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Standing Joint Committee.—In the system of county government established by the Local Government Act, 1889 (52 & 53 Vict. c. 50), the Standing Joint Committee is (by sec. 18) charged with important duties. (1) It is "deemed to be the Police Committee under the Police Act, 1857" (20 & 21 Vict. c. 72); having all the powers of such Police Committee, and being subject to all the provisions of the Police Act, except in so far as these are expressly modified by the Local Government Act. (2) No works involving capital expenditure can be undertaken in any county or district thereof, in virtue of powers transferred or conferred by the Act or any other Act, without the consent in writing (signed by two members and the county clerk (s. 67)) of the Standing Joint Committee. (For definition of capital works, see sec. 18 (7).) The committee consists of —(1) Such number of county councillors, not exceeding seven, as shall be appointed by the county council annually at their meeting in May; (2) Such number of the Commissioners of Supply, not exceeding seven, as shall be appointed by the Commissioners of Supply annually at their meeting on the same day; and (3) the Sheriff of the county (or in his absence one of his Substitutes to be nominated by him for that purpose (s. 18 (1) and (2)). Casual vacancies are filled up by the county council or Commissioners of Supply, as the case may be (s. 18 (3)). The committee elect one of their own number to be chairman. The county clerk acts as clerk of the committee, "without any further appointment or remuneration" (*ib.* (4)). See COUNTY COUNCIL; CONSTABLE (vol. iii. 233).

Statute Law.—Statute law is the chief part of what is known as the "written law" of the land, and consists of the whole body of Acts of Parliament now in force. An Act of Parliament is the expression of the will of the supreme legal authority recognised by the constitution. It is "enacted by the Queen's" (or King's) "Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in Parliament assembled, and by the authority of the same." It cannot be altered, suspended, or repealed, except by the same authority. In Scotland, differing in this respect from England, it may fall into desuetude. (See DESUETUDE.)

Certain fragments in the *Regiam Majestatem* are believed to form

portions of the early statute law of Scotland, but this is uncertain, and "under statute law, in its proper and strict sense, those Acts only are included which passed in the reign of James I. of Scotland, and from thence down to the union of the two kingdoms in 1707; and such of the British statutes enacted since the union as concern this part of the United Kingdom" (Ersk. I. i. 37).

Collections of Acts. — Several collections of the Acts of the Scots Parliament were made and published by authority, of which the most important are:—(1) The edition of 1566, known as the "Black Acts," because printed in black letter; (2) a collection made by Sir John Skene, Lord Clerk Register, in 1597: (3) the "Glendook Acts," edited by Sir Thomas Murray of Glendook, 1681, folio, and 1682, duodecimo, the latter of which is the most commonly used for the statutes down to that date; (4) the Folio Record Edition, published in 1807, by a Royal Commission. This is now the authoritative edition, and has formed the basis of the work of revision by the Statute Law Committee.

Of British statutes since the Union, a large number of collections have been published, most of them by authority. The most important for practical purposes is that known as the "Statutes Revised," edited by the Statute Law Committee formed by Lord Cairns in 1868. (See Statute Law Revision.) A "Chronological Table and Index of the Statutes" has been prepared and published by authority, giving a chronological table of all the statutes, showing total or partial repeals thereof, and an index to the subject-matter of the statutes in force (13th ed., 1896). A volume is published annually, containing the Acts passed during the year.

Statutes applying to Scotland. — General Acts of Parliament passed since the Union may or may not apply to Scotland. In many cases this is expressly provided for, as regards either the whole or certain portions of a statute; or, an interpretation clause, indicating the sense in which particular terms are to be read in applying the Act to Scotland, places the intention of the Legislature beyond doubt. In the absence of such indications, the presumption is that the Act applies to the whole of the United Kingdom (*Bridges*, 1844, 6 D. 968; 1847, 6 Bell's App. 1). The presumption may be overcome by implication from the tenor of the enactment or from the nature of the remedies which it affords (*Westminster Fire Office*, 1888, 15 R. H. L. 89, per Ld. Watson at 94). But this result does not follow merely from the fact that the Act has been framed with apparently exclusive reference to English institutions and procedure, and its application to Scotland may in consequence be extremely difficult (*Perth Water Commissioners*, 1879, 6 R. 1050, per Ld. Moncreiff at 1055 and Ld. Gifford at 1061), or that the nomenclature is distinctively English (*e.g. Dunlop*, 1895, 22 R. (Just. C.) 34). In the case of an amending Act, the leading presumption is stronger where the original Act applied to Scotland (*Dunlop, supra*). The presumption is the other way where the original Act was not so applicable (*Westminster Fire Office, supra*).

Classification of Statutes. — Acts of Parliament have been, for different purposes, classified on various principles. As regards extent of operation, they have been divided as follows: — (1) Public and General Statutes, which are of general application to the whole kingdom, or to one or more of its main divisions,—England, Scotland, Ireland, and Wales. (2) Private — Local and Personal, including (*a*) Local Acts, which are of special application to particular districts or towns, *e.g.* a

Burgh Police Act; (*b*) Personal Acts, which relate to particular undertakings, such as a railway or a water supply. (3) Private Acts, in a narrower sense, which relate only to particular persons, *e.g.* an Act validating a marriage or authorising a change of name. In the case of private Acts, the Standing Orders of both Houses of Parliament prescribe a certain procedure to be gone through, and certain notices to be given to the public and to persons interested, and it was formerly held that failure to comply with these regulations invalidated the Act *quoad* persons who had not received proper notice (*Donald*, 1832, 11 S. 119). It is now held that the validity of the Act is not thus affected (*Wauchope*, 1837, 16 S. 227; 1842, 1 Bell's App. 252). The differences between Public and General, and Local and Personal Acts as regards citation are noted below (see *Citation, infra*).

With reference to their objects, statutes have been classified as follows:—A *Declaratory* Act is one passed to remove doubts or correct mistakes as to the common law, or the meaning or effect of a statute, *e.g.* the Territorial Waters Jurisdiction Act, 1878 (see *R.* v. *Dudley*, 1884, L. R. 14 Q. B. D. 273, at 281). To this class belong Consolidation Acts, intended to reduce into systematic form the whole of the statute law on a given subject (*e.g.* the Titles to Land Consolidation Act, 1868), and Codifying Acts, which systematise the law laid down in judicial decisions or previous statutes (*e.g.* Bills of Exchange Act, 1882; Partnership Act, 1890). A *Remedial* Act, whether enlarging or restraining, is passed to remedy some defect in the law. Strictly, almost all Acts fall under this description. An *Enabling* Act renders it lawful to do something which otherwise would not have been lawful, *e.g.* an Act authorising the compulsory taking of land for some public object. A *Penal* Act is one creating an offence against the State.

An *Adoptive* Act is one the application of which, in whole or in part, depends on its adoption either by some public body or by a prescribed number of voters, *e.g.* the Public Libraries Act, and the General Burgh Police Act.

Parts of an Act of Parliament.—A statute may consist of the following:—

(1) The *Title or Rubric*, which gives a general indication of its purpose. This, strictly, is no part of the Act, and it cannot be resorted to in the construction of the enacting part (*Farquharson*, 1886, 13 R. (Just. C.) 29). This rule, however, has not always been rigidly adhered to (*Salkeld*, 1848, 2 Ex. 256, at 283; see *Coomber*, 1882, L. R. 9 Q. B. D. 17, at 32–3). It is occasionally necessary to treat the title as a substantive part of the Act, in order to prevent an enacting section from becoming unintelligible (*e.g.* 31 & 32 Vict. c. 89). *Sub-titles*, or general headings introducing groups of sections (*e.g.* in the Glasgow Police Act, 1866), have often, especially in Scotland, been used as aids in construction (*Lang*, 1877, 4 R. 779; 1878, 5 R. H. L. 65, at 67; *Nelson*, 1889, 17 R. (Just. C.) 1, per Ld. M'Laren at 2; *Scott*, 1890, 17 R. (Just. C.) 35; *Rayson*, [1893] 2 Q. B. 304, at 307). *Marginal notes*, like brackets and punctuation, form no part of the statute, though since 1849 they have been inserted in the record copy (*Sutton*, 1882, L. R. 22 Ch. D. 511; *D. Devonshire*, 1890, L. R. 24 Q. B. D. 468).

(2) The *Preamble* states in general terms the object of the Legislature in passing the Act. Frequently this is not coextensive with the enactment which it introduces, and though it is a part of the Act, it cannot in general alter the effect of the enactment (*Overseers of West Ham*, 1883, L. R. 8 App. Ca. 386, at 388–9; *In re Watts*, 1885, L. R. 29 Ch. D. 947, at 950; *Bentley*, 1876, L. R. 4 Ch. D. 588, at 592). Where, however, there is ambiguity in

the latter the preamble may afford help in the construction, by indicating the general scope of the Act, or fixing the meaning of doubtful words (*Eq. Caledonian Ry. Co.*, 1881, 8 R. H. L. 23, per Ld. Chan. Selborne at 25–26; *Fitzgerald*, 1886, L. R. 11 App. Ca. 286, at 288). In modern statutes the tendency is to omit preambles.

(3) The *Enacting Sections*—the substantive portion of the statute. See *Interpretation, infra*.

(4) The *Date* now forms part of the Act, and is indorsed on it by the Clerk of the Parliaments (33 Geo. III. c. 13).

(5) *Schedule*.—Schedules are commonly appended to the enacting sections for convenience of drafting, and contain matters of detail, such as lists, styles, etc. They are a part of the enactment, but if any discrepancy appears between a schedule and an enacting section, the latter prevails (*Att.-Gen.* v. *Lamplough*, 1878, L. R. 3 Ex. D. 229; *Dean*, 1882, L. R. 8 P. D. 79 at p. 89; *Laird*, 1879, 6 R. 756, at 767).

INTERPRETATION.—The object in all cases is to ascertain the intention of the Legislature, as expressed or implied by the Act itself. The words of the enactment are to be taken in their plain, ordinary, and grammatical meaning. Technical words are to be applied with their technical meaning (*Bertel*, 1847, 16 M. & W. 307, per Parke, B., at 309; *R.* v. *Commrs. of Income Tax*, 1888, L. R. 296, at 309). Where the meaning of the Act, taken thus, is clear and explicit, effect must be given to it, without reference to consequences, and without speculation as to the possible meaning and object of the Legislature. Strictly speaking, there is no place for interpretation. *Absoluta sententia expositore non eget.* "The business of the interpreter is not to improve the statute; it is to expound it. The question for him is not what the Legislature meant, but what its language means; what it has said it meant" (Maxwell, p. 7; *The Queensberry Leases*, 1819, 1 Bl. 339, per Ld. Redesdale at 497; *Hornsey Local Board*, 1889, L. R. 24 Q. B. D. 1, per Ld. Esher, M. R., at 5; *Clerical Assurance Co.*, 1889, L. R. 22 Q. B. D. 440, at 448). Accordingly, a statutory enactment is not to be extended so as to correct defects or supply an omission which is apparently the result of a mistake (*Jones*, 1785, 1 T. R. 44; *R.* v. *Dyott*, 1882, L. R. 9 Q. B. D. 47).

This rule is departed from only where the application of the enactment in its strict grammatical sense would produce a gross injustice or manifest absurdity or inconsistency with the obvious intention of the Legislature, and in that case the sense may be modified only so far as may be necessary to avoid such a result (*Caledonian Ry. Co.*, 1881, 8 R. H. L. 23, per Ld. Blackburn at 30; *Bradlaugh*, 1883, 8 App. Ca. 354, at 384). A very strong case of injustice must be made out before the Court will construe a section in a way contrary to the natural meaning of the language used (*in re Hall*, 1888, L. R. 21 Q. B. D. 137, at 141–2).

