scotland) Act*, 1874.

(17) *General Exemptions from all Stamp Duties.*

(18) *Special Exemptions contained in Statutes not otherwise relating to Stamp Duties.*

(19) *Writs specified in* 55 *Geo. III. c.* 184, *Sched. Pt. II. (IV.), relating to Proceedings in the Courts in Scotland.*

(20) *Schedule of Duties under the Stamp Act*, 1891, *with the Relative Sections of the Act, so far as applicable to Scotland.*

(1) *Interpretation Clause of the Stamp Act*, 1891.—Sec. 122 provides as follows:—

(1) In this Act, unless the context otherwise requires,—

The expression "Commissioners" means Commissioners of Inland Revenue.

The expression "material" includes every sort of material upon which words or figures can be expressed.

The expression "instrument" includes every written document:

The expression "stamp" means as well a stamp impressed by means of a die as an adhesive stamp:

The expression "stamped," with reference to instruments and material, applies as well to instruments and material impressed with stamps by means of a die as to instruments and material having adhesive stamps affixed thereto:

The expressions "executed" and "execution," with reference to instruments not under seal, mean signed and signature (see *Great Western Railway Co.*, [1894] 1 Q. B. 507; *Caledonian Railway Co.*, 1881, 8 R. (H. L.) 23, 27, per Ld. Blackburn, cited (7) below):

The expression "money" includes all sums expressed in British or in any foreign or colonial currency:

The expression "stock" includes any share in any stocks or funds transferable at the Bank of England or at the Bank of Ireland, and India promissory notes, and any share in the stocks or funds of any foreign or colonial State or Government, or in the capital stock or funded debt of any county council, corporation, company, or society in the United Kingdom, or of any foreign or colonial corporation, company, or society;

The expression "marketable security" means a security of such a description as to be capable of being sold in any stock market in the United Kingdom (see (20) below, *s.v.* "Marketable Security"):

The expression "steward" of a manor includes deputy steward.

(2) In the application of this Act to Scotland expressions referring to the High Court shall be construed as referring to the Court of Session sitting as the Court of Exchequer.

(2) *Construction of Statutes and Instruments.*—The law relating to stamps is altogether *positivi juris*; it involves nothing of principle or reason, but depends entirely upon the language of the Legislature (per Taunton, J., in *Morley*, 2 D. P. C. 494). If there is any doubt as to the meaning of the Stamp Act, it must be construed in favour of the subject, because a tax cannot be imposed without clear and express words for that purpose (per Pollock, C. B., *Gurr*, 11 Ex. 190; *Comm. of Inland Revenue* v. *Angus & Co.*, L. R. 23 Q. B. D. 579, per Esher, M. R.; *Committee of London Clearing Bankers*, L. R. [1896] 1 Q. B. 222, per Wright, J.; affd. *ib.* 512). But general words imposing a charge cannot be restricted (*in re Wright*, 11 Ex. 458, 25 L. J. Ex. 49). If the words employed raise a patent ambiguity, it is the duty of a Court to solve it as a matter of construction. In construing the words, the surrounding circumstances, the facts which must have been known to the Legislature when passing the measure, the language of the other enactments with which the enactment in question is associated, and the language

of the class of enactments of which it forms one, are elements to be considered (*Committee of London Clearing Bankers, ut supra*). As to the character of the language employed in the Revenue Acts, see *Liquidators of the Glasgow City Bank*, 1881, 8 R. 389, per Ld. Pres. Inglis. A liberal construction should be given to words of exemption confining the operation of the duty (*Warrington*, 8 East, 242, per Ld. Ellenborough). Where certain instruments are exempted in general words in an Act not a Stamp Act, the scope and purpose of the Act must be considered in determining the scope of the exemption (*Att.-Gen.* v. *Gilpin*, L. R. 6 Ex. 193).

Observe that the headings under which the sections of the Stamp Act, 1891, are grouped, cannot be discarded from consideration (*Mersey Dock and Harbour Board*, [1897] 1 Q. B. 786, 2 Q. B. 316; cp. *Inglis*, 1898, 25 R. (H. L.) 70, per Ld. Herschell). It may be noted that each specific heading in the schedule refers to the sections dealing with the subject of that heading.

In determining whether any or what stamp duty is exigible, the substance and effect of the deed are to be considered rather than its exact words or form (*Christie*, L. R. 2 Ex. 46; *Limmer Asphalte Co.*, L. R. 7 Ex. 211; *Mortgage Insurance Cptn.*, L. R. 20 Q. B. D. 645, 21 Q. B. D. 352; *Belch*, 1877, 4 R. 592; *Gibb*, 1880, 8 R. 120; *Glasgow & S.-W. Railway Co.*, 1887, 14 R. (H. L.) 33; see (3) *infra*). The question, Is the instrument dutiable? involves the application of a canon of construction different from that to be applied when the question is,—Under which of several heads of charge does the instrument fall? Thus a document which in a question of charge or no charge would undoubtedly have been liable as a promissory note, was in a question whether it was chargeable as a "promissory note" or "debenture" held liable under the latter head (*British India Steam Navigation Co.*, L. R. 7 Q. B. D. 165; *Mortgage Insurance Co., ut supra*; cf. *Limmer Asphalte Co., ut supra*). It is to be observed that while the description of the instrument by the parties will not determine its character (*Mortgage Insurance Co.* and *Limmer Asphalte Co., ut supra*), their intention is a relevant consideration (*Mortgage Insurance Co., ut supra*). Where the meaning is doubtful, the stamp may be looked at (*Hutley*, 46 L. T. R. 186).

Observe the provision of 61 & 62 Vict. c. 46, s. 7 (2), that any document referring to any Act or enactment repealed by the Stamp Act, 1891, shall, unless the context otherwise requires, be construed to refer to that Act or the corresponding enactment in that Act.

(3) *The Stamping of Instruments; General Provisions.*—The instrument must be duly stamped for its main object (*Limmer Asphalte Co., ut supra*). If not so stamped, it cannot be made available for any subordinate purpose, for which it may happen to be stamped (*Corder*, 3 Taunt. 382; *Doe d. Wyatt* v. *Stagg*, 9 L. J. C. P. 73; cf. *Fleming*, 1859, 21 D. 982). If it be duly stamped for its main object (*Limmer Asphalte Co., ut supra*, per Martin, B.), or if it be exempt from duty as to its main object (cf. *Curry*, 3 T. R. 524; *Heron*, 5 Esp. 269; *Walker*, 6 C. B. 662, 18 L. J. C. P. 323; and *Skrine*, 2 Camp. 407, with *South*, 3 Bing. N. C. 506, and *Horsfall*, 2 Ex. 778, 17 L. J. Ex. 256), anything contained in it accessory to that object will not attract stamp duty. Moreover, the expression in the instrument of that which the law implies does not necessitate a further stamp, for *expressio eorum quæ tacite insunt nihil operatur* (*Wroghton*, 11 M. & W. 561, 13 L. J. Ex. 57, per Parke, B.). If a stamped deed be altered *in substantialibus*, a new stamp is requisite (*French*, 9 East, 351; *London and Brighton Railway Co.*, 2 M. & G. 674; *Noble*, L. R. 2 Ex. 135, 1 Bell's *Com.* 321, 322), unless the deed was not perfected (*Jones*, 1 C. & M. 721; *Johnson*, 2 Stark. 313).

Sec. 3 provides that—

(1) Every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped is to be so stamped, that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument written upon the same piece of material.

(2) If more than one instrument be written upon the same piece of material, every one of the instruments is to be separately and distinctly stamped with the duty with which it is chargeable.

Thus unless it be merely explanatory or declaratory, a memorandum indorsed upon an instrument may itself be chargeable (*Stephens*, 2 M. & Scott, 44; *Bacon*, 3 M. & W. 78; *Schumann*, 1 East, 537); or it may so control the instrument as to render it, together with itself, liable to one duty (see *s.v.* "Agreement" below).

Sec. 4 provides that—

Except where express provision to the contrary is made by this or any other Act,—

(*a*) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the matters;

(*b*) An instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration or considerations, is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of the considerations.

Thus an instrument containing an appointment of new trustees and a conveyance of the trust property is chargeable with two duties of 10s. each (*Hadgett*, L. R. 3 Ex. D. 46); and a settlement of a definite sum and of the proceeds of heritage not yet sold is liable to settlement duty and deed duty (*Stuceley*, L. R. 5 Ex. 85). An instrument which operates to convey separate properties to separate persons, to be held by them in severalty (*Freeman*, L. R. 6 Ex. 101), or includes several contracts with several persons (*Waddington*, 5 Esp. 182; cp. *Doe d. Copley* v. *Day*, 13 East, 241), attracts separate duties. But where a person purchases several lots at a sale by auction, thereby entering into several contracts (*Couston, Thomson, & Co.*, 1872, 10 M. (H. L.) 74), he may combine these contracts in one written contract liable to one stamp (cf. *Baildey*, 2 B. & C. 37, with *James*, 1 Stark. 426, and *Roots*, 4 B. & Ad. 77). If the several parties to an instrument have a common interest in its subject-matter, or if its purpose be a purpose common to them all, it will be liable to one duty only (*Bowen*, 1 N. R. 274; *Davis*, 13 East, 232; *Goodson*, 1 Marsh, 525; *Allen*, 8 B. & C. 565; *Ramsbottom*, 4 M. & W. 584; *Doe d. Croft* v. *Tidbury*, 14 C. B. 304, 23 L. J. C. P. 57).

Sec. 5 provides that—

All the facts and circumstances affecting the liability of any instrument to duty, or the amount of the duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument; and every person who, with intent to defraud Her Majesty,

(*a*) executes any instrument in which all the said facts and circumstances are not fully and truly set forth; or

(*b*) being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all the said facts and circumstances;

shall incur a fine of ten pounds.

The penalty is not enforceable if the duty paid be not less than the duty payable had the provisions of the section been complied with (see *Furness Railway Co.*, 33 L. J. Ex. 173, per Pollock, C. B.).

Observe the provision of sec. 117—

Every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument executed after the sixteenth day of May one thousand eight hundred and eighty-eight, and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument or indemnifying against such liability, absence, or insufficiency, shall be void.

See *Nixon*, L. R. 2 Ex. 338; *Cowan*, 1872, 10 M. 735.

Sec. 6 provides that—

(1) Where an instrument is chargeable with *ad valorem* duty in respect of—
(*a*) any money in any foreign or colonial currency, or
(*b*) any stock or marketable security,
the duty shall be calculated on the value, on the day of the date of the instrument, of the money in British currency according to the current rate of exchange, or of the stock or security according to the average price thereof.

(2) Where an instrument contains a statement of current rate of exchange, or average price, as the case may require, and is stamped in accordance with that statement, it is, so far as regards the subject-matter of the statement, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

(4) *Impressed Stamps; Adhesive Stamps; Cancellation; Fraudulent Removal; Defacement.*—Sec. 2 provides that—

All stamp duties for the time being chargeable by law upon any instruments are to be paid and denoted according to the regulations in this Act contained, and except where express provision is made to the contrary are to be denoted by impressed stamps only.

Sec. 7 provides that—

Any stamp duties of an amount not exceeding two shillings and sixpence upon instruments which are permitted by law to be denoted by adhesive stamps not appropriated by any word or words on the face of them to any particular description of instrument, and any postage duties of the like amount, may be denoted by the same adhesive stamps.

Appropriated adhesive stamps are to be used in the case of bills of exchange or promissory notes drawn or made out of the United Kingdom (s. 34 (2)), and of contract notes liable to the duty of one shilling (s. 52 (3); 56 Vict. c. 7, s. 3). Adhesive or impressed stamps may be used in the case of agreements liable to the fixed duty of sixpence (s. 22); bills of exchange (including cheques) payable on demand (s. 34 (1)); certified copies of or extracts from registers of births, etc. (s. 64); charter-parties (s. 49 (2)); contract notes liable to the duty of one penny (s. 52 (3)); delivery-orders (s. 69 (3)); a lease or agreement for a lease and duplicate or counterpart thereof (*a*) for any definite term, not exceeding a year, of a dwelling-house, or part thereof, at a rent not exceeding £10 *per annum*, or (*b*) for any definite term less than a year of a furnished dwelling-house or apartments (s. 78 (1)); letters of renunciation (s. 79 (2)); notarial acts (s. 90); policies of insurance, other than sea or life insurance (s. 99); protests of bills or notes (s. 90); proxies liable to the duty of one penny (s. 80 (2)); receipts (s. 101 (2)); transfers of shares in cost-book mines (s. 110 (1)); voting papers (s. 80 (2)); and warrants for goods (s. 111 (2)).

Sec. 8 provides that—

(1) An instrument, the duty upon which is required or permitted by law to be denoted by an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp unless the person required by law to cancel the adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectively cancels the stamp

and renders the same incapable of being used for any other instrument, or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time.

(2) Where two or more adhesive stamps are used to denote the stamp duty upon an instrument, each or every stamp is to be cancelled in the manner aforesaid.

(3) Every person who, being required by law to cancel an adhesive stamp, neglects or refuses duly and effectually to do so in the manner aforesaid, shall incur a fine of ten pounds.

This section does not apply to the adhesive stamps used for foreign bills and promissory notes (see sec. 35 (2), 38, and *infra, sub voce* "Bill"). Adhesive stamps are to be cancelled, in the case of an agreement, by the person by whom it is first executed (s. 22); of a bill payable on demand, by the person who signs the bill before he delivers it out of his hands, custody, or power (s. 34 (1)); of foreign bills and notes, by the person in the United Kingdom into whose hands the document comes before it is stamped (s. 35 (1)); of a charter-party, by the person by whom it was last executed, or by whose execution it is completed as a binding contract (s. 49 (2)); of a contract note, by the person by whom the note is executed (s. 52 (4)); of certified copies and extracts from registers of births, etc., by the person by whom the copy is signed before he delivers the same out of his hands, custody, or power (s. 64); of a delivery-order, by the person by whom the instrument is made, executed, or issued (s. 69 (3)); of a lease of a dwelling-house at rent not exceeding £10 per annum, or furnished house or apartments, and duplicate or counterpart thereof, by the person by whom the instrument is first executed (s. 78); of a letter of renunciation, by the person by whom the letter of renunciation is executed (s. 79 (2)); of a notarial act, by the notary (s. 90); of a protest of a bill or note, by the notary (s. 90); of a policy other than a life or sea policy, by the person by whom it is first executed (s. 99); of a proxy or voting paper liable to the duty of one penny, by the person by whom the instrument is executed (s. 80 (2)); of a receipt, by the person by whom the receipt is given, before he delivers it out of his hands (s. 101 (2)); of a transfer of shares in cost-book mines, by the person by whom the request, authority, or notice is written or executed (s. 110 (1)); and of a warrant for goods, by the person by whom the instrument is made, executed, or issued (s. 111 (2)).

Sec. 9 provides that—

(1) If any person—

(*a*) Fraudulently removes or causes to be removed from any instrument any adhesive stamp, or affixes to any other instrument or uses for any postal purpose any adhesive stamp which has been so removed, with intent that the stamp may be used again; or

(*b*) Sells or offers for sale, or utters, any adhesive stamp which has been so removed, or utters any instrument, having thereon any adhesive stamp which has to his knowledge been so removed as aforesaid;

he shall, in addition to any other fine or penalty to which he may be liable, incur a fine of fifty pounds.

Subsec. (2) is repealed by 61 & 62 Vict. c. 46, s. 7 (4), which enacts that the expression "instrument" in sec. 9 (1) shall include any postal packet within the meaning of 47 & 48 Vict. c. 76. Sec. 7 (5) of the same Act provides that any fine incurred under sec. 9 may be recovered summarily, subject to the like right of appeal as in the case of any fine under any Act relating to the Excise.

Sec. 20 of 54 & 55 Vict. c. 38 provides that—

20. Every person who by any writing in any manner defaces any adhesive stamp before it is used shall incur a fine of five pounds: Provided that any person may with the express sanction of the Commissioners, and in conformity with the conditions which

they may prescribe, write upon or otherwise appropriate an adhesive stamp before it is used for the purpose of identification thereof.

(5) *Appropriated Stamps.*—Sec. 10 provides that—

(1) A stamp which by any word or words on the face of it is appropriated to any particular description of instrument is not to be used, or, if used, is not to be available, for an instrument of any other description.

(2) An instrument falling under the particular description to which any stamp is so appropriated as aforesaid is not to be deemed duly stamped, unless it is stamped with the stamp so appropriated.

See *Ashling*, L. R. [1891] 1 Ch. 568.

The appropriated stamps are impressed and adhesive, and are used in the case of bills of exchange (payable otherwise than on demand, or at sight, or on presentation), promissory notes and contract notes liable to the duty of one shilling. These bills of exchange and promissory notes are to be stamped with impressed or adhesive appropriated stamps, according as they are inland or foreign (see secs. 34 (2), 37, *s.v.* "Bill"). Contract notes liable to the duty of one shilling are to be stamped with adhesive appropriated stamps (see sec. 52 (3); 56 Vict. c. 7, sec. 3, *s.v.* "Contract Note").

(6) *Denoting Stamps.*—Sec. 11 provides that—

Where the duty with which an instrument is chargeable depends in any manner upon the duty paid upon another instrument, the payment of the last-mentioned duty shall, upon application to the Commissioners and production of both the instruments, be denoted upon the first-mentioned instrument in such manner as the Commissioners think fit.

The denoting stamps used are: (1) Duplicate denoting stamp ("Duplicate or Counterpart; original stamped with £—"), see *Duplicate or Counterpart, infra*, and sec. 72; (2) duty paid denoting stamp ("Duty paid, *ad valorem* £—"), required, *e.g.*, upon a lease stamped with sixpence, the agreement for the lease bearing the *ad valorem* duty if in excess of sixpence (s. 75); and (3) substituted security stamp ("Original Security Duty stamped," and "Original Security stamped ten shillings per cent."). In the case of denoting stamps (1) and (2), the instruments bearing the higher duty, together with those to be denoted, must be produced at the office of the Solicitor of Inland Revenue, Edinburgh, or sent to him through the local distributor of stamps.

The denoting stamp does not ensure to an instrument the privileges of sec. 12 (5) (see (7) *infra*).

As to a lease, see *s.v.* "Duplicate or Counterpart."

(7) *Adjudication Stamps; Letter of Satisfaction; Appeal.*

Sec. 12 provides that—

(1) Subject to such regulations as the Commissioners may think fit to make, the Commissioners may be required by any person to express their opinion with reference to any executed instrument upon the following questions:

(*a*) Whether it is chargeable with any duty;

(*b*) With what amount of duty it is chargeable.

(2) The Commissioners may require to be furnished with an abstract of the instrument, and also with such evidence as they may deem necessary, in order to show to their satisfaction whether all the facts and circumstances affecting the liability of the instrument to duty, or the amount of the duty chargeable thereon, are fully and truly set forth therein.

(3) If the Commissioners are of opinion that the instrument is not chargeable with any duty, it may be stamped with a particular stamp denoting that it is not chargeable with any duty.

(4) If the Commissioners are of opinion that the instrument is chargeable with duty, they shall assess the duty with which it is in their opinion chargeable, and when the instrument is stamped in accordance with the assessment it may be stamped with a particular stamp denoting that it is duly stamped.

(5) Every instrument stamped with the particular stamp denoting either that it is not chargeable with any duty, or is duly stamped, shall be admissible in evidence, and available for all purposes notwithstanding any objection relating to duty.

(6) Provided as follows:

(*a*) An instrument upon which the duty has been assessed by the Commissioners shall not, if it is unstamped or insufficiently stamped, be stamped otherwise than in accordance with the assessment:

(*b*) Nothing in this section shall extend to any instrument chargeable with *ad valorem* duty, and made as a security for money or stock without limit; or shall authorise the stamping after the execution thereof of any instrument which by law cannot be stamped after execution:

(*c*) A statutory declaration made for the purpose of this section shall not be used against any person making the same in any proceeding whatever, except in an inquiry as to the duty with which the instrument to which it relates is chargeable; and every person by whom any such declaration is made shall, on payment of the duty chargeable upon the instrument to which it relates, be relieved from any fine or disability to which he may be liable by reason of the omission to state truly in the instrument any fact or circumstance required by this Act to be stated therein.

As to the meaning of the words "executed instrument" see (1) above.

Provision for the adjudication of instruments was introduced by the Act 13 & 14 Vict. c. 97, s. 14. Observe that the instrument cannot be adjudicated unless completed and executed.

An adjudication can be conducted by correspondence only in the case of agents not resident in Edinburgh. Each instrument must be accompanied by an abstract and a schedule. The latter, which is provided by the Commissioners, states the date of the application for adjudication, the date and description of the instrument, the names of the parties to it, the name of the applicant, and the amount of duty, if any, which the instrument bears. The former must contain a full statement of the narrative and operative clauses of the instrument. Further, the abstract of a settlement should bear the value of the stocks and securities settled, and of the amount and quality of any property which falls under it (see *Onslow*, [1891] 1 Q. B. 239); and with the abstract of an agreement for the sale of a business and its assets should be sent the balance-sheets and valuations upon which the sale proceeds. If the instrument be short, a copy rather than an abstract should be furnished. As to subsec. (5), see *Prudential Mutual Investment and Loan Association*, 8 Ex. 97, 22 L. J. Ex. 85.

As to the first paragraph of subsec. (6) (*b*), see "Mortgage" and sec. 88. It may be observed that while an instrument constituting an unlimited security cannot be adjudicated, a letter may in certain cases be obtained from the Solicitor of the Inland Revenue stating that the claims of the revenue are satisfied; *e.g.* where the instrument purports to create a security, without stating a limit, and a signed docquet is added stating that the amount secured never exceeded the amount covered by the stamp; or where the instrument constituting the security is *ex facie* absolute, and a duly stamped back-letter is subsequently executed.

As to the second paragraph of the subsection, see *Morgan*, 14 C. B. 473, 23 L. J. C. P. 64; *in re The Belfort*, L. R. 9 P. 215; *Vallance*, 1879, 6 R. 1099.

Sec. 13 provides that—

(1) Any person who is dissatisfied with the assessment of the Commissioners may, within twenty-one days after the date of the assessment, and on payment of duty in conformity therewith, appeal against the assessment to the High Court of the part of the United Kingdom in which the case has arisen, and may for that purpose require the Commissioners to state and sign the case, setting forth the question upon which their opinion was required, and the assessment made by them.

(2) The Commissioners shall thereupon state and sign a case and deliver the same to

the person by whom it is required, and the case may, within seven days thereafter, be set down by him for hearing.

(3) Upon the hearing of the case, the Court shall determine the question submitted, and, if the instrument in question is in the opinion of the Court chargeable with any duty, shall assess the duty with which it is chargeable.

(4) If it is decided by the Court that the assessment of the Commissioners is erroneous, any excess of duty which may have been paid in conformity with the erroneous assessment, together with any fine or penalty which may have been paid in consequence thereof, shall be ordered by the Court to be repaid to the appellant, with or without costs as the Court may determine.

(5) If the assessment of the Commissioners is confirmed, the Court may make an order for payment to the Commissioners of the costs incurred by them in relation to the appeal.

The expression "High Court" as applied to Scotland means the Court of Session sitting as the Court of Exchequer (s. 122 (2)). It is the duty of the Court, on an appeal, to fix the amount of duty, whether it be less or greater than that fixed by the Commissioners; but it is incompetent for it to consider their determination on points not the subject of appeal (*Maxwell*, 1866, 4 M. 1121).

In the case of the *Great Western Railway Co.*, [1894] 1 Q. B. 507, the provisions of this section were applied in dealing with a statute (see also *Caledonian Railway Co.*, 1881, 8 R. (H. L.) 23, 27, per Ld. Blackburn). An appeal on a question of stamp duty was taken from the Court of Session sitting as the Court of Exchequer to the House of Lords in the cases of the *Glasgow and S.-W. Railway Co.*, 1886, 13 R. 480; 1887, 14 R. (H. L.) 33, and *Tod*, 1897, 24 R. 934; 1898, 35 S. L. R. 671.

(8) *Production of Instruments in Evidence; Expense of After-stamping.*—Sec. 14 provides as follows:—

(1) Upon the production of an instrument chargeable with any duty as evidence in any Court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp thereon (see *Cowan*, 1872, 10 M. 735; *Bowker*, 5 T. L. R. 382), and if the instrument is one which may legally be stamped after the execution thereof (see *Vallance*, 1879, 6 R. 1099), it may, on payment to the officer of the Court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

(2) The officer, or arbitrator, or referee receiving the duty and penalty shall give a receipt for the same, and make an entry in a book kept for that purpose of the payment and of the amount thereof, and shall communicate to the Commissioners the name or title of the proceeding in which, and of the party from whom, he received the duty and penalty, and the date and description of the instrument, and shall pay over to such person as the Commissioners may appoint the money received by him for the duty and penalty.

(3) On production to the Commissioners of any instrument in respect of which any duty or penalty has been paid, together with the receipt, the payment of the duty and penalty shall be denoted on the instrument.

(4) Save as aforesaid, an instrument executed in any part of the United Kingdom (*in re Wright*, 11 Ex. 458, 25 L. J. Ex. 49), or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done (see *Gilchrist*, 26 L. T. R. 381, where an instrument, executed abroad, and relating to property abroad, was admitted in evidence unstamped) in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed (see *Clarke*, L. R. 3 Q. B. D. 170).

In the case of *Bristow*, 5 Ex. 275, 19 L. J. Ex. 289, it was observed that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here, but that an unstamped document is not necessarily inadmissible in this country, because the revenue laws of a foreign State

require that it shall be stamped before it can be received in evidence there. In other cases, however, the rule that no notice can be taken of the revenue laws of a foreign country has been applied absolutely (*Holman*, Cowp. 341; *James*, 3 D. & R. 190; *Stewart*, 1871, 9 M. 1057; *Valery*, 1876, 3 R. 965; see Westlake, *Private International Law*, 3rd ed., ss. 155, 209). An attempt has been made to limit the application of this principle to deeds made in independent States, and to exempt from its operation a deed made in a British colony; but it does not appear to have the sanction of authority (*Alves*, 7 T. R. 241; *Crutchley*, 5 Taun. 529; *Clegg*, 3 Camp. 166).

The words "available for any purpose whatever" are new. In *Birchall*, [1896] 1 Q. B. 325, an insufficiently stamped promissory note was handed to a witness under cross-examination to refresh his memory as to the debt to which it referred, and judgment was given on admissions thereupon made. The words in the Stamp Act, 1870, s. 17, were "admitted to be good, useful, or available, in law or equity." The rule was to admit a deed unstamped or insufficiently stamped to prove facts collateral to its purpose (*Matheson & Son*, 1849, 6 Bell's App. 374; *Rutty*, L. R. 2 C. P. 488; *Adams*, 12 Ir. L. R. Ex. 1; *M'Laren*, 1869, 8 M. 106; *Duric's Exrx.*, 1893, 20 R. 295; cf. *Hutchinson*, 1851, 13 D. 837; and see Tilsley, *Stamp Laws*, 3rd ed., 247). On this ground an unstamped instrument has been admitted when tendered, not to be enforced, but to show that it was part of a fraudulent scheme (*R.* v. *Gompertz*, 9 Q. B. 824; 16 L. J. Q. B. 121; *Holmes*, 7 Ex. 802, 21 L. J. Ex. 312), or that the transaction embodied in it was illegal (*Coppock*, 4 M. & W. 361), or in proof of a person's handwriting (*Mackenzie*, 1839, 1 D. 1091), or as secondary evidence of a lost deed, duly stamped (*Munn*, 3 Bing. 292, 4 L. J. C. P. 54; cf. *Paul*, 2 Y. & J. 116). In the case of an instrument lost, destroyed, or withheld, the presumption is that it was duly stamped (*Hart*, 1 Hare, 1, 11 L. J. Ch. 9; *Crowther*, 6 C. B. 758, 18 L. J. C. P. 92; *Pooley*, 4 A. & E. 94; *Crisp*, 1 Stark. 35; *R.* v. *Long Buckley*, 7 East, 45; *Closmadeuc*, 18 C. B. 36, 25 L. J. C. P. 216), in the absence of some evidence to the contrary, *e.g.* that when last seen it was unstamped (*Marine Investment Co.*, L. R. 5 H. L. 624; cf. *Rippiner*, 2 B. & Al. 478; *Bousfield*, 5 Bing. 418, 7 L. J. C. P. 158). Accordingly, in an action of proving of the tenor of a deed, it is not necessary to prove in the first instance that it was stamped (see Bell, *Com.* i. 322; Dickson, ss. 978, 1352).