Where the language of the enactment is flexible, and the meaning more or less doubtful, rules of interpretation are resorted to, in order to ascertain the true intent of the Legislature. "The more literal construction ought not to prevail, if it is opposed to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated" (*Caledonian Ry. Co.*, 1881, 8 R. H. L. 23, per Ld. Selborne at 25). The Acts of the Scots Parliament are framed in much more general terms than are modern statutes, and accordingly afford more room for interpretation (*Johnstone*, 1802, 4 Pat. 274, per Ld. Eldon at p. 285).

The enactment must be construed in the sense appropriate to the subject-matter of the Act, and with reference to its object as disclosed by its own

terms (*Lion Insurance Association*, 1883, L. R. 12 Q. B. D. 176, at 186; *Bridges*, 1847, 6 Bell's App. 1).

The words are to be used in the sense in which they were understood at the date of the passing of the Act (*Montrose Peerage*, 1853, 1 Macq. 401, per Ld. Cranworth at 406; *Sharpe*, 1888, L. R. 22 Q. B. D. 239, at 242). *Contemporanea expositio*, or the construction put upon an Act at the time of its passing and consistently followed throughout a long period, cannot override the plain words of an enactment, but where the Act is silent on a particular point, or its language is of doubtful import, usage long continued may supply the defect or explain the meaning (*Mags. of Dunbar*, 1835, 1 S. & M'L. 134, per Ld. Brougham at 195; *Beresford-Hope*, 1889, L. R. 23 Q. B. D. 79, at 91; *Hamilton*, 1889, L. R. 14 App. Ca. 209, at p. 221; cf. *Molleson*, 1892, 19 R. 581, at 587).

The Act must be read as a whole, since, even where there is no Interpretation clause, the context may modify the meaning of the plainest words (*Colquhoun*, 1889, L. R. 14 App. Ca. 493, per Ld. Herschell, at 506; *Edinburgh Tramway Co.*, 1877, 3 App. Ca. 58, at 68). It is often permissible to go beyond the Act itself. A series of Acts *in pari materiâ*, *i.e.* dealing with the same subject-matter, may be read together as forming one continuous code, and this whether or not there is any reference from one to the other (*Waterlow*, 1857, 27 L. J. Q. B. 55). Hence the construction put upon expressions in an earlier Act applies equally to the same expressions in a later Act *in pari materiâ* (*Hodgson*, 1890, L. R. 24 Q. B. D. 525, at 528; *Committee of London Clearing Bankers*, [1896] 1 Q. B. 222, at 227–8). This applies even where an enactment has been repealed but re-enacted in substance (*Mayor of Portsmouth*, 1885, L. R. 10 App. Ca. 364, at 371; *Smith*, [1891] App. Ca. 325, at 349; cf. Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 38 (1)).

The rule as to statutes *in pari materiâ* has been said not to apply in Scotland in the case of local and personal Acts (*Strachan*, 1850, 13 D. 272, per Ld. Pres. Boyle at 276).

Similar but much weaker inferences may sometimes be drawn from one statute to another which deals not with the same but with a similar subject-matter.

A fundamental rule in the construction of statutes is that laid down by Ld. Coke, "that for the sure and true interpretation of all statutes in general . . . four things are to be discerned and considered:—(1) What was the common law before the making of the Act? (2) What was the mischief and defect for which the common law did not provide? (3) What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth? and (4) The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy" (*Heydon's* case, 1584, 2 Coke Rep. p. 18: see *Phillips*, 1889, L. R. 24 Q. B. D. 17, at 22; *Pelton Brothers*, [1891] 2 Q. B. 422, at 424). But it is not admissible to inquire into the motives for passing the Act as disclosed by its history in Parliament (*Mew*, 1862, 31 L. J. Bankruptcy, 89; *R.* v. *Hertford Coll.*, 1878, L. R. 3 Q. B. D. 693, at 707; *Holme*, 1877, L. R. 5 Ch. D. 901, at 905. But see *S. E. Ry.*, 1880, L. R. 5 Q. B. D. 217, at 236). Nor is reference allowed to the reports of Commissioners, on which legislation has proceeded (*Salkeld*, 1846, 2 C. B. 759, at 747), or to the explanatory memoranda which are now often prefixed to important statutes. In the case of local and personal Acts, plans and notices required before the passing of the Act may not be referred to for its interpretation except in so far as they have been incorporated in it (*N. B. Ry. Co.*, 1846, 5 Bell's App. 184).

There are certain general presumptions in the construction of statutes, and to some extent the consequences may be considered. Although the intention of the Legislature is not to be departed from merely because it is thought unreasonable, still where two constructions are open, the Court adopts the more reasonable. The words are to be so construed *ut res magis valeat quam pereat* (*Mersey Steel Co.*, 1882, L. R. 9 Q. B. D. 648, at 660; *Caledonian Railway*, 1882, 9 R. H. L. 108, per Ld. Blackburn at 109; *Curtis*, 1889, L. R. 22 Q. B. D. 515, at 517). The Legislature is presumed not to intend to do a palpable injustice, or to allow a person to profit by his own wrong-doing (Maxwell, 277; *cp. Corbett*, 1880, L. R. 14 Ch. D. 122, at 129). So also, an argument may be drawn from the inconveniences which will result from a particular construction, but this presumption "is not to be lightly entertained, and never for the purpose of construing a statute which is clear in its terms, and indicates unmistakeably the purpose of the Legislature" (*Hudson*, 1876, 1 App. Ca. 464, per Ld. O'Hagan at 474).

A cognate, but stronger, presumption is that against retrospection or retroaction, which would disturb existing rights. To overcome this presumption, express provision or necessary implication is required (*Upjohn*, 1851, 13 D. 742; 1853, 1 Macq. 658; *Kerr*, 1852, 14 D. 864; 1854, 1 Macq. 736; *Gardner*, 1878, 5 R. 638; 1878, 5 R. H. L. 105). And a minor rule involved is that a statute is not to be construed so as to have a greater retrospective effect than its language renders necessary (*Lauri*, [1892] 2 Ch. 402, at 420). An Act may be retrospective in a modified sense, *e.g.* the Trusts Act, 1861, which, on a consideration of the "language, subject-matter, and general object and scope" of the statute, was held to apply to trusts constituted before its date in regard to their future management (*Reid*, 1863, 1 Macph. 774; cf. *Cunningham*, 1856, 18 D. 312).

This presumption does not apply (1) where the enactment is declaratory of the previous law (*e.g. Att.-Gen.* v. *Theobald*, 1890, L. R. 24 Q. B. D. 557; cf. *Scott*, 1897, 24 R. 462, per Ld. Kincairney at 467): (2) where the change in the law relates only to procedure, unless a reservation is made of existing actions (*Ballantine*, 1852, 14 D. 927; *Hazeel*, 1855, 18 D. 265).

Modern Acts of Parliament are supposed to express fully the intention of the Legislature, and the tendency is therefore to apply uniform rules of construction without much reference to the differences in the subjects with which they deal. The distinction between a *strict and "ample" construction* is now of much less significance than formerly. In cases of doubt, however, it may still be important. Thus it is presumed that the Legislature does not intend to alter the law beyond the immediate scope and object of the statute (*R.* v. *Harrald*, 1872, L. R. 7 Q. B. 361). Acts conferring a privilege on particular persons or corporations are strictly construed (*Hogg*, 1880, 7 R. 966, at 996; *Gilhooley*, 1884, 12 R. 309; *Port-Glasgow Sailcloth Co.*, 1893, 20 R. H. L. 95). So also are statutes which impose penalties or restrain the liberties of the subject (*Hosack*, 1839, 2 D. 129). An Act which enumerates specific cases to which it is to apply is not readily extended, unless that is necessary to prevent obvious evasion (*Philpott*, 1857, 6 H. L. 338). The Crown is not affected by a statute unless expressly named in it (*Mersey Dock Trs.*, 1865, 11 H. L. 443; *Somerville*, 1893, 20 R. 1050). There is a strong presumption against any curtailment of the jurisdiction of the Superior Courts—in Scotland the Court of Session and the Court of Judiciary (*Cross*, 1877, L. R. 2 Ex. D. 346).

A strict interpretation is applied to local and personal Acts. These are construed *contra proferentes*, being regarded as embodying a contract between the public and the promoters of the undertaking, in terms chosen by the latter (*Caledonian Railway*, 1882, 9 R. H. L. 108; *Scottish Drainage Co.*, 1889,

16 R. H. L. 16, per Ld. Herschell at 17; *Altrincham Union*, 1885, L. R. 15 Q. B. D. 597, at 602).

Permissive and Imperative Words.—Words which are permissive or directory may be shown from their context to be really imperative, and *vice versâ*. Or, in either case, the enactment may mean that a discretion is given as to the exercise of the power or performance of the duty. As in other cases, the question is one of the intention of the Legislature, and the *onus* is on the party who seeks to displace the natural meaning of the words (*Maxwell*, 1831, 5 W. & S. 269; *Julius*, 1880, 5 App. Ca. 214, at 222–3). It has, however, been stated as a general canon of construction that *primâ facie*, "where powers are conferred in a statute for the public benefit, they must be exercised, and the enactment is imperative" (*Walkinshaw*, 1860, 22 D. 627, per Ld. J.-Cl. Inglis at 631). See Interpretation Act, 1889, s. 32. See Maxwell, 518 *sqq.*

Interpretation Clause.—An interpretation clause is inserted in many Acts. Its object is to define the sense in which words, otherwise ambiguous, are to be used, and though it is not understood to enact anything, it frequently does so, by including in the definition things which otherwise would not come under the word explained. But where this is so, the interpretation clause does not prevent the word receiving its ordinary and natural signification, wherever that is applicable. "An interpretation clause is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term, where the circumstances require that it should" (*R.* v. *Cambridgeshire*, 1838, 7 A. & E. 480, at 491).

Technical Terms in General Act.—In a general Act, terms are often employed which have different meanings in England and Scotland, or which are unknown to the law of one of these countries. The rules applicable to this case are apparently not quite definitely settled (*e.g.*, see *R.* v. *Slator*, 1881, L. R. 8 Q. B. D. 267, at 272). The sounder opinion seems to be that the meaning should be taken from the law of the country to which the term properly belongs, and the term should then be applied in the other country in the sense which is most closely analogous (*Ld. Adv.* v. *Ld. Saltoun*, 1860, 3 Macq. 659, at 675; *Income Tax Commissioners* v. *Pemsel*, [1891] App. Ca. 531: *Macfarlane*, 1894, 21 R. H. L. 28; cf. *Studd*, 1883, 10 R. H. L. 53).

In the case of general taxing Acts, it has been held that, if possible, on any fair construction, the words are to be so read as to have the same effect in both England and Scotland (*Ld. Adv.* v. *Ld. Saltoun, supra*; *Macfarlane, supra*, per Ld. Watson at 34).

Interpretation Act, 1889 (52 & 53 Vict. c. 63).—This Act, repealing and re-enacting Lord Brougham's Act of 1850, has for its main object the shortening of the language in future statutes. It defines a large number of words and expressions in common use in Acts of Parliament. Thus, unless the contrary intention appears, "person" includes any body of persons corporate or incorporate; words importing the masculine gender include females, and words in the singular include the plural and *vice versâ*.

Repeal.—It is usual now to annex to a statute a schedule showing the extent to which previous legislation has been affected, and the scheduled Acts are expressly repealed in the body of the Act. Repeal may also be effected by an enactment which is inconsistent with an earlier statute. Repeal by implication, however, is not readily admitted, and where two statutory provisions are apparently inconsistent, the Court endeavours to read them in such a way as to give effect to both, *e.g.* by construing the second as providing an alternative to the first, or a special Act as creating

an exception to a more general (*Debbs*, 1882, L. R. 9 Q. B. D. 151, at 158; *Kutner*, [1891] 2 Q. B. 267, at 271–2). If there is a clear inconsistency, the later enactment, as being the last word of the Legislature, overrides the earlier. Similarly, of two clearly repugnant provisions in the same Act, the later receives effect (*Dean of Ely*, 1842, 5 Beav. 574, at 582).

Formerly when a statute, repealing an earlier one, was itself repealed, the latter was thereby revived, without any express enactment to that effect. The rule now is that where an Act passed after 1850 repeals a repealing enactment, it is not to be construed as reviving any enactment previously repealed, unless words are added for that purpose (Interpretation Act, s. 11 (1)); and where any Act passed after 1889 repeals any other enactment, then, unless the contrary intention appears, the repeal does not revive anything not in force or existing at the time at which the repeal takes effect (*ib.*, s. 38 (2)). Where any new provisions are substituted for provisions repealed, the latter continue in force till the former come into operation (*ib.*, s. 11 (2)).

Publication of Acts of Parliament.—Acts of the old Scots Parliament were at one time formally proclaimed throughout the country in the county-towns, burghs, and baron Courts (1425, c. 67; 1457, c. 89). But after the statutes began to be printed in pursuance of the Act 1540, c. 127, this custom gradually fell into disuse, and by the Act 1581, c. 128, it was provided that after proclamation at the market-cross of Edinburgh no further publication should be required, and that the statute should come into operation forty days after such proclamation.

British statutes are not formally promulgated. They are printed and distributed among the persons whose names are entered in what is known as the "Promulgation List," the object being not so much publication as the distribution of copies to public officials for judicial and administrative purposes (Hardcastle, p. 39).

Date of Commencement.—Formerly the Royal Assent, by which a Bill is converted into an Act of Parliament, was given at the end of the Parliamentary session to all Bills which, during that session, had passed through the two Houses. At that period, the date specified in the Chancery enrolment of Acts was the beginning of the session, and hence every Act was held to have been in force from the beginning of the session in which it was passed (*Robertson*, 1758, M. 11280; *Panter*, 1772, 6 Brown's Cases in Parl. 455). To prevent the injustice which often resulted, the Act 33 Geo. III. c. 13 directed that thenceforward the date of the commencement of every Act should be the date on which the Royal Assent was given to it, unless some other date was specified by the Act itself, and that that date should be indorsed on the Act by the Clerk of the Parliaments, and should form part of the Act. Where, however, an Act expires before the passing of an Act introduced in the same session for its continuation, the latter takes effect from the date of the expiration of the former, except as otherwise provided, and except as to penalties (48 Geo. III. c. 106).

Citation of Acts of Parliament.—The record of a statute is a copy printed on vellum by the Queen's printer.

A statute, if public and general, is assumed to be known, and is sufficiently brought under judicial notice by the production of a copy bearing to be printed by the Queen's printer or under the authority of Her Majesty's Stationery Office. Formerly, private Acts had to be pleaded and proved. But by the Act 13 & 14 Vict. c. 21, s. 7, repealed and re-enacted by the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 9), every Act passed subsequent to 1850 is deemed a public Act, and is judicially noticed as such

unless the contrary is expressly provided. The effect is to make almost all modern Acts public Acts so far as judicial notice is concerned (see *Alton*, 1875, 2 R. 470; 1876, 3 R. H. L. 4, per Ld. Cairns at 6).

Since 1889, any Act may be cited either (1) by the short title, if any, or (2) 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 year, by reference to the statute or session. Particular enactments may be cited by reference to the sections or subsections in which they are contained (Interpretation Act, s. 35 (1)). The latter is the method generally employed in statutes relating to Scotland.

By the Short Titles Acts, 1892 and 1896 (55 Vict. c. 10, and 59 & 60 Vict. c. 14), short titles are provided for large numbers of Acts and groups of Acts.

See ACT OF PARLIAMENT.

[Maxwell, Hardcastle, and Dwarris on *Statutes*.]

Statute Law Revision.—The Statute Law Revision Act, 1861 (24 & 25 Vict. c. 101), was passed on the preamble that, "with a view to the revision of the statute law, and particularly to the preparation of an edition of the statutes comprising only enactments which are in force, it is expedient that divers Acts and parts of Acts which have ceased to be in force otherwise than by express and specific repeal, should be expressly and specifically repealed."

This Act was followed by others with similar preambles, and on 9th July 1868 Ld. Chan. Cairns nominated a committee to prepare and publish an edition of the statutes containing only such Acts as were in force.

That committee, now known as the Statute Law Committee, accordingly prepared and published a Revised Edition of the Statutes brought down to the year 1878. They also prepared a series of Statute Law Revision Bills having the same object as the Act of 1861. This edition was completed in 1885.

In 1886 Mr. George Howell, M.P., called the attention of the Chancellor of the Exchequer to the expediency of providing a cheap edition of the statutes for the use of the public, and in particular for sale to public libraries accessible to working men. The Statute Law Committee, to whom the matter was referred, recommended the publication of a new edition in a cheap form, and a further revision of the statutes. The matter was proceeded with, and Statute Law Revision Acts have been passed almost yearly from 1887. The new edition has also been proceeded with, the first volume being published in 1888, and at the present time (December 1898) volume 13 has been published, including all statutes to the end of the session of 1875. It is understood that this edition will be carried on so as to include session 1886.

Various provisions saving the effect of the enactments thus repealed have been inserted in the various Acts, and the final form of the saving clause is given in the Act of 1898 (61 & 62 Vict. c. 22). As to the effect of repeals by these Acts, see *Morrison* v. *Stubbs*, 1897 24 R. (J. C.) 61: *Hawke* v. *Dunn*, [1897] 1 Q. B. 579.

In reading these Acts it must be noted that the repeal does not extend to parts of titles, preambles, or recitals. These are not repealed; the provision with regard to them is merely that they may be omitted from any revised edition of the statutes published by authority. It is also further to be noted that by sec. 4 of the Act of 1894 (57 & 58 Vict. c. 56), what are called the enacting words, which appear as the introduction to every Act, may be omitted in any such revised edition without being

expressly mentioned in a Statute Law Revision Act. The usual form of those words is—Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:—

Until the end of 1890 the Statute Law Revision Bills were prepared under the direction of the Statute Law Committee by English counsel. In that year, however, there was conjoined with them a Scottish counsel, who prepared the schedules to the Revision Bills so far as they affected Acts applicable to Scotland. This arrangement terminated in 1896, and since that date there has been no special Scottish assistance in preparing these Bills.

Up to this time the Statute Law Committee have dealt only with English Acts prior to the Union, and Imperial Acts thereafter. They had also dealt with Irish Acts prior to the union with that country.

In 1897, however, on a strong representation being made to them by Sheriff Mackay, the Statute Law Committee was increased by the addition to its numbers of three Scottish members, and the revision of the Scots Acts prior to the Union was undertaken.

There is now in preparation a Statute Law Revision Bill to effect for the Scots Acts what has already been done for the English Acts, with the view of publishing, when that Bill becomes an Act, a revised edition of the Pre-Union Scots Acts.

In determining what enactments have ceased to be in force, the Statute Law Committee have prepared a note for the preparation of the schedules attached to their Bills. The important part of that note is as follows:—

1. For the purposes of the schedule six different classes of enactments are considered as having ceased to be in force, although not expressly and specifically repealed: namely, such enactments as are—

1. *Expired.*—That is, enactments which, having been originally limited to endure only for a specified period, by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had for their object the continuance of previous temporary enactments for periods now gone by effluxion of time:
2. *Spent.*—That is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect, or on the happening of some event, or on the doing of some act authorised or required:
3. *Repealed in General Terms.*—That is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts on which it is to operate:
4. *Virtually Repealed.*—Where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one:
5. *Superseded.*—Where a later enactment effects the same purposes as an earlier one, by repetition of its terms or otherwise:
6. *Obsolete.*—Where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstance.

The schedules, as laid before the Houses of Parliament with the Bill, contain a column which is struck out at a later stage. That column gives very briefly the reasons on which the enactment to be repealed is held to have ceased to be in force. When considering the effect of these Acts, this

column is of great interest, but unfortunately is only to be found in the Bill and not in the Act.

In addition to the preparation of Revision Bills and of the Revised Editions of the Statutes, the Statute Law Committee have also prepared a chronological table of these Statutes and a subject index thereto. The last edition of this work was published in 1896, and it is understood that new editions will be published at intervals of four or five years. This work does not include either Scots Acts or Irish Acts passed by the respective Parliaments of these countries.

The Statute Law Committee have also undertaken the publication of Statutory Rules and Orders. See STATUTORY RULES AND ORDERS.

Statutory Rules and Orders are part of the written law of the land. They are Orders, Rules, or Regulations made by the Queen and Council, or a Government Department, under authority of Parliament conferred upon them in any particular Act for the purpose of carrying the provisions of that Act into effect by establishing procedure, or forms, or tables of fees, or otherwise.

These Orders are, when duly made, tantamount to Acts of Parliament: and in many cases the Act giving the authority to make the Order specifically declares that the Order, when made, shall have effect as if enacted in the Act.

Until 1890 these Orders were not published in any systematic manner; and although they had become numerous and important, search for them had to be made through many and different official and non-official publications.

In that year the Lord Chancellor and the Treasury directed publication annually thenceforward of all Orders of a public and general character made in each year, in a volume uniform with the official annual volumes of the statutes. Accordingly, volumes containing the Orders made in 1890, 1891, 1892, and 1893 were published under the direction of the Statute Law Committee.

Meanwhile that Committee also undertook the collection and publication of all similar Orders issued prior to 1890 and still in force. This collection was completed and published in eight volumes.

The Rules Publication Act, 1893, effected a change in the authority responsible for the publication of these Orders, which were there termed Statutory Rules. The principal clauses of the Act are secs. 3 and 4, which are as follows:—

"3. [*Printing, Numbering, and Sale of Statutory Rules.*] (1) All Statutory Rules made after the thirty-first day of December next after the passing of this Act shall forthwith after they are made be sent to the Queen's Printer of Acts of Parliament, and shall, in accordance with regulations made by the Treasury, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, be numbered, and (save as provided by the regulations) printed, and sold by him.

"(2) Any Statutory Rules may, without prejudice to any other mode of citation, be cited by the number so given as above mentioned, and the calendar year.

"(3) Where any Statutory Rules are required by any Act to be published or notified in the London, Edinburgh, or Dublin *Gazette*, a notice in the *Gazette* of the rules having been made, and of the place where copies of them can be purchased, shall be sufficient compliance with the said requirement.

"(4) Regulations under this section may provide for the different treatment of Statutory Rules which are of the nature of public Acts, and of those which are of the nature of local and personal or private Acts; and may determine the classes of cases in which the exercise of a statutory power by any rule-making authority constitutes, or does not constitute, the making of a Statutory Rule within the meaning of this section, and may provide for the exemption from this section of any such classes.

"(5) In the making of such regulations, each Government department concerned shall be consulted, and due regard had to the views of that department.

"4. [*Definitions.*] In this Act—

"'Statutory Rules' means rules, regulations, or bye-laws made under any Act of Parliament which (*a*) relate to any Court in the United Kingdom, or to the procedure, practice, costs, or fees therein, or to any fees or matters applying generally throughout England, Scotland, or Ireland; or (*b*) are made by Her Majesty in Council, the Judicial Committee, the Treasury, the Lord Chancellor of Great Britain, or the Lord Lieutenant or the Lord Chancellor of Ireland, or a Secretary of State, the Admiralty, the Board of Trade, the Local Government Board for England or Ireland, the Chief Secretary for Ireland, or any other Government department.

"'Rule-making authority' includes every authority authorised to make any Statutory Rules."

Regulations by virtue of sec. 3 (1) were made by the Treasury with the requisite concurrence (No. 734 of 1894), and will be found at page 415 of the volume of Statutory Rules and Orders for that year.