Observe that the provision of 8 & 9 Vict. c. 16, s. 14, is directory only, and that a deed transferring shares or stock is not invalid because erroneously stamped (*Powell*, L. R. [1893] 1 Ch. 610, 2 Ch. 555).

It may be noted in regard to the exemption in favour of instruments given in evidence in criminal proceedings, that proceedings before justices for the recovery of statutory penalties are regarded in England as criminal matters (*R.* v. *Tyler & International Commercial Co.*, L. R. [1891] 2 Q. B. 588). As to the Scots law on the point, see *Stevenson*, 1854, 1 Irv. 603; *Bruce*, 1861, 24 D. 184; *Alison*, 1862, 1 M. 87; *Blair*, 1864, 4 Irv. 545; *Christie Miller*, 1879, 6 R. 1215; *Thomson & Co.*, 1885, 23 S. L. R. 3; *Dodsworth*, 1886, 14 R. 238.

When a document on which both the parties to a suit are entitled to found requires to be stamped, he who founds on it must stamp it in the first instance. If he be successful, he may recover half the expenses from the other party (*Neil*, 1867, 5 M. 631; *M'Donall*, 1870, 8 M. 1012). But if the document turn out to be worth nothing for the purposes of the suit, he must bear the expense (*Hislop*, 1878, 5 R. 794). See Mackay, *Manual*, 677; Monteith Smith, *Expenses*, 329.

(9) *Stamping after Execution.*—Sec. 15 provides as follows:—

(1) Save where other express provision is in this Act made, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when the amount of interest is equal to the unpaid duty.

(2) In the case of such instruments hereinafter mentioned as are chargeable with *ad valorem* duty, the following provisions shall have effect:

(*a*) The instrument, unless it is written upon duly stamped material, shall be duly stamped with the proper *ad valorem* duty before the expiration of thirty days after it is first executed, or after it has been first received in the United Kingdom in case it is first executed at any place out of the United Kingdom, unless the opinion of the Commissioners with respect to the amount of duty with which the instrument is chargeable has, before such expiration, been required under the provisions of this Act:

(*b*) If the opinion of the Commissioners with respect to any such instrument has been required, the instrument shall be stamped in accordance with the assessment of the Commissioners within fourteen days after notice of the assessment:

(*c*) If any such instrument executed after the sixteenth day of May one thousand eight hundred and eighty-eight has not been or is not duly stamped in conformity with the foregoing provisions of this subsection, the person in that behalf hereinafter specified shall incur a fine of ten pounds, and in addition to the penalty payable on stamping the instrument there shall be paid a further penalty equivalent to the stamp duty thereon, unless a reasonable excuse for the delay in stamping, or the omission to stamp, or the insufficiency of stamp, be afforded to the satisfaction of the Commissioners, or of the Court, judge, arbitrator, or referee before whom it is produced:

(*d*) The instruments and persons to which the provisions of this subsection are to apply are as follows:—

Title of Instrument as described in the First Schedule to this Act.	Person liable to Penalty.
Bond, covenant, or instrument of any kind whatsoever	The obligee, covenantee, or other person taking the security.
Conveyance on sale	The vendee or transferee.
Lease or tack	The lessee.
Mortgage, bond, debenture, covenant, and warrant of attorney to confess and enter up judgment	The mortgagee or obligee; in the case of a transfer or reconveyance, the transferee, assignee, or disponee, or the person redeeming the security.
Settlement	The settlor.

(3) Provided that save where other express provision is made by this Act in relation to any particular instrument:

(*a*) Any unstamped or insufficiently stamped instrument which has been first executed at any place out of the United Kingdom, may be stamped, at any time within thirty days after it has been first received in the United Kingdom, on payment of the unpaid duty only: and

(*b*) The Commissioners may, if they think fit, ... (see Finance Act, 1895, s. 15) mitigate or remit any penalty payable on stamping.

(4) The payment of any penalty payable on stamping is to be denoted on the instrument by a particular stamp.

The following instruments are the subject of other express provision:—Articles of clerkship (s. 27); bills of exchange and promissory notes (ss. 34 (2), 37 (2)); bills of lading (s. 40 (1)); charter-party, save when wholly executed out of the United Kingdom (ss. 50, 51); contract notes liable to the duty of one shilling (s. 52 (3); 56 Vict. c. 7, s. 3); proxies and voting papers liable to the duty of one penny, save when executed abroad (s. 80 (2)); policies of sea insurance (s. 95); and receipts, save when executed

abroad (s. 102). The Act penalises the issue or execution unstamped of the following instruments:—Contract notes (s. 53 (2)); delivery-orders (s. 70 (*b*)); certain leases, and the duplicates or counterparts thereof (s. 78); letters of allotment and renunciation (s. 79 (1)); policies of insurance other than sea insurance (s. 100); scrip certificates and scrip (s. 79 (1)); share warrants (s. 107); warrants for goods (s. 111 (3)); and appraisements or valuations not stamped within fourteen days of the making (s. 24). The Commissioners will in general exact a penalty on after-stamping any one of such instruments. In practice, all instruments not specified above may be stamped without penalty within thirty days from the date of execution save agreements, liable to the fixed duty of sixpence, which may be so stamped within fourteen days, and attested copies and extracts, which may be so stamped within fourteen days of the authentication or attestation. In administration, the period within which the memorandum and articles of association of a company in course of formation may be stamped without penalty is extended to twelve months.

As to the bearing of sec. 13 upon this section, see (7) above.

As to questions as to the expense of stamping, see (8) above

(10) *Entries upon Rolls, Books, etc.*—Sec. 16 provides as follows:—

Every public officer having in his custody any rolls, books, records, papers, documents, or proceedings, the inspection whereof may tend to secure any duty, or to prove or lead to the discovery of any fraud or omission in relation to any duty, shall at all reasonable times permit any person thereto authorised by the Commissioners to inspect the rolls, books, records, papers, documents, and proceedings, and to take such notes and extracts as he may deem necessary, without fee or reward, and in case of refusal shall for every offence incur a fine of ten pounds.

Sec. 17 provides as follows:—

If any person whose office it is to enrol, register, or enter in or upon any rolls, books, or records any instruments chargeable with duty, enrols, registers, or enters any such instrument not being duly stamped, he shall incur a fine of ten pounds.

Where the registrar of joint stock companies refuses to file a deed on the ground that it is not duly stamped, the proper remedy is provided by secs. 12 and 13 (see (7) above), and not by way of *mandamus* (*R.* v. *Registrar of Joint Stock Companies*, L. R. 21 Q. B. D. 131).

(11) *Supplemental Provisions.*

(*a*) *Duty on the Capital of Companies.*—Sec. 112 provides that—

A statement of the amount which is to form the nominal share capital of any company to be registered with limited liability shall be delivered to the Registrar of Joint Stock Companies in England, Scotland, or Ireland, and a statement of the amount of any increase of registered capital of any company now registered or to be registered with limited liability shall be delivered to the said registrar, and every such statement shall be charged with an *ad valorem* stamp duty of two shillings for every one hundred pounds and any fraction of one hundred pounds over any multiple of one hundred pounds of the amount of such capital or increase of capital as the case may be.

As to the meaning of "nominal share capital," see *Att.-Gen.* v. *Milford Docks Co.*, 69 L. T. R. 453.

Sec. 113 provides that—

(1) Where by virtue of any letters patent granted by Her Majesty, or any Act, the liability of the holders of shares in the capital of any corporation or company is limited otherwise than by registration with limited liability under the law in that behalf, a statement of the amount of nominal share capital of the corporation or company shall be delivered by the corporation or company to the Commissioners within one month after the date of the letters patent or the passing of the Act; and in case of any increase of the amount of nominal share capital of any corporation or company, whether now existing or to be hereafter formed, being authorised by any letters

patent or Act, a statement of the amount of such increase shall be delivered by the corporation or company to the Commissioners within the like period.

(2) The statement shall be charged with an *ad valorem* stamp duty of two shillings for every one hundred pounds and any fraction of one hundred pounds over any multiple of one hundred pounds of the amount of such capital or increase of capital as the case may be, and shall be duly stamped accordingly when the same is delivered to the Commissioners.

(3) In the case of neglect to deliver such a statement as is hereby required to be delivered, the corporation or company shall be liable to pay to Her Majesty a sum equal to ten pounds per centum upon the amount of duty payable, and a like penalty for every month after the first month during which the neglect shall continue.

The Finance Act, 1896, s. 12, extends this provision to the case of any corporation or company where its capital or the increase thereof is authorised by an Order of Council, or a certificate of a Government Department, or in any other manner.

(*b*) *Composition for certain Stamp Duties.*—Sec. 114 provides that—

(1) By way of composition for stamp duty chargeable on transfers of any stock of the Government of Canada which may be inscribed in books kept in the United Kingdom or of any Colonial Stock to which the Colonial Stock Act, 1877, applies, the Government of Canada or other colony, as the case may be, shall pay to the Commissioners a sum as stamp duty calculated at the rate of one shilling and threepence for every ten pounds, and any fraction of ten pounds of the nominal amount of such stock inscribed in the name of each and every stockholder at the date of the composition—

With the addition—

(*a*) when the period within which the stock is to be redeemed or paid off, or during which annual or other payments in respect of the redemption or payment off of the same are required to be made, exceeds sixty years, but does not exceed one hundred years from that date, of threepence for every such ten pounds or fraction of ten pounds; or

(*b*) when the said period exceeds one hundred years, or no period is fixed for such redemption or payment off, or no such annual or other payments are required to be made, of sixpence for every such ten pounds or fraction of ten pounds;

and in consideration of the payment transfers of the stock in respect of which the composition has been paid shall be exempt from stamp duty.

(2) All sums certified by the Commissioners to have been received by way of composition for stamp duty on transfers of stock under this section shall be paid over to the National Debt Commissioners, and shall be applied by them towards the reduction of the National Debt in such manner as the Treasury from time to time direct.

Sec. 39 of the Finance Act, 1894, extends this provision to the stock of any foreign State or Government which is inscribed in the books of the Bank of England. Further, this section has been amended by sec. 14 of the Finance Act, 1895, which provides that—

Where foreign securities within the meaning of secs. 82 and 83 of the Stamp Act, 1891, are issued in the United Kingdom, and the interest thereon is not payable in the United Kingdom, and such evidence of the amount of the securities as the Commissioners of Inland Revenue require is produced to them, then the Commissioners, if in their discretion they consider it expedient to do so, may accept payment of the amount of stamp duty which would be payable if all the securities were duly stamped, and on such payment may dispense with the necessity of the securities being stamped. The Commissioners shall give notice in the *London Gazette* of any such dispensation.

Sec. 114 of the Stamp Act, 1891, is extended by sec. 5 of the Finance Act, 1898, to the stock of any British protectorate to which a Secretary of State applies the Colonial Stock Acts, 1877 and 1892.

Sec. 115 provides that—

(1) Any county council or corporation or company may enter into an agreement with the Commissioners, if the Commissioners in their discretion think proper, for the delivery of an account showing the nominal amount of all the stock and funded debt of such county council, corporation, or company, or the amount thereof in respect of which payment has been made, if the whole sums payable in respect thereof have not been

paid; and after such agreement has been entered into the account shall be immediately delivered to the Commissioners, and a like account shall be delivered half-yearly in each year.

(2) The agreement shall specify the officer of the county council, corporation, or company, whether secretary, treasurer, accountant, or other officer, by whom the accounts are to be delivered, and such officer shall observe the rules in the first part of the Second Schedule to this Act, and is in those rules referred to by the expression "accountable officer."

(3) There shall be charged by way of composition upon the aggregate amount appearing on every half-yearly account delivered to the Commissioners for every one hundred pounds and any fraction of one hundred pounds of such amount the duty of sixpence as a stamp duty, and so soon as any account has been delivered, and payment of the duty hereby imposed has been made, transfers of any stock or funded debt included in such account, and also any share warrants or stock certificates relating to such stock or funded debt, shall be exempt from duty.

(4) If the duty charged is not paid upon the delivery of the account it shall be a debt due to Her Majesty from the county council, corporation, or company on whose behalf the account is delivered.

(5) In the case of wilful neglect to deliver such an account as is hereby required to be delivered, or to pay the duty in conformity with this section, the county council or corporation or company shall be liable to pay to Her Majesty a sum equal to ten pounds per centum upon the amount of duty payable, and a like penalty for every month after the first month during which the neglect continues.

(6) Where an agreement for composition under this section has been entered into by any county council or corporation or company, such county council or corporation or company shall have power, in addition to any fee exigible upon registration of any transfer of stock, or funded debt, as the case may be, or upon issue of any share warrant, or stock certificate relating thereto, to require payment of an amount not exceeding the amount of duty which would have been chargeable upon the transfer or share warrant or stock certificate if no such agreement had been entered into.

Sec. 116 provides that—

(1) Where any person issuing policies of insurance against accident shall, in the opinion of the Commissioners, so carry on the business of such insurance as to render it impracticable or inexpedient to require that the duty of one penny be charged and paid upon the policies, the Commissioners may enter into an agreement with that person for the delivery to them of quarterly accounts of all sums received in respect of premiums on policies of insurance against accident.

(2) The agreement shall be in such form and shall contain such terms and conditions as the Commissioners may think proper, and the person with whom the agreement is entered into shall observe the rules in the second part of the Second Schedule to this Act.

(3) After an agreement has been entered into between the Commissioners and any person and during the period for which the agreement is in force, no policy of insurance against accident issued by that person shall be chargeable with any duty, but in lieu of and by way of composition for that duty there shall be charged on the aggregate amount of all sums received in respect of premiums on policies of insurance against accident a duty at the rate of five pounds per centum as a stamp duty.

(4) If the duty charged is not paid upon the delivery of the account it shall be a debt due to Her Majesty from the person by or on whose behalf the account is delivered.

(5) In the case of wilful neglect to deliver such an account as is hereby required or to pay the duty in conformity with this section the person shall be liable to pay to Her Majesty a sum equal to ten pounds per centum upon the amount of duty payable, and a like penalty for every month after the first month during which the neglect continues.

Sec. 13 of the Finance Act, 1896, provides that this provision shall apply as if the expression "policy of insurance against accident" therein included a policy of insurance for any payment agreed to be made during the sickness of any person or during his incapacity from personal injury.

The rules as to composition are contained in the Second Schedule of the Act, and are as follows:—

First Part.

1. Every account shall be made in such form and shall contain all such particulars as the Commissioners shall require.

2. Every account shall be a full and true account of all stock and funded debt existing at the time of the delivery of the account, and of the amount thereof in respect of which payment has been made, if the whole sums payable in respect thereof have not been paid.

3. In the case of any company or corporation formed within the United Kingdom, and having registers abroad in which stock or funded debt may be registered, the stock or funded debt of such company or corporation shall not for the purposes of the account include the stock or funded debt for the time being registered abroad.

4. In the case of any colonial or foreign company or corporation having registers in the United Kingdom in which stock or funded debt are registered, the stock or funded debt for the time being registered in the United Kingdom shall for the purposes of the account be regarded as constituting all the stock or funded debt of the company or corporation.

5. Where the first account shall be delivered at any time between two half-yearly days, such account shall be charged with an amount of duty proportionate to the period between the date of the delivery of the account and the first succeeding half-yearly day.

6. Accounts shall be delivered to the Commissioners on or within seven days before the first day of February and the first day of August in each year.

7. The duty shall be paid upon the delivery of the account.

Second Part.

1. Every account shall be made in such form and shall contain all such particulars as the Commissioners shall require.

2. Every account shall be a full and true account of all unstamped policies of insurance against accident issued during the quarter of a year ending on the quarterly day next preceding the delivery thereof, and of all sums of money received for or in respect of such policies so issued during that quarter, and of all sums of money received and not already accounted for in respect of any other unstamped policies of insurance against accident issued at any time before the commencement of that quarter.

3. Accounts shall be delivered to the Commissioners within twenty days after the fifth day of April, the fifth day of July, the tenth day of October, and the fifth day of January in each year.

4. The duty shall be paid upon the delivery of the account.

As to composition in the case of the notes and bills of Scots bankers, see 16 & 17 Vict. c. 63, s. 7.

(12) *Miscellaneous Provisions.*

(*a*) *Assignation of Policy to Insurance Company.* — Sec. 118 of the Act provides that—

(1) No assignment of a policy of life insurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless the assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped.

(2) If any payment is made in contravention of this section, the stamp duty not paid upon the assignment, together with the penalty payable on stamping the same, shall be a debt due to Her Majesty from the person by whom the payment is made.

Where assignments, however numerous, are necessary links in the assignee's title, the insurance company should satisfy itself that these are all duly stamped. Where the assured or an assignee has been divested of, and subsequently reinvested in the policy, it is not necessary in dealing with a subsequent assignation to consider the stamping of the reinstating instrument.

(*b*) *Instruments relating to Crown property*, or to the private property of the Sovereign, are, in the absence of express provision to the contrary, to be stamped as if the property belonged to a subject (s. 119).

(*c*) *Instruments charged specifically with the duty of* 35*s.* by any Act passed prior to 1st January 1871, and not relating to stamp duty, shall be chargeable with 10s. only (s. 120).

(13) *Recovery of Penalties.*—These are to be sued for and recovered by

information in Scotland in the name of the Lord Advocate (s. 121; see Court of Exchequer (Scotland) Act, 1856, 19 & 20 Vict. c. 56, and *Adv. Gen.* v. *Moncreiff*, 1848, 10 D. 987). As to the time within which proceedings must be commenced, see *Ld. Adv.* v. *Sawers*, *infra*. Observe that the Commissioners are empowered to reward informers, to mitigate fines, and to stay proceedings (53 & 54 Vict. c. 21, ss. 32, 35). See *Ld. Adv.* v. *Thomson*, 1897, 24 R. 543; *Ld. Adv.* v. *Sawers*, 1897, 25 R. 242.

(14) *Sale of Stamps; Discounts to Purchasers; Stamp Offences; Recovery of Money received for Duty; Allowance for Spoiled Stamps.*—The Stamp Duties Management Act, 1891, applies to all stamp duties and to all fees collected by means of stamps (s. 1), and to excise labels (s. 23). It makes provision for the sale of stamps (ss. 3–8), and deals with offences relating to stamps (ss. 13–21; see 61 & 62 Vict. c. 46. The Board of Inland Revenue have issued a circular, dated 21st January 1898, stating the conditions on which illustrations of postage stamps are permissible; see *Dickens*, [1896] 2 Q. B. 310), with the discontinuance of dies (s. 22; see 61 & 62 Vict. c. 46), and with the mode of making statutory declarations (s. 24; see 61 & 62 Vict. c. 46), and of granting licences (s. 25), in relation to stamp duties. Sec. 8 provides that such discount shall be allowed to purchasers of stamps as the Treasury may direct. The following discounts are allowed on the purchase of stamps at the Inland Revenue Office, Edinburgh:—(1) On impressed bills (not exceeding 1s. each), 1s. for every complete £5 worth is allowed, for a minimum purchase of £10 worth, or, where material is brought to be stamped, of £20 worth; (2) on transfers (where forms are supplied by the purchaser), impressed bills (exceeding 1s. each), foreign bills and deeds, 1s. for every complete £5 worth is allowed, for a minimum purchase of £50 worth. Discount under head (1) is allowed on purchases out of stock at the office of such distributors of stamps as are collectors of Inland Revenue. The allowance of discount (except in the case of foreign bills) is granted only to vendors of stamps licensed prior to March 1895. Observe that discount is not allowed on stamps for denoting the fixed duty of 1d., on stamps of £10 and upwards, on stamps to be impressed on appropriated forms (except certain bills of lading), on stamps to be impressed on executed instruments, on postage stamps, on patent medicine labels, on estate duty adhesive stamps, and on fee stamps generally.

Further, the Act of 1891 provides that moneys received for duty and not appropriated thereto, shall be recoverable in the Court of Exchequer from the receiver (s. 2). Sec. 9 provides as follows:—

> Subject to such regulations as the Commissioners may think proper to make, and to the production of such evidence by statutory declaration or otherwise as the Commissioners may require, allowance is to be made by the Commissioners for stamps spoiled in the cases hereinafter mentioned; (that is to say,)
>
> (1) The stamp on any material inadvertently and undesignedly spoiled, obliterated, or by any means rendered unfit for the purpose intended, before the material bears the signature of any person or any instrument written thereon is executed by any party:
>
> (2) Any adhesive stamp which has been inadvertently and undesignedly spoiled or rendered unfit for use and has not in the opinion of the Commissioner been affixed to any material:
>
> (3) Any adhesive stamp representing a fee capable of being collected by means of such stamp which has been affixed to material, provided that a certificate from the proper officer is produced to the effect that the stamp should be allowed.
>
> (4) The stamp on any bill of exchange signed by or on behalf of the drawer which has not been accepted or made use of in any manner whatever or delivered out of his hands for any purpose other than by way of tender for acceptance.
>
> (5) The stamp on any promissory note signed by or on behalf of the maker which

has not been made use of in any manner whatever or delivered out of his hands.

(6) The stamp on any bill of exchange or promissory note which from any omission or error has been spoiled or rendered useless, although the same, being a bill of exchange, may have been accepted or indorsed, or, being a promissory note, may have been delivered to the payee, provided that another completed and duly stamped bill of exchange or promissory note is produced identical in every particular, except in the correction of the error or omission, with the spoiled bill or note :

(7) The stamp used for any of the following instruments ; that is to say,

(*a*) An instrument executed by any party thereto, but afterwards found to be absolutely void from the beginning :

(*b*) An instrument executed by any party thereto, but afterwards found unfit, by reason of any error or mistake therein, for the purpose originally intended :

(*c*) An instrument executed by any party thereto which has not been made use of for any purpose whatever, and which by reason of the inability or refusal of some necessary party to sign the same, or to complete the transaction according to the instrument, is incomplete and insufficient for the purpose for which it was intended.

(*d*) An instrument executed by any party thereto, which by reason of the refusal of any person to act under the same, or for want of enrolment or registration within the time required by law, fails of the intended purpose or becomes void.

(*e*) An instrument executed by any party thereto which is inadvertently and undesignedly spoiled, and in lieu whereof another instrument made between the same parties and for the same purpose is executed and duly stamped, or which becomes useless in consequence of the transaction intended to be thereby effected being effected by some other instrument duly stamped :

Provided as follows :—

(*a*) That the application for relief is made within two years (61 & 62 Vict. c. 46, s. 13) after the stamp has been spoiled or become useless, or in the case of an executed instrument, after the date of the instrument, or, if it is not dated, within two years (*ib.*) after the execution thereof by the person by whom it was first or alone executed or within such further time as the Commissioners may prescribe in the case of any instrument sent abroad for execution or when from unavoidable circumstances any instrument for which another has been substituted cannot be produced within the said period ;

(*b*) That in the case of an executed instrument no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence, and that the instrument is given up to be cancelled ;

(*c*) That in the case of stamps used for medicines or playing cards, the medicines or cards bearing the stamps are produced to an officer and the stamps are removed therefrom in his presence.

The Inland Revenue Office, No. 10 Waterloo Place, Edinburgh, is open for the allowance of spoiled stamps every day except Saturday, from 10 a.m. to 3 p.m., Saturday 10 to 12. The distributors, most of the sub-distributors of stamps, and certain postmasters also receive spoiled stamps for allowance.

A supply of forms of affidavit is kept at the Inland Revenue Office, and by the distributors of stamps and by most of the sub-distributors and certain postmasters, and claimants may attend at the Inland Revenue Office and have the affidavits taken ; or they may take the oath before a justice of the peace, and shortly afterwards lodge the affidavits and the stamps with any of the above officers. If not brought within ten days or a fortnight afterwards, the stamp will not be allowed without a fresh affidavit. If the claim be lodged at Edinburgh, a ticket is issued stating that application is to be made for information as to the result of such claim after the next Monday, and within six weeks from the date of the ticket. If the claim be lodged with a distributor or sub-distributor or postmaster, a ticket is issued stating that application is to be made regarding such claim after a specified

date, and within six weeks from the date of the ticket. If application be not made within that time, the claim will be forfeited, and no excuse will be accepted.

Sec. 10 provides as follows:—

When any person has inadvertently used for an instrument liable to duty a stamp of greater value than was necessary, or has inadvertently used a stamp for an instrument not liable to any duty, the Commissioners may, on application made within two years (61 & 62 Vict. c. 46, s. 13) after the date of the instrument, or, if it is not dated, within two years (*ib.*) after the execution thereof by the person by whom it was first or alone executed, and upon the instrument, if liable to duty, being stamped with the proper duty, cancel and allow as spoiled the stamp so misused.

Sec. 11 provides as follows:—

In any case in which allowance is made for spoiled or misused stamps the Commissioners may give in lieu thereof other stamps of the same denomination and value, or if required, and they think proper, stamps of any other denomination to the same amount in value, or in their discretion, the same value in money, deducting therefrom the discount allowed on the purchase of stamps of the like description.

Sec. 12, as amended by 61 & 62 Vict. c. 46, s. 13, provides that a stamp not required may be repurchased by the Commissioners on deduction of the proper discount, delivery of the stamp for cancellation, and proof that it was purchased from a person duly appointed or licensed to sell the same, within two years next preceding the application, and with a *bonâ fide* intention to use it.

(15) *Stamp Duties imposed by Acts other than the Stamp Act*, 1891, *and Amending Statutes.*—(*a*) The collection of the various death duties by means of stamps is regulated by the Acts imposing the duties. (*b*) The stamp duty in the case of licences to bankers is imposed by 55 Geo. III. c. 184, s. 24, and Sched. 1 (see also 7 Geo. IV. c. 67, s. 13; 7 & 8 Vict. c. 32, s. 22; and *National Bank of Scotland*, 1893, 30 S. L. R. 579). (*c*) As to the stamp duty on cards, see 25 Vict. c. 22, ss. 28, 29, and 32–37; 16 Vict. c. 107, ss. 114–116; and as to recovery, 54 & 55 Vict. c. 38, s. 26; and (*d*) on medicines, see 44 Geo. III. c. 98, Sched. B; 52 Geo. III. c. 150, s. 1, Sched. (as to exemptions, see 52 Geo. III. c. 150, Sched.; 55 Geo. III. c. 184, s. 54; as to duties, labels, and penalties, see 42 Geo. III. c. 56, ss. 3, 11, 13–15; 52 Geo. III. c. 150, s. 2; as to recovery, 54 & 55 Vict. c. 38, s. 26). (*e*) As to the collection of fees in Scots law courts and (*f*) in public offices by means of stamps, see the Courts of Law Fees (Scotland) Act, 1868; the Revenue Act, 1898; and the Public Office Fees Act, 1879. (*g*) As to similar provision regarding the fees chargeable by the Inclosure Commissioners, see 31 & 32 Vict. c. 89, s. 6. (*h*) As to postage duties, see Post Office. By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 11, it is provided that the (*i*) articles of association and the (*j*) memorandum of association are to be stamped as deeds. (*k*) The Alkali, etc., Works Regulation Act, 1881 (44 & 45 Vict. c. 37), s. 11, provides that the certificate of registration of an alkali work, and the certificate of registration of a work required to be registered not being an alkali work, are liable to a duty of £5 and £3 respectively. (*l*) The Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19), s. 14, imposes a duty of £5 upon every licence to keep a retreat (see secs. 6, 14), and of 10s. for every patient above ten whom it is intended to admit into the retreat.

(16) *Stamp Duty on Instruments, Forms of which are given in the Conveyancing (Scotland) Act*, 1874 (37 & 38 Vict. c. 94).

Sched. A. Notice to superior on change of ownership—*Not charged to stamp duty.*
Sched. C. Minute for effecting consolidation of lands—*Deed stamp duty*, 10s.

SCHED. D. Memorandum of allocation of feu-duty where there is no augmentation of feu-duty—*Agreement duty*, 6d. Where there is augmentation—*Conveyance on sale duty*, on the amount thereof only—(54 & 55 Vict. c. 39, s. 56 (2)).