The volumes for 1894 and each succeeding year are edited in behalf of the Queen's Printer of Acts of Parliament with the advice of a committee appointed by the Treasury, the Lord Chancellor, and the Speaker of the House of Commons.

The Statutory Rules and Orders, therefore, are now to be found in the collection entitled "Statutory Rules and Orders Revised," containing all those in force issued prior to 1890, and in the annual volumes containing those issued in each year from 1890 onwards.

An index of such Rules and Orders in force is also published periodically.

Steelbow.—Steelbow is probably the oldest form of agricultural lease known in this country. Mr. Cosmo Innes (*Legal Antiquities*, p. 245, note) is of the opinion that it can be traced to Anglo-Saxon times, and refers to the practice of *Stuht*, mentioned by the writer of the Rental of Kelso of 1260, as being equivalent to steelbow. The term is not one that is peculiar to Scotland, similar expressions being found in the *Eisernviehverlag* of Germany and in the *beste de fer—bestio ferri*—in Old French and Latin.

Steelbow goods usually consisted of corn, cattle, straw, and implements of husbandry delivered by the landlord to the tenant at the entry of the latter to the farm, by means of which the tenant was enabled to stock and labour it. The obligation imposed on the tenant was to redeliver to the landlord at the end of the lease the same quantity or number of goods of the same kind and quality. An inventory of the steelbow goods was usually made up at entry, and the rent for land and steelbow separately stated.

Whether the contract of steelbow is in its nature one of *locatio* or of *mutuum* is a matter about which there is diversity of opinion. Stair

expressly states (i. 11. 4) that steelbow goods fall under the contract of *mutuum*, and (ii. 3. 81) quotes the cases of *Lady Westmorland* (1638, Mor. 14179) and *Dundas* (1642, Mor. 14780) as determining that they do not pass by a disposition of the lands as pertinents thereof, but remain, as moveables, subject to arrestment, and that they fall under the tenant's single escheat, and cannot be taken from him until the tack runs out. Mr. More (*Stair*, i. Note ccii.) further states that steelbow goods were held so much the property of the tenant that they could be poinded for his debts (*Turnbull*, 1624, Mor. 11615), and that the claim on the part of the landlord for steelbow goods, arising at the end of the lease, was of a personal nature and passed to his executry (*Dundas, supra*). Stair's view is supported by Bankton (i. 355), and both Erskine (iii. 1. 18) and Bell (*Prin.* 1264) describe it as a species of *mutuum*.

Mr. Hunter, however (*Landlord and Tenant*, i. 328), inclines to the opinion that the contract is really one of location, involving the same power of administration in applying the steelbow goods to the cultivation of the land as is involved in the management of the land itself, considered as the subject of temporary occupation. As authority for this view he cites the Act of Sederunt, 28th Feb. 1666, which directs the Commissaries, in confirming the tenant's testament, to deduct the steelbow goods along with other privileged debts before the *quot* is struck; but, as Mr. Rankine points out (Rankine on *Leases*, p. 270), no argument can be deduced from this, as the tenant's interest in the *corpus* of the goods, though ownership, is, on account of the eventual burden or replacement, not an effective asset.

In further support of his views, Mr. Hunter cites the case of *Butler* (1764, Mor. 6208), in which a tenant having died bankrupt, and a competition for the steelbow goods having arisen between the landlord and the general creditors, the former was preferred. Mr. Bell, however, points out (*Prin.* 1264) that this decision was based chiefly on the principle of hypothec.

Steelbow is now practically unknown, though Mr. Hunter mentions two instances from the West Highlands of as recent a date as 1848 and 1850. The usual agreements, however, as to straw, dung, etc., in the last year of a lease, rest on the principle of steelbow.

[Stair, Bk. i. tit. 11, s. 4; Bk. ii. tit. 3, s. 81; Bk. iii. tit. 8, s. 58; More's *Notes*, ccii.; Ersk. Bk. ii. tit. 6, s. 12; Bk. iii. tit. 1, s. 18; Bankt. i. 355: Bell, *Prin.* s. 1264; Hunter, *Landlord and Tenant*, i. 62, 325, ii. 368: Rankine on *Leases*, 256; Cosmo Innes, *Legal Antiquities*, 245, note.]

Stillicide.—See Eavesdrop.

Stipend.—The stipends payable to the parochial clergy of the Church of Scotland may be classed as follows, viz.: I. Stipends from teinds (see Teinds), with supplements in some cases from Exchequer (see Stipend (Small)) and other sources, including special Crown grants apart from those given from Exchequer. II. Stipends in ordinary *quoad sacra* parishes where special endowments have been provided to the amount of £100 with a manse, or £120 without a manse. These are the minimum stipends, but in some cases slightly larger stipends have been provided. The stipends, and also sums for the maintenance of fabrics, must be secured to the satisfaction of the Court of Teinds, in terms of sec. 8 of the New Parishes (Scotland) Act, 1844. And III. Stipends from Exchequer to the amount of £120 each, with manses and glebes in the cases of parliamentary churches. These, with districts attached, have now been all erected into

parishes grand sums in virtue of sec. 14 of the above Act. There are in all forty-two of these parishes, with forty-three churches, there being two churches in one of the parishes.

The stipends from teinds, where in money, are payable one half at Whitsunday and the other half at Martinmas: but if in victual, as to a large extent they are, as required by the Teinds Act, 1808,—except in cases where the teinds are valued in money and surrendered,—they fall to be paid at the highest fiars prices (see FIARS PRICES) of the county betwixt Yule and Candlemas, after the separation of the crop from the ground, or as soon thereafter as the fiars prices of the county shall be struck (see ANN). Where there are surplus teinds, this class of stipend may be augmented on the expiry of twenty years from the date of last augmentation (see AUGMENTATION). The stipends in ordinary *quoad sacra* cases are payable half-yearly at Whitsunday and Martinmas by equal portions: while those payable from Exchequer are due one half at Whitsunday (15th May) and the other half at Michaelmas (29th September).

The minister is provided, at the expense of the heritors, with a decree of modification and locality, to enable him to recover his stipend payable from teinds: but the right to raise an ordinary action for stipend is expressly reserved by the Act 1695, c. 27, and this right has been recognised by the Court of Session. See cases of *Cameron*, 1869, 7 M. 565, and *Cochrane*, 1873, 45 Jur. 314.

Stipend (Small).—This is a special class of cases for which grants were made from Exchequer under the Acts 50 Geo. III. c. 84, and 5 Geo. IV. c. 72. The amount provided under the first Act, passed in 1810, was £10,000; and under the second Act, passed in 1824, was £2000. The purpose was to supplement stipends so as to increase them to £150; and where there was neither manse nor glebe, the second Act allowed them to be augmented to £200. The whole of these funds were early applied at the sight of the Court of Teinds, on reports by the Teind Clerk. In calculating the deficiency the Court, on 18th December 1811, allowed £5 6s. 8d to be deducted in all cases from the teinds for communion elements. In later years, where teinds were discovered in certain of the parishes sufficient to meet or in excess of the amount paid by Exchequer, the grants were withdrawn by the Court and applied to other cases. The only case after the lapse of forty-six years in which the Court has had occasion to intervene was that of Newton on Ayr, where the minister was found entitled to an augmentation from local sources by the Court of Session (*Reid*, 1897, 24 R. 606): and, on the application of the Procurator for the Church the Teind Court recalled the grant of £90, made on 17th June 1812, and re-allocated it to the ministers of five parishes with stipends under £150 (*Hyde, Sir John Cheyne*, 8th July 1898). At present the full amount of the Exchequer grants is exhausted.

Stipendiary Magistrate.—A stipendiary magistrate is a magistrate appointed to exercise the summary jurisdiction of a sheriff, police magistrate, justice of the peace, or justices of the peace, but having a salary attached to his office in contradistinction to the unpaid magistracy. The Commissioners of any burgh, by the 455th section of the Burgh Police (Scotland) Act, are empowered to resolve that a stipendiary magistrate should be appointed to officiate in the Police Courts or Court of the burgh, and are authorised to fix the salary which may be paid to him. The Commissioners may from time to time increase his salary. The Secretary

for Scotland makes the appointment, provided the salary fixed is in his view satisfactory. The person to be appointed must possess the qualifications required for a sheriff-substitute in Scotland, which, according to the provisions of 40 & 41 Vict. c. 50, s. 4, are that he must be an advocate or law agent of not less than five years' standing in his profession.

The tenure of office of the stipendiary magistrate is the same as that possessed by a sheriff-substitute. He is only removable from his office for incompetency or misbehaviour, by the like process and by the same authority as is provided by law for the removal of a sheriff-substitute. A salaried sheriff-substitute is only removable from office by one of Her Majesty's Principal Secretaries of State for inability or misbehaviour, upon a report by the Lord President of the Court of Session and the Lord Justice-Clerk for the time being (40 & 41 Vict. c. 50, s. 5).

Stipendiary magistrates, whether appointed before or after the passing of the Act, are entitled, out of the burgh general assessment, to retiring allowances for like reasons, on the like conditions and of the like amounts, having regard to their salaries and periods of service, as are provided by law in the case of sheriff-substitutes.

By 1 & 2 Vict. c. 119, s. 6, sheriff-substitutes are granted an annuity, payable in like manner as salaries, if from old age or any permanent infirmity they are disabled from the due exercise of their office; such annuity not exceeding one-third of the salary payable, in case the period of service shall have been not less than ten years, and not exceeding two-thirds of such salary in case the period of service shall have been not less than fifteen years, and shall not exceed three-fourths of such salary in case the period of service shall have been not less than twenty years or upwards. No annuity is granted unless the sheriff-substitute has duly fulfilled the duties of his office during one of the periods before mentioned, and is from old age or permanent infirmity disabled from the due exercise of his office, which facts must be ascertained by the Lord President, the Lord Justice-Clerk, and the Lord Advocate for the time being, as having been established to their satisfaction by proper evidence.

Stipendiary magistrates possess within the burgh the same jurisdiction, powers, and authorities as the other magistrates of the burgh acting in the Police Court, or any of them. By the Stipendiary Magistrates Jurisdiction (Scotland) Act, 1897, it is provided, sec. 3, "that every stipendiary magistrate in Scotland shall, within the limits of the city, burgh, place, or district for which he has been or shall be appointed, have and possess, in addition to the jurisdiction conferred upon him by any Act now in force, the summary jurisdiction at present exercised by, or which may hereafter be conferred upon, any sheriff or any justice of the peace or two justices of the peace in Scotland, together with all the powers auxiliary to or connected with such summary jurisdiction."

By sec. 2 it is provided "that the expression 'summary jurisdiction' means jurisdiction in the proceedings so far as the same are of a criminal nature enumerated and described in the third section of the Summary Procedure Act, 1864, and in all proceedings of a like nature which by any Act of Parliament are directed or authorised to be taken summarily or under the provisions of the aforesaid Summary Jurisdiction (Scotland) Acts."

By clause 4 it is provided that "the Clerk of Court, procurator-fiscal, and other officers of or acting in any Court in which a stipendiary magistrate may sit as judge, and any constable, shall possess the same powers, and perform the same duties, in reference to the jurisdiction conferred by

this Act as are respectively possessed or performed by them with reference to the ordinary jurisdiction of such Court, or as by law and practice are respectively possessed and performed by officers of the Sheriff Court, or other Court of summary jurisdiction in Scotland, and all penalties imposed by a stipendiary magistrate under the jurisdiction conferred upon him by this Act may be recovered and applied in the same manner as such penalties are by law presently applied."

By clause 5 it is provided that "any magistrate presiding in a Police Court may remit for trial to a stipendiary magistrate possessing jurisdiction any person brought before him charged with a crime or offence; but nothing herein contained shall affect the right and duty of the stipendiary magistrate or magistrate sitting in the Police Court to remit for trial to a higher Court any person charged with a crime or offence of a serious nature."

By clause 6 it is provided that "nothing contained in this Act shall limit or affect any right of appeal or review, and where proceedings are taken before a stipendiary magistrate in lieu of justices of the peace, the right of appeal, if any, to quarter sessions is hereby reserved."

Upon the death, removal, or superannuation of a stipendiary magistrate, the Commissioners may resolve that the office shall be discontinued, or resolve then or at any future time that the office shall be continued or renewed, in which case the same provisions again apply.

The power to appoint a stipendiary magistrate has not been taken advantage of in Scotland. The only burgh where a stipendiary magistrate has been appointed is Glasgow, and there since a vacancy arose through the death of the holder of the office, a new appointment has not been made.

Stipulatio in Roman law, was a form of contract by question and answer, giving rise to an obligation *verbis* (see Obligation in Roman Law). The form of words might be *Spondes? Spondeo; Promittis? Promitto; Dabis? Dabo; Facies? Faciam*, or otherwise according to the subject of the contract. The words *Spondes? Spondeo*, were the most ancient, pointing back to the time when the contract had a religious sanction, and were so peculiarly Roman that a valid obligation could not be made except by their use (Gaius, iii. 93, 179). The person who asked the question was *stipulator*; the person who answered, was *promissor*. Two or more persons might be concerned on either side. Where there are several co-debtors, *plures rei promittendi*, and the *stipulator* puts the question to each and receives from each an identical reply, the debtors are *correi*, and are bound *singuli in solidum* to the creditor. Where there were two *rei promittendi*, one might bind himself unconditionally, and the other conditionally or only after a certain day (*Inst.* iii. 16. 2). If the debtor in a *stipulatio* associated with himself another person, who, in the interest of such debtor, gave the same promise, such person was called an *adpromissor*. The chief instance of *adpromissio* was in *fidejussio*, or cautionary obligations (see Fidejussio). Similarly, there might be several co-creditors *plures rei stipulandi*, to each of whom the debtor was bound for the whole debt, *i.e. in solidum*. If the creditor in a *stipulatio* associated with himself another person, who, in the interest of such creditor, stipulated from the debtor for the same act, such person was called an *adstipulator*. Although an *adstipulator* was in form, and in a question with the debtor, a creditor, yet in substance, and in a question with the creditor, he was merely an agent of the creditor. Before the time of Justinian a prohibition was laid on stipulations in which the money was not to be paid till after the death of

the *stipulator*, and this prohibition was evaded by the *stipulator* associating with himself an *adstipulator*, who, on the death of the *stipulator*, could, as creditor, enforce payment of the debt and hand over the proceeds to the heir of the deceased *stipulator*. An *adstipulator* could be creditor for less, but not for more (either in time or amount), than his principal, and he could not transmit any right of action to his heir (Gaius, iii. 100).

A stipulation was invalid (*a*) if the parties were incapable of contracting, *e.g.* insane, or incapable of going through the requisite form, *e.g.* deaf and dumb persons; (*b*) if the subject-matter was *extra commercium*, e.g. *res sacræ* or *res religiosæ*; (*c*) if the answer does not correspond to the question, so that *consensus in idem* was wanting; (*d*) if an impossible condition was adjected; (*e*) if the promise was *ex turpi causâ*; (*f*) if the parties stood to one another in the relation of *paterfamilias* and *filiusfamilias*. In the last-mentioned case, the stipulation gave rise only to a natural obligation (see Obligation in Roman Law). The form of the contract rendered it possible only *inter præsentes*. A slave might stipulate for his master's benefit *ex personâ domini*, but could not bind him by a promise.

An informal promise, as such, was not actionable according to the Roman law of contract (see Obligation in Roman Law); but by means of a *stipulatio* a promise could be raised to the rank of a contract, and so become enforceable. Common examples of this were stipulations for the payment of interest, or for the payment of a specified penalty. *Stipulatio* was also in common use for the purpose of transforming or novating an *obligatio*. A novating *stipulatio* may have for its purpose to effect a change in the parties to the obligation (as in *delegatio*), or it may be designed to serve a particular purpose desired by the parties, without involving a change of parties, as, for example, to render the obligation more readily enforceable by action. If it was desired to extinguish any debt by *acceptilatio*, the debt must first be transformed by novation into a debt by *stipulatio*, and then, whether actually paid or not, it could be formally discharged by a verbal acknowledgment of receipt in the form of a *stipulatio* (see Acceptilatio). What is called the *stipulatio Aquiliana* was a formula by means of which all the liabilities of one person to another could be converted into one debt by *stipulatio*, and then be completely discharged by a verbal *acceptilatio*.

A slave might stipulate for his master's benefit *ex personâ domini*, but cannot bind him in a promise. A slave owned in common acquired by stipulation for his owners according to their respective proprietary interests in him, except when he expressly stipulated in the name of one of them in particular (Gaius, iii. 167). Any kind of obligation might be made the subject of a *stipulatio*. A "preposterous" stipulation, *i.e.* an agreement to pay or do something *before* instead of *after* the happening of an event, was made valid by Justinian, the obligation not being enforceable till after the fulfilment of the condition (*Inst.* iii. 19. 14).

Justinian in the *Institutes* (iii. 18) divides stipulations into four classes: (1) *Judicial*, arising out of the order of a judge, *e.g. cautio de dolo*; (2) *Prætorian*, arising out of an order by the prætor, *e.g. cautio damni infecti*, security against a threatened injury to property; (3) *Conventional*, made by agreement between the parties; (4) *Common*, which are in their nature both *judicial* and prætorian, *e.g. cautio rem salvam fore pupillo*, the security given by a tutor.

The actions to which the contract gave rise were: (1) *condictio certi*, available where the promise was to pay a definite sum of money or to deliver a specific thing; and (2) *condictio incerti* or *actio ex stipulatu*, available where what was promised was *incertum* or indefinite.

[*Inst.* iii. 15–20; *Dig.* 45. 1; *Cod.* 8. 38–44; Gaius, iii. 92–127; Paul, *Sent. Rec.* 2. 3; 5. 7–9.]

See OBLIGATION IN ROMAN LAW; ACCEPTILATIO; ADPROMISSOR.

Stirpes.—See PER CAPITA, PER STIRPES.

Stockbroker.—The law of agency applies to stockbroking as it does to any other transactions carried out through special agents. Any peculiarities in the application of that law depend, not on any intrinsic difference in this agent from any other agents, but on the rules and customs of the market in which he deals. A stockbroker is a broker who deals in the purchase and sale of stocks and shares of public companies, and in other public funds. He does not require to be a member of any Stock Exchange; but Stock Exchanges are the only markets in which such property is dealt in, and practically all the business of its sale and purchase is done by persons who are subject to the rules of one or other of these associations. The division of the members of a Stock Exchange into brokers and jobbers, the brokers buying from, and selling to the jobbers, and the jobbers acting for no outside client, but for themselves alone (see JOBBER), is known only in London. On other Exchanges brokers deal with each other directly. But the difference is of no practical importance so far as legal relations are concerned, since it is a rule of all Stock Exchanges that *inter se* all members are principals (see also *Maxted*, 2nd action, 1871, L. R. 6 Ex. 132, per Blackburn, J.) Contracts on the Stock Exchange are not intended to be immediately carried out. They are presumed to be for "the account," *i.e.* the current account, which comes to an end at the next settling day. But they may be made for a subsequent account. Settling days are fixed by the Exchange Committee, according to the rules, and occur at short intervals. Two rules common to all these associations are of chief importance to the public, viz.: (1) that, as stated above, all members deal with each other as principals, not as agents, and therefore a broker, although known to be acting as agent for a constituent, is personally liable on the contract; and (2) that in the case of the continuation or carrying over of a contract, differences are payable at once and are not carried to the following account.

Stock Exchange Rules.—The special importance of the large class of transactions on the Stock Exchange arises from the general rule of law that "by employing a broker who acts upon a particular market, you authorise him to make contracts upon all such terms as are usual upon the market" (*Robinson*, 1875, L. R. 7 E. & I. App. 802, per Cleasby, B., at p. 826). "Customs of trade are tacitly incorporated in the contract, though not expressed in it, provided the express terms of the writing are not so inconsistent with the custom as to exclude it" (*Robinson*, *supra*, per Blackburn, J., at p. 811). So when a person outside the Stock Exchange makes, through a broker who is a member of that body, a contract for the sale or purchase of stock or shares, he is held to do so according to the rules of the Stock Exchange (*Nickalls*, 1875, L. R. 7 E. & I. App. 530; *Coles*, 1868, L. R. 3 Ch. 3; *Grissell*, 1868, L. R. 4 C. P. 36), although the Stock Exchange is merely a voluntary association, whose rules and regulations bind no one but its own members (*Tomkins*, 1877, 3 A. C. 213; *Marr*, 1852, 14 D. 467; *Bentinck*, [1893] 2 Ch. 120, effect of "contango" custom on the broker depositing securities with bank for advance). But such customs are only incorporated to the extent of controlling the performance of the contract—they cannot alter its intrinsic nature (*Robinson*, 1875, L. R. 7 E. & I. App. 802). "If a person employs a broker to transact for him upon a market with the usages of which the

principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as to regulate the mode of performing the contracts, and do not change their intrinsic character" (*Robinson, supra*, per Ld. Chelmsford, at p. 836). Thus no usage of the market can be pleaded which transforms an agent employed to buy into a principal to sell his own goods, or which transforms an agent employed to sell into a principal to buy, for this is contrary to the nature of the contract of agency (*Robinson, supra*; *Cunningham*, 1874, 2 R. 83; *Maffett*, 1887, 14 R. 506; *Stark*, 1891, 2 Guthrie's S. C. Cas. 406); and no proof of fraud on the part of the stockbroker is necessary to set aside a contract when the agent has sold his own shares or stock to his employer. Moreover, any custom of the market, to be enforceable against an outsider, must be reasonable, and it must not be contrary to law. A usage by which a stockbroker, on his client failing to pay differences on pay-day in the case of a continuation, may sell out and close the account, is reasonable (*Davis & Co.*, 1890, 24 Q. B. D. 691). But a custom by which one broker, considering as his principal only the person who employs him, although he knows him to be acting as agent for a client, may set off a debt due to such person as agent against one due by him on his own account, is unreasonable (*Pearson*, 1878, 9 Ch. D. 198).

The Banking Companies (Shares) Act, 1867 (30 Vict. c. 29), generally known as Leeman's Act, by sec. 1 provides that all contracts for sale and purchase of any shares, stock, or other interest in any Joint Stock Banking Company shall be null and void, unless it sets forth such shares, stock, or interest by the numbers by which the same are distinguished on the registers of the companies, or, where there is no such registered numbers, by the names of the persons in whose names they stand in the books of the companies. Every person who wilfully inserts false numbers or names is declared to be guilty of an offence, punishable by fine or imprisonment. Any custom to disregard this Act is both illegal and unreasonable, and a principal will not be bound by any contract entered into in which it is not adhered to, although it may be the custom of the Stock Exchange to disregard it (*Neilson*, 1882, 9 Q. B. D. 546; *Perry*, 1885, 15 Q. B. D. 388; *Harverson*, 1885, 1 S. L. Rev. 303). But this Act does not prevent the implement of a contract entered into in contravention of its terms; and a client who authorises his agent to contract in disregard of it, or who must, on account of his knowledge of the custom, be held to have so authorised, cannot afterwards repudiate his broker's act (*Seymour*, 1885, 14 Q. B. D. 460). It is the duty of the principal when he becomes aware of the nullity of the contract his broker has entered into on his behalf, to repudiate it at once. If in that knowledge he continues the agency and allows the broker to accept the transfer, he is bound by it (*Loring*, 1886, 32 Ch. D. 625).