SCHED. F. Discharge of casualties—*Conveyance on sale stamp duty.*

SCHED. G. Memorandum constituting a feu-duty, or additional feu-duty, where the superior has elected to have the redemption-money of a casualty converted into an annual sum—*Conveyance on sale stamp duty* (54 & 55 Vict. c. 39, s. 56 (2)).

N.B.—See sec. 24 of 37 & 38 Vict. c. 94, where the casualty is converted into feu-duty at the constitution of the feu-right.

SCHED. I. Docquet where granter of deed cannot write—*Not charged to stamp duty.*

SCHED. L. No. 1. Certificate by notary public where lands are sold under heritable security and no surplus emerges :

No. 2. Certificate by notary public where lands have been redeemed of heritable security, but discharge cannot be obtained—*Stamp duty*, 5s.

SCHED. M. Assignation of right of relief, etc. (37 & 38 Vict. c. 94, s. 50)—*Deed stamp duty*, 10s.

SCHED. N. Instrument by notary public in favour of a general disponee or assignee, in right of a heritable security—*Stamp duty*, 5s.

(17) *General Exemptions from all Stamp Duties.*

(1) Transfers of shares in the Government or Parliamentary stocks or funds.

(2) Instruments for the sale, transfer, or other disposition either absolutely or by way of mortgage, or otherwise, of any ship or vessel, or any part, interest, share, or property of or in any ship or vessel.

This exemption covers bottomry bonds and instruments for the sale, etc., of freight (see *Willis*, 7 C. B. N. S. 340, 29 L. J. C. P. 194, per Erle, C. J.), but does not include instruments relating to shares in a shipping company.

(3) Instruments of apprenticeship, bonds, contracts, and agreements entered into in the United Kingdom for or relating to the service in any of Her Majesty's colonies or possessions abroad of any person as an artificer, clerk, domestic servant, handicraftsman, mechanic, gardener, servant in husbandry, or labourer.

(4) Testaments, testamentary instruments, and dispositions *mortis causâ* in Scotland.

(5) Bonds given to Sheriffs or other persons in Ireland upon the replevy of any goods or chattels, and assignments of such bonds.

(6) Instruments made by, to, or with the Commissioners of Works for any of the purposes of the Act 15 & 16 Vict. c. 28.

(18) *Special Exemptions in Statutes not otherwise relating to Stamp Duties.*

(i.) *The Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52), s. 144.

(ii.) *The Bankruptcy (Scotland) Act*, 1856 (19 & 20 Vict. c. 79), s. 184, exempts

All conveyances or assignations, instruments, discharges, writings, or deeds relating solely to the estate belonging to any bankrupt against whom sequestration has been or may be awarded, either under this or any former Act, and which estate, after the execution of such conveyances, etc., shall be and remain the property of such bankrupt for the benefit of his creditors or the trustees appointed or chosen under or by virtue of such sequestration, and all discharges to such bankrupt, and all deeds, assignations, instruments or writings for reinvesting such bankrupt in the estate, and all powers of attorney, commissions, factories, oaths, affidavits, articles of roup or sale, submissions, decrees-arbitral and all other instruments and writings whatsoever relating solely to the estate of such bankrupt, and all other deeds or writings forming a part of the proceedings ordered under such sequestration.

In practice, receipts given to a trustee in bankruptcy by creditors for dividends are not treated as dutiable.

(iii.) *The Irish Bankrupt and Insolvent Act*, 1857 (20 & 21 Vict. c. 60), s. 400.

(iv.) *The Barracks Act*, 1890 (53 & 54 Vict. c. 25), s. 11, exempts

All contracts, conveyances, and other documents made in pursuance of or with a view to carrying into effect the purposes of this Act.

(v.) *The Building Societies Act*, 1874 (37 & 38 Vict. c. 42), s. 41, provides that

No rules of any society under this Act, nor any copy thereof, nor any power, warrant, or letter of attorney granted or to be granted by any person as trustee for the society for the transfer of any share in the public funds standing in his name, nor any receipts given for any dividend in any public stock or fund, or interest of Exchequer bills, nor any receipt, nor any entry in any book of receipt for money deposited in the funds of the society, nor for any money received by any member, his executors or administrators, assigns, or attorneys, from the funds of the society, nor any transfer of any share, nor any bond or other security to be given to or on account of the society, or by any officer thereof, nor any order on any officer for payment of money to any member, nor any appointment of any agent, nor any certificate or other instrument for the revocation of any such appointment, nor any other instrument or document whatever required or authorised to be given, issued, signed, made, or produced in pursuance of this Act, or of the rules of the society, shall be subject or liable to or charged with any stamp duty or duties whatsoever, provided that the exemption shall not extend to any mortgage.

The exemption covers only those instruments which are concerned with transactions which form part of the internal administration of the society, or are required to render it capable of carrying on its business. See *Royal Liver Friendly Society*, L. R. 5 Ex. 78; *Att.-Gen.* v. *Gilpin*, L. R. 6 Ex. 193; *Att.-Gen.* v. *Phillips*, 24 L. T. R. 832. Building societies which existed prior to 1874, and did not register under the 1874 Act, enjoy an exemption from stamp duty on mortgages not exceeding £500 (Stamp Act, 1891, s. 89).

(vi.) *The Carriers Act*, 1830 (11 Geo. IV. and 1 Will. IV. c. 68), s. 3, exempts receipts given by carriers for packages and parcels acknowledging the same to have been insured at increased rates.

(vi. (*b*)) *The Charitable Loan Societies (Ireland) Act* (6 & 7 Vict. c. 91), s. 26.

(vii.) *The Church Building Act*, 1822 (3 Geo. IV. c. 72), s. 28. Exemption is incorporated in subsequent Church Building Acts.

(viii.) *Church Building (Scotland) Act* (5 Geo. IV. c. 90), s. 10, exempts certain specified conveyances or assurances, and any lease to be granted under the powers contained in this Act.

(ix.) *The Clergy Residences Repair Act*, 1776 (17 Geo. III. c. 53), s. 15. Exemptions incorporated in 21 Geo. III. c. 66; 7 Geo. IV. c. 66; 1 & 2 Vict. c. 23; 28 & 29 Vict. c. 69; 34 & 35 Vict. c. 43; and 44 & 45 Vict. c. 25.

(x.) *The Common Law Procedure Act*, 1854 (17 & 18 Vict. c. 125), s. 30.

(xi.) *The Common Law Procedure Amendment Act, Ireland*, 1856 (19 & 20 Vict. c. 102), s. 36.

(xii.) *Companies (Colonial Registers) Act*, 1883 (46 & 47 Vict. c. 30), s. 3 (7), exempts an instrument of transfer of a share registered in a colonial register under this Act, unless executed in any part of the United Kingdom.

(xiii.) *The Consecration of Churchyards Act*, 1867 (30 & 31 Vict. c. 133), s. 6.

(xiv.) *The Diseases of Animals Act*, 1894 (57 & 58 Vict. c. 57), s. 47, exempts any appointment, certificate, declaration, or licence under the Act, and certain Orders of the Board of Agriculture, and regulations of a local authority.

(xv.) *Copyhold Act*, 1894 (57 & 58 Vict. c. 46), s. 53 (1).

(xvi.) *Copyright Act*, 1842 (5 & 6 Vict. c. 45), s. 3; exempts any assignment by entry in the Registry Book of the Stationers' Company of the interest of the registered proprietor of the copyright in a book.

(xvii.) *County Treasurers* (*Ireland*) *Act*, 1838 (1 & 2 Vict. c. 53), s. 1.

(xviii.) *Crown Lands Act*, 1829 (10 Geo. IV. c. 50) (continued by 14 & 15 Vict. c. 42, s. 2, and applied to Scotland by 3 & 4 Will. IV. c. 69, s. 3), s. 77.

No memorandum, contract or agreement to be made or entered into by or with the Commissioners for the time being of His Majesty's Woods, Forests, and Land Revenues under the powers and provisions of this Act, for the sale, purchase or exchange of any estates, manors, lordships, messuages, lands, tenements, rents or hereditaments, or any term or interest therein, by the said Commissioners . . .; nor any deed, receipt or other instrument which shall be given, granted, entered into, executed or made for the purpose of carrying into effect any sale, purchase or exchange to be made by the said Commmissioners . . . . under the powers and authorities of this Act, or which shall be incidental to or connected with any such purchase, sale or exchange, nor any grant by the said Commissioners under the authority of this Act; nor any lease or contract or agreement for any lease or leases; nor any counterpart of any lease to be entered into, made, executed or granted under the powers and authorities of this Act; nor any appointment of officers to be made by the said Commissioners under the authority hereof; nor any certificate for any gamekeeper appointed or to be appointed under the authority of this Act; nor any bond to be given by or for any receiver, as hereinafter mentioned, or by or for any other officer or agent, from or for whom security may be required by the said Commissioners, shall be subject . . . . to any . . . . stamp duty . . . . unless the same be specially subjected thereto in and by [any] future Act or Acts.

By 14 & 15 Vict. c. 42, the Commissioners of Works and Public Buildings are separated from the Commissioners of Woods and Forests and Land Revenues. The exemption is extended to foreshores, see 29 & 30 Vict. c. 62, s. 10.

(xix.) *Crown Lands Act*, 1845 (8 & 9 Vict. c. 99), s. 5.

(xx.) *Customs and Inland Revenue Act*, 1889 (52 Vict. c. 7), s. 13.

Any person may cause an attested copy (which shall be exempt from stamp duty) of any document which creates a liability for payment of any succession duty or duty hereinbefore imposed, etc., to be deposited with the Commissioners of Inland Revenue. . . .

(xxi.) *Debtors* (*Scotland*) *Act*, 1880 (43 & 44 Vict. c. 34), s. 11.

No fee fund or other dues of Court shall be exigible in respect of any proceedings under the Cessio Acts or this Act; nor shall any stamp duty or other Government duty be exigible in respect of any disposition which the debtor shall be required or decerned to execute in terms thereof, any law or statute to the contrary notwithstanding.

(xxii.) *Dispensary Houses* (*Ireland*) *Act*, 1879 (42 & 43 Vict. c. 25), s. 14.

(xxiii.) *East India Loan Act*, 1893 (56 & 57 Vict. c. 70), s. 16, applies the provisions of 5 & 6 Will. IV. c. 64, s. 4, as to composition by the East India Company in lieu of stamp duty on their bonds, and extension of the exemption of their bonds, to all bonds, debentures, and bills to be issued by the Secretary of State under the authority of this or any previous Act.

(xxiv.) *Education* (*Scotland*) *Act*, 1872 (35 & 36 Vict. c. 62), s. 39, exempts the deed of conveyance by which the persons vested with the title recorded in the Register of Sasines transfer any school, with the site and house and land, if any, held therewith to any school board.

(xxv.) *Friendly Societies Act*, 1896 (59 & 60 Vict. c. 25), s. 33, exempts: (*a*) Draft or order or receipt given by or to a registered society or branch in respect of money payable by virtue of its rules or of the Act; (*b*) letter or power of attorney granted by any person as trustee for the transfer of any money of a registered society or branch invested in his name in the

public funds; (*c*) bond given to or on account of a registered society or branch, or by the treasurer or other officer thereof; (*d*) policy of insurance or appointment or revocation of appointment of agent, or other document required or authorised by the Act or by the rules of a registered society or branch. The scope of the exemption is limited as in the case of the Building Societies Act, 1874, *vide supra*.

(xxvi.) *The Glebe Loans (Ireland) Act*, 1870 (33 & 34 Vict. c. 112), s. 8.

(xxvii.) *Inclosure Act*, 1845 (8 & 9 Vict. c. 118), s. 163.

(xxviii.) *Income Tax Act*, 1842 (5 & 6 Vict. c. 35) s. 179, exempts any receipt, certificate of payment, contract of composition, affidavit, appraisement, or valuation made or given in pursuance and for the purposes of the Act.

(xxix.) *Indian Prize Money Act*, 1866 (29 & 30 Vict. c. 47), s. 8, exempts any order for payment of prize money for any sum less than 40s.

(xxx.) *Indian Securities Act*, 1860 (23 Vict. c. 5), s. 2, exempts any transfer of any part of Indian Government Loans registered and transferable in the books of the Secretary of State in Council in London, or in the books of the Bank of England.

(xxxi.) *Landed Property Improvement (Ireland) Act*, 1847 (10 & 11 Vict. c. 32), s. 59.

(xxxii.) *Land Tax Redemption Act*, 1802 (42 Geo. III. c. 116), s. 68, provides that—

"Where the moneys to be paid as the consideration for any sale, mortgage, or grant to be made by virtue of this Act by any person or persons (other than bodies politic or corporate, or companies, for feoffees or trustees for charitable or other public purposes) shall not exceed the sum of £1000, the deed of sale, mortgage, or grant, or the enrolment thereof, and in cases of copyhold or customary estates the deed of sale or of grant, ... or any copy of the entry upon the Court rolls of such deed of sale or grant . . . . shall not be liable to any stamp duty whatever."

Sec. 81 exempts every "deed or instrument whatever whereby any sale, enfranchisement, mortgage, or grant shall be made of or out of any manors, messuages, lands, tenements, or hereditaments under the authority of the said last-mentioned Commissioners (for regulating sales, etc)., by virtue of the Act."

Sec. 107 exempts every obligation to His Majesty, in pursuance of the Act.

Sec. 173 provides that "no contract entered into for the redemption or purchase of any land tax, nor any assignment of any such contract or land tax, by virtue of the said recited Acts or this Act, nor any copy of the register thereof, nor any certificate or receipt which shall be given by virtue of the said recited Acts or of this Act, nor any transfer of any stock in the funds which shall be made by virtue of the said recited Acts or of this Act to the Commissioners for the Reduction of the National Debt, or any letter of attorney authorising any person or persons to transfer any such stock to the said Commissioners, or to accept any such stock previously to and for the purpose of transferring the same to them, nor any affidavits whatever to be made in pursuance of the said recited Acts or of this Act, shall be liable to any stamp duty whatever."

(xxxiii.) *Land Tax Redemption Act*, 1805 (45 Geo. III. c. 77), ss. 1, 107, 173.

(xxxiii. (*b*)) *Legacy Duty Act*, 1796 (36 Geo. III. c. 52), s. 41, exempts receipts duly stamped for legacy duty purposes from all other stamp duties.

(xxxiv.) *Loan Societies Act*, 1840 (3 & 4 Vict. c. 110), ss. 9, 12, 14.

(xxxv.) *Local Loans Act*, 1875 (38 & 39 Vict. c. 83), s. 19.

(xxxvi.) *London Hackney Carriage Act*, 1843 (6 & 7 Vict. c. 86), s. 23.

(xxxvii.) *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60), exempts every indenture of apprenticeship, which must be executed in duplicate (s. 108 (1)); bill for wages of seamen volunteering into the navy, drawn upon the owner and payable at sight to the Accountant-General of the Navy (s. 196 (1)); the bond given by the master of an emigrant ship, which must

be executed in duplicate (s. 309 (2)); contract tickets for passengers under sec. 320 (4); the bond given by a passage broker, which must be renewed on each occasion of obtaining a licence (s. 342 (2)); all indentures and agreements, for the sea-fishing service, made in conformity with Part IV. (Fishing Boats) of the Act (s. 395 (7)); any bond, statement, agreement, or other document made or executed in pursuance of Part IX. of the Act, relating to salvage by Her Majesty's ships, if made or executed out of the United Kingdom (s. 563); any instruments used for carrying into effect Part I. of the Act (s. 721); any instruments used by or under the direction of the Board of Trade in carrying into effect Parts II., V., XI., and XII. of the Act (*ib.*); and any instruments which are by those parts of the Act required to be in a form approved by the Board of Trade, if made in that form (*ib.*).

(xxxviii.) *Metropolitan Board of Works Loan Act* (33 & 34 Vict. c. 24), s. 5.

(xxxix.) *Military Forces Localisation Act*, 1872 (35 & 36 Vict. c. 68), s. 12, exempts all contracts, conveyances, and other documents made in pursuance of the Act.

(xl.) *Militia Law Amendment Act*, 1854 (17 & 18 Vict. c. 105), s. 20.

(xli.) *Militia (Scotland) Act*, 1854 (17 & 18 Vict. c. 106), s. 41, exempts all conveyances, leases, bonds, contracts, receipts, and other deeds and instruments made for giving effect to the Act.

(xlii.) *Municipal Corporations in England and Wales*, 1882 (45 & 46 Vict. c. 50), ss. 45 (9), 168 (10).

(xliii.) *Municipal Corporations (Ireland) Act*, 1840 (3 & 4 Vict. c. 108), s. 48.

(xliv.) *National Debt Redemption Act*, 1893 (56 & 57 Vict. c. 64), s. 4 (2), exempts a power of attorney given exclusively for the purpose of authorising the receipt for money payable on redemption under the Act.

(xlv.) (xlvi.) *Naval Agency and Distribution Act* (27 & 28 Vict. c. 24), s. 16, and *Naval and Marine Pay and Pensions Act* (28 & 29 Vict. c. 73), s. 6, exempt all bills, orders, receipts, and other instruments drawn, given, or made under the authority or in pursuance of an Order in Council under either Act by, to, or upon any person in the service of Her Majesty or the Admiralty.

(xlvii.) *New General Post Office, Edinburgh, Act*, 1858 (21 & 22 Vict. c. 40), s. 20, exempts any deed, bond, discharge, receipt, or other instrument made or executed by, to, or with the Commissioners, or otherwise, for the purposes of the Act, unless such instrument be specially charged by any future Act.

(xlvii. (*b*)) *Parochial Stipends (Scotland) Act* (50 Geo. III. c. 84), s. 22, exempts receipts for the sums of money payable under the Act.

(xlviii.) *Pawnbrokers Act*, 1872 (35 & 36 Vict. c. 93), s. 15, exempts a pawnbroker's receipt for the amount of loan and profit paid to him, unless the profit amounts to 40s. A special contract pawn-ticket or the duplicate thereof (in accordance with Form No. VII. in Sched. III.) is exempt (s. 24).

(xlix.) *Pensions and Yeomanry Pay Act*, 1884 (47 & 48 Vict. c. 55), s. 5.

Every order, receipt, affidavit, and document used in pursuance of any warrant, order, or regulation of Her Majesty, or a Secretary of State, whether made in pursuance of this Act or otherwise, in relation to the payment of any pension in respect of military service, including service in any of the auxiliary forces, shall, unless otherwise provided by such warrant, etc., or by the regulations general or special of a Secretary of State, be exempt from stamp duty.

(l.) *Poor Law Amendment Act*, 1834 (4 & 5 Will. IV. c. 76), s. 86.

(li.) *Poor Law Amendment Act*, 1844 (7 & 8 Vict. c. 101), s. 61. Sec. 74 provides that this Act shall be construed as one Act with 5 & 6 Vict. c. 57, and with the previous Acts thereby required to be construed as one Act.

(lii.) *Poor Relief* (*Ireland*) *Act*, 1838 (1 & 2 Vict. c. 56), s. 96.

(liii.) *Post Office Land Act*, 1881 (44 & 45 Vict. c. 20), s. 5.

Every deed, instrument, receipt, or document made or executed for the purpose of the Post Office by, to, or with Her Majesty or any officer of the Post Office, shall be exempt from any stamp duty . . . except where such duty is declared by the deed, etc., or by some memorandum indorsed thereon, to be payable by some person other than the Postmaster-General, and except so far as any future Act specifically charges the same.

(liv.) *Post Office* (*Duties*) *Act*, 1840 (3 & 4 Vict. c. 96), s. 38, has been held to sanction the issue of a post office order unstamped (*Gilchrist*, Car. & M. 224), and this exemption is recognised in the *Post Office* (*Money Orders*) *Act*, 1880 (43 & 44 Vict. c. 33), s. 1. See sec. 7, which provides that the Act is to be read as one with 11 & 12 Vict. c. 38.

(lv.) *Public Health* (*Scotland*) *Act* (60 & 61 Vict. c. 38), s. 168, exempts "all bonds, assignations, conveyances, instruments, agreements, receipts, or other writings made or granted to or in favour of the local authority" under the Act. See *Local Government* (*Scotland*) *Act*, 1889 (52 & 53 Vict. c. 50), ss. 11, 17. In practice, a decree-arbitral is regarded as falling under the exemption.

(lvi.) *Public Money Drainage Act*, 1846 (9 & 10 Vict. c. 101), s. 47, exempts any bond or other security given to the Commissioners under the Act, and any certificate or other instrument made thereunder.

(lvii.) *Public Works* (*Ireland*) *No.* 2 *Act*, 1846 (9 & 10 Vict. c. 86), ss. 8, 47.

(lviii.) *Representation of the People* (*Scotland*) *Act*, 1868 (31 & 32 Vict. c. 48), s. 39 (4), exempts, by applying the provision of 24 & 25 Vict. c. 53 (see sec. 6), voting papers used at Scots University Parliamentary Elections. As to England and Ireland, see 24 & 25 Vict. c. 53, s. 6; 30 & 31 Vict. c. 102, s. 45.

(lix.) *Review of Justices' Decisions Act*, 1872 (35 & 36 Vict. c. 26), s. 2.

(lx.) *Rules of the Supreme Court.* Order XXXIV. (6).

(lxi.) *Savings Banks Annuities Act*, 1853 (16 & 17 Vict. c. 45), s. 29, exempts any copy register of birth or baptism or marriage or burial, or any certificate or declaration made in pursuance of the Act, or any certificate or other instrument whatsoever respecting the payment of money for the purchase of any annuity or sum payable at death under this Act, or any power of attorney authorising the receipt or any receipt for the payment of such annuity or sum.

(lxii.) *Statute of Frauds Amendment Act*, 1828 (9 Geo. IV. c. 14), s. 5.

(lxiii.) *Taxes Management Act*, 1880 (43 & 44 Vict. c. 19), s. 78, exempts any bond or other security given under the Act by a collector or other person in respect of the collection, accounting for, or remitting of the land tax or the duties.

(lxiv.) *The Teinds Act*, 1810 (50 Geo. III. c. 84), s. 22, exempts the precepts, warrants, and receipts specified in the Act.

(lxv.) *Telegraph Act* (32 & 33 Vict. c. 73), s. 22, exempts any deed or other instrument made by, to, or with the Postmaster-General or otherwise for the purposes of the Act, or of the Telegraph Act, 1868, unless such instrument shall be specifically charged by any future Act. The 5th

section of the Telegraph Act, 1868, shall operate as if the words "duly stamped" were omitted therefrom.

(lxvi.) *The Tithe Act*, 1836 (6 & 7 Will. IV. c. 71), s. 91.

(lxvii.) *The Tithe Act*, 1837 (1 Vict. c. 69), s. 12.

(lxviii.) *The Tithe Act*, 1838 (1 & 2 Vict. c. 64), s. 2.

(lxix.) *The Truck Act*, 1896 (59 & 60 Vict. c. 44), s. 7, exempts contracts made under the provisions of the Act.

(lxix. (*b*)) *The Trustee Savings Bank Act*, 1863 (26 & 27 Vict. c. 87), s. 50.

No power, warrant, or letter of attorney granted to or to be granted by any person or persons, or trustee or trustees of any savings bank as aforesaid, nor any power, warrant, or letter of attorney given by any depositor or depositors in the funds of any such savings bank to any person or persons authorising him, her, or them to make any deposit or deposits of any sum or sums of money in the said funds on behalf of the said depositor or depositors, or to sign any document or instrument required, by the rules or regulations of such savings bank, to be signed on making such deposits, or to receive back any sum or sums of money deposited in the said funds, or the dividends or interest arising therefrom, nor any receipt nor any entry in any book of receipt for money deposited in the funds of any such savings bank, nor for any money received by any depositor, his or her executors or administrators, assigns or attorneys from the funds of such savings bank, nor any draft or order, nor any appointment of any agent or agents nor any certificate or other instrument for the revocation of any such appointment, nor any surety bond, nor any submission to, or award, order, or determination of the said barrister, nor any other instrument or document whatever, required or authorised to be given, issued, signed, made, or produced in pursuance of this Act, shall be subject or liable to or charged with any stamp duty or duties whatsoever.

(lxx.) *Weights and Measures Act*, 1878 (41 & 42 Vict. c. 49), s. 37, exempts indentures evidencing verification of local standards, and indorsements upon such indentures, or new indentures evidencing reverification.

(19) *Writs specified in* 55 *Geo.* III. *c.* 184, *Sched. Pt. II.* (*iv.*) *relating to Proceedings in the Courts in Scotland*, are treated in practice as exempt. The schedule was repealed by 5 Geo. IV. c. 41. The latter enactment was repealed by 33 & 34 Vict. c. 99; but the scheduled instruments are still regarded as free from duty, on the ground that it would have required a resolution of the House of Commons, and a charge in particular and express terms, to reimpose the duties repealed. Accordingly, a judicial bond, a report, estimate or scheme prepared under the authority of a judge, and a warrant, mandate, or authority, given to any solicitor, attorney, agent, or procurator, to commence, carry on, defend, or appear in any action, suit, or procedure, at the instance or on behalf of any party or parties not having distinct interests, are regarded as exempt. These are the only instruments, mentioned in the schedule, which have been dealt with in practice.

(20) *Schedule of Duties under the Stamp Act*, 1891, *and the Regulations applicable to Particular Instruments, with the Relative Sections, so far as applicable to Scotland.*

. . . . . .

	£	*s.*	*d.*
Admission in Scotland of any person—			
As an advocate.			
If he has been previously duly admitted to the degree of barrister-at-law in Ireland	10	0	0
In any other case	50	0	0

Exemption.

Admission of any person who has been previously duly admitted to the degree of barrister-at-law in England.

And see secs. 18, 19 [and 20].

. . . . . .

Admission in Scotland of any person—	£	s.	d.
(1) As a law agent to practise before the Court of Session or as a writer to the signet:			
If he has previously paid the sum of £60 for duty upon his articles of clerkship (see *s.v.* "Articles of Clerkship" below) . . .	25	0	0
If he has been previously duly admitted as a law agent to practise before a Sheriff Court	30	0	0
In any other case	85	0	0
(2) As a law agent to practise before a Sheriff Court:			
If he has previously paid the sum of 2s. 6d. for duty on his articles of clerkship	54	17	6
In any other case	55	0	0

Exemption.

Admission of any person who has been previously duly admitted as a law agent to practise before the Court of Session, or as a writer to the signet to act in the other of those capacities.

And see secs. 18 and 19.

An enrolled law agent, who has paid the stamp duty chargeable on admission to practise as agent in a Sheriff Court, shall be qualified to sign the roll of law agents practising in the Court of Session on paying the difference between such duty and the duty chargeable on admission to practise in the Court of Session (36 & 37 Vict. c. 63, s. 7).

Admission to act as a notary public.

See Faculty.

Admission of any person—	£	s.	d.
As a Fellow of the College of Physicians in England, Scotland, or Ireland	25	0	0

And see secs. 18 and 19.

. . . . . .

Admission in Scotland of any person—			
As a burgess, or into any corporation or company, in any burgh . .	0	5	0

Exemption.

Admission of a craftsman or other person into any corporation within any royal burgh, burgh of royalty, or burgh of barony incorporated by the magistrates and council of such burgh, provided such craftsman or other person has been previously duly admitted a freeman or burgess of the burgh.

And see secs. 18 and 19.

Admissions.

18. The duty payable upon an admission is to be denoted on the instrument of admission delivered to the person admitted, if there be any such instrument, or if not, on the register, entry, or memorandum of the admission in the rolls, books, or records of the court, inn, college, borough, burgh, company, corporation, guild, or society in which the admission is made, and in cases in which no instrument of admission is delivered, and no register, entry, or memorandum is made, on the rescript or warrant for admission.

19. If any person whose office it is to prepare or deliver out any instrument of admission chargeable with duty, or to register, enter, or make any memorandum of any admission in respect of which no instrument of admission is delivered to the person admitted, neglects or refuses, within one month after the admission, to prepare a duly stamped instrument of admission, or to make a duly stamped register, entry, or memorandum of the admission, as the case may require, he shall incur a fine of ten pounds.