Customs or rules of a market which merely regulate the mode of performing a contract can be of no effect to decide the rights of parties after its implement. These rights arise independently of any particular market, and are in no respect the result of any special custom or usage in entering into or fulfilling the contract. A rule of the Stock Exchange by which the affairs of a defaulting member are to be administered by members of the Exchange cannot affect the claims or rights of creditors of the bankrupt outside the Exchange (*Tomkins*, 1877, 3 A. C. 213; *ex parte Grant*, 1880, 13 Ch. D. 667). When one broker, not a member of the Stock Exchange, instructs another who is a member, *e.g.* in the case of a country broker instructing a member of the London Stock Exchange, to sell shares belonging to a client, the broker who sells the shares does not properly pay over the price by

crediting the amount to his immediate employer in his account (*Crossley*, [1893] 1 Ch. 594), even although it is averred that such accounting is in accordance with the custom of the Stock Exchange (*Pearson*, 1878, 9 Ch. D. 198). The broker who sells ought to pay over the principal's money, when received, in cash, payment by a cheque which is cashed being of course equivalent to payment in cash (*Crossley, supra*). The decision in *Crossley* is founded upon the privity of contract created between the principal and the sub-agent duly appointed. But no such privity of contract is created when the employing broker assumes towards the broker through whom he executes his commission the position of a principal, not of an agent delegating his authority (*Mackenzie & Aitken*, 1886, 13 R. 494). The rule applies to stockbrokers as to other agents, that a broker cannot, in full knowledge of the facts, retain money due to the client of another broker against a debt due by such other broker (*Matthews*, 1874, 1 R. 1224).

Broker's Obligation.—A stockbroker is not bound to accept every order and execute it; but if he does enter into a contract of agency, he is bound to use reasonable efforts to carry out his undertaking (*Neilson*, 1882, 9 Q. B. D. 546). What may be a reasonable time for executing his commission will be a question of circumstances, depending in large measure on whether there is at the time a market for the commodities in which he is instructed to deal. A client instructed his broker on 14th October to buy certain shares for him. On 15th October the broker informed his client that he had done so. But the shares transferred were not, as matter of fact, purchased until 6th November. It was held that the client was not bound to accept them, as they had not been bought in accordance with the authority given (*Black*, 1853, 15 D. 646). The broker must also make a binding contract on his principal's behalf (*Neilson, supra*), and in accordance with the usual terms of such contracts. But this does not mean that he guarantees the solvency of the other contracting party. He is not even bound to inquire as to the credit of a transferee and his ability to indemnify the transferor for future liabilities in respect of the shares transferred. Nor is it part of the duty of the seller's broker to see to the registration of the transfer: his office is exhausted when he has delivered the transfer to the purchaser's broker and received the price (*Marr*, 1852, 14 D. 467). A stockbroker may have orders from different clients to buy quantities of the same stock or shares, and he may require to buy them in many lots at varying prices; but he must allocate the stock or shares to specific instructions as they are purchased. If he lumps them all together and charges each client an average price, he transforms himself from a broker into a principal, and the result is the same if he does this not in the original bargains but in making a continuation (*Maffett*, 1887, 14 R. 506). Failure to fulfil his obligation will render the broker liable in damages (*Ellis*, [1898] 1 Q. B. 426), but only for those damages which are directly consequent on his default. A broker, instructed to buy, sold his own property to his client, and the client kept it up and then sold it at great loss, and claimed the difference between the price paid and the sum received. It was held that he ought not, on discovering the truth, to have sold the goods, but to have claimed rescission of the contract, and that the damages to which he was entitled were only the difference between what he paid and what he could have got for a resale on the same day, plus commission and incidental expenses (*Waddell*, 1879, 4 Q. B. D. 678). In another case a broker, who had failed to effect a binding contract for the sale of shares, was found liable to pay as damages the price which his client would have got if the contract had been properly carried out

(*Neilson*, 1882, 9 Q. B. D. 546). In this case the client also claimed for the consequences of remaining a member of the company, but his counsel withdrew this part of the claim during the case.

Contract Note.—When a stockbroker has made a contract on behalf of his principal, he renders to his constituent a contract note containing the particulars of the bargain he has made. Failure to do so when the stock or security is of the value of £5 or upwards, or sending a contract note unstamped which ought to be stamped, renders the broker liable to a penalty of £20; and he is deprived of any right to charge commission on the sale or purchase of stock, etc., referred to in any contract note which is not duly stamped (Stamp Act, 1891, 54 & 55 Vict. c. 39, ss. 52, 53). But this does not affect the validity of the contract of agency between the parties, and failure to send a contract note, which is merely an advice note, will not relieve the client from his obligation to pay commission and to repay to the broker money paid out for him (*Learoyd*, [1894] 1 Q. B. 114).

Settling.—Stock or shares may pass through many hands before settling day arrives. When that time comes, the names of sellers and purchasers pass from hand to hand until the ultimate vendor and vendee are brought together. When that is done, it is customary for the buyer to prepare the transfer. Privity of contract is established between the transferor and transferee (*Hodgkinson*, 1868, L. R. 6 Eq. 496; *Hawkins*, 1868, L. R. 6 Eq. 505); and on acceptance of the transfer and payment of the price, intermediate parties are released, and are no longer liable in any way on the contract (*Coles*, 1868, L. R. 4 Ch. 3; *Grissell*, 1868, L. R. 4 C. P. 36; *Maxted*, 2nd action, 1871, L. R. 6 Ex. 132; *Bowring*, 1871, L. R. 6 Q. B. 309; *Loring*, 1886, 32 Ch. D. 625). The obligation of a jobber towards the vendor is either to take the shares himself or to give the name of an unobjectionable person willing or bound by contract to take them (*Allen*, 1870, L. R. 5 Q. B. 478; *Maxted*, 2nd action, *supra*; *Nickalls*, 1875, 7 E. & I. Ap. 530). When he has done the latter, he cannot be made liable to indemnify the vendor for future claims, *e.g.* for calls which he is required to pay owing to his name remaining on the register (*Coles*, *supra*; *Grissell*, *supra*; *Maxted*, 1st action, 1869, L. R. 4 Ex. 81; 2nd action, *supra*), unless he has guaranteed registration or undertaken an additional obligation which renders him so liable (*Cruse*, 1869, L. R. 4 Ch. 441). The purchaser takes all benefit which may accrue from the ownership of the shares after the date of purchase, and he must also take all the risk their ownership may carry with it. He must therefore indemnify the seller from any liability arising therefrom (*Evans*, 1867, L. R. 5 Eq. 9; cf. *Paine*, 1868, L. R. 3 Ch. 388; *Davis*, 1869, L. R. 4 Ex. 373), and he cannot escape this burden by taking the transfer in the name of another person. Such person will be considered a trustee for the real purchaser, and the transferor will not lose his indemnity by the nominal transferee being a man of straw (*Castellan*, 1870, L. R. 10 Eq. 47; *Brown*, 1873, L. R. 8 Ch. 939). If a contract made for the next settling day is not then carried out, the broker has no implied authority to continue. The mere purchase does not entitle the buyer nor bind the seller to agree that there shall be a carry-over; and the broker must have special authority to do so (*Newton*, 1884, 11 R. 554; *Maxted*, 1st action, 1889, L. R. 4 Ex. 81).

Broker's Rights.—If the principal does not implement the contract his broker has made on his behalf, the rules of the Stock Exchange, which lay upon its members an unusual liability, confer on them peculiar privileges. As a member of the Stock Exchange the broker is the only person towards whom his fellow-members look for implement. The first duty of the principal is therefore to indemnify his agent for all reasonable obligations undertaken

on his account (*Loreay*, 1886, 32 Ch. D. 625), and not contrary to instructions (*Ellis*, [1898] 1 Q. B. 426). If a transfer of shares in a company is rendered null unless the Court order otherwise, but is not absolutely void, and the purchaser's broker has, in accordance with Stock Exchange rules, accepted the transfer and paid the price, his client is bound to repay him without any decision of the Court as to the admission of the transfer (*Chapman, Whitehead*, 1867, L. R. 2 C. P. 228; see also *Biederman*, 1867, L. R. 2 C. P. 504). This right of indemnity is all the more necessary when the liability is incurred owing to the misrepresentation or concealment of the principal. A principal instructed his broker to sell certain particular shares, but failed to disclose the material fact that the shares were on the colonial list and not on the home list, shares on the colonial list not being saleable. In consequence of this concealment the broker had to go into the market and buy shares on the home list to fulfil the contract he had made; and the principal was held bound to relieve the broker (*Mackenzie*, 1879, 6 R. 1329). When a broker has purchased stock or shares for a client, and either become personally liable for the price or has actually paid it, he may, on the client's insolvency or death, or on it becoming in any other way manifest that he cannot be depended upon for payment of the price, sell out and close the account (*Lacey* (*Scrimgeour's* claim), 1873, L. R. 8 Ch. 921; *Lacey* (*Crowley's* claim), 1874, L. R. 18 Eq. 182; *Drummond*, 1852, 14 D. 611). Insolvency in this matter means inability to pay ordinary commercial debts (*Drummond*, *supra*; *Lacey* (*Crowley's* claim), *supra*). And this power may be exercised by the broker on failure by his client to pay differences at once in the case of a carry-over (*Lacey* (*Crowley's* claim), *supra*; *Davis & Co.*, 1890, 24 Q. B. D. 691). If the broker has been induced to accept the agency and make contracts for his principal by the latter's misrepresentation of his position, he may, on becoming aware of the facts, sell his client's stock in his hands and close the account (*Risk*, 1881, 8 R. 729). But a principal is liable only for results consequent directly from his own defections; he cannot be made liable to indemnify the broker for the consequences of his own default (*Duncan*, 1873, L. R. 8 Ex. 242; *Ellis*, [1898] 1 Q. B. 426). If his failure to pay differences at settling day result in his broker's subsequent bankruptcy, and according to the rules of the Stock Exchange the defaulter's accounts are all closed, the principal will not be rendered liable for differences as at the date of closing the accounts, that event being due to the broker's default (*Duncan*, *supra*; and see *Ellis*, *supra*, per A. L. Smith, L. J., p. 438). If the broker becomes a defaulter and has all his accounts closed before settling day, his constituent may repudiate the agency. If, on the other hand, he elects to ratify the closing of the accounts and accept the prices in order to hold for settling day, he becomes liable for the amount due at the date of closing accounts (*Hartas*, 1889, 22 Q. B. D. 254). If the broker, before settling day, wrongfully sell what he has bought for his principal for delivery and payment on settling day, the principal cannot be made liable to indemnify the broker for differences paid by him (*Ellis*, *supra*).

[Brodhurst on the *Stock Exchange*.]

See BROKER; FRAUD; GAMING AND BETTING; LIEN; NEGOTIABLE SECURITIES; PRINCIPAL AND AGENT.

Stoppage *in transitu*.—The right of stoppage *in transitu* is the right of the unpaid seller of goods, on the insolvency of the buyer, to resume possession of them so long as they are in course of transit, and to retain them until payment or tender of the price (56 & 57 Vict. c. 71, ss. 39 and 44; cf. Bell, *Com.* i. 223).

An older rule of Scots law allowed the seller, on the buyer becoming insolvent within a short time—ultimately restricted to three days—after delivery, to recover possession of the goods, on the ground of presumed fraud (*Prince* v. *Pallat*, 1680, Mor. 4932; *Inglis* v. *Royal Bank* (*Carr's* case), 1736, Mor. 4936; Bell, *Com.* i. 225). The modern doctrine of stoppage *in transitu*, which superseded this, was introduced from English law, into which it had been adopted from the general law merchant, on grounds of equity (*Gibson* v. *Carruthers*, 1841, 8 M. & W. 336, per Ld. Abinger, for history of the doctrine). It was first applied in a Scots case by the House of Lords in 1790 (*Allan, Steuart, & Co.* v. *Stein*, 1788, Mor. 4949; *sub nom. Jaffrey* v. *Allan, Steuart, & Co.*, 1790, 3 Pat. 191). Many of the earlier Scots cases are confused by the influence of the older rule.

In effect, the rule extends the unpaid seller's lien on the goods for their price. The right of stoppage arises only when the seller has parted with the possession of the goods, and thereby lost his lien. It differs from the lien, in depending on the buyer's insolvency. Both rights imply that the property has passed to the buyer. Until then, stoppage is unnecessary, because the goods are still the seller's own at common law, and because by statute, since the Sale of Goods Act, 1893, "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 coextensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer" (56 & 57 Vict. c. 71, s. 39 (2); cf. *Black*, 1867, 6 M. 136, per Ld. Pres. Inglis, at p. 140; *Fraser*, 1868, L. R. 7 Eq. 64, per Romilly, M. R., at p. 70; Benjamin, *Sale*, 853).

Conditions.—The rules of stoppage *in transitu* have been codified by the Act just mentioned (56 & 57 Vict. c. 71, ss. 39 and 44–48). The conditions of the exercise of the right are: (1) The buyer must be insolvent; (2) the seller must be unpaid; (3) the goods must be in course of transit.

1. *Insolvent Buyer.*—The buyer is insolvent for this purpose when he "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" (s. 62 (3); Bell, *Com.* i. 242; *The Tigress*, 1863, 32 L. J. Ad. 97, at p. 101; *Schotsmans*, 1865, L. R. 1 Eq. 349, per Romilly, M. R., at p. 360; revd., on another point, 1867, L. R. 2 Ch. 332). It has been held sufficient that the buyer is insolvent before the end of the transit, although not so when notice of stoppage is given (*The Constantia*, 1807, 6 Rob. A. 321, per Ld. Stowell, 326; *Virtue*, 1814, 4 Camp. 31; *Dixon* v. *Yates*, 1833, 5 B. & Ad. 313). The seller has been said to be liable to indemnify the buyer if he stops when the latter is not insolvent (*The Constantia*, 1807, 6 Rob. A. 321, at p. 326).

2. *Unpaid Seller.*—The term "seller," in the sense of this rule, "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" (s. 38 (2); *Morison*, 1824, 2 Bing. 260; *Adamson, Howie, & Co.*, 1868, 6 M. 347; Bell, *Com.* i. 245). The right has been held to belong to a principal consigning goods to a factor for sale (*Kinloch*, 1790, 3 T. R. 119, 783); to a person consigning goods for sale on a joint account with the consignee (*Newsom*, 1805, 6 East, 17); an agent consigning to a foreign principal goods which he has purchased on his own credit, the relation between the parties being that of buyer and seller (*Feise*, 1802, 3 East, 93, per Lawrence, J., at p. 101; *Ireland*, 1872, L. R. 5 H. L. 395, per Blackburn,

L. at p. 409; *ex parte Bowker*, 1876, L. R. 2 Ch. D. 278, per Mellish, L. J., at p. 287; *ex parte Miles*, 1885, 15 Q. B. D. 39, per Brett, M. R., at p. 42; cf. Benjamin, *Sale*, 844). The right is not excluded by the fact that the "seller" has only an interest under a contract to deliver the goods (*Jenkins*, 1844, 7 Man. & G. 678); or that he is a partner of the consignee (*ex parte Cooper*, 1879, L. R. 11 Ch. D. 68). The right, however, arises from the consignor possessing the character of a seller, and not from his having had a lien on the goods (*Sweet*, 1800, 1 East, 4). Nor apparently does it belong to a mere cautioner for the price (*Siffken*, 1805, 6 East, 371; *Loeum*, 1842, 4 D. 1452).

An agent of the seller, authorised to act for his principal, may stop in the name of the latter (*Whitehead*, 1842, 9 M. & W. 518, per Parke, B., 533). This is not expressly authorised by the statute, but was previously recognised as effectual, and the statute provides that the rules relating to principal and agent shall continue to apply to contracts for the sale of goods (s. 61 (2)). In the absence, however, of antecedent authority, a subsequent ratification by the principal does not validate the agent's stoppage unless made before the goods actually reach the buyer's possession (*The Tigress*, 1863, 32 L. J. Ad. 97; *Morison*, 1824, 2 Bing. 260; *Bird*, 1850, 4 Ex. 786; *Hutchings*, 1863, 1 Moo. P. C. N. S. 243).

The seller is "unpaid," "(*a*) when the whole of the price has not been paid or tendered" (s. 38 (1); *Hodgson*, 1797, 7 T. R. 440); or "(*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" (*ib.*). Thus the right is not excluded by the seller holding bills accepted by the buyer (*Feise*, 1802, 3 East, 93; *Dixon*, 1833, 5 B. & Ad. 313; *Edwards*, 1837, 2 M. & W. 375), even though these have not matured, and have been discounted (*Kinloch*, 1790, 3 T. R. 119, at 122, 783; *Patten*, 1816, 5 M. & S. 350; *Gunn*, 1875, L. R. 10 Ch. 491, per Mellish, L. J., 501; but see *Bunney*, 1833, 4 B. & Ad. 568). It is otherwise where bills have been received by the seller in absolute payment, and not conditionally on their being met when due, *e.g.* where bills are taken in preference to money (see cases collected, Benjamin, *Sale*, 734). A seller holding goods belonging to the buyer has been held entitled to stop even while the balance of accounting between them was uncertain (*Woods*, 1825, 7 D. & R. 126; see also *Patten*, 1816, 5 M. & S. 350; contrast *Vertue*, 1814, 4 Camp. 31; and see Benjamin on the last case, *Sale*, 849–50).

Where the contract and the price are apportionable, the right of stoppage is excluded as regards a portion of the goods for which payment has been made (*Merchant Banking Co.*, 1877, L. R. 5 Ch. D. 205; cf. *ex parte Chalmers*, 1873, L. R. 8 Ch. App. 289).

3. *Duration of Transit.*—The goods must be in course of transit, *i.e.* "in the custody of some third person intermediate between the seller who has parted with, and the buyer who has not yet acquired, actual possession" (per Ld. Cranworth in *Gibson* v. *Carruthers*, 1841, 8 M. & W. 328, at p. 336). The transit may be of any kind, by land or water. It is not necessary that the goods should be in motion, provided they are in some place of deposit connected with their transmission. Nor is it necessary that they should be still in the hands of the person to whom the seller intrusted them for carriage, provided they are in the hands of a carrier who holds them as such (*Bethell* v. *Clark*, 1888, L. R. 20 Q. B. D. 615, at 619; *Lyons* v. *Hoffnung*, 1890, L. R. 15 App. Ca. 391).

The transit ends when the goods pass into the actual possession of the

buyer, or his constructive possession through an agent whose duty it is to receive them on his behalf. The possession by a trustee in bankruptcy is equivalent to that of the buyer himself (*Ellis*, 1789, 3 T. R. 464).

"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" (s. 45 (1)). The difficulty is generally to determine whether the transit has ended, and this in most cases is a question of fact and intention (*Schotsmans*, 1867, L. R. 2 Ch. 332, per Ld. Chelmsford, 337; *Merchant Banking Co.*, 1877, L. R. 5 Ch. D. 205, per Jessel, M. R., 219).

The transit ends with delivery of the goods, at the place agreed on, into the hands of persons who are to hold them for the buyer and subject to his orders, *e.g.* in a warehouse where goods are kept for him, or one commonly used by him as his own (*Scott*, 1803, 3 B. & P. 469; *Rowe*, 1817, 8 Taun. 83; *James*, 1837, 2 M. & W. 623, per Parke, B., 633; *Dodson*, 1842, 4 Man. & G. 1080; cf. Smith, *Leading Cases*, 727, and cases there). The delivery may be in a warehouse which belongs to the carrier (*Rowe*, *supra*) or even to the seller, if it is clear, *e.g.* from the payment of rent, that he holds for the buyer (*Harry*, 1808, 1 Camp. 452). Mere arrival at the place agreed on does not end the transit. Actual possession must be taken by or for the buyer (*Crawshay*, 1823, 1 B. & C. 181; *Tucker*, 1828, 4 Bing. 516; *Fraser*, 1868, L. R. 7 Eq. 64; *ex parte Barrow*, 1877, L. R. 6 Ch. D. 783; *Kemp* v. *Falk*, 1882, 7 App. Ca. 573, per Ld. Fitzgerald, 588; cf. *ex parte Miles*, 1885, L. R. 15 Q. B. D. 39, per Ld. Esher, M. R., 43). And it must be taken for him as owner, and not for some purpose such as the temporary protection of the seller's rights (*James*, 1837, 2 M. & W. 623; *Hutchings*, 1863, 9 L. T. N. S. 125; *Booker & Co.*, 1870, 9 M. 314).

Similarly, the transit is ended by the carrier becoming an agent for the buyer, for the purpose not of transmitting but of keeping the goods. Thus, "if after the arrival of the goods at the appointed destination, the carrier . . . 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" (s. 45 (3)). To produce this result a new and distinct agreement is required (*Whitehead*, 1842, 9 M. & W. 518, per Parke, B., at 535; *Bolton*, 1866, L. R. 1 C. P. 431; *ex parte Gouda*, 1872, 20 W. R. 981; *ex parte Barrow*, 1877, L. R. 6 Ch. D. 783; *ex parte Cooper*, 1879, L. R. 11 Ch. D. 68). Mere intention on the part of the carrier (*Edwards*, 1837, 2 M. & W. 375; *James*, 1837, *ib.* 623), or mere demand by the buyer, is insufficient (*Jackson*, 1839, 5 Bing. N. C. 508; *Coventry*, 1868, L. R. 6 Eq. 44; *Kemp* v. *Falk*, 1882, 7 App. Ca. 573, at 584). The agreement may, however, be inferred from a course of dealing, as where the carrier has been in the habit of storing goods for the buyer, and holding them subject to his orders (*Wentworth*, 1842, 10 M. & W. 436; *Allan*, 1832, 2 C. & J. 218; *Rowe*, 1817, 8 Taun. 83; see *Black*, 1828, 6 S. 896—a decision which can hardly be supported). This change in the relations of the parties is not incompatible with the subsistence of the carrier's lien for freight (*Allan*, *supra*; *Kemp* v. *Falk*, *supra*, at 584). Such acts as marking or sampling the goods, though with intent to take possession, probably do not amount to constructive possession by the carrier as the buyer's agent "unless accompanied with such circumstances as to denote that the carrier was intended to keep, and assented to keep, the goods in the nature of an agent for custody" (*White-*

Ward, 1842, 9 M. & W. 518, per Parke, B., 535; *Foster* v. *Frampton*, 1826, 6 B. & C. 107; cf. *Ellis* v. *Hunt*, 1789, 3 T. R. 464; *Cooper*, 1865, 3 H. & C. 722).

The transit does not, as a rule, end before the destination appointed has been reached, or until such time as may have been agreed on for its termination (*ex parte Watson*, 1877, L. R. 5 Ch. D. 35; *Coates* v. *Railton*, 1827, 6 B. & C. 422, per Bayley, J., at 425, and cases there; cf. *Kendal*, 1883, 11 Q. B. D. 356, at 367 and 369; *M'Leod* v. *Harrison*, 1880, 8 R. 227). "If," however, "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" (s. 45 (2)); *Kendal*, *supra*; *Bethell*, 1887, 19 Q. B. D. 553, per Cave, J., at 561). It appears, therefore, that the buyer may end the transit by taking possession at any place on which he and the carrier may have agreed (*L. & N.-W. Ry. Co.*, 1861, 7 H. & N. 400). The carrier's consent would seem to be necessary (*Whitehead*, 1842, 9 M. & W. 518, per Parke, B., 534; but see Benjamin, 878–9; cf. *Bird* v. *Brown*, 1850, 4 Ex. 786; *Litt*, 1816, 7 Taun. 169; *Loeschman*, 1815, 4 Camp. 181. See also sec. 61 (2)).