The charge upon an appointment or admission to a salaried office or employment (38 Vict. c. 23, s. 14), and to an ecclesiastical benefice (40 Vict. c. 13, s. 13), has been repealed. But an admission to an honorary office, if contained in a deed, and not chargeable under a specific head, is liable to deed duty.

	£	s.	d.
Affidavit and Statutory Declaration	0	2	6

Exemptions.

(1) Affidavit made for the immediate purpose of being filed, read, or used in any Court, or before any judge, master, or officer of any Court.
(2) Affidavit or declaration made upon a requisition of the commissioners of any public board of revenue, or any of the officers acting under them, or required by law, and made before a justice of the peace.
(3) Affidavit or declaration which may be required at the Bank of England or the Bank of Ireland to prove the death of any proprietor of any stock transferable there, or to identify the person of any such proprietor, or to remove any other impediment to the transfer of any such stock.
(4) Affidavit or declaration relating to the loss, mutilation, or defacement of any bank note or bank post bill.
(5) Declaration required to be made pursuant to any Act relating to marriages in order to a marriage without licence.
(6) Declaration forming part of an application for a patent in comformity with the Patents, Designs, and Trade Marks Act, 1883.

As to special exemptions, see (18) (ii.) (xxviii.) (xxxii.) (xlix.).

As to the meaning of "statutory declaration," see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 21.

A ratification by a married woman is regarded as falling under exemption (2), being "required by law, and made before a justice of the peace" (see 6 & 7 Will. IV. c. 43). Under exemption (3) "proprietor" does not include a trustee.

	£	s.	d.
Agreement or Contract, accompanied with a deposit. See Mortgage, etc., and secs. 23 and 86.			
Agreement for a lease or tack, or for any letting. See Lease or Tack, and sec. 75.			
Agreement for sale of property. See Conveyance on Sale, and sec. 59.			
Agreement or Contract made or entered into pursuant to the Highway Acts for or relating to the making, maintaining, or repairing of highways	0	0	6

See *County Council of Cumberland*, 78 L. T. R. 679.

Agreement or any Memorandum of an Agreement, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument	0	0	6

Exemptions.

(1) Agreement or memorandum the matter whereof is not of the value of £5.
(2) Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.
(3) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.
(4) Agreement or memorandum made between the master and mariners of any ship or vessel for wages on any voyage coastwise from port to port in the United Kingdom.

. . . . . .

And see secs. 22 and 23.

As to special exemptions, see (18) (ii.) (xviii.) (xxxvii.) (xxxix.) (xli.) (liii.) (lv.) (lxv.) (lxix.).

Agreements.

22. The duty of sixpence upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed.

23.—(1) Every instrument under hand only (not being a promissory note or bill of exchange) given upon the occasion of the deposit of any share warrant or stock certificate to bearer, or foreign or colonial share certificate, or any security for money transferable by delivery, by way of security for any loan, shall be deemed to be an agreement, and shall be charged with duty accordingly.

(2) Every instrument under hand only (not being a promissory note or bill of exchange) making redeemable or qualifying a duly stamped transfer, intended as a security, of any registered stock or marketable security, shall be deemed to be an agreement, and shall be charged with duty accordingly.

(3) A release or discharge of any such instrument shall not be chargeable with any *ad valorem* duty.

"A promise is a pure and simple expression of the will of the party undertaking the obligation, requiring no acceptance, and still less requiring mutual consent. A promise is distinguished by Ld. Stair from a pollicitation or offer, which requires acceptance to make it binding, and still more from a paction, which, in order to be binding, requires the mutual consent of two parties" (*Macfarlane*, 1864, 2 M. 1210, per Ld. J.-Cl. Inglis; see Stair, i. 10. 3). In the same case Ld. Neaves observes that "the word 'agree' is ambiguous, and, strictly, ought to be confined to pactions; and an agreement, properly speaking, means a paction, a consensus, of a plurality of persons *in idem placitum*. But it is also used improperly as a word of unilateral significance; and, if it be so used, I see no difference between the expressions 'I agree to pay' and 'I promise to pay'" (see also *Goldston*, 1868, 7 M. 188; *Malcolm*, 1891, 19 R. 278; *Cambuslang West Church Committee of Management*, 1897, 25 R. 322). In dealing with English cases falling under the "Statute of Frauds" (29 Car. II. c. 3), the requisites as to authentication under that enactment (see secs. 4 and 7) must be kept in view (see Benjamin on *Sale*, chap. vii.; *Welsh's Trs.*, 1885, 12 R. 851). In the case of *Dewar*, 1892, 20 R. 203, Ld. Young observes that "parole evidence that there was jotting or writing, however formal in certain terms, not signed by the parties who were making the arrangement, and that the arrangement which they ultimately came to was in accordance with that writing, is, in my opinion, just evidence of a parole agreement. It is proved by parole and nothing else" (see REI INTERVENTUS; and cf. *Walker*, 9 M. & W. 411; *Chadwick*, 1 C. B. 700, 14 L. J. C. P. 233). As to the question when does a recital in an agreement create a covenant, see Elphinstone, Norton, and Clark, *Interpretation of Deeds*, pp. 128, 415, and authorities there cited. A mere consent, *e.g.* a minute of consent by the Local Government Board, to a disposition of heritage, under the Local Government (Scotland) Act, 1894, s. 48, or a jotting showing the state of account between the parties (*Todd*, 1897, 24 R. 1104), or a mere acknowledgment of debt (*Beeching*, 8 M. & W. 411, 10 L. J. Ex. 464; unless it itself amounts to an agreement (*ib.*), or falls within the terms of sec. 101, see *s.v.* "Receipt" below), or an I. O. U., is not liable to stamp duty. But of the two latter, either may, by the addition of special matter, be brought into charge as an agreement (*Melanotte*, 13 M. & W. 216, 13 L. J. Ex. 358; *Taylor*, 16 M. & W. 665, 16 L. J. Ex. 177; *White*, 3 Ex. 689, 18 L. J. Ex. 316; *Welsh's Trs.*, 1885, 12 R. 851; cf. *Cory*, 14 C. B. N. S. 370), or promissory note (*Ashby*, M. & P. 186; *Green*, 1 C. & P. 451; *Brooks*, 2 M. & W. 74). Observe, that a document cannot be in part an agreement and in part a promissory note; it must be the one or the other (*Mortgage Insur. Corpn.*, L. R. 20 Q. B. D. 645, 21 Q. B. D. 352; see *Thomson*, 1894, 32 S. L. R. 16); and that an indorsement upon a promissory note may render indorsement and note liable to one stamp as an agreement (*Leeds*, 12 East, 1; *Hartley*, 4 M. & S. 25; *Cholmley*, 14 M. & W. 344, 14 L. J. Ex. 328). A policy operating as

guarantee for the payment of a mortgage debt (*Mortgage Insur. Corptn.*, 57 L. J. Q. B. 179), or securing to the assured payment of a sum at a specific date (*Mortgage Insur. Corptn.*, L. R. 20 Q. B. D. 645, 21 Q. B. D. 352), is, unless containing a clause of registration, chargeable as an agreement; and a document similar in form to a bill of lading, relating to inland navigation, is chargeable under that head. As to a receipt granted by a person, in respect of personal injuries, for a sum in settlement of all claims, see *s.v.* "Receipt" below. Observe that a document, in form a receipt, stating that the money received was received on loan, is chargeable as an agreement, and does not require to be stamped in addition as a receipt (see *Welsh's Trs.*, *ut supra*). When an agreement is constituted by letters, the stamp may be on any one of them.

The second exemption has been held to apply to firemen and stokers (*Wilson*, 14 Q. B. 405, 19 L. J. Q. B. 49), and to a farm bailiff paid by salary and a share of profits (*R.* v. *Wortley*, 2 Den. C. C. 333, 21 L. J. M. C. 44); and not to apply to a clerk (*Dakin*, 2 Cr. & D. 225). See as to the meaning of "servants," *M'Intyre*, 1863, 2 M. 94; *Brown*, 1884, 11 R. 821; *Todd*, 8 Ex. 151, 22 L. J. Ex. 1; 2 Williams, *Exors.* 1007).

The third exemption has been liberally construed. It has been extended to an agreement to indemnify a purchaser against loss on re-sale (*Curry*, 3 T. R. 524); to an agreement between joint purchasers to share in profit or loss (*Venning*, 13 East, 7); to a guarantee for payment of goods to be supplied to a third person (*Warrington*, 8 East, 242; *Sadler*, 16 M. & W. 775, 16 L. J. Ex. 178); and to a stamped receipt for the price of a horse, with the words "warranted sound" added (*Skrine*, 2 Camp. 407). An agreement will not fall within the exemption where the sale of goods is not the primary object (*Smith*, 2 B. & A. 778); or where it includes property subject to charge (*South*, 3 Bing. N. C. 506). The words "goods, wares, or merchandise" comprehend "all tangible moveable property" (Blackburn, *Sale*, 9); and in construing these words, or in determining the quality of property, the decisions upon secs. 4 and 17 of the Statute of Frauds (29 Car. II. c. 3, as amended by the Statute of Frauds Amendment Act, 1828, 9 Geo. IV. c. 14, s. 8), in the latter of which those words occur, may be applied (Benjamin, *Sale*, 4th ed., pp. 93–129; see also Stair, ii. 2. 4; Ersk. ii. 4. 7; Bell, *Prin.* ss. 1471 *et seq.*; Rankine, *Leases*, pp. 304, 369; FIXTURES; HERITABLE AND MOVEABLE). Observe that an executory contract for a sale of goods not yet manufactured falls within that statute, while an agreement for work and labour does not (*Lee*, 1 B. & S. 272, 30 L. J. Q. B. 252; cf. *Clay*, 1 H. & N. 73, 25 L. J. Ex. 237). As to a hire-purchase agreement, see *Murdoch & Co.*, 1889, 16 R. 396; *Lee*, L. R. [1893] 2 Q. B. 318; *Helby*, L. R. [1895] A. C. 471. See also *s.v.* "Bill of Lading," "Conveyance on Sale," "Lease," "Mortgage," below.

	£	*s.*	*d.*
ALLOTMENT. See LETTER OF ALLOTMENT.			
ANNUITY, conveyance in consideration of.			
See CONVEYANCE ON SALE, and sec. 56.			
purchase of.			
See CONVEYANCE ON SALE, and sec. 60.			
creation of, by way of security.			
See MORTGAGE, etc., and sec. 87.			
instruments relating to, upon any other occasion.			
See BOND, COVENANT, etc.			
APPOINTMENT of a new trustee, and APPOINTMENT in execution of a power of any property, or of any use, share, or interest in any property, by any instrument not being a will	0	10	0
And see sec. 62.			

A conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any duty higher than 10s. (s. 62; see below, *s.v.* "Conveyance or Transfer" of any kind not hereinbefore described). To attract the charge the trustee must be a new trustee; and so the appointment of a trustee under 43 & 44 Vict. c. 26, s. 2, is not chargeable, unless the deed containing it is liable to deed duty (see *s.v.* "Deed" below), or unless the policy has become a claim prior to the appointment. An instrument appointing a new trustee which contains a conveyance of the trust property is liable to a further duty not exceeding 10s. in respect of the conveyance (*Hadgett*, L. R. 3 Ex. D. 46).

	£	*s.*	*d.*
APPOINTMENT of a gamekeeper. See DEPUTATION.			
APPRAISEMENT or VALUATION of any property, or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials and labour used or to be used in any building, or of any artificers' work whatsoever.			
Where the amount of the appraisement or valuation does not exceed £5	0	0	3
Exceeds £5 and does not exceed £10	0	0	6
„ 10 „ 20	0	1	0
„ 20 „ 30	0	1	6
„ 30 „ 40	0	2	0
„ 40 „ 50	0	2	6
„ 50 „ 100	0	5	0
„ 100 „ 200	0	10	0
„ 200 „ 500	0	15	0
„ 500	1	0	0

Exemptions.

(1) Appraisement or valuation made for, and for the information of, one party only, and not being in any manner obligatory as between parties either by agreement or operation of law.

(2) Appraisement or valuation made in pursuance of the order of any Court of Admiralty, or of any Court of Appeal, from a judgment of any Court of Admiralty.

(3) Appraisement or valuation of property of a deceased person made for the information of an executor or other person required to deliver, in England or Ireland, an affidavit, or to record in any Commissary Court in Scotland an inventory of the estate of such deceased person.

(4) Appraisement or valuation of any property made for the purpose of ascertaining the legacy or succession or account duty payable in respect thereof.

And see sec. 24.

As to special exemptions, see (18) (ii.) (xxviii.).

Appraisements.

24.—(1) Every appraiser by whom an appraisement or valuation chargeable with stamp duty is made, shall, within fourteen days after the making thereof, write out the same in words and figures showing the full amount thereof, upon duly stamped material, and if he neglects or omits so to do, or in any other manner discloses the amount of the appraisement or valuation, he shall incur a fine of fifty pounds.

(2) Every person who receives from any appraiser, or pays for the making of, any such appraisement or valuation, shall, unless the same be written out and stamped as aforesaid, incur a fine of twenty pounds.

"Appraiser" is defined by 46 Geo. III. c. 43, s. 4, as a person who shall value or appraise any estate or property, real or personal, or any interest therein, whether in possession or not, or any goods, merchandise, or effects, for or in expectation of any hire, gain, fee or reward or valuable consideration. This definition has been held to apply

only to a person who bears the known character of an appraiser (*Atkinson*, 5 M. & S. 240); and this limitation seems equally applicable to the section imposing the existing duty (8 & 9 Vict. c. 76, s. 1). The distinction between an appraisement and an award (see *s.v.* "Award") is not always clear in stamp duty questions. In England it has been held that "to make a decision an award, there must be a dispute on foot between the parties" (*Carus Wilson & Greene, in re*, L. R. 18 Q. B. D. 7). In Scotland a decision is regarded as an award, wherever it follows upon a formal submission (see ARBITRATION). An appraisement if originally exempt remains so although adopted as a basis of an obligatory agreement (*Jackson*, 4 Tyr. 330).

	£	*s.*	*d.*
APPRENTICESHIP, instrument of	0	2	6

Exemptions.

(1) Instruments relating to any poor child apprenticed by or at the sole charge of any parish or township, or by or at the sole charge of any public charity, or pursuant to any Act for the regulation of parish apprentices.
(2) Instrument of apprenticeship in Ireland, where the value of the premium or consideration does not exceed £10.
And see sec. 25.

As to general exemption, see (17). As to special exemptions, see (18) (xxxvii.).

As to the meaning of public charity in the first exemption, see *Hall*, L. R. 16 Q. B. D. 163, and cases cited in Tilsley, *Stamps*, 3rd ed., pp. 59 *et seq.*

Instruments of Apprenticeship.

25. 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.

	£	*s.*	*d.*
ARTICLES OF CLERKSHIP whereby any person first becomes bound to serve as a clerk in order to his admission,			
. . . . .			
(2) As a law agent to practise before the Court of Session or as writer to the signet in Scotland	60	0	0
(3) As a law agent to practise before a Sheriff Court in Scotland .	0	2	6

And see secs. 26, 27 [and 28].

Articles of Clerkship.

26.—(1) Where the same articles are a qualification for the admission of any person as a law agent to practise before the Court of Session, and also as a law agent to practise before a Sheriff Court in Scotland, the articles are not to be charged with any further duty than sixty pounds.

(2) Where any person has become bound by duly stamped articles in order to his admission as a law agent to practise before a Sheriff Court in Scotland, the articles shall, on payment of such further amount of duty as, together with the amount previously paid thereon, will make up the sum of sixty pounds, be impressed with a stamp denoting the payment of the further duty, and shall thereupon be considered to be sufficiently stamped for entitling the person to admission as a law agent to practise before the Court of Session.

27. Save as hereinbefore provided, articles of clerkship are not to be stamped at any time after the date thereof, except upon payment of penalties, as follows:—

(*a*) If brought to be stamped within one year after date, ten pounds:
(*b*) If so brought after one year and within five years after date,—
For every complete year, and also for any additional part of a year elapsed since the date, ten pounds:
(*c*) In every other case, fifty pounds.

	£	s.	d.
ARTICLES OF CERKSHIP whereby any person, having been bound by previous duly stamped articles to serve as a clerk in order to his admission in any of the Courts aforesaid, and not having completed his service so as to be entitled to such admisson, becomes bound afresh for the same purpose.			
Where the duty upon the previous articles was 2s. 6d.	0	2	6
In any other case	0	10	0
ASSIGNMENT OR ASSIGNATION.			
By way of security, or of any security. See MORTGAGE, etc.			
Upon a sale, or otherwise. See CONVEYANCE.			
ASSURANCE. See POLICY.			
ATTESTED COPY. See COPY.			
ATTORNEY, LETTER OR POWER of. See LETTER OF ATTORNEY.			
WARRANT of. See WARRANT OF ATTORNEY.			
AWARD in England or Ireland, and AWARD or DECREET-ARBITRAL in Scotland.			
In any case in which an amount or value is the matter in dispute—			
Where no amount is awarded or the amount or value awarded does not exceed £5.	0	0	3
Where the amount or value awarded—			
Exceeds £5 and does not exceed £10	0	0	6
„ 10 „ 20	0	1	0
„ 20 „ 30	0	1	6
„ 30 „ 40	0	2	0
„ 40 „ 50	0	2	6
„ 50 „ 100	0	5	0
„ 100 „ 200	0	10	0
„ 200 „ 500	0	15	0
„ 500 „ 750	1	0	0
„ 750 „ 1000	1	5	0
„ 1000 „ .	1	15	0
In any other case	1	15	0

As to special exemptions, see (18) (ii.) (lxi. (*b*)).

"Award" is properly an English law term. See *s.v.* 'Appraisement" above, and AWARD.

BACK BOND OR BACK LETTER. See MORTGAGE, etc., and secs. 23 and 86.

BANK NOTE—

	£	s.	d.
For money not exceeding £1	0	0	5
Exceeding £1 and not exceeding £2	0	0	10
„ 2 „ 5	0	1	3
„ 5 „ 10	0	1	9
„ 10 „ 20	0	2	0
„ 20 „ 30	0	3	0
„ 30 „ 50	0	5	0
„ 50 „ 100	0	8	6

And see secs. 29, 30, and 31.

Bank Notes, Bills of Exchange, and Promissory Notes.

29. For the purposes of this Act the expression "banker" means any person carrying on the business of banking in the United Kingdom, and the expression "bank note" includes—

(*a*) Any bill of exchange or promissory note issued by any banker, other than the Bank of England, for the payment of money not exceeding one hundred pounds to the bearer on demand; and

(*b*) Any bill of exchange or promissory note so issued which entitles or is intended to entitle the bearer or holder thereof, without indorsement or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of money not exceeding one hundred pounds on demand, whether the same be so expressed or not and in whatever form, and by whomsoever the bill or note is drawn or made.

30. A bank note issued duly stamped, or issued unstamped by a banker duly

licensed or otherwise authorised to issue unstamped bank notes, may be from time to time reissued without being liable to any stamp duty by reason of the reissuing.

31.—(1) If any banker, not being duly licensed or otherwise authorised to issue unstamped bank notes, issues, or permits to be issued, any bank note not being duly stamped, he shall incur a fine of fifty pounds.

(2) If any person receives or takes in payment or as a security any bank note issued unstamped contrary to law, knowing the same to have been so issued, he shall incur a fine of twenty pounds.

As to the composition for these duties, see (11) (*b*) above.

	£	*s.*	*d.*
BILL OF EXCHANGE—			
Payable on demand or at sight or on presentation . . .	0	0	1
And see secs. 32, 34, and 38.			
BILL OF EXCHANGE of any other kind whatsoever (*except a Bank Note*) and PROMISSORY NOTE of any kind whatsoever (*except a Bank Note*)— drawn, or expressed to be payable, or actually paid, or indorsed, or in any manner negotiated in the United Kingdom.			
Where the amount or value of the money for which the bill or note is drawn or made does not exceed £5	0	0	1
Exceeds £5 and does not exceed £10	0	0	2
„ 10 „ 25	0	0	3
„ 25 „ 50	0	0	6
„ 50 „ 75	0	0	9
„ 75 „ 100	0	1	0
„ 100—			
for every £100, and also for any fractional part of £100, of such amount or value	0	1	0

Exemptions.

(1) Bill or note issued by the Bank of England or the Bank of Ireland.

(2) Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or to order, and used solely for the purpose of settling or clearing any account between such bankers.

(3) Letter written by a banker in the United Kingdom to any other banker in the United Kingdom, directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made or to any person on his behalf.

(4) Letter of credit granted in the United Kingdom, authorising drafts to be drawn out of the United Kingdom payable in the United Kingdom.

(5) Draft or order drawn by the Paymaster-General on behalf of the Court of Chancery in England or by the Accountant-General of the Supreme Court of Judicature in Ireland.

(6) Warrant or order for the payment of any annuity granted by the National Debt Commissioners, or for the payment of any dividend or interest on any share in the Government or Parliamentary stocks or funds.

(7) Bill drawn by any person under the authority of the Admiralty, upon and payable by the Accountant-General of the Navy.

(8) Bill drawn (according to a form prescribed by Her Majesty's orders by any person duly authorised to draw the same) upon and payable out of any public account for any pay or allowance of the army or auxiliary forces, or for any other expenditure connected therewith.

(9) Draft or order drawn upon any banker in the United Kingdom by an officer of a public department of the State for the payment of money out of a public account.

(10) Bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue.

(11) Coupon or warrant for interest attached to and issued with any security, or with an agreement or memorandum for the renewal or extension of time for payment of a security.

And see secs. 32, 33, 34, 35, 36, 37, 38, and 39.

As to special exemptions, see (18) (xxv.) (xxix.) (xlv.) (xlvi.) (liv.) (lxix.(*b*)).

Exemption (10) does not apply unless the money remitted be public money or money standing to a revenue account at the time of such remittance (*The Committee of London Clearing House Bankers*, L. R. [1896] 1 Q B. 219). With reference to exemption (11), observe the provision of the Finance Act, 1894, s. 40:—

A coupon for interest on a marketable security as defined by the Stamp Act, 1891, being one of a set of coupons whether issued with the security or subsequently issued in a sheet, shall not be chargeable with any stamp duty.

See *Rothschild & Sons*, L. R. [1894] 2 Q. B. 142; *Australasian Mortgage & Agency Co.*, 1888, 16 R. 64.

Post-office orders are regarded as not liable to duty (*R.* v. *Gilchrist*, Car & M. 224; 3 & 4 Vict. c. 96, s. 38; 43 & 44 Vict. c. 33, s. 1).

32. For the purposes of this Act the expression "bill of exchange" includes draft, order, cheque, and letter of credit, and any document or writing (except a bank note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression "bill of exchange payable on demand" includes—

(*a*) An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and

(*b*) An order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf.

33.—(1) For the purposes of this Act the expression "promissory note" includes any document or writing (except a bank note) containing a promise to pay any sum of money.

(2) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money.

The meaning given to the expressions "bill of exchange," "promissory note," brings into charge documents which are not bills of exchange or promissory notes apart from this enactment. The Bills of Exchange Act, 1882, s. 97 (3), declares that it is not to affect the provisions of the Stamp Acts. In a question of stamp duty the sum payable must be a sum certain (*Tennent*, 1878, 5 R. 433; *Vallance*, 1879, 6 R. 1099; *Henderson*, 1895, 22 R. 895; see Bills of Exchange Act, 1882, s. 9). To "Bill of exchange" are referred the scheduled headings "Cheque," "Draft for money," "Letter of credit," and "Order for the payment of money." An order for payment of balance of price, addressed by the seller to the purchaser and delivered to the payee, is regarded in England as an assignation of the debt (see *Conveyance on Sale*), and not as an order for the payment of money. To the latter it is essential that the drawee hold moneys of the drawer, subject to his order (*Brice*, L. R. 3 Q. B. D. 569; *Buck*, L. R. 3 Q. B. D. 686; *Fisher*, 27 W. R. 301). As to the views of the Scots Courts in regard to such a document, see *Ritchie*, 1870, 8 M. 815, and the cases there cited. See also Ersk. iii. 5. 2; Bell, *Com.* ii. 16. The charge is on the principal sum in the bill; interest is not chargeable (*Prussing*, 4 B. & Ald. 204; *Wills*, 4 Tyr. 726). The stamp is exhausted when the bill, being for value, has been satisfied by

the acceptor; by the drawer if an accommodation bill (*Callow*, 3 M. & S. 95; *Hubbard*, 4 Bing. 390; *Lazarus*, 2 Q. B. 459, 11 L. J. Q. B. 310). A post-dated cheque is chargeable as a bill of exchange payable on demand, whether to order or bearer (*Royal Bank of Scotland*, L. R. [1894] 2 Q. B. 715). It is to be observed that an order for the transfer of money from one account to another at the same bank falls under the charge (*The Committee of London Clearing House Bankers*, L. R. [1896] 1 Q. B. 219).

It is of the essence of a promissory note that it be a unilateral obligation, which becomes effectual on delivery, and requires nothing to be done on the other side to make it operative (*Thomson*, 1894, 22 R. 16, per Ld. M'Laren; cf. Bowen, L. J., in *Mortgage Insurance Corporation, infra cit.*). It must contain a promise to pay a sum certain at a fixed date to a person named (*Vallance*, 1879, 6 R. 1099). In determining the question whether a document is an agreement or a promissory note,—it cannot be both,—the intention of the parties is relevant (*Mortgage Insurance Corporation*, L. R. 20 Q. B. D. 645, 21 Q. B. D. 352; see *s.v.* "*Agreement*"). A document may be a promissory note, and yet be chargeable under another head, *e.g.* debenture (*British India Steam Navigation Co.*, L. R. 7 Q. B. D. 165). The fact that coupons are attached to it does not alter its character (*ib.*). See *Ashby*, M. & P. 186; *Green*, 1 C. & P. 451; *Brooks*, 2 M. & W. 74; *Lovell*, 6 C. & P. 238; *Morris*, 1 Str. 629 (see Tilsley, *Stamp Laws*, 3rd ed., 119); *Vallance, supra*; *Blyth*, 1879, 6 R. 1102,—where the documents in issue were held to be promissory notes,—and *Tennent*, *Thomson*, and *Henderson, supra*, where they were held not to be promissory notes.

Observe that bills charged on local rates repayable not later than twelve months from date are dutiable as promissory notes and not as marketable securities (60 & 61 Vict. c. 24, s. 8).

34.—(1) The fixed duty of one penny on a bill of exchange payable on demand or at sight or on presentation may be denoted by an adhesive stamp, which, where the bill is drawn in the United Kingdom, is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power.

(2) The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom are to be denoted by adhesive stamps.

The adhesive stamp under subsec. (1) is the "Postage and Revenue" stamp, under subsec. (2) an appropriated stamp provided by sec. 10. (See (5) above.)

35.—(1) Every person into whose hands any bill of exchange or promissory note drawn or made out of the United Kingdom comes in the United Kingdom before it is stamped shall, before he presents for payment, or indorses, transfers, or in any manner negotiates, or pays the bill or note, affix thereto a proper adhesive stamp or proper adhesive stamps of sufficient amount, and cancel every stamp so affixed thereto.

(2) Provided as follows:

(*a*) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp effectually cancelled, the stamp shall, so far as relates to the holder, be deemed to be duly cancelled, although it may not appear to have been affixed or cancelled by the proper person;

(*b*) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp not duly cancelled, it shall be competent for the holder to cancel the stamp as if he were the person by whom it was affixed, and upon his so doing the bill or note shall be deemed duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed.

(3) But neither of the foregoing provisoes is to relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp.

The adhesive stamps for *ad valorem* duties on foreign bills and notes are

the appropriated stamps provided by sec. 10 (see (5) above). Until presented for payment or indorsed or transferred, or in any manner negotiated or paid, a foreign bill is admissible in evidence although unstamped (*Sharples*, 2 H. & N. 57, 26 L. J. Ex. 302; *Griffin*, L. R. 3 Q. B. 753). It appears that a foreign bill may be cancelled at any time before verdict (*Viale*, 30 L. T. R. 453); and if it be *ex facie* stamped and cancelled as required by the Act, the presumption is that it was stamped and cancelled as required (*Bradlaugh*, L. R. 3 C. P. 286; *Marc*, 31 L. T. R. 372).

36. A bill of exchange or promissory note which purports to be drawn or made out of the United Kingdom is, for the purpose of determining the mode in which stamp duty thereon is to be denoted, to be deemed to have been so drawn or made, although it may in fact have been drawn or made within the United Kingdom.

For the purposes of the Stamp Act, 1891, the Channel Islands and the Isle of Man are not within the United Kingdom (see *Griffin*, *supra cit.*). They have their own revenue laws.

37.—(1) Where a bill of exchange or promissory note has been written on material bearing an impressed stamp of sufficient amount but of improper denomination, it may be stamped with the proper stamp on payment of the duty, and a penalty of forty shillings if the bill or note be not then payable according to its tenor, or of ten pounds if the same be so payable.

(2) Except as aforesaid, no bill of exchange or promissory note shall be stamped with an impressed stamp after the execution thereof.

38.—(1) Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall incur a fine of ten pounds, and the person who takes or receives from any other person any such bill or note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

(2) Provided that if any bill of exchange payable on demand or at sight or on presentation, is presented for payment unstamped, the person to whom it is presented may affix thereto an adhesive stamp of one penny, and cancel the same, as if he had been the drawer of the bill, and may thereupon pay the sum in the bill mentioned, and charge the duty in account against the person by whom the bill was drawn, or deduct the duty from the said sum, and the bill is, so far as respects the duty, to be deemed valid and available.

(3) But the foregoing proviso is not to relieve any person from any fine or penalty incurred by him in relation to such bill.

This section applies to all bills and notes, foreign and inland. Under sec. 8 (see (4) above) cancellation is essential to a bill being "duly stamped"; under sec. 38 it is otherwise (see *Marc*, 31 L. T. R. 372). As to the scope of the words "issues, indorses, transfers, negotiates, presents for payment, or pays," see *Sharples*, 2 H. & N. 57, 26 L. J. Ex. 302; *Griffin*, L. R. 3 Q. B. 753; and cf. *Broddelius*, 1887, 14 R. 536. The alteration of a bill prior to issue does not make it a new instrument requiring a fresh stamp (*Scholfield*, L. R. [1894] 2 Q. B. 660; [1895] 1 Q. B. 536).

39. When a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated apart from the stamped bill, be exempt from duty; and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill.

	£	*s.*	*d.*
Bill of Lading of or for any goods, merchandise, or effects to be exported or carried coastwise	0	0	6

And see sec. 40.

Bills of Lading.

40.—(1) A bill of lading is not to be stamped after the execution thereof.

(2) Every person who makes or executes any bill of lading not duly stamped shall incur a fine of fifty pounds.

Documents similar in form, relating to inland navigation, are liable under the head of agreement.

BILL OF SALE—
Absolute. See CONVEYANCE ON SALE.
By way of security. See MORTGAGE, etc.
And see sec. 41.

Bills of Sale.

41. A bill of sale is not to be registered under any Act for the time being in force relating to the registration of bills of sale unless the original, duly stamped, is produced to the proper officer.

BOND for securing the payment or repayment of money or the transfer or retransfer of stock.
See MORTGAGE, etc., and MARKETABLE SECURITY.

BOND in relation to any annuity upon the original creation and sale thereof.
See CONVEYANCE ON SALE, and sec. 60.

BOND, COVENANT, or INSTRUMENT of any kind whatsoever.

(1) Being the only or principal or primary security for any annuity (*except upon the original creation thereof by way of sale or security, and except a superannuation annuity*), or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack. £ s. d.

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained. — The same *ad valorem* duty as a bond or covenant for such total amount.

For the term of life or any other indefinite period.
For every £5, and also for any fractional part of £5, of the annuity or sum periodically payable 0 2 6

(2) Being a collateral or auxiliary or additional or substituted security for any of the above-mentioned purposes where the principal or primary instrument is duly stamped.

Where the total amount to be ultimately payable can be ascertained — The same *ad valorem* duty as a bond or covenant of the same kind for such total amount.

In any other case :
For every £5, and also for any fractional part of £5, of the annuity or sum periodically payable 0 0 6

(3) Being a grant or contract for payment of a superannuation annuity, that is to say a deferred life annuity granted or secured to any person in consideration of annual premiums payable until he attains a specified age and so as to commence on his attaining that age.
For every £5 and also for any fractional part of £5 of the annuity 0 0 6

If the obligation be to pay an annuity at certain stated periods the aggregate of the periodical payments is dutiable. If the obligation be to pay a sum at certain stated intervals, *e.g.* weekly, monthly, or quarterly, and there is nothing in the terms of the instrument to indicate an annual payment, the dutiable amount is the sum payable weekly, monthly, or quarterly (cf. *Clifford*, L. R. [1896] 2 Q. B. 187, with *Lewis & Lewis*, L. R. [1898] 2 Q. B. 290).

Observe that "covenant" under this head is not in practice limited to instruments under seal or containing a clause of registration.

The "instrument of any kind whatsoever" must be *ejusdem generis* with "bond" or "covenant" to be chargeable under that head (*Thames Conservancy*, L. R. 18 Q. B. D. 279).

Observe that the term "security" has the same meaning under this head and under that of "Mortgage" (*Sweetmeat Automatic Delivery Co.*, L. R. [1895] 1 Q. B. 484). In order to attract the charge the instrument must contain a personal obligation to pay; and so an instrument operating to charge lands with an annuity, or as a direction to trustees to pay an annuity, is in itself not chargeable as a bond.

The head "Lease or Tack" applies only to a lease or tack of heritable subjects (*Sweetmeat Automatic Delivery Co., supra*), and, accordingly, an agreement to pay a separate rent for furniture, or for a right to set up automatic machines, or for the use of telephone lines or of a patented invention, is chargeable not as a lease but as a bond, save in cases where the right given to the licensee is heritable in character (*National Telephone Co.*, 79 L. T. R. 514; *Sweetmeat Automatic Delivery Co., supra*; *Heap*, L. R. 42 Ch. D. 461; *Callender and Oban Rwy. Co.*, 1888, 15 R. 634; cf. *Thames Conservancy, supra*). The charge does not extend to an agreement for payment of future services (*Mounsey*, 7 B. & C. 403), nor to a bond for securing payments of purchase money, where conveyance on sale duty has been paid under sec. 56 (4) (see *s.v.* "Conveyance on Sale"). The provision relating to an unlimited security (s. 88; see *s.v.* "Mortgage" below) does not apply to this charge. Annuities may be payable concurrently; or a joint annuity may be subject to diminution on the death of one of the parties; or an annuity may be susceptible of increase. The charge is, in the first case, on both annuities; in the second case, on the original annuity; and, in the third case, on the annuity as increased.

See also below *s.v.* "Conveyance on Sale," "Mortgage," "Policy of Life Insurance."

	£	s.	d.
BOND given pursuant to the directions of any Act, or of the Commissioners or the Commissioners of Customs, or any of their officers, for or in respect of any of the duties of excise or customs, or for preventing frauds or evasions thereof, or for any other matter or thing relating thereto.			
Where the penalty of the bond does not exceed £150	The same *ad valorem* duty as a bond for the amount of the penalty.		
In any other case	0	5	0

Exemption.

Bond given as aforesaid upon, or in relation to, the receiving or obtaining, or for entitling any person to receive or obtain, any drawback of any duty of excise or customs, for or in respect of any goods, wares, or merchandise exported or shipped to be exported from the United Kingdom to any parts beyond the seas, or upon or in relation to the obtaining of any debenture or certificate for entitling any person to receive any such drawback as aforesaid.

And see sec. 42.

Bonds given in relation to the Duties of Excise.

42. If any person required by any Act for the time being in force or by the Commissioners, or any of their officers, to give or enter into any bond for or in respect of any duty of excise, or for preventing any fraud or evasion in relation to any such duty, or for any matter or thing relating thereto, includes in one and the same bond any goods or things belonging to more persons than one, not being partners or joint-tenants, or tenants in common, he shall for every offence incur a fine of fifty pounds.

	£	s.	d.
BOND on obtaining letters of administration in England or Ireland, or a confirmation of testament in Scotland	0	5	0

Exemptions.

(1) Bond given by the widow, child, father, mother, brother or sister, of any common seaman, marine or soldier, dying in the service of Her Majesty.
(2) Bond given by any person where the estate to be administered does not exceed £100 in value.

£ s. d.

Bond of any kind whatsoever not specifically charged with any duty :

Where the amount limited to be recoverable does not exceed £300 — The same *ad valorem* duty as a bond for the amount limited.

In any other case 0 10 0

Fidelity bonds come under this charge.

The second general exemption (see (17) above) is regarded as covering bottomry bonds. As to judicial bonds, see (19) above. As to special exemptions, see (18) (v.) (xviii.) (xxiii.) (xxv.) (xxxvii.) (lv.) (lvi.) (lxiii.) (lxix. (*b*)).

Bond, accompanied with a deposit of title deeds, for making a mortgage, wadset, or other security on any estate or property therein comprised.
See Mortgage, etc., and sec. 86.

Bond, Declaration, or other Deed or Writing for making redeemable any disposition, assignation, or tack, apparently absolute, but intended only as a security.
See Mortgage, etc., and secs. 23 and 86.

Certificate to be taken out yearly—
(1) By every person admitted or enrolled in England or Ireland as a solicitor, or in Scotland as a law agent or writer to the signet, or in any part of the United Kingdom as a notary public.
(2) By every other legally qualified person who carries on business in England or Ireland as a conveyancer, special pleader, or draftsman in equity, and is obliged by law to take out such a certificate.

If such person practises or carries on his business	If he has been admitted or enrolled, or has carried on business, for three years or upwards.	If he has not been so long admitted or enrolled, or has not so long carried on business.
. . . . .		
In Scotland, within the city or shire of Edinburgh	9 0 0	4 10 0
. . . . .		
In Scotland, beyond the above-mentioned limits	6 0 0	3 0 0

And see secs. 43, 44, 45, [46], 47, and 48.

The three years are calculated from the date of the law agent's admission, whether he has or has not practised from that date. The words "or has carried on business" refer to paragraph (2) of the charge.

Certificates of Solicitors and others.

43.—(1) Every person who in any part of the United Kingdom—
(*a*) Directly or indirectly acts or practises as a solicitor or law agent in any Court, or as a notary public, without having in force at the time a duly stamped certificate ; or
(*b*) On applying for his certificate does not truly specify the facts and circumstances upon which the amount of duty chargeable upon the certificate depends :

shall incur a fine of fifty pounds, and shall be incapable of maintaining any action or suit for the recovery of any fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by him in any such capacity.

(2) Every person in whose name, either alone or together with any other person, any proceeding is taken in any Court, shall, unless the proceeding is set aside by the Court as irregular, or unless the contrary is otherwise satisfactorily proved, be deemed to have acted in the proceeding.

(3) Nothing in this Act shall require a stamped certificate to be taken out by a person who is by law authorised to act as solicitor of a public department without admission, or by any assistant or clerk or officer appointed to act under the direction of such solicitor.

44. Every person who (not being a barrister, or a duly certificated solicitor, law agent, writer to the signet, notary public, conveyancer, special pleader, or draftsman in equity) either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument relating to real or personal estate, or any proceeding in law or equity, shall incur a fine of fifty pounds.

Provided as follows—

(1) This section does not extend to—

(*a*) Any public officer drawing or preparing instruments in the course of his duty; or

(*b*) Any person employed merely to engross any instrument or proceeding.

(2) The expression "instrument" in this section does not include—

(*a*) A will or other testamentary instrument; or

(*b*) An agreement under hand only; or

(*c*) A letter or power of attorney; or

(*d*) A transfer of stock containing no trust or limitation thereof.

Where a qualified law agent or writer to the signet, being employed by a duly certificated law agent or writer to the signet, is paid wholly by salary, and confines himself to the duties of his employment, he is not required to take out a certificate; and the same rule is applied in the case of a notary.

45. It shall not be necessary for any person required to take out a stamped certificate to take out in England, or in Scotland, or in Ireland more than one certificate for any one year.

. . . . . .

47. Every person required to take out a certificate to authorise him to practise :—

(*a*) In Scotland, as a law agent or writer to the signet; or

. . . . . .

(*c*) In any part of the United Kingdom, as a notary public;

shall in every year before he does any act in any of the aforesaid capacities, deliver to the Commissioners, or to their proper officer, in such manner and form as they direct, a note in writing stating his full name and the place where he carries on his business, and thereupon, and upon payment of the proper duty, shall be entitled to a certificate, which is to be duly stamped and issued to him by the Commissioners.

48. The certificates in this section specified are to be dated and to expire at the times hereinafter in that behalf mentioned; that is to say,

(*a*) The certificates of law agents, writers to the signet, and notaries public in Scotland, and of conveyancers, special pleaders, and draftsmen in equity in England, are to be dated, if taken out between the thirty-first of October and the first of December, on the first of November, and if taken out at any other time, on the day on which they are issued, and are in all cases to expire on the thirty-first of October next after their date.

. . . . . .

	£	s.	d.
CERTIFICATE of any goods, wares, or merchandise, having been duly entered inwards, which shall be entered outwards for exportation at the port of importation, or be removed from thence to any other port for the more convenient exportation thereof, where such certificate is issued for enabling a person to obtain a debenture or certificate entitling him to receive a drawback of any duty of customs . .	0	1	0
CHARTER of resignation, or of confirmation, or of novodamus or upon apprising, or upon a decreet of adjudication, or sale of any lands, or other heritable subjects in Scotland	0	5	0
CHARTER PARTY	0	0	6

And see secs. 49, 50, and 51.

Charter-parties.

49.—(1) For the purposes of this Act the expression "charter-party" includes any agreement or contract for the charter of any ship or vessel or any memorandum, letter, or other writing between the captain, master, or owner of any ship or vessel, and any

other person for or relating to the freight or conveyance of any money, goods, or effects on board of the ship or vessel.

(2) The duty upon a charter-party may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract.

The words "any memorandum, letter, or other writing" must be *ejusdem generis* with "charter-party" to be chargeable as such (*Rein*, L. R. 2 Q. B. 144).

50. Where a charter-party is first executed out of the United Kingdom without being duly stamped, any party thereto may, within ten days after it has been first received in the United Kingdom, and before it has been executed by any person in the United Kingdom, affix thereto an adhesive stamp denoting the duty chargeable thereon, and at the same time cancel such adhesive stamp, and the instrument when so stamped shall be deemed duly stamped.

51. A charter-party may be stamped with an impressed stamp after execution upon the following terms; that is to say,

(1) Within seven days after the first execution thereof, on payment of the duty and a penalty of four shillings and sixpence;

(2) After seven days, but within one month after the first execution thereof, on payment of the duty and a penalty of ten pounds;

and shall not in any other case be stamped with an impressed stamp.

This section does not apply to a charter-party wholly executed abroad. As to such a document, see sec. 15 (3) (*The Belfort*, L. R. 9 P. D. 215; see (9) above).

	£	*s.*	*d.*
CHEQUE. See BILL OF EXCHANGE.			
CLARE CONSTAT. See PRECEPT AND WRIT.			
COLONIAL SECURITY. See MARKETABLE SECURITY and sec. 82.			
COMMISSION:			
(1) To any officer in the army, or in the corps of Royal Marines .	1	10	0
(2) To any officer in the navy	0	5	0
Exemption.			
Commission to any officer of militia, yeomanry, or volunteers.			
COMMISSION OF LUNACY	0	5	0
COMMISSION to act as a notary public in Scotland. See FACULTY.			
COMMISSION in the nature of a power of attorney in Scotland. See LETTER OR POWER OF ATTORNEY.			
CONDITIONAL SURRENDER of any copyhold or customary estate by way of mortgage. See MORTGAGE, etc., and secs. 86 and 87.			
CONGÉ D'ELIRE. See GRANT.			
CONSTAT of Letters Patent. See EXEMPLIFICATION.			
CONTRACT. See AGREEMENT.			
CONTRACT NOTE for or relating to the sale or purchase of any stock or marketable security—			
Of the value of £5 and under the value of £100 . . .	0	0	1
„ £100 or upwards	0	0	6

And see secs. 52 & 53.

52.—(1) For the purposes of this Act the expression "contract note" means the note sent by a broker or agent to his principal (except where such principal is acting as broker or agent for a principal) advising him of the sale or purchase of any stock or marketable security.

(2) Where a note advises the sale or purchase of more than one description of stock or marketable security, the note shall be deemed to be as many contract notes as there are descriptions of stock or security sold or purchased.

(3) The duty of one penny on a contract note may be denoted by an adhesive stamp, and the duty of one shilling (56 Vict. c. 7, s. 3 (1)) on a contract note is to be denoted by an adhesive stamp appropriated to a contract note (*ib.* s. 3 (2)).

(4) Every adhesive stamp on a contract note is to be cancelled by the person by whom the note is executed.

A continuation note is to be regarded as a contract note, advising the

sale or purchase of stock, etc., for one account, and the purchase or sale thereof for the next account, and as liable to two stamps accordingly.

53.—(1) Any person who effects any sale or purchase of any stock or marketable security, of the value of five pounds or upwards, as a broker or agent, shall forthwith make and execute a contract note and transmit the same to his principal, and in default of so doing shall incur a fine of twenty pounds [see *Learoyd*, L. R. [1894] 2 Q. B. 114].

(2) Every person who makes or executes any contract note chargeable with duty, and not being duly stamped, shall incur a fine of twenty pounds [see *Ld. Adv.* v. *Thomson*, 1897, 24 R. 543].

(3) No broker, agent, or other person shall have any legal claim to any charge for brokerage, commission, or agency, with reference to the sale or purchase of any stock or marketable security of the value of five pounds or upwards mentioned or referred to in any contract note, unless the note is duly stamped.

Observe that this subsection applies where a person required to make, execute, and transmit a contract note fails to do so, in the same manner as if he had made, executed, and transmitted a contract note not duly stamped (61 & 62 Vict. c. 46, s. 7 (1)).

(4) The duty of one shilling (56 Vict. c. 7, s. 3 (1)) upon a contract note may be added to the charge for brokerage or agency.

Sec. 3 (2) of 56 Vict. c. 7 provides that the duty of one shilling is to be denoted by an adhesive stamp appropriated to a contract note, and may be added to the charge for brokerage or agency.

Conveyance or Transfer, whether on sale or otherwise,—	£	*s.*	*d.*
(1) Of any stock of the Bank of England	0	7	9
(2) Of any stock of the Government of Canada inscribed in books kept in the United Kingdom, or of any Colonial stock to which the Colonial Stock Act, 1877, applies—			
For every £100, and also for any fractional part of £100, of the normal amount of stock transferred . . .	0	2	6

And see sec. 62.

Sec. 62 (see *s.v.* "Conveyance or Transfer" of any kind not hereinbefore described) provides, *inter alia*, that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than 10s. (see *s.v.* "Appointment" of a new trustee). As to transfer of stock by way of mortgage, see sec. 23 (see *s.v.* "Agreement," above).

Conveyance or Transfer on sale,	£	*s.*	*d.*
Of any property (*except such stock as aforesaid*),			
Where the amount or value of the consideration for the sale does not exceed £5	0	0	6
Exceeds £5 and does not exceed £10	0	1	0
„ 10 „ 15	0	1	6
„ 15 „ 20	0	2	0
„ 20 „ 25	0	2	6
„ 25 „ 50	0	5	0
„ 50 „ 75	0	7	6
„ 75 „ 100	0	10	0
„ 100 „ 125	0	12	6
„ 125 „ 150	0	15	0
„ 150 „ 175	0	17	6
„ 175 „ 200	1	0	0
„ 200 „ 225	1	2	6
„ 225 „ 250	1	5	0
„ 250 „ 275	1	7	6
„ 275 „ 300	1	10	0
„ 300			
For every £50, and also for any fractional part of £50, of such amount of value	0	5	0

And see secs. 54, 55, 56, 57, 58, 59, 60, and 61.

As to the general exemptions, see (17) above. As to special exemptions, see (18) (ii.) (iv.) (viii.) (xii.) (xvi.) (xxi.) (xxiv.) (xxx.) (xxxii.) (xxxix.) (xli.) (lv.) (lxv.).

Conveyances on Sale.

54. For the purposes of this Act the expression "conveyance on sale" includes every instrument, and every decree or order of any Court or of any Commissioners, whereby any property, or any estate, or interest in any property, upon the sale thereof, is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.

Sec. 6 of the Finance Act, 1898, provides that—

For the removal of doubts with reference to the effect of secs. 54 and 57 of the Stamp Act, 1891, it is hereby declared that the definition of "conveyance on sale" in the said sec. 54 includes a decree or order for, or having the effect of an order for, foreclosure.

Provided that—

(*a*) The *ad valorem* stamp duty upon any such decree or order shall not exceed the duty on a sum equal to the value of the property to which the decree or order relates, and where the decree or order states that value, that statement shall be conclusive for the purpose of determining the amount of the duty; and

(*b*) Where *ad valorem* stamp duty is paid upon such decree or order, any conveyance following upon such decree or order shall be exempt from the *ad valorem* stamp duty.

Sec. 6 is held to apply only to decrees or orders having the effect of orders for foreclosure executed after the commencement of the Stamp Act, 1891. But this limitation does not receive effect in the case of conveyances effecting foreclosure executed by order of the Court (see *Huntington*, L. R. [1896] 1 Q. B. 422). Decrees under 57 & 58 Vict. c. 44, s. 8, are chargeable under sec. 54 (*Tod*, 1898, 35 S. L. R. 671; and in practice decrees of expiry of the legal are similarly treated. Sec. 62 (see below) provides for the charge upon a conveyance by decree or order of Court on any occasion except a sale or a mortgage. Where duty is chargeable it is impressed upon the extract.

Observe that chargeability arises if the property be either "transferred to" or "vested in a purchaser on sale" (see *Mersey Dock and Harbour Board*, L. R. [1897] 1 Q. B. 786, 2 Q. B. 316; and cf. *Chesterfield Brewery Co.*, 79 L. T. R. 559).

The transaction must be a sale. A transfer of property from one person to another for money, or stock, or marketable security (see s. 55 (1) below), is a sale under the Act (*John Foster & Son Ltd.*, L. R. [1894] 1 Q. B. 516; *J. & P. Coats Ltd.*, L. R. [1897] 1 Q. B. 778; *Chesterfield Brewery Co., ut supra*); and this principle has been applied where the members of a partnership agreed to convert it into a limited liability company, having the same capital as the partnership, and accepted shares in proportion to their holdings in the partnership (*John Wilson & Son Ltd.*, 1895, 23 R. 18; cf. *John Foster & Son Ltd., ut supra*; *Great Western Railway Co.*, L. R. [1894] 1 Q. B. 507; *Furness Railway Co.*, 33 L. J. Ex. 173). In the case of the reconstruction of a company, it must, it is thought, be shown, in order to escape *ad valorem* duty, that the shares in the new company are held by shareholders of the old company in the same proportion *inter se* as in the old company, that they are not held by persons other than the shareholders in the old company, and that new capital has not been created. It is not sufficient that the shareholders have the option to take all their shares in the proportion above mentioned; in order to have the benefit of the principle in the case of an option, they must have exercised it.

A conveyance by a father to his son in consideration of natural love and affection, and of a covenant by the son to increase his sisters' portions by £1500, was held to be a family transaction, and not a sale (*Denn d. Manifold* v. *Diamond*, 4 B. & C. 243, 3 L. J. K. B. 211; see also *Massy*, 3 Bing. N. C. 478; with these cases, cf. *Huntingdon*, L. R. [1896] 1 Q. B. 422; *Todd*, 1898, 35 S. L. R. 671). It is often difficult to say to which class a case belongs. But it may be observed that in practice, when property is conveyed in exchange for money, neither inadequacy of consideration nor the near relationship of the parties will exclude liability to *ad valorem* duty.

A partition is not a sale (*Macleod*, 1885, 12 R. 1045).

Where a contract of ground-annual, or a feu-charter, or, it is thought, a bond of annuity, contains a clause of redemption, the discharge in respect of redemption is chargeable not as a conveyance on sale, but as a "release or renunciation" to the fixed duty of 10s. (*Belch*, 1877, 4 R. 592; *Gibb*, 1880, 8 R. 120; cf. 55 Geo. III. c. 184, s. 31). But *ad valorem* duty is chargeable where the rate of redemption is not adhered to, or where the person redeeming is not a party, or assignee of a party, to the original contract. A memorandum of allocation of feu-duty in the form prescribed by the Conveyancing (Scotland) Act, 1874, Sched. D., is charged as an agreement. If it be in the form of a separate deed it is chargeable with deed duty. If it contain a provision for augmentation of feu-duty it is liable to *ad valorem* duty upon the amount thereof. Where a vassal sells part of his feu, and there being no allocation in the original charter takes the purchaser bound to pay to the superior more than the proportion of feu-duty properly applicable to the part sold, *ad valorem* duty is not charged upon the excess; for a new feu-duty is not created, nor is the *cumulo* amount of the original feu-duty altered. When an executor, at the request of a legatee other than a residuary legatee, conveys to him subjects or stocks not specially bequeathed to him to account of his interest, *ad valorem* duty is chargeable. It is also chargeable where the executor conveys the whole estate to residuary legatees on their undertaking to put him in funds to pay the special legacies.

The *ad valorem* duty is also chargeable upon the ascertained amount of the interest of an outgoing partner who has been bought out by the remaining partners (*Christie*, L. R. 2 Ex. D. 46; *Macleod*, 1885, 12 R. 1045); but it is not chargeable where the interest of a partner deceased is paid out under a special provision in the contract of copartnery. Again, while a premium paid to the owner of a business by an incoming partner is chargeable, his contribution to the capital is not.

An order for payment of balance of price addressed by the seller to the buyer and delivered to the payee, is in England regarded as an assignation of a debt, and is, if on sale, chargeable as a conveyance on sale (*Adams*, 12 L. R. Ir. 1, 14 *ib.* 141; and see *Brice*, L. R. 3 Q. B. D. 569; *Buck*, L. R. 3 Q. B. D. 687; *Fisher*, 27 W. R. 301; "Bill of Exchange" above). As to the views of the Scots Courts in regard to such a document, see *Ritchie*, 1870, 8 M. 815; see also Ersk. iii. 5. 2; 2 Bell, *Com.* 16.

The conveyance must be a conveyance of "property, or any estate or interest in property." Property is that which belongs to a person exclusive of others, and can be the subject of bargain and sale (*Potter*, 10 Ex. 147, 23 L. J. Ex. 345, per Pollock, C. B.; approved in *Limmer Asphalte Paving Co.*, L. R. 7 Ex. 211, per Martin, B.). It has been held to include a share in a colonial patent, and the sole licence to use that patent within a certain district of that colony (*Smelting Co. of Australia*, L. R. [1896] 2 Q. B. 179; [1897] 1 Q. B. 175; cf. *Limmer Asphalte Paving Co., ut supra*; *Conservators of*

River Thames, L. R. 18 Q. B. D. 279. It is thought that the original grant of a licence is chargeable no less than the transfer of one already in existence; see the two cases last cited, and *Mersey Dock and Harbour Board*, L. R. [1897] 1 Q. B. 786, 2 Q. B. 316); a trade mark (*Brooke & Co.*, L. R. [1896] 2 Q. B. 356), and the goodwill of a trade (*Potter*, *ut supra*; *West London Syndicate*, L. R. [1898] 1 Q. B. 226, 79 L. T. R. 289. As to goodwill generally, see *Trego*, L. R. [1896] A. C. 7; *Donald*, 1893, 21 R. 246; *Drummond*, 1886, 13 R. 540. As to the goodwill of a surgeon's or solicitor's business, see *Bain*, 1878, 5 R. 416; *Spicer*, cited in Collyer, *Partnership*, p. 82; *Arundell*, 52 L. J. Ch. 537; *James*, L. R. 22 Q. B. D. 669, 23 Q. B. D. 12; and *Smale*, 3 De G. & Sm. 706, 19 L. J. Ch. 157). A marine or fire policy, if no loss have occurred, is not property (*Blandy*, 9 B. & C. 396).