Delivery to the buyer's servant, *e.g.* to the master of a ship belonging to him, is delivery to the buyer himself, and so ends the transit. In such a case, the seller can preserve his right by taking the bills of lading so as to make the goods deliverable to his order, or otherwise to indicate that the master is to be the buyer's agent for carriage only, and not for the receipt of the goods (*Van Casteel*, 1848, 2 Ex. 691; *Turner*, 1851, 6 Ex. 543; see *Schotsmans*, 1867, L. R. 2 Ch. 332). The mere fact, however, that the carrier is named or employed by the buyer does not make him the agent of the latter so as to exclude stoppage; and this is so even where the ship has been expressly sent by the buyer to convey the goods (Benjamin, 854, and cases there; *Merchant Banking Co.*, 1877, L. R. 5 Ch. D. 205; *Schotsmans*, *supra*; *Van Casteel*, *supra*; *Bethell*, 1887, L. R. 19 Q. B. D. 553; 1888, L. R. 20 Q. B. D. 615; cf. *Cowasjee*, 1845, 5 Moo. P. C. 165; *M'Leod*, 1880, 8 R. 227; *ex parte Rosevear China Clay Co.*, 1879, 11 Ch. D. 560, at 568 and 571; *Berndtson*, 1867, L. R. 4 Eq. 481, per Ld. Hatherley, at 490). And "where 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" (s. 45 (5)). The question is one of intention, and depends chiefly on the nature of the charter-party. If that amounts to a "demise" of the ship, so that the buyer has complete control and the master is his servant, the transit usually ends with delivery on board. If the buyer has hired only the use of the vessel—even the exclusive use—the transit ends with delivery at the end of the voyage unless a contrary intention clearly appears (Benjamin, 856; *Buckler*, 1803, 3 East, 381, at 396; *Fowler*, 1 East, 522; *Berndtson*, 1867, L. R. 4 Eq. 481; *ex parte Rosevear China Clay Co.*, 1879, L. R. 11 Ch. D. 560; *Bethell*, 1888, L. R. 20 Q. B. D. 615; see also *Baxter*, 1807, Hume, 688; *Drake*, 1809, Hume, 691; *Nash*, 1807, Hume, 693).

A similar test has generally been applied in cases where the destination of the goods is to be reached by more than one stage, or where they are delivered to an agent for the purpose of being forwarded to the buyer. The question often arises whether the further transmission is a part of the original transit as between seller and buyer, or is a new journey with which the seller has no concern. The following statement seems still to express the leading rule of law: "Where the transit is a transit which has been caused either by the terms of the contract, or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists;

but if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit" (*Bethell*, 1888, L. R. 20 Q. B. D. 615, per Ld. Esher, M. R., at 617; see also *Coates*, 1827, 6 B. & C. 422, at 427; *Rodger*, 1869, L. R. 2 P. C. 393; *ex parte Watson*, 1877, 5 Ch. D. 35, discussed in *ex parte Miles*, 1885, L. R. 15 Q. B. D. 39, at 46-47; *Lyons* v. *Hoffnung*, 1890, 15 App. Ca. 391; *Dixon*, 1804, 5 East, 175; *Rowe*, 1817, 8 Taun. 83; *Valpy* v. *Gibson*, 1847, 4 C. B. 837; *ex parte Gibbes*, 1875, L. R. 1 Ch. D. 101; *ex parte Barrow*, 1881, L. R. 6 Ch. D. 783; *Kendal* v. *Marshall*, 1883, L. R. 11 Q. B. D. 356, per Bowen, L. J., 369; *Morton*, 1850, 20 D. 362; *Cowdenbeath Coal Co.*, 1895, 22 R. 682; *Wright*, 1871, 9 M. 516). It is immaterial whether the destination is communicated at the time of the contract for the sale, or is indicated later, but before shipment (*ex parte Rosevear China Clay Co.*, 1879, L. R. 11 Ch. D. 560, per Brett, L. J., at p. 569).

Wrongful refusal by the carrier to deliver does not prolong the transit. "Where the carrier . . . wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end" (s. 45 (6); *Bohtlingk*, 1803, 3 East, 381, at 394; *Cowasjee*, 1845, 5 Moo. P. C. 165, at 175; *Bird* v. *Brown*, 1850, 4 Ex. 786, at 797).

"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" (s. 45 (7); cf. sec. 42 as to lien). The question is therefore one of intention, and the presumption seems to be against actual delivery of part operating as constructive delivery of the whole, especially where the goods are clearly divisible (*Melrose*, 1851, 13 D. 880, 14 D. 268; *ex parte Cooper*, 1879, L. R. 11 Ch. D. 68, and earlier cases discussed there; *Kemp* v. *Falk*, 1882, L. R. 7 App. Ca. 573, per Ld. Blackburn, at 586; cf. *Bolton*, 1866, L. R. 1 C. P. 431, at 440; *ex parte Gibbes*, 1875, L. R. 1 Ch. D. 101, at 109). It has been suggested that where the goods form an integral whole, such as a piece of machinery, the delivery of an essential part may exclude stoppage of what remains (*ex parte Cooper*, *supra*, per Cotton, L. J., 75; cf. *Girdwood*, 1827, 5 S. 507). An agreement to give up possession of the whole is less easily inferred where the freight has not been paid, since the carrier is not readily supposed to have abandoned his lien by parting with the goods (*ex parte Cooper*, *supra*; *Collins*, 1804, Mor. 14223).

"If the goods are rejected by the buyer, and the carrier . . . 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" (s. 45 (4); *Bolton*, 1866, L. R. 1 C. P. 431). This provision seems to embody the view taken in England, where rejection by the seller has been regarded as part of the doctrine of stoppage *in transitu*. In Scotland, hitherto, a distinction has been drawn, and, apart from stoppage, the buyer's duty, on finding himself unable to pay for the goods, was to reject them, or give notice to the seller and retain them only for custody (*Drake*, 1807, Hume, 691; cf. *Brown*,

1816, Hume, 709; *Inglis*, 1842, 4 D. 478; *Booker & Co.*, 1870, 9 M. 314; see Gourlay, *Bankruptcy*, 293).

Where the transit has once terminated, it does not begin again on the goods coming for any purpose into the hands of the vendor (*Valpy* v. *Gibson*, 1847, 4 C. B. 837).

Method of Exercising the Right.—"The unpaid seller may exercise his right of stoppage *in transitu* 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" (s. 46 (1)). No special form of notice seems to be required. An interdict against the carrier delivering used to be common in Scotland, and is still resorted to (Bell, *Com.* i. 248; *Stoppel*, 1850, 13 D. 61, per Ld. Pres. Boyle, at p. 68; *Morton*, 1858, 20 D. 362; cf. *Booker & Co.*, 1870, 9 M. 314). But interdict against the purchaser receiving delivery was probably, even before the Act, insufficient, without notice to the carrier (*Booker & Co.*, *supra*, per Ld. Ardmillan at 321.

An informal notice, *e.g.* a mere verbal intimation, has been held sufficient (*Robertson* v. *More*, 1801, Mor. App. "Sale," No. 3); and so also has a demand for the bills of lading from the shipowner, who happened to be in possession of them (*ex parte Watson*, 1877, 5 Ch. D. 35). But some form of notice is necessary, asserting the intention to exercise the right (Bell, i. 250; *Lawson*, 1842, 4 D. 1452, per Ld. J.-Cl. Hope, 1457). In spite of some earlier views to the contrary, the mere fact of the buyer's insolvency does not operate a stoppage (see, *e.g.*, Bell, *Com.* i. 248; *Schurmans & Sons*, 1828, 6 S. 1110; *Allan, Steuart, & Co.*, 3 Pat. 191, at 196). This view seems to be clearly implied in the Act, and has long been settled law in England.

The notice is usually given to the person in actual possession of the goods (*Litt*, 1816, 7 Taun. 169; *Whitehead*, 1842, 9 M. & W. 518; *Bethell*, 1887, L. R. 19 Q. B. D. 553; 1888, L. R. 20 Q. B. D. 615). If given to the principal, "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" (s. 46 (1); *Whitehead*, *supra*, per Parke, B., 534). It was formerly held to be necessary that the notice should actually reach the person in possession (*Whitehead*, *supra*; *Kemp* v. *Falk*, 1882, L. R. 7 App. Ca. 573; and see as to duty of principal to transmit, per Ld. Bramwell, at 10 Ch. D. 455, and Ld. Blackburn, at 7 App. Ca. 585).

Notice to the consignee to hold the *proceeds* of the goods for the seller is not an effectual mode of stopping (*Phelps, Stokes, & Co.*, 1885, L. R. 29 Ch. D. 813).

Effect of Stoppage *in transitu*.—"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 redeliver the goods to, or according to the directions of, the seller" (s. 46 (2); *The Tigress*, 1863, 32 L. J. Adm. 97, at pp. 101-2). The effect, therefore, is not only to countermand delivery, but to entitle the seller to resume possession, and, having done so, to retain it until payment or tender of the price (s. 44; cf. *Stoppel*, 1850, 13 D. 61, per Ld. Mackenzie, 69). His right is unaffected by delivery of the goods to the buyer, either by design or by mistake, after notice of stoppage has been given. The right, however, is a right against the goods themselves, whatever their condition may be, and does not entitle the seller to sums obtained under an insurance policy for injury done to them during the transit (*Provincial*, 1868, L. R. 3 Ch. 588).

The exercise of the right of stoppage does not, in general, rescind the contract (*Stoppel*, 1850, 13 D. 61; *Adamson, Howie, & Co.*, 1868, 6 M. 347, at p. 354). The question was formerly much discussed, and some of the earlier cases in both England and Scotland proceed on the negative view (see Smith, *Leading Cases*, i. p. 720). Now, subject to the exceptions below, "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*" (s. 48 (1)). Accordingly, at common law, the seller had no right to resell the goods, at all events if the price had not been paid within the period of credit, where such period was fixed. By statute, "where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer's making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages" (s. 48 (4)). Further, "where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods, and recover from the original buyer damages for any loss occasioned by his breach of contract" (s. 48 (3); *Page*, 1866, L. R. 1 P. C. 127, at p. 145; *ex parte Stapleton*, 1879, 10 Ch. Div. 586). A reasonable time here, as throughout the Act, is a question of fact (s. 56). The purchaser from an unpaid seller who has exercised his right of stoppage *in transitu* and resold the goods, acquires a good title to them as against the original purchaser (s. 48 (2)).

The vendor's right is subject to the carrier's lien for charges in respect of the particular goods, *e.g.* freight, but not to claims which the carrier may have against the buyer merely as owner of these goods, which do not arise out of the contract for their carriage, *e.g.* claims in respect of other goods (*Oppenheim*, 1802, 3 B. & P. 42; *Richardson* v. *Goss*, 1802, 3 B. & P. 119). Nor is it subject to diligence gone against the goods by the buyer's creditors during the transit (*Smith* v. *Goss*, 1808, 1 Camp. 282; *Neish*, 1807, Hume, 693; *Dunlop*, 22 Feb. 1814, F. C.).

Exclusion of the Right of Stoppage.—The right is one which arises "by implication of law," and accordingly "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" (s. 55). Thus a seller, by agreeing, while the goods were *in transitu*, to rank for their price in a composition arrangement by the buyer, was held to have waived his right to stop (*Nichols*, 1831, 5 C. & P. 179).

The right of the unpaid seller is a right against the goods themselves, and in general is unaffected by any dealings between the insolvent buyer and persons deriving right from him. "Subject to the provisions of this Act, the unpaid seller's right of . . . 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" (s. 47; *Kemp* v. *Falk*, 1880, L. R. 14 Ch. D. 446; 1882, 7 App. Ca. 573, per Ld. Selborne, 578, and Ld