The consideration chargeable is the true consideration whether it be that expressed in the deed or not. The price of all property passing by the conveyance is chargeable, and, in the case of a conveyance of land, the value of everything which goes with the land *sub silentio* (see Rankine, *Landownership*, p. 119; *Nisbet*, 1880, 7 R. 575. See as to what is heritable, the authorities cited *supra*, *s.v.* "Agreement") forms part of the consideration. Goodwill, in so far as it is heritable in character, is chargeable on the conveyance by which the subjects, to which it attaches, pass (*ex parte Punnett*, L. R. 16 Ch. D. 226; *West London Syndicate, ut supra*; cf. *Philp's Exr.*, 1894, 21 R. 482; *Trego, ut supra*). In the case of a sale, compulsory under statute, to a railway company, the value of occupation for trade purposes of the subjects sold forms part of the consideration on which the duty chargeable on the conveyance is assessed (*Comm. of Inland Revenue* v. *Glasgow and S.-W. Railway Co.*, 1887, 14 R. (H. L.) 33). It is thought that duty is not chargeable on sums representing compensation, either for severance or in respect of lands injuriously affected, where the sums are separately fixed. Where the consideration cannot be ascertained, *e.g.* in the case of a royalty *per* ton to be excavated,—deed duty is chargeable. Where *pro indiviso* proprietors purchase the interest of one of their number, and all of them are parties to the conveyance, conveyance on sale duty on the interest sold is the only duty chargeable. Where the consideration is a feu-duty, to be increased if the ground be used for purposes other than those for which it was primarily conveyed, the charge is upon the original feu-duty plus the additional feu-duty in so far as the charge on the latter does not exceed 10s. In assessing the duty in the case of the sale of a patent to a company, deduction is given for expenses paid by the vendor, and properly payable by the vendee, *e.g.* premium to broker for placing shares, or initial cost of flotation.

55.—(1) Where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or security.

(2) Where the consideration, or any part of the consideration, for the conveyance on sale consists of any security not being a marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon the security.

In regard to the first subsection, see *John Foster & Sons Ltd.*, L. R. [1894] 1 Q. B. 516; *John Wilson & Son Ltd.*, 1895, 23 R. 18; *J. & P. Coats*, L. R. [1897] 1 Q. B. 778. As to the method of computing the value, see (2) above.

56.—(1) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period not exceeding

twenty years, so that the total amount to be paid can be previously ascertained, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on such total amount.

(2) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument.

(3) Where the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically during any life or lives, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the amount which will or may, according to the terms of sale, be payable during the period of twelve years next after the day of the date of the instrument.

(4) Provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical payments, and containing also provision for securing the payments, is to be charged with any duty in respect of such provision, and no separate instrument made in that case for securing the payments is to be charged with any higher duty than ten shillings.

Where the consideration is a joint annuity, and an annuity, smaller in amount on the death of one of the parties, the charge will be upon twelve times the joint annuity.

In accordance with subsec. (4), where an instrument is chargeable as a conveyance of sale, a covenant to pay the balance of the price by instalments does not attract *ad valorem* bond duty in addition (*Limmer Asphalte Paving Co.*, L. R. 7 Ex. 211).

57. Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty.

Thus where a heritable property is conveyed in consideration of a debt due by the disponer to the disponee, *ad valorem* duty is charged on the amount of the debt; and where the property is disponed subject to a bond, the amount of the bond forms part of the consideration, whether the disponee be personally bound to pay the bond or not (*Comm. of Inland Revenue* v. *Liquidators of Glasgow City Bank*, 1881, 8 R. 389; cf. *Furness Railway Co.*, 33 L. J. Ex. 173; *Mortimer*, 2 H. & C. 838; 33 L. J. Ex. 263). This principle was applied to a conveyance of security subjects to the bondholder, who had deducted their value in claiming on the bankrupt borrower's estate, by the trustee, who renounced his reversionary interest (*Scottish Equitable Life Assurance Society*, 1894, 22 R. 85; cf. *Anderson*, 1878, 6 R. 56). So a sum lent on a policy prior to sale thereof, forms part of the consideration, save where the Insurance Company is the lender. Where a *pro indiviso* share only of the property subject to a bond is sold, the amount of the bond proportionate to the share sold is chargeable. No further duty is attracted by the insertion in a disposition by a bondholder, selling under the powers in the bond, of an assignation of the bond to the purchaser. Feu-duties, ground-annuals, and annuities do not fall within the provision of sec. 57 (see *Swayne*, *Times*, 16th Dec. 1898). As to the charge on foreclosure decrees, decrees of declaration of expiry of the legal, and decrees under sec. 8 of the Heritable Securities (Scotland) Act, 1894 (57 & 58 Vict. c. 44), see sec. 54, *supra*, and sec. 62, *infra*.

58.—(1) Where property contracted to be sold for one consideration for the whole is conveyed to the purchaser in separate parts or parcels by different instruments, the con-

sideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with *ad valorem* duty in respect of such distinct consideration.

(2) Where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified.

(3) Where there are several instruments of conveyance for completing the purchaser's title to property sold, the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument.

(4) Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with *ad valorem* duty in respect of the consideration moving from the sub-purchaser.

(5) Where a person having contracted for the purchase of any property but not having obtained a conveyance contracts to sell the whole, or any part or parts thereof, to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration.

(6) Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration moving from him, and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable only with such other duty as it may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty.

As to the words "principal instrument of conveyance" in subsec. (3), see *Doe d. Priest* v. *Weston*, 2 Q. B. 249.

59.—(1) Any contract or agreement made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold.

(2) Where the purchaser has paid the said *ad valorem* duty, and, before having obtained a conveyance or transfer of the property, enters into a contract or agreement for the sale of the same, the contract or agreement shall be charged, if the consideration for that sale is in excess of the consideration for the original sale, with the *ad valorem* duty payable in respect of such excess consideration, and in any other case with the fixed duty of ten shillings or of sixpence, as the case may require.

(3) Where duty has been duly paid in conformity with the foregoing provisions, the conveyance or transfer made to the purcharer or sub-purchaser, or any other person on his behalf or by his direction, shall not be chargeable with any duty, and the Commissioners, upon application, either shall denote the payment of the *ad valorem* duty upon the conveyance or transfer, or shall transfer the *ad valorem* duty thereto upon production of the contract or agreement, or contracts or agreements, duly stamped.

(4) Provided that where any such contract or agreement is stamped with the fixed duty of ten shillings or of sixpence, as the case may require, the contract or agreement shall be regarded as duly stamped for the mere purpose of proceedings to enforce specific performance or recover damages for the breach thereof.

(5) Provided also that where any such contract or agreement is stamped with the said fixed duty, and a conveyance or transfer made in conformity with the contract or agreement is presented to the Commissioners for stamping with the *ad valorem* duty chargeable thereon within the period of six months after the first execution of the contract or

agreement, or within such longer period as the Commissioners may think reasonable in the circumstances of the case, the conveyance or transfer shall be stamped accordingly, and the same, and the said contract or agreement, shall be deemed to be duly stamped. Nothing in this proviso shall alter or affect the provisions as to the stamping of a conveyance or transfer after the execution thereof.

(6) Provided also, that the *ad valorem* duty paid upon any such contract or agreement shall be returned by the Commissioners in case the contract or agreement be afterwards rescinded or annulled, or for any other reason be not substantially performed or carried into effect, so as to operate as or be followed by a conveyance or transfer.

Heritable subjects (as to heritable goodwill, see cases cited under sec. 54), property in the nature of land having a local situation out of the United Kingdom (see *Smelting Co. of Australia*, L. R., [1896] 2 Q. B. 179, [1897] 1 Q. B. 175), goods, wares, or merchandise, stocks, or marketable securities, and ships are not chargeable under this section (see *Farmer & Co.*, 79 L. T. R. 32, and *Chesterfield Brewery Co.*, 79 L. T. R. 559, as to "equitable estates or interests"). The question what articles do and what do not fall under the words "goods, wares, or merchandise" is to be determined by the same considerations as those which *e converso* determine whether articles are or are not fixtures (see FIXTURES). Foreign book-debts, however, and foreign goodwill other than that which is inseparable from premises situate abroad, fall within the charge; and the exemption has been held not to embrace a share of a colonial patent, and of a licence to use that patent in a specified district of that colony (*Smelting Co. of Australia, ut supra*; *Brooke & Co.*, L. R. [1896] 2 Q. B. 356).

Accordingly, in the case of an agreement for the sale of a going business, only that portion of the price is dutiable which is payable in respect of assets other than those falling under the exemption, *e.g.* goodwill, so far as not heritable, patents, book-debts, etc. An undertaking by the purchaser to pay, in addition to the price, the liabilities of the business forms part of the dutiable consideration (s. 57). When cash, bills, or notes form part of the subject sold, they are not regarded as chargeable. Where heritable subjects, heritable machinery, and heritable goodwill are among the assets agreed to be sold, duty in respect of their *cumulo* value is chargeable upon the disposition of the subjects. In practice, the *ad valorem* duty in respect of the heritage is, if desired, impressed upon the agreement instead of the disposition. In that case, the latter instrument is liable to the fixed duty of ten shillings. If the heritable subjects are conveyed subject to bonds, the amount of the bonds is regarded as part of the consideration (s. 57).

When an outgoing partner agrees to sell his interest in the firm to the remaining partners, that interest being not a share of assets, but a right of accounting as against the partnership *persona*, is charged as an *unum quid*.

It may be observed that a company's articles of association are simply a contract between the shareholders *inter se* (*Eley*, L. R. 1 Ex. 20, 88); and, accordingly, where one company has purchased the business of another, the articles of the former company, to which the latter was not a party, cannot be treated for duty purposes as the agreement for sale between the companies.

60. Where upon the sale of any annuity or other right not before in existence, such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale.

See *Mersey Dock and Harbour Board*, [1897] 1 Q. B. 786, 2 Q. B. 316.

61.—(1) In the cases hereinafter specified, the principal instrument is to be ascertained in the following manner :—

. . . . . .

(*c*) Where in Scotland there is a disposition or assignation executed by the seller, and any other instrument is executed for completing the title, the disposition or assignation is to be deemed the principal instrument.

(2) In any other case the parties may determine for themselves which of several instruments is to be deemed the principal instrument, and may pay the *ad valorem* duty thereon accordingly.

Sec. 12 of the Finance Act, 1895, provides that—

Where after the passing of this Act, by virtue of any Act, whether passed before or after this Act, either—

(*a*) Any property is vested by way of sale in any person ; or

(*b*) Any person is authorised to purchase property.

Such person shall, within three months after the passing of the Act, or the date of vesting, whichever is later, or after the completion of the purchase, as the case may be, produce to the Commissioners of Inland Revenue a copy of the Act printed by the Queen's printer of Acts of Parliament, or some instrument relating to the vesting in the first case, and an instrument of conveyance of the property in the other case, duly stamped with the *ad valorem* duty payable upon a conveyance on sale of the property ; and in default of such production, the duty with interest at the rate of 5 per cent. per annum from the passing of the Act, date of vesting, or completion of the purchase, as the case may be, shall be a debt to Her Majesty from such person.

In cases falling under (*a*), duty is taken on the whole property, heritable and moveable.

See also *s.v.* "Exchange or Excambion."

	£	*s.*	*d.*
CONVEYANCE or TRANSFER by way of security of any property (*except such stock as aforesaid*), or of any security. See MORTGAGE, etc., and MARKETABLE SECURITY.			
CONVEYANCE or TRANSFER of any kind not hereinbefore described . . And see sec. 62.	0	10	0

Conveyances on any Occasion except Sale or Mortgage.

62. Every instrument, and every decree or order of any Court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property.

Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings.

As to instruments and decrees of Court which operate a sale, see sec. 54. A decree which is effectual as a mortgage, *e.g.* a decree of adjudication in security, is not chargeable. In practice a decree of general or special service is not charged.

A deed of gift, whether with or without a clause of registration, is liable to the fixed duty of ten shillings.

	£	*s.*	*d.*
COPY or EXTRACT (*attested or in any manner authenticated*) of or from—			
(1) An instrument chargeable with any duty.			
(2) An original will, testament, or codicil.			
(3) The probate or probate copy of a will or codicil.			
(4) Any letters of administration or any confirmation of a testament.			
(5) Any public register (*except any register of births, baptisms, marriages, deaths, or burials*).			
(6) The books, rolls, or records of any Court.			
In the case of an instrument chargeable with duty not amounting to one shilling	The same duty as such instrument.		
In any other case	0	1	0

Exemptions.

(1) Copy or extract of or from any law proceeding.

(2) Copy or extract in Scotland of or from the commission of any person as a delegate or representative to the convention of royal burghs or the general assembly or any presbytery or church court.

And see sec. 63.

As to special exemption, see (18) (xx.).

Attested Copies and Extracts.

63. An attested or otherwise authenticated copy or extract of or from—

(1) An instrument chargeable with any duty;
(2) An original will, testament, or codicil;
(3) The probate or probate copy of a will or codicil;
(4) Letters of administration or a confirmation of a testament;

may be stamped at any time within fourteen days after the date of the attestation or authentication on payment of the duty only.

The charge is limited to "such copies as are evidence *per se* . . . ; the word 'copy' there means an authenticated copy, receivable as evidence in the first instance" (*Braythwaite*, 10 M. & W. 494, 12 L. J. Ex. 38, per Ld. Abinger, C. B.). Accordingly, if a copy notarially executed be made evidence by statute, it will be chargeable. It will, if it be a notarial act, be chargeable under that heading in addition.

Observe that where a decree is chargeable under sec. 54 or sec. 62, the duty is impressed on the extract.

	£	s.	d.
Copy or Extract (*certified*) of or from any register of births, baptisms, marriages, deaths, or burials	0	0	1

Exemptions.

(1) Copy or extract furnished by any clergyman, registrar, or other official person pursuant to and for the purposes of any Act, or furnished to any general or superintending registrar under any general regulation.
(2) Copy or extract for which the person giving the same is not entitled to any fee or reward.

And see sec. 64.

Certified Copies and Extracts from Registers of Births, etc.

64. The duty upon a certified copy or extract of or from any register of births, baptisms, marriages, deaths, or burials is to be paid by the person requiring the copy or extract, and may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the copy or extract is signed before he delivers the same out of his hands, custody, or power.

Copyhold and Customary Estates—Instruments relating thereto.

. . . . . .

Cost Book Mines. See Transfer.

Counterpart. See Duplicate.

Covenant for securing the payment or repayment of money, or the transfer or retransfer of stock.

See Mortgage, etc.

Covenant in relation to any annuity upon the original creation and sale thereof.

See Conveyance on Sale, and sec. 60.

Covenant in relation to any annuity (*except upon the original creation and sale thereof*) or to other periodical payments.

See Bond, Covenant, etc.

Covenant. Any separate deed of covenant (*not being an instrument chargeable with* ad valorem *duty as a conveyance on sale or mortgage*) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid.

	£ s. d.
Where the *ad valorem* duty in respect of the consideration or mortgage money does not exceed ten shillings	A duty equal to the amount of such *ad valorem* duty.
In any other case	0 10 0

Customary Estates. See Copyhold.

Debenture for securing the payment or repayment of money or the transfer or retransfer of stock.

See Mortgage, etc., and Marketable Security.

Debenture or Certificate for entitling any person to receive any allowance by way of drawback or otherwise payable out of the revenue of customs or excise, for or in respect of any goods, wares, or merchandise exported or shipped to be exported from the United Kingdom to any part beyond the sea.

Where the allowance to be received does not exceed £10 . .	0 1 0
Exceeds £10 and does not exceed £50	0 2 6
Exceeds £50	0 5 0

Declaration of any use or trust of or concerning any property by any writing, not being a will, or an instrument chargeable with *ad valorem* duty as a settlement 0 10 0

Declaration (*Satutory*). See Affidavit.

Decreet Arbitral. See Award.

Deed whereby any real burden is declared or created on lands or heritable subjects in Scotland.

See Mortgage, etc., and sec. 86.

Deed containing an obligation to infeft any person in heritable subjects in Scotland, under a clause of reversion, as a security for money.

See Mortgage, etc., and sec. 86.

Deed containing an obligation to infeft or seize in an annuity to be uplifted out of heritable subjects in Scotland.

See Bond, Covenant, etc.

Deed of any kind whatsoever, not described in this schedule . . . 0 10 0

As to general exemptions, see (17); as to special exemptions, see (18) (ii.) (xviii.) (xli.) (xlvii.) (liii.) (lv.) (lxv.) (lxix. (*b*)) (lxx.).

The term "deed" is not defined in the Act. The proposition that "in Scotland . . . any writing in the form of a deed, containing narrative and subsumption, followed by present act and deed, and clause of registration, will be liable to deed duty" (2 M. Bell's *Conveyancing*, 3rd ed., 205), holds true where such an instrument does not fall wholly under a specific head of charge. Where it contains provisions of which some are chargeable under a specific head, or specific heads, and some are not, deed duty will be chargeable in respect of the latter in addition to the specific duty or duties chargeable in respect of the former. Where the instrument falls under a specific head,—*e.g.* receipt,—the fact that it contains a clause of registration will not, it is thought, make it liable to the fixed duty of ten shillings (see *Fleming*, 1859, 21 D. 982). If the instrument be a deed in all respects, save that it does not contain a clause of registration, it will be chargeable as a deed if it is to enter the register, or if sealed, save where the seal is that of a company.

In England two of the most important characteristics of a deed are sealing and delivery. But every document under seal is not a deed (see *Morton*, L. R. 2 C. C. R. 22, and cases therein cited). Further, instruments sealed in England or Ireland under the seal of a company or corporation are liable to deed duty.

Defeasance. Instrument of defeasance of any conveyance, transfer, disposition, assignation, or tack, apparently absolute, but intended only as a security for money or stock.

See Mortgage, etc., and sec. 86.

In respect of marketable securities under hand only, see Agreement, and sec. 23.

	£	s.	d.
DELIVERY ORDER	0	0	1

And see secs. 69, 70, and 71.

See *s.v.* "Warrant for Goods." See also DELIVERY ORDER.

69.—(1) For the purposes of this Act the expression "delivery order" means any document or writing entitling, or intended to entitle, any person therein named, or his assigns, or the holder thereof, to the delivery of any goods, wares, or merchandise of the value of forty shillings or upwards lying in any dock or port, or in any warehouse in which goods are stored or deposited on rent or hire, or upon any wharf, such document or writing being signed by or on behalf of the owner of such goods, wares, or merchandise, upon the sale or transfer of the property therein.

(2) A delivery order is to be deemed to have been given upon a sale of, or transfer of the property in, goods, wares, or merchandise of the value of forty shillings or upwards, unless the contrary is expressly stated therein.

(3) The duty upon a delivery order may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued.

70.—(1) If any person—

(*a*) Untruly states, or knowingly allows to be untruly stated, in a delivery order, either that the transaction to which it relates is not a sale or transfer of property, or that the goods, wares, or merchandise to which it relates are not of the value of forty shillings; or

(*b*) Makes, signs, or issues any delivery order chargeable with duty, but not being duly stamped; or

(*c*) Knowingly, either himself, or by his servant or any other person, delivers, or procures, or authorises the delivery of, any goods, wares, or merchandise mentioned in any delivery order which is not duly stamped, or which contains to his knowledge any false statement with reference either to the nature of the transaction, or the value of the goods, wares, or merchandise,

he shall incur a fine of twenty pounds.

(2) But a delivery order is not, by reason of the same being unstamped, to be deemed invalid in the hands of the person having the custody of, or delivering out, the goods, wares, or merchandise therein mentioned, unless such person is proved to have been party or privy to some fraud on the revenue in relation thereto.

71. The duty upon a delivery order is, in the absence of any special stipulation, to be paid by the person to whom the order is given, and any person from whom a delivery order chargeable with duty is required may refuse to give it, unless or until the amount of the duty is paid to him.

	£	s.	d.
DEPOSIT of title deeds. See MORTGAGE, etc., and sec. 86.			
DEPUTATION or APPOINTMENT of a gamekeeper	0	10	0
DISPENSATION. See FACULTY.			
DISPOSITION of heritable property in Scotland to singular successors or purchasers. See CONVEYANCE ON SALE.			
DISPOSITION of heritable property in Scotland to a purchaser, containing a clause declaring all or any part of the purchase-money a real burden upon, or affecting, the heritable property thereby disponed, or any part thereof. See CONVEYANCE ON SALE, MORTGAGE, etc., and sec. 86.			
DISPOSITION in Scotland, containing constitution of feu or ground annual right. See CONVEYANCE ON SALE, and sec. 56.			
DISPOSITION in security in Scotland. See MORTGAGE, etc.			
DISPOSITION of any wadset, heritable bond, etc. See MORTGAGE, etc.			
DISPOSITION in Scotland of any property or of any right or interest therein not described in this schedule	0	10	0
DOCK WARRANT. See WARRANT FOR GOODS.			
DOCKET made on passing any instrument under the Great Seal of the United Kingdom	0	2	0
DRAFT for money. See BILL OF EXCHANGE.			
DUPLICATE or COUNTERPART of any instrument chargeable with any duty. Where such duty does not amount to 5*s.*	The same duty as the original instrument.		
In any other case	0	5	0

And see sec. 72.

Duplicates and Counterparts.

72. The duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, such counterpart not being executed by or on behalf of any lessor or grantor), is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart.

See sec. 11, cited (6) above.

	£	s.	d.
EIK to a reversion. See MORTGAGE, etc., and sec. 86.			
EQUITABLE MORTGAGE. See MORTGAGE, etc., and secs. 23 and 86.			
EXCHANGE or EXCAMBION. Instruments effecting.			
In the case specified in sec. 73, see that section.			
In any other case	0	10	0

Exchange and Partition or Division.

73. Where upon the exchange of any real or heritable property for any other real or heritable property, or upon the partition or division of any real or heritable property, any consideration exceeding in amount or value one hundred pounds is paid or given, or agreed to be paid or given, for equality, the principal or only instrument whereby the exchange or partition or division is effected is to be charged with the same *ad valorem* duty as a conveyance on sale for the consideration, and with that duty only; and where in any such case there are several instruments for completing the title of either party, the principal instrument is to be ascertained, and the other instruments are to be charged with duty in the manner hereinbefore provided in the case of several instruments of conveyance.

For special exemption, see (18) (xviii.).

As to the final clause of the section, see secs. 58, 61.

As to the scope of the section, see *J. & P. Coats*, [1897] 1 Q. B. 778.

The provisions of sec. 57 are not applicable to the instruments charged under this head.

A partition is not a sale (see *Macleod*, 1885, 12 R. 1045; *Henniker*, 1 E. & B. 54, 22 L. J. Q. B. 94).

	£	s.	d.
EXEMPLIFICATION or CONSTAT, under the Great Seal of the United Kingdom of Great Britain and Ireland of any letters patent or grant made or to be made by Her Majesty or by any of her royal predecessors of any honour, dignity, promotion, franchise, liberty, or privilege, or of any lands, office, or other thing whatsoever	5	0	0
. . . . .		.	
EXTRACT. See COPY or EXTRACT.			
FACTORY, in the nature of a letter or power of attorney in Scotland. See LETTER or POWER OF ATTORNEY.			
FACULTY, LICENCE, COMMISSION, or DISPENSATION for admitting or authorising any person to act as a notary public :—			
In England	30	0	0
In Scotland or Ireland	20	0	0
. . . . .		.	
FEU CONTRACT in Scotland. See CONVEYANCE ON SALE, and sec. 56.			
FOREIGN SECURITY. See MARKETABLE SECURITY, and sec. 82.			
FURTHER CHARGE or FURTHER SECURITY. See MORTGAGE, etc., and sec. 86.			
GRANT or LETTERS PATENT under the Great Seal or wafer Great Seal of the United Kingdom of Great Britain and Ireland, or of the Great Seal of Ireland, or the Seal of the Duchy or County Palatine of Lancaster, or under the Seal kept and used in Scotland in place of the Great Seal formerly used there :			

	£	s.	d.
(1) Of the honour or dignity of a duke	350	0	0
,, ,, of a marquis	300	0	0
,, ,, of an earl	250	0	0
,, ,, of a viscount	200	0	0
,, ,, of a baron	150	0	0
,, ,, of a baronet	100	0	0
(2) Of a congé d'élire to any dean and chapter for the election of an archbishop or bishop (3) Of the Royal Assent to, or signification of, the election made by any dean and chapter, or of the nomination and presentation by Her Majesty, in default of such election of any person to be an archbishop or bishop (4) Of or for the restitution of the temporalities to any archbishop or bishop (5) Of any other honour, dignity, or promotion whatsoever (6) Of any franchise, liberty, or privilege to any person or body politic or corporate	30	0	0

And see sec. 74.

Grants of Honours and Dignities.

74.—(1) Where two or more honours or dignities are granted by the same letters patent to the same person, such letters patent are to be charged with the proper duty in respect of the highest in point of rank only.

(2) Where any honour or dignity is granted to any person in remainder, the letters patent are to be charged with such further duty in respect of every remainder as would be payable for an original grant of the same honour or dignity.

	£	s.	d.
GRANT or WARRANT of PRECEDENCE to take rank among nobility, under the sign manual of Her Majesty	100	0	0
GRANT or LICENCE under the sign manual of Her Majesty to take and use a surname and arms, or a surname only.			
In compliance with the injunctions of any will or settlement	50	0	0
Upon any voluntary application	10	0	0
GRANT of arms or armorial ensigns only, under the sign manual of Her Majesty, or by any of the Kings of Arms of England, Scotland, or Ireland	10	0	0
GRANT of copyhold or customary estates. See CONVEYANCE; COPYHOLD.			
GRANT of the custody of the person or estate of a lunatic	2	0	0
HERITABLE BOND. See MORTGAGE, etc., and sec. 86.			
INSURANCE. See POLICY.			
LEASE or TACK—			
(1) For any definite term not exceeding a year: Of any dwelling-house or part of a dwelling-house at a rent not exceeding the rate of £10 per annum	0	0	1
(2) For any definite term less than a year: (*a*) Of any furnished dwelling-house or apartments where the rent for such term exceeds £25	0	2	6
(*b*) Of any lands, tenements, or heritable subjects except or otherwise than as aforesaid — The same duty as a lease for a year at the rent reserved for the definite term.			
(3) For any other definite term or for any indefinite term: Of any lands, tenements, or heritable subjects— Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock, or security: In respect of such consideration — The same duty as a conveyance on a sale for the same consideration.			
Where the consideration, or any part of the consideration, is any rent:			

In respect of such consideration :

If the rent, whether reserved as a yearly rent or otherwise, is at a rate or average rate :

	If the term does not exceed 35 years, or is indefinite.			If the term exceeds 35 years, but does not exceed 100 years.			If the term exceeds 100 years.		
	£	*s.*	*d.*	£	*s.*	*d.*	£	*s.*	*d.*
Not exceeding £5 per annum .	0	0	6	0	3	0	0	6	0
Exceeding £5 and not exceeding £10	0	1	0	0	6	0	0	12	0
„ 10 „ „ 15	0	1	6	0	9	0	0	18	0
„ 15 „ „ 20	0	2	0	0	12	0	1	4	0
„ 20 „ „ 25	0	2	6	0	15	0	1	10	0
„ 25 „ „ 50	0	5	0	1	10	0	3	0	0
„ 50 „ „ 75	0	7	6	2	5	0	4	10	0
„ 75 „ „ 100	0	10	0	3	0	0	6	0	0
„ 100 For every full sum of £50, and also for any fractional part of £50 thereof	0	5	0	1	10	0	3	0	0

(4) Of any other kind whatsoever not hereinbefore described . 0 10 0

And see secs. 75, 76, 77, and 78.

As to general exemptions, see (17). As to special exemptions, see (18) (viii.) (xviii.) (xli.).

A lease of which the consideration is a grassum, or the release of a debt (*Gingell*, 4 Ex. 720, 19 L. J. Ex. 129), is charged with the same duty as a conveyance on sale. Observe that a lease from week to week or from month to month is chargeable as a lease for an indefinite term. A lease "of any other kind whatsoever" applies only to leases of lands, tenements, or heritable subjects.

A lease is sufficiently stamped with the *ad valorem* lease duty, although it contains an option to purchase the property let (*Worthington*, 5 C. B. 635, 17 L. J. C. P. 117), or a cautionary obligation for the rent (*Price*, 2 B. & Ad. 218); but it is otherwise where the lease contains an option to purchase subjects other than those let (*Lovelock*, 8 Q. B. 371, 16 L. J. Q. B. 182), or an agreement for the sale of fixtures (*Corder*, 3 Taun. 382; *Clayton*, 5 B. & C. 41). Where the consideration is a fixed rent and an indefinite royalty, the instrument is chargeable with *ad valorem* duty and ten shillings. Where the tenant undertakes as part of his rent to pay burdens falling properly upon the landlord, or to pay interest upon the landlord's plant, or an annual sum for the depreciation of heritable machinery, such undertaking forms part of the dutiable consideration. If, in the last case, the machinery be moveable, and there be an obligation to pay an annual sum during the currency of the lease, that obligation may be liable under the head "Bond, Covenant," etc. A lease of a house and furniture at a *cumulo* rent is chargeable with *ad valorem* lease duty upon the amount of the rent. But where the rent is apportioned in the instrument between the house and the furniture, in so far as it effeirs to the furniture, it is not regarded as liable to lease duty. It may, however, be regarded as falling under the head "Bond, Covenant," etc., if the instrument contain an obligation to pay. An undertaking by the tenant to pay direct to the insuring company the premiums in respect of the insurances on the subjects let, is not regarded in practice as forming part of the dutiable consideration.

Duty is chargeable on the amount of a rent which, although not stated, is ascertainable (*Parry*, 5 A. & E. 551).

Where a landlord, in one instrument, lets several subjects to different tenants at separate rates, *ad valorem* duty is chargeable upon each of the rents (cf. *Doe d. Copley* v. *Day*, 13 East, 241, with *Boase*, 3 B. & B. 185; *Blount*, 1 Bing. N. C. 408).

Where the rent is the value of a specific quantity of grain according to fiars' prices, the practice is to charge on an average of the last seven years (see s. 76 below).

A minute of extension of lease is chargeable as a new lease, unless the original lease contain an option to extend, and the period of lease, and extension does not exceed the period covered by the original duty.

Leases.

75.—(1) An agreement for a lease or tack, or with respect to the letting of any lands, tenements, or heritable subjects for any term not exceeding thirty-five years, or for any indefinite term, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement.

(2) A lease or tack made subsequently to, and in conformity with, such an agreement duly stamped is to be charged with the duty of sixpence only.

An agreement for a lease made for a fixed consideration and a further valuable consideration, uncertain in amount, is chargeable with *ad valorem* lease duty and ten shillings.

76.—(1) Where the consideration, or any part of the consideration, for which a lease or tack is granted or agreed to be granted, consists of any produce or other goods, the value of the produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with *ad valorem* duty.

(2) Where it is stipulated that the value of the produce or goods is to amount at least to, or is not to exceed, a given sum, or where the lessee is specially charged with, or has the option of paying after any permanent rate of conversion, the value of the produce or goods is, for the purpose of assessing the *ad valorem* duty, to be estimated at the given sum, or according to the permanent rate.

(3) A lease or tack or agreement for a lease or tack made either wholly or partially for any such consideration, if it contains a statement of the value thereof, and is stamped in accordance with the statement, is, so far as regards the subject-matter of the statement, to be deemed duly stamped, unless or until it is otherwise shown that the statement is incorrect, and that the lease or tack or agreement is in fact not duly stamped.

The case of grain rents converted according to fiars' prices has already been noted.

77.—(1) A lease or tack, or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the surrender or abandonment of any existing lease, tack, or agreement, of or relating to the same subject-matter.

(2) A lease made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is not to be charged with any duty in respect of such further consideration.

(3) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding twenty-one years, granted by an ecclesiastical corporation aggregate or sole, is to be charged with any higher duty than thirty-five shillings.

(4) . . . . . .

(5) An instrument whereby the rent reserved by any other instrument chargeable with duty and duly stamped as a lease or tack is increased is not to be charged with duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable.

The renunciation of the old lease, when contained in the new lease, does not form part of the dutiable consideration.

The fifth sub-section does not apply where the period is extended.

78.—(1) The duty upon an instrument chargeable with duty as a lease or tack of—

(*a*) Any dwelling-house, or part of a dwelling-house, for a definite term, not exceeding a year at a rent not exceeding the rate of ten pounds per annum ; or

(*b*) Any furnished dwelling-house or apartments for any definite term less than a year ;

and upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed.

(2) Every person who executes, or prepares or is employed in preparing, any such instrument (except letters or correspondence) which is not, at or before the execution thereof, duly stamped, shall incur a fine of five pounds.

The exception in favour of "letters or correspondence" applies only to a *bonâ fide* correspondence. The mere form of a letter is not sufficient.

	£	*s.*	*d.*
LETTER OF ALLOTMENT and LETTER OF RENUNCIATION, or any other document having the effect of a letter of allotment :			
(1) Of any share of any company or proposed company .			
(2) In respect of any loan raised, or proposed to be raised by any company or proposed company, or by any municipal body or corporation			
(3) Issued or delivered in the United Kingdom, of any share of any foreign or colonial company or proposed company, or in respect of any loan raised or proposed to be raised by or on behalf of any foreign or colonial State, Government, municipal body, corporation, or company	0	0	1
And SCRIP CERTIFICATE, SCRIP, or other document :			
(1) Entitling any person to become the proprietor of any share of any company or proposed company			
(2) Issued or delivered in the United Kingdom, and entitling any person to become the proprietor of any share of any foreign or colonial company or proposed company . .			
(3) Denoting, or intended to denote, the right of any person as a subscriber in respect of any loan raised or proposed to be raised by any company or proposed company, or by any municipal body or corporation	0	0	1
(4) Issued or delivered in the United Kingdom, and denoting, or intended to denote, the right of any person as a subscriber in respect of any loan raised or proposed to be raised by or on behalf of any foreign or colonial State, Government, municipal body, corporation, or company			
And see sec. 79.			

A share certificate, *i.e.* a document certifying that the person named in it is proprietor, is not dutiable.

Letters of Allotment or Renunciation, Scrip Certificates, and Scrip.

79.—(1) Every person who executes, grants, issues, or delivers out any document chargeable with duty as a letter of allotment, letter of renunciation, or scrip certificate, or as scrip, before the same is duly stamped, shall incur a fine of twenty pounds.

(2) The stamp duty of one penny on a letter of renunciation may be denoted by an adhesive stamp which is to be cancelled by the person by whom the letter of renunciation is executed.

LETTER OF CREDIT. See Bill of Exchange.

	£	*s.*	*d.*
LETTER OR POWER OF ATTORNEY and COMMISSION, FACTORY, MANDATE, or other instrument in the nature thereof :			
(1) For the sole purpose of appointing or authorising a proxy to vote at any one meeting at which votes may be given by proxy, whether the number of persons named in such instrument be one or more	0	0	1

	£	s.	d.
(2) By any petty officer, seaman, marine, or soldier serving as a marine, or his representatives, for receiving prize money or wages	0	1	0
(3) For the receipt of the dividends or interest of any stock :			
Where made for the receipt of one payment only	0	1	0
In any other case	0	5	0
(4) For the receipt of any sum of money, or any bill of exchange or promissory note for any sum of money, not exceeding £20, or any periodical payments not exceeding the annual sum of £10 (*not being hereinbefore charged*)	0	5	0
(5) For the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds :			
Where the nominal value of the stocks or funds does not exceed £100 [58 & 59 Vict. c. 16, s. 11]	0	2	6
In any other case	0	10	0
(6) Of any kind whatsoever not hereinbefore described	0	10	0

Exemptions.

(1) Letter or power of attorney for the receipt of dividends of any definite and certain share of the Government or Parliamentary stocks or funds producing a yearly dividend less than £3.
(2) Letter or power of attorney or proxy filed in the Probate Division of the High Court of Justice in England or Ireland, or in any ecclesiastical court.
(3) Order, request, or direction under hand only from the proprietor of any stock to any company or to any officer of any company or to any banker to pay the dividends or interest arising from the stock to any person therein named.

And see secs. 80 and 81.

As to special exemption, see (18) (ii.) (v.) (xxv.) (xxxii.) (xliv.) (lxix. (*b*)).

Observe in regard to the first head of charge, that an instrument authorising a proxy to vote at a particular meeting, and any adjournment thereof, falls under this charge. An instrument authorising a proxy to vote at more than one meeting, or generally at all meetings, is liable to the duty of ten shillings (see *In re English, Scottish, and Australian Chartered Bank*, L. R. [1893] 3 Ch. 385).

An appointment of a deputy to undertake the duties of the appointer falls under the sixth head of charge, unless fees or emoluments are attached to it. In that case the appointment is exempt (see above, *s.v.* "Admission").

Letters or Powers of Attorney and Voting Papers.

80.—(1) Every letter or power of attorney for the purpose of appointing a proxy to vote at a meeting, and every voting paper, hereby respectively charged with the duty of one penny, is to specify the day upon which the meeting at which it is intended to be used is to be held, and is to be available only at the meeting so specified, and any adjournment thereof.

(2) The duty of one penny may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is executed, and a letter or power of attorney or voting paper charged with the duty of one penny is not to be stamped after the execution thereof by any person.

(3) Every person who makes or executes, or votes, or attempts to vote, under or by means of any such letter or power of attorney or voting paper, not being duly stamped, shall incur a fine of £50, and every vote given or tendered under the authority or by means of the letter or power of attorney or voting paper, shall be void.

As to what amounts to specification of the day of meeting sufficient to satisfy the requirement of subsection (1), see *R.* v. *M'Inerney*, 30 L. R. Ir. 49; *Ernest*, [1897] 1 Ch. 1.

81. A letter or power of attorney for the sale, transfer, or acceptance of any of the Government or Parliamentary stocks or funds, duly stamped for that purpose, is not to be charged with any further duty by reason of containing an authority for the receipt of the dividends on the same stocks or funds.

	£	*s.*	*d.*
LETTERS OF MARQUE AND REPRISAL	5	0	0

LETTERS PATENT. See GRANT.

LETTER OF REVERSION in Scotland. See MORTGAGE, etc., and sec. 86.

LICENCE for Marriage in England or Ireland.

. . . . . .

LICENCE under the seal of any archbishop, bishop, chancellor, or other ordinary, or by any ecclesiastical Court in England or Ireland, or by any presbytery or other ecclesiastical power in Scotland :

(1) To hold the office of lecturer, reader, chaplain, church clerk, chapel clerk, parish clerk, or sexton	0	10	0
(2)			
(3)			
(4) For any other purpose	2	0	0

Exemptions.

(1) Licence granted to any spiritual person to perform divine service in any building approved by the archbishop or bishop in lieu of a church or chapel whilst the same is under repair or is rebuilding, or in any building so approved for the convenience of the inhabitants of a parish resident at a distance from a church or consecrated chapel.

(2) Licence to hold a perpetual curacy.

(3) Licence to a stipendiary curate, wherein the annual amount of the stipend is specified.

(4) Licence for the purpose of authorising or enabling any person to preach or exercise any other spiritual function, not being a licence to hold the office of lecturer, reader, or chaplain, and there being no salary or emolument for or attached to the exercise of the function for which such licence is granted.

(5) Licence by any ecclesiastical authority for licensing or authorising any matter relating to a consecrated building or ground, or anything to be constructed, set up, taken down, or altered therein, or to be removed therefrom.

LICENCE to act as a Notary Public. See FACULTY.

LICENCE to use Surname or Arms. See GRANT.

MARKETABLE SECURITY AND FOREIGN OR COLONIAL SHARE CERTIFICATE.

(1) Marketable security (*a*) being a colonial Government security, or (*b*) being a security not transferable by delivery, or (*c*) being a security transferable by delivery and bearing date or signed before or on the sixth day of August one thousand eight hundred and eighty-five—

For or in respect of the money thereby secured . . . . The same *ad valorem* duty according to the nature of the security as upon a mortgage.

(2) TRANSFER, ASSIGNMENT, DISPOSITION, or ASSIGNATION of a marketable security of any description—

Upon a sale thereof—see conveyance or transfer on sale.

Upon a mortgage thereof—see mortgage of stock or marketable security.

In any other case than a sale or mortgage . . .	0	10	0

(3) Marketable security (except a colonial Government security) being a security transferable by delivery and bearing date or signed or offered for subscription after the sixth day of August one thousand eight hundred and eighty-five—

For every £10, and also for any fractional part of £10, of the money thereby secured	0	1	0

(4) Marketable security (except a colonial Government security) being such security as last aforesaid given in substitution for

	£	s.	d.
a like security duly stamped in conformity with the law in force at the time when it became subject to duty—			
For every £20, and also for any fractional part of £20, of the money thereby secured	0	0	6

The words "or offered for subscription" in subhead (1) were repealed by 61 & 62 Vict. c. 46, s. 7 (3).

The Act 56 & 57 Vict. c. 7, s. 4, abolished the annual duties charged under the subheads (5) and (6) of this heading.

Marketable Securities and Foreign and Colonial Share Certificates.

82.—(1) Marketable securities for the purpose of the charge of duty thereon include—

(*a*) A marketable security, made or issued by or on behalf of any company or body of persons corporate or unincorporate formed or established in the United Kingdom; and

(*b*) A marketable security by or on behalf of any foreign State or Government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security), bearing date or signed after the third day of June one thousand eight hundred and sixty-two,

(i.) Which is made or issued in the United Kingdom, or

(ii.) Which, though originally issued out of the United Kingdom, has been, after the sixth day of August one thousand eight hundred and eighty-five, or is offered for subscription, and given or delivered to a subscriber in the United Kingdom, or

(iii.) Which, the interest thereon being payable in the United Kingdom, is assigned, transferred, or in any manner negotiated in the United Kingdom; and

(*c*) A marketable security by or on behalf of any colonial Government which if the borrower were a foreign Government would be a foreign security (hereinafter called a colonial Government security).

Subsec. (2) was repealed by 56 & 57 Vict. c. 7, s. 4.

The term "marketable security" includes "all securities of such a description as to be capable, according to the use and practice of stock markets, of being there sold and bought" (*Texas Land & Cattle Co.*, 1888, 16 R. 69, per Ld. Shand; app. in *Brown, Shipley, & Co.*, [1895] 2 Q. B. 598, per Ld. Esher, M. R.). As to the meaning of the words "made or issued," see *Grenfell*, L. R. 1 Ex. D. 242; *Chicago Railway Terminal Elevator Co.*, 75 L. T. R. 157, 575; *Lord Revelstoke*, [1898] 1 Q. B. 78, 79 L. T. R. 227). As to the meaning of the words "offered for subscription," see *Chicago Railway Terminal Elevator Co., ut supra*. As to the charge where a debenture, being a marketable security, contains an obligation on the issuer to redeem at a sum in excess of the amount advanced, see *Rowell*, L. R. [1897] 2 Q. B. 194; *Knights Deep Ltd.*, 79 L. T. R. 704.

Observe that bills, repayable not later than twelve months from their date charged on local rates, etc., are dutiable as promissory notes, and not as marketable securities (60 & 61 Vict. c. 24, s. 8).

83. Every person who in the United Kingdom makes, issues, assigns, transfers, negotiates, or offers for subscription any foreign security or colonial Government security not being duly stamped, shall incur a fine of twenty pounds.

84. The Commissioners may at any time, without reference to the date thereof, allow any foreign security or colonial Government security to be stamped without the payment of any penalty, upon being satisfied, in any manner that they may think proper, that it was not made or issued, and has not been transferred, assigned, or negotiated within the United Kingdom.

Sec. 85 was repealed by 56 & 57 Vict. c. 7, s. 4.

MARRIAGE LICENCE. *See* LICENCE.

MARRIAGE SETTLEMENT. *See* SETTLEMENT.

MEMORIAL to be registered pursuant to any Act for the time being in force relating to the public registering of deeds in England or Ireland.

. . . . . .

MORTGAGE, BOND, DEBENTURE, COVENANT (except a marketable security otherwise specially charged with duty), and WARRANT OF ATTORNEY to confess and enter up judgment.

	£	*s.*	*d.*
(1) Being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money—			
Not exceeding £10	0	0	3
exceeding £10 and not exceeding £25 . . .	0	0	8
„ 25 „ „ 50 . . .	0	1	3
„ 50 „ „ 100 . . .	0	2	6
„ 100 „ „ 150 . . .	0	3	9
„ 150 „ „ 200 . . .	0	5	0
„ 200 „ „ 250 . . .	0	6	3
„ 250 „ „ 300 . . .	0	7	6
„ 300			
For every £100, and also for every fractional part of £100, of the amount secured	0	2	6
(2) Being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped :			
For every £100, and also for any fractional part of £100, of the amount secured	0	0	6
(3) Being an equitable mortgage :			
For every £100, and any fractional part of £100, of the amount secured	0	1	0
(4) TRANSFER, ASSIGNMENT, DISPOSITION, or ASSIGNATION of any mortgage, bond, debenture, or covenant (except a marketable security), or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment :			
For every £100, and also for any fractional part of £100, of the amount transferred, assigned, or disponed, exclusive of interest which is not in arrear	0	0	6
And also where any further money is added to the money already secured	The same duty as a principal security for such further money.		
(5) RECONVEYANCE, RELEASE, DISCHARGE, SURRENDER, RESURRENDER, WARRANT TO VACATE, or RENUNCIATION of any such security as aforesaid, or of the benefit thereof, or of the money thereby secured :			
For every £100, and also for any fractional part of £100, of the total amount or value of the money at any time secured	0	0	6

And see secs. 86, 87, 88, and 89.

As to the general exemptions, see (17); and observe that, while a mortgage of which a ship is the subject is exempt, it is otherwise where not only the ships of a shipping company but its uncalled capital is mortgaged. As to the special exemptions, see (18) (xli.) (xlvii.) (lv.) and sec. 89, quoted below.

When a terminable bond or debenture is renewed by indorsement, the indorsement is in Scotland charged as an agreement.

In reference to subhead (2), it may be observed that where a company on issuing debentures conveys property, *e.g.* heritable subjects and uncalled capital, to trustees to hold for the debenture-holders, and the trustees execute a declaration of trust, the conveyance and declaration are regarded as liable to deed duty, if mortgage duty has been paid on the debentures issued. But where the issue is of debenture stock, mortgage duty is chargeable on the declaration.

As to the meaning of "substituted security," see *City of London Brewery Co.*, L. R. [1898] 1 Q. B. 408, 15 T. L. R. 49.

Transfer duty—subhead (4)—is charged on the amount transferred, and interest in arrear must be included in that amount. The assignation of a bond of corroboration, when contained in an assignation of the principal bond, attracts no further duty.

Observe with regard to subhead (5), that the *ad valorem* duty is payable only once, *i.e.* upon the final discharge, each partial discharge being liable to deed duty (*M'Kimmie's Trs.*, 1895, 23 R. 232).

Observe that a release or discharge of any instrument constituting a mortgage under sec. 23 (see below) is not chargeable with any *ad valorem* duty, but with sixpence as an agreement, or, if it contain a clause of registration, with ten shillings as a deed.

When several bonds are assigned or reconveyed to, or discharged in favour of, one person, or several persons jointly, the charge is on the *cumulo* amount; when to or in favour of several persons for their separate interests, a separate duty is chargeable in respect of each interest.

As to the relation of the subheadings to the principal heading "Mortgage," see *Old Battersea Building Soc.*, L. R. [1898] 2 Q. B. 294. A mortgage is not constituted by charging by will a legacy upon lands (see s. 86, quoted below). The discharge in such a case is chargeable not under subhead (5), but as a deed.

Mortgages, etc.

86.—(1) For the purposes of this Act the expression "mortgage" means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be;

And includes—

(*a*) Conditional surrender by way of mortgage, further charge, wadset, and heritable bond, disposition, assignation, or tack in security, and eik to a reversion of or affecting any lands, estate, or property, real or personal, heritable or moveable, whatsoever: and

(*b*) Any deed containing an obligation to infeft any person in an annual rent, or in lands or other heritable subjects in Scotland, under a clause of reversion, but without any personal bond or obligation therein contained for payment of the money or stock intended to be secured: and

(*c*) Any conveyance of any lands, estate, or property whatsoever in trust to be sold or otherwise converted into money, intended only as a security, and redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except where the conveyance is made for the benefit of creditors generally, or for the benefit of creditors specified who accept the provision made for payment of their debts, in full satisfaction thereof, or who exceed five in number: and

(*d*) Any defeasance, letter of reversion, back bond, declaration, or other deed or writing for defeating or making redeemable or explaining or qualifying any conveyance, transfer, assignation, or tack of any lands, estate, or property whatsoever, apparently absolute, but intended only as a security: and

(*e*) Any agreement (other than an agreement chargeable with duty as an equitable mortgage), contract, or bond accompanied with a deposit of title deeds for making a mortgage, wadset, or any other security or conveyance as aforesaid of any lands, estate, or property comprised in the title deeds, or for pledging or charging the same as security: and

(*f*) Any deed whereby a real burden is declared or created on lands or heritable subjects in Scotland: and

(*g*) Any deed operating as a mortgage of any stock or marketable security.

(2) For the purpose of this Act the expression "equitable mortgage" means an agreement or memorandum, under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property whatever (other than stock or marketable security), or creating a charge on such property.

Observe that subsections (*a*) to (*g*) are not to be taken as extending the introductory words defining the meaning of mortgage and adding cases not included in them (*City of London Brewery*, 15 T. L. R. 49, per Rigby, L. J.).

To satisfy the definition the sum secured must be a "definite and certain sum of money advanced or lent at the time," etc. Accordingly, liability to duty is not incurred where a legacy is made a real burden by testamentary writings. The words "definite and certain" express the idea that the sum shall be of ascertained amount, not that it shall be certainly payable (*Maxwell*, 1866, 4 M. 1121; *Mortimore*, 2 H. & C. 838, 33 L. J. Ex. 263). A bond of relief in favour of a cautioner is chargeable with mortgage duty (*Canning*, 1 E. & B. 164, 22 L. J. Q. B. 87), unless it be contained in the bond in which the cautioner was obligant. A mere guarantee is not a bond of relief; there must be an obligation to pay.

Where the debtor in a bond secured over lands disposes of part of the subject, and the security is restricted to the portion undisposed of by a deed of restriction, that deed is liable to duty at the rate of sixpence *per cent.* on the amount of the bond up to a maximum of ten shillings. But where the restriction is contained in the conveyance, that instrument is not chargeable in respect thereof, in addition to the duty to which it is itself liable.

Mortgage duty is chargeable only on the "definite or certain sum" secured. Accordingly, it is not chargeable on interest (*Barker*, 7 M. & W. 590), bankers' commission (*Frith*, 14 M. & W. 39, 15 L. J. Ex. 133), incidental expenses (*Doe d. Scruton* v. *Smith*, 8 Bing. 146; *Doe d. Jarman* v. *Larder*, 3 Bing. N. C. 92; *Doe d. Mereeron* v. *Bragg*, 8 A. & E. 620; *Wroghton*, 11 M. & W. 561; 13 L. J. Ex. 57; *Laurance*, 7 Ex. 28, 21 L. J. Ex. 49), or costs (*Lysaght*, 10 Ir. L. R. 269). See *Rowell*, [1897] 2 Q. B. 194.

The assignation in security of a policy of life assurance is chargeable with mortgage duty (*Caldwell*, 5 Ex. 1).

A mortgage stamp is not required where there has been merely a deposit of goods, or of some document relating to goods, as a bill of lading or a dock-warrant (*Harris*, 9 M. & W. 591, 11 L. J. Ex. 216; see also *Attenborough*, 11 Ex. 461, 25 L. J. Ex. 22).

As to "debenture," see *British India Steam Navigation Co.*, L. R. 7 Q. B. D. 165; *Rowell*, [1897] 2 Q. B. 194; and *s.v.* "Marketable Securities." See also DEBENTURES.

With regard to subheads (*d*) and (*g*), it is to be observed that sec. 23 provides that certain instruments relating to mortgages of stock are to be charged as agreements. It enacts that—

(1) Every instrument under hand only (not being a promissory note or bill of exchange) given upon the occasion of the deposit of any share warrant or stock certificate to bearer, or foreign or colonial share certificate, or any security for money transferable by delivery, by way of security for any loan, shall be deemed to be an agreement, and shall be charged with duty accordingly.

(2) Every instrument under hand only (not being a promissory note or bill of exchange) making redeemable or qualifying a duly stamped transfer, intended as a security, of any registered stock or marketable security, shall be deemed to be an agreement, and shall be charged with duty accordingly.

(3) A release or discharge of any such instrument shall not be chargeable with any *ad valorem* duty.

87.—(1) A security for the transfer or retransfer of any stock is to be charged with the same duty as a similar security for a sum of money equal in amount to the value of the stock; and a transfer, assignment, disposition, or assignation of any such security, and a reconveyance, release, discharge, surrender, resurrender, warrant to vacate, or renunciation of any such security, is to be charged with the same duty as an instrument of the same description relating to a sum of money equal in amount to the value of the stock.

(2) A security for the payment of any rent-charge, annuity, or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance, or payment

intended to be so repaid, satisfied, or discharged, is to be charged with the same duty as a similar security for the payment of the sum of money so lent, advanced, or paid.

(3) A transfer of a duly stamped security, and a security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is not to be charged with any duty by reason of its containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in relation thereto, or any further assurance of the property comprised in the transferred or previous security.

(4) Where any copyhold or customary lands or hereditaments are mortgaged alone by means of a conditional surrender or grant, the *ad valorem* duty is to be charged on the surrender or grant, if made out of Court, or the memorandum thereof, and on the copy of Court roll of the surrender or grant, if made in Court.

(5) Where any copyhold or customary lands or hereditaments are mortgaged, together with other property, for securing the same money or the same stock, the *ad valorem* duty is to be charged on the instrument relating to the other property, and the surrender or grant, or the memorandum thereof, or the copy of Court roll of the surrender or grant, as the case may be, is not to be charged with any higher duty than ten shillings.

(6) An instrument chargeable with *ad valorem* duty as a mortgage is not to be charged with any further duty by reason of the equity of redemption in the mortgaged property being thereby conveyed or limited in any other manner than to a purchaser, or in trust for, or according to the direction of, a purchaser.

The second subsection relates to cases in which the payment of the annuity is in satisfaction and discharge of the principal of the loan, and in which the security is a mortgage, or something like a mortgage. It does not apply to the case of the grant of an annuity in consideration of a sum paid by way of purchase (*Mersey Docks and Harbour Board, ut infra*, per Wills, J.).

In the case of *Wale* (L. R. 4 Ex. D. 270), the mortgagor who desired a further advance, the mortgagee who desired repayment, and a third person who was willing to make the additional loan, entered into a deed by which the subjects securing the original loan were conveyed to the new lender, in security of an advance made up (1) of the sum to be repaid to the original mortgagee, and (2) of the sum forming the new loan. It was held that the instrument was chargeable as a transfer *quoad* (1), and as a new mortgage *quoad* (2). Cf. *Mersey Docks and Harbour Board*, [1897] 1 Q. B. 786, 2 Q. B. 316.

88.—(1) A security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited.

(2) Where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover, but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made.

(3) Provided that no money to be advanced for the insurance of any property comprised in the security against damage by fire, or for keeping up any policy of life insurance comprised in the security, or for effecting in lieu thereof any new policy, or for the renewal of any grant or lease of any property comprised in the security upon the dropping of any life whereon the property is held, shall be reckoned as forming part of the amount in respect whereof the security is chargeable with *ad valorem* duty.

As to subsec. (1), see *City of London Brewery Co.*, L. R. [1898] 1 Q. B. 408, 15 T. L. R. 49.

As to letters of satisfaction, see (7) above.

89. The exemption from stamp duty conferred by the Act of the session held in the sixth and seventh years of King William the Fourth, chapter thirty-two, for the regulation of benefit building societies, shall not extend to any mortgage made after the

thirty-first day of July one thousand eight hundred and sixty-eight, except a mortgage by a member of a benefit building society for securing the repayment to the society of money not exceeding five hundred pounds.

The exemption thus limited applies only to building societies subsisting at the date of the commencement, but not registered under the Building Societies Act, 1874 (37 & 38 Vict. c. 42, ss. 7, 41), as to which see above (18) (v.). Observe that a reconveyance *per se* is not within the word "mortgage" (*Old Battersea Building Soc.*, L. R. [1898] 2 Q. B. 294).

	£	s.	d.
MORTGAGE OF STOCK or Marketable Security—			
Under hand only. See AGREEMENT, and sec. 23 (quoted *s.v.* "Mortgage").			
By deed. See MORTGAGE, and sec. 86.			
MUTUAL DISPOSITION or Conveyance in Scotland. See EXCHANGE or EXCAMBION.			
NOTARIAL ACT of any kind whatsoever (*except a protest of a bill of exchange or promissory note or any notarial instrument to be expeded and recorded in any Register of Sasines*)	0	1	0
And see PROTEST, SEISIN, and sec. 90.			

Notarial Acts.

90. The duty upon a notarial act, and upon the protest by a notary public of a bill of exchange or promissory note, may be denoted by an adhesive stamp, which is to be cancelled by the notary.

Notarial execution does not attract the charge.

	£	s.	d.
ORDER for the payment of money. See BILL OF EXCHANGE.			
PARTITION or DIVISION—Instruments effecting.			
In the case specified in sec. 73, see that section.			
In any other case	0	10	0
PASSPORT	0	0	6
POLICY OF SEA INSURANCE—			
(1) Where the premium or consideration does not exceed the rate of 2s. 6d. per centum of the sum insured	0	0	1
(2) In any other case—			
(*a*) For or upon any voyage—			
In respect of every full sum of £100, and also any fractional part of £100 thereby insured	0	0	3
(*b*) For time—			
In respect of every full sum of £100, and also any fractional part of £100 thereby insured—			
Where the insurance shall be made for any time not exceeding six months	0	0	3
Where the insurance shall be made for any time exceeding six months and not exceeding twelve months . .	0	0	6
And see secs. 91, 92, 93, 94, 95, 96, and 97.			

Policies of Insurance.

91. For the purposes of this Act the expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced, and the expression "insurance" includes assurance.

See sec. 93 and *Ionides*, L. R. 6 Q. B. 674, 7 Q. B. 517.

Policies of Sea Insurance.

92.—(1) For the purposes of this Act the expression "policy of sea insurance" means any insurance (including reinsurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in or relating to, any ship or vessel, and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea risk, but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance.

(2) Where any person, in consideration of any sum of money paid or to be paid for

additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise, or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise, or property from any risk, loss, or damage, such agreement or engagement shall be deemed to be a contract for sea insurance.

It has been held that a time policy embracing 119 vessels, with separate sums insured on each, was properly stamped, the duty being calculated upon the aggregate amount of the insurance (*Great Britain Steamship Premium Association*, 1891, 19 R. 109).

93.—(1) A contract for sea insurance (other than such insurance as is referred to in the fifty-fifth section of the Merchant Shipping Act Amendment Act, 1862) shall not be valid unless the same is expressed in a policy of sea insurance.

(2) No policy of sea insurance made for time shall be made for any time exceeding twelve months.

(3) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months.

See the *Home Marine Insurance Co.*, L. R. [1898] 2 Q. B. 351.

Sec. 55 of 25 & 26 Vict. c. 63 refers to sec. 54 of the same Act. That Act was repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), of which secs. 502, 503, and 506 correspond to secs. 54 and 55 of the repealed Act.

94. Where any sea insurance is made for a voyage and also for time, or to extend to or cover any time beyond thirty days after the ship shall have arrived at her destination and been there moored at anchor, the policy is to be charged with duty as a policy for a voyage, and also with duty as a policy for time.

95.—(1) A policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person, except in the two cases following; that is to say,

(*a*) Any policy of mutual insurance having a stamp impressed thereon may, if required, be stamped with an additional stamp provided that at the time when the additional stamp is required the policy has not been signed or underwritten to an amount exceeding the sum or sums which the duty impressed thereon extends to cover:

(*b*) Any policy made or executed out of, but being in any manner enforceable within, the United Kingdom, may be stamped at any time within ten days after it has been first received in the United Kingdom on payment of the duty only.

(2) Provided that a policy of sea insurance shall for the purpose of production in evidence be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of one hundred pounds.

96. Nothing in this Act shall prohibit the making of any alteration which may lawfully be made in the terms and conditions of any policy of sea insurance after the policy has been underwritten; provided that the alteration be made before notice of the determination of the risk originally insured, and that it do not prolong the time covered by the insurance thereby made beyond the period of six months in the case of a policy made for a less period than six months, or beyond the period of twelve months in the case of a policy made for a greater period than six months, and that the articles insured remain the property of the same person or persons, and that no additional or further sum be insured by reason or means of the alteration.

97.—(1) If any person—

(*a*) Becomes an assurer upon any sea insurance, or enters into any contract for sea insurance, or directly or indirectly receives or contracts or takes credit in account for any premium or consideration for any sea insurance, or knowingly takes upon himself any risk, or renders himself liable to pay, or pays, any sum of money upon any loss, peril, or contingency relative to any sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

(*b*) Makes or effects, or knowingly procures to be made or effected, any sea insurance, or directly or indirectly gives or pays, or renders himself liable to pay, any premium, or consideration for any sea insurance, or enters into any

contract for sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

(*c*) Is concerned in any fraudulent contrivance or device, or is guilty of any wilful act, neglect, or omission, with intent to evade the duties payable on policies of sea insurance, or whereby the duties may be evaded,

he shall for every such offence incur a fine of one hundred pounds.

(2) Every broker, agent, or other person negotiating or transacting any sea insurance contrary to the true intent and meaning of this Act, or writing any policy of sea insurance upon material not duly stamped, shall for every such offence incur a fine of one hundred pounds, and shall not have any legal claim to any charge for brokerage, commission, or agency, or for any money expended or paid by him with reference to the insurance, and any money paid to him in respect of any such charge shall be deemed to be paid without consideration, and shall remain the property of his employer.

(3) If any person makes or issues, or causes to be made or issued, any document purporting to be a copy of a policy of sea insurance, and there is not at the time of the making or issue in existence a policy duly stamped whereof the said document is a copy, he shall for such offence in addition to any other fine or penalty to which he may be liable incur a fine of one hundred pounds.

	£	*s.*	*d.*
Policy of Life Insurance—			
Where the sum insured does not exceed £10	0	0	1
Exceeds £10 but does not exceed £25	0	0	3
Exceeds £25 but does not exceed £500 :			
For every full sum of £50, and also for any fractional part of £50, of the amount insured	0	0	6
Exceeds £500 but does not exceed £1000 :			
For every full sum of £100, and also for any fractional part of £100, of the amount insured	0	1	0
Exceeds £1000 :			
For every full sum of £1000, and also for any fractional part of £1000, of the amount insured	0	10	0
And see secs. 91, 98, and 100.			

If the policy was originally issued in the United Kingdom, each assignation, wherever executed, must be duly stamped (see sec. 14 (4), quoted (8) above). As to the provision of sec. 118, see (12 (*a*)) above.

The reinsurance between insurance companies of a risk under a duly stamped life policy is liable to 10s. or 6d. according as it does or does not contain a clause of registration; but a guarantee by one insurance company in favour of another such company in respect of an annuity purchased from the latter is regarded as chargeable under the head of "Bond, Covenant, etc."

Policy of Insurance against Accident and Policy of insurance for any payment agreed to be made during the sickness of any person, or his incapacity from personal injury, or by way of indemnity against loss or damage of or to any property	0	0	1
And see secs. 91, 98, 99, and 100.			

As to special exemptions, see (18) (xxv.). See *Lancashire Ins. Co.*; *Vulcan Boiler & General Ins. Co.*, 79 L. T. R. 731, where it was held that a contract indemnifying an employer against claims of compensation for death or injury by his employees was not chargeable under this head.

A reinsurance or guarantee between insurance companies of a risk under a policy duly stamped under this head is charged with the duty of 1d. It has been held that a policy of insurance upon a mortgage, guaranteeing to the assured payment of the mortgage debt and interest, if, from any cause whatever, the mortgagor failed to pay, was chargeable not under this head but under that of agreement (*Mortgage Insurance Corporation*, 57 L. J. Q. B. 179).

Policies of Insurance except Policies of Sea Insurance.

98.—(1) For the purposes of this Act the expression "policy of life insurance" means a policy of insurance upon any life or lives or upon any event or contingency

relating to or depending upon any life or lives except a policy of insurance against accident; and the expression "policy of insurance against accident" means a policy of insurance for any payment agreed to be made upon the death of any person only from accident or violence or otherwise than from a natural cause, or as compensation for personal injury, and includes any notice or advertisement in a newspaper or other publication which purports to insure the payment of money upon the death of or injury to the holder or bearer of the newspaper or publication containing the notice only from accident or violence or otherwise than from a natural cause.

(2) A policy of insurance against accident is not to be charged with any further duty than one penny by reason of the same extending to any payment to be made during sickness or incapacity from personal injury.

Observe the provision of the Finance Act, 1895 (58 & 59 Vict. c. 16), s. 13, that

"a policy of insurance for any payment agreed to be made during the sickness of any person or his incapacity from personal injury" within the meaning of the Stamp Act, 1891, includes a notice or advertisement in a newspaper or other publication which purports to insure such payment.

A policy upon attainment of a certain age is chargeable not under this head, but with ten shillings or sixpence, according as it does or does not contain a clause of registration.

99. The duty of one penny upon a policy of insurance other than a policy of sea insurance or life insurance may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the policy is first executed.

100. Every person who—

(1) Receives, or takes credit for, any premium or consideration for any insurance other than a sea insurance, and does not, within one month after receiving, or taking credit for, the premium or consideration, make out and execute a duly stamped policy of insurance; or

(2) Makes, executes, or delivers out, or pays or allows in account, or agrees to pay or allow in account, any money upon or in respect of any policy other than a policy of sea insurance which is not duly stamped;

shall incur a fine of twenty pounds.

	£	s.	d.
PRECEPT OF CLARE CONSTAT to give seisin of lands or other heritable subjects in Scotland	0	5	0
PROCURATION, Deed, or other instrument of	0	10	0
PROMISSORY NOTE. See BANK NOTE, BILL OF EXCHANGE.			
PROTEST of any bill of exchange or promissory note:			
Where the duty on the bill or note does not exceed one shilling	The same duty as the bill or note.		
In any other case	0	1	0
And see sec. 90.			
PROXY. See LETTER OR POWER OF ATTORNEY.			
RECEIPT given for, or upon the payment of, money amounting to £2 or upwards	0	0	1

Exemptions.

(1) Receipt given for money deposited in any bank, or with any banker, to be accounted for and expressed to be received of the person to whom the same is to be accounted for.

(2) Acknowledgment by any banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment.

(3) Receipt given for or upon the payment of any parliamentary taxes or duties, or of money to or for the use of Her Majesty.

(4) Receipt given by an officer of a public department of the State for money paid by way of imprest or advance, or in adjustment of an account, where he derives no personal benefit therefrom.

(5) Receipt given by any agent for money imprested to him on account of the pay of the army.

(6) Receipt given by any officer, seaman, marine, or soldier, or his representatives, for or on account of any wages, pay, or pension, due from the Admiralty or Army Pay Office.

(7) Receipt given for any principal money or interest due on an Exchequer bill.

(8) Receipt written upon a bill of exchange or promissory note duly stamped, or upon a bill drawn by any person under the authority of the Admiralty, upon and payable by the Accountant-General of the Navy.

This exemption was repealed, as from 1st July 1895, by the Finance Act, 1895 (58 & 59 Vict. c. 16), s. 9, subject to the proviso that

neither the name of a banker (whether accompanied by words of receipt or not) written in the ordinary course of his business as a banker upon a bill of exchange or promissory note duly stamped, nor the name of the payee written upon a draft or order, if payable to order, shall constitute a receipt chargeable with stamp duty.

(9) Receipt given upon any bill or note of the Bank of England or the Bank of Ireland.

(10) Receipt given for the consideration money for the purchase of any share in any of the Government or Parliamentary stocks or funds, or in the stocks and funds of the Secretary of State in Council of India, or of the Bank of England, or of the Bank of Ireland, or for any dividend paid on any share of the said stocks or funds respectively.

(11) Receipt indorsed or otherwise written upon or contained in any instrument liable to stamp duty [see *Skrine*, 2 Camp. 407], and duly stamped, acknowledging the receipt of the consideration money therein expressed, or the receipt of any principal money, interest, or annuity thereby secured or therein mentioned.

This exemption seems not to extend to a receipt indorsed on an insurance policy for the sums payable thereunder, such sums not being "principal money." It includes receipts indorsed for the payment of instalments (*Orme*, 4 Camp. 336).

(12) Receipt given for any allowance by way of drawback or otherwise upon the exportation of any goods or merchandise from the United Kingdom.

(13) Receipt given for the return of any duty of customs upon a certificate of over entry.

And see secs. 101, 102, and 103.

The Act 61 & 62 Vict. c. 46, s. 8, enacts two additional exemptions, viz.:

(14) Receipt given by an officer of a county Court for money received by him from a party to any proceeding in the Court.

(15) Receipt given by or on behalf of a clerk to justices or a magistrate, for money received in respect of a fine.

As to special exemptions, see (18) (ii.) (v.) (xxviii.) (xxxii.) (xxxiii. (*b*)) (xli.) (xlv.) (xlvi.) (xlvii. (*b*)) (liii.) (lv.) (lxi.) (lxix. (*b*)). Observe that, in administrations, receipts granted for voluntary contributions to religious and charitable institutions are treated as exempt.

Receipts.

101.—(1) For the purposes of this Act the expression "receipt" includes any note, memorandum, or writing whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied, or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.

(2) The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

A receipt for a cheque for £2 or upwards is liable to duty, a cheque being included in the expression "Bill of exchange" (see sec. 32 quoted under that head). A stamped receipt must be given where, on a settlement of cross accounts, the balance payable amounts to £2 or upwards. In *Lucas*, 5 C. B.

949, 13 L. J. Q. B. 208,—a case falling under the Act 35 Geo. III. s. 184,—it was held that a discharge of rent on the consideration that the tenant, who was mortgagee of other premises belonging to the lessor, had written off a sum from his mortgage debt equal to the amount of rent due, was a receipt. Denman, C. J., observed that as this writing off the debt was by the agreement to be considered as money, the document was a receipt or discharge given on payment of money. A document, if it acknowledge the receipt of money, is not the less dutiable because it states the object for which the money was paid (*Thomson*, 1894, 32 S. L. R. 16; cf. *Welsh's Trs.*, 1885, 12 R. 851). In *Cameron*, 1891, 18 R. 728, the document in question was headed "Statement of the annuity due to" A.; then followed entries of various half-yearly payments of annuity; and at the foot, below the total brought out, were the words "I acknowledge that my annuity as above detailed has been duly accounted for to me." It was held that the document was not a fitted account (as to which, cf. *Finney*, 5 C. B. 504, 17 L. J. C. P. 158), but a receipt. A writing acknowledging receipt of a sum in compensation for personal injuries, and discharging the alleged wrong-doer from all claims competent to the injured person, is regarded as liable to duty as an agreement (see *White*, "Times," 13 Dec. 1889, per Huddleston, B.). *Quoad* liability to receipt duty, it appears to fall under exemption (11). A document, in form a receipt, stating that the money received was received on loan, is chargeable as an agreement, and does not require to be stamped in addition as a receipt (see *Welsh's Trs., ut supra*).

102. A receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say,

(1) Within fourteen days after it has been given, on payment of the duty and a penalty of five pounds;

(2) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds;

and shall not in any other case be stamped with an impressed stamp.

103. If any person—

(1) Gives a receipt liable to duty and not duly stamped; or

(2) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped; or

(3) Upon a payment to the amount of two pounds or upwards gives a receipt for a sum not amounting to two pounds, or separates or divides the amount paid with intent to evade the duty;

he shall incur a fine of ten pounds.

	£	s.	d.
RECONVEYANCE, RELEASE, or RENUNCIATION of any security. See MORTGAGE, etc.			
RELEASE or RENUNCIATION of any property, or of any right or interest in any property—			
Upon a sale. See CONVEYANCE ON SALE.			
By way of security. See MORTGAGE, etc.			
In any other case	0	10	0
RENUNCIATION. See RECONVEYANCE and RELEASE.			
RUNUNCIATION, LETTER OF. See LETTER of ALLOTMENT.			
RESIGNATION. Principal or original instrument of resignation, or service of cognition of heirs, or charter or seisin of any houses, lands, or other heritable subjects in Scotland holding burgage, or of burgage tenure . .	0	5	0
And instrument of resignation of any lands or other heritable subjects in Scotland not of burgage tenure	0	5	0
REVOCATION of any use or trust of any property by any writing, not being a will	0	10	0
SCRIP CERTIFICATE or SCRIP. See LETTER OF ALLOTMENT.			
SEISIN. Instrument of seisin given upon any charter, precept of clare constat, or precept from Chancery, or upon any wadset, heritable bond, disposition, apprizing, adjudication, or otherwise of any lands or heritable subjects in Scotland	0	5	0

Prior to 33 & 34 Vict. c. 97, the charge was 1s. (*E. of Eglinton's Tr.*, 3 H. & C. 871, 34 L. J. Ex. 225).

	£	s.	d.
And any NOTARIAL INSTRUMENT to be expeded and recorded in any Register of Sasines	0	5	0
SETTLEMENT. Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not), or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever: For every £100, and also for any fractional part of £100, of the amount or value of the property settled or agreed to be settled . .	0	5	0

Exemption.

Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, where duty has been duly paid in respect of the same property upon the settlement creating the power or the grant of representation of any will or testamentary instrument creating the power.

And see secs. 104, 105, and 106.

The Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (4), provides that "any person paying the settlement estate duty . . . upon property comprised in a settlement, may deduct the amount of the *ad valorem* stamp duty (if any) charged on the settlement in respect of that property."

An instrument containing a mere statement by the persons holding an estate that they hold it on trust is liable to duty not under this head of charge, but under "Declaration of any use or trust." To attract settlement duty, the instrument must contain the trust purposes for which the estate is held (see *Maxwell*, 1866, 4 M. 1121). Thus this duty is not chargeable if trustees are introduced only that execution may pass at their instance. Nor is it chargeable in respect of an assignation of a fund to trustees to pay an annuity out of the income, and to hold the fund itself for the assignors. It is chargeable where the settlement is for a limited period only; and an assignment of a fund to trustees to hold for the assignor's life-interest, and on his death to convey the trust estate as directed by will, and failing such direction to the assignor's heirs *in mobilibus*, has been regarded as dutiable under this head. Duty is also chargeable under this head where a person agrees or binds himself to pay or bequeath sums to be held for the purposes of the trust. Where the settlor directs the trustees to pay over to him absolutely a portion of the money settled so soon as they receive it, that portion will escape the charge.

Where the sum is settled by the settlor, subject to another's life-interest, or to a power of appointment, the duty is charged as if the life-interest or power did not exist.

"The charge applies to every interest, whether vested, whether liable to be divested, whether contingent or not, on any sum of which it may be said that it is definite and certain in amount" (*Onslow*, [1891] 1 Q. B. 239, per Fry, L. J.). "The words 'definite and certain' apply not to the interest of the settlor or the amount of the interest, but to the amount" of the money or stock (*ib.*, per Bowen, L. J.). The existing fact can alone be looked to; and accordingly land, although, by the operation of the doctrine of conversion, it may be regarded in law as money, cannot be regarded as a "definite and certain" sum (*Stuclcy*, L. R. 5 Ex. 85). A conveyance of heritable property or of furniture or of *acquirenda* attracts not settlement duty, but the fixed duty of 10s.; and however many conveyances there may

be in the same deed, but one deed duty is charged in practice. Where a settlor binds himself to convey heritage, or, in his option, to pay the value thereof to trustees, *ad valorem* duty is not exigible. It will be observed that money secured on land falls expressly within the terms of the charge.

Deed duty is chargeable where the one spouse discharges his or her legal rights in the property of the other only when settlement duty is not payable in respect of that property.

A conveyance of *acquirenda* renders the settlement containing it liable to the further duty of 10s.; and an instrument vesting *acquirenda* in the trustees of a settlement containing such a conveyance and duly stamped, is not dutiable as a settlement.

Settlements.

104.—(1) Where any money which may become due or payable upon any policy of life insurance, or upon any security not being a marketable security, is settled or agreed to be settled, the instrument whereby the settlement is made or agreed to be made is to be charged with *ad valorem* duty in respect of that money.

(2) Provided as follows :—

(*a*) Where, in the case of a policy, no provision is made for keeping up the policy, the *ad valorem* duty is to be charged only on the value of the policy at the date of the instrument :

(*b*) If in any such case the instrument contains a statement of the said value, and is stamped in accordance with the statement, it is, so far as regards the policy, to be deemed duly stamped, unless or until it is shown that the statement is untrue, and that the instrument is in fact insufficiently stamped.

Prior to 13th May 1864 (27 Vict. c. 18, s. 12), a settlement of a policy of insurance was not chargeable under this head (*Sanville*, 10 Ex. 159, 23 L. J. Ex. 270).

Observe that it is sufficient to attract the charge that there be in some instrument, not necessarily in the settlement, a provision binding the settlor of the policy to keep it up.

A bonus accrued forms part of the dutiable amount.

If a settlor bind himself to effect a policy for a definite sum and to keep it up, the obligation is liable to the charge (see *Arthur's Estate*, L. R. 14 Ch. D. 603).

Where a policy, upon which a sum has been borrowed, is brought into settlement, and there is no mention of the debt in the settlement, no allowance is given, on the ground that it is apparently the settlor's intention to pay off the debt from funds other than those settled.

105. An instrument chargeable with *ad valorem* duty as a settlement in respect of any money, stock, or security is not to be charged with any further duty by reason of containing provision for the payment or transfer of the money, stock, or security, or by reason of containing, where the money, stock, or security is in reversion or is not paid or transferred upon the execution of the instrument, provision for the payment, by the person entitled in possession to the interest or dividends of the money, stock, or security, during the continuance of such possession, of any annuity or yearly sum not exceeding interest at the rate of four pounds per centum per annum upon the amount or value of the money, stock, or security.

Thus where in a marriage contract the settlor binds himself and his representatives to pay to his widow £100 for mournings and an annuity of £300, and places £5000 in the hands of trustees for the purpose, *inter alia*, of meeting these obligations, settlement duty is charged on £5000, and bond of annuity duty upon £104, that sum being the amount of the annuity less 4 per cent. upon £4900, *i.e.* £5000 less £100 for mournings. The abatement is allowed whether the obligation to pay the annuity is contained in the settlement or in a separate instrument.

106.—(1) Where several instruments are executed for effecting the settlement of the same property, and the *ad valorem* duty chargeable in respect of the settlement of the property exceeds ten shillings, one only of the instruments is to be charged with the *ad valorem* duty.

(2) Where a settlement is made in pursuance of a previous agreement, upon which *ad valorem* settlement duty exceeding ten shillings has been paid in respect of any property, the settlement is not to be charged with *ad valorem* duty in respect of the same property.

(3) In each of the aforesaid cases the instruments not chargeable with *ad valorem* duty are to be charged with the duty of ten shillings.

Where settlement duty has been paid upon bonds, the transfers are charged with 6d. *per cent.* up to a maximum of 10s. Where it has been paid upon stocks, the transfers are charged with 5s. per cent. (*i.e.* with settlement duty) up to 10s. See *Lant*, 3 Nev. & Per. 329. A separate bond by the settlor in favour of the trustees of the settlement for the sum agreed to be settled is charged with duty at the rate of 2s. 6d. per cent. up to 10s.

Share Certificate, Foreign and Colonial. See Marketable Security.

Share Warrant issued under the provisions of the Companies Act, 1867, and Stock Certificate to bearer.
And see secs. 107, 108, 109.

A duty of an amount equal to three times the amount of the *ad valorem* stamp duty which would be chargeable on a deed transferring the share or shares or stock specified in the warrant or certificate if the consideration for the transfer were the nominal value of such share or shares or stock.

Share Warrants.

107. If a share warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, is the managing director or secretary or other principal officer of the company, shall incur a fine of £50.

Stock Certificates to Bearer.

108. For the purposes of this Act the expression "stock certificate to bearer" includes every stock certificate to bearer issued after the third day of June one thousand eight hundred and eighty-one, under the provisions of the Local Authorities Loans Act, 1875, or of any other Act authorising the creation of debenture stock, county stock, corporation stock, municipal stock, or funded debt, by whatever name known.

109.—(1) Where the holder of a stock certificate to bearer has been entered on the register of the local authority as the owner of the share or stock described in the certificate, the certificate shall be forthwith cancelled so as to be incapable of being reissued to any person.

(2) Every person by whom a stock certificate to bearer is issued without being duly stamped shall incur a fine of £50.

	£	s.	d.
Superannuation Annuity. See Bond, Covenant, etc.			
Surrender—			
Of copyholds. See Copyhold.			
Of any other kind whatsoever not chargeable with duty as a conveyance on sale or a mortgage	0	10	0
Tack of lands, etc., in Scotland. See Lease or Tack.			
Tack in Security. See Mortgage, etc.			
Transfer. See Conveyance or Transfer.			
Transfer. Any request or authority to the purser or other officer of any mining company, conducted on the cost-book system, to enter or register any transfer of any share, or part of a share, in any mine, or any notice to such purser or officer of any such transfer	0	0	6

And see sec. 110.

110.—(1) The duty upon a request or authority to the purser or other officer of a mining company conducted on the cost-book system to enter or register the transfer of any share or part of a share of the mine, and the duty upon a notice to such purser or officer of any such transfer, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the request, authority, or notice is written or executed.

(2) Every person who writes or executes any such request, authority, or notice, not being duly stamped, and every purser or other officer of any such company who in any

manner obeys, complies with, or gives effect to any such request, authority, or notice, not being duly stamped, shall incur a fine of £20.

	£	s.	d.
VALUATION. See APPRAISEMENT.			
VOTING PAPER. Any instrument for the purpose of voting by any person entitled to vote at any meeting of any body exercising a public trust, or of the shareholders, or members, or contributors to the funds of any company, society, or institution	0	0	1

And see sec. 80.

Sec. 80 is quoted *s.v.* "Letter or Power of Attorney," etc. A voting paper does not fall under this charge unless it can only be used for voting at a meeting. If there be no meeting and the voting paper is sent by post, it is not liable to duty.

	£	s.	d.
WADSET. See MORTGAGE, etc.			
WARRANT OF ATTORNEY to confess and enter up a judgment given as a security for the payment or repayment of money, or for the transfer or retransfer of stock. See MORTGAGE, etc.			
WARRANT OF ATTORNEY of any other kind	0	10	0
WARRANT FOR GOODS	0	0	3

Exemptions.

(1) Any document or writing given by an inland carrier acknowledging the receipt of goods conveyed by such carrier.

(2) A weight note issued together with a duly stamped warrant, and relating solely to the same goods, wares, or merchandise.

And see sec. 111.

111.—(1) For the purposes of this Act the expression "warrant for goods" means any document or writing, being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods, wares, or merchandise.

(2) The duty upon a warrant for goods may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is made, executed, or issued.

(3) Every person who makes, executes, or issues, or receives or takes by way of security or indemnity, any warrant for goods not being duly stamped, shall incur a fine of £20.

See *s.v.* "Delivery Order."

	£	s.	d.
WARRANT under the sign manual of Her Majesty.	0	10	0
WRIT—			
(1) Of ACKNOWLEDGMENT under the Registration of Leases (Scotland) Act, 1857	0	5	0
(2) Of ACKNOWLEDGMENT by any person infeft in lands in Scotland in favour of the heir or disponee of a creditor fully vested in right of an heritable security constituted by infeftment .			
(3) Of RESIGNATION and CLARE CONSTAT			

[Dowell, *A History and Explanation of the Stamp Duties*, 1873; *id.*, *A History of Taxation and Taxes in England*, 2nd ed., 1895; Alpe, *Law of Stamp Duties*, 6th ed., 1898; Griffith, *Stamp Duties Digest*, 11th ed., 1894; Highmore, *The Stamp Act*, 1891; Tilsley on the *Stamp Laws*, 1st ed., 1847; 2nd ed., 1854; 3rd ed., 1871.]

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 23 1952

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 695 595 9

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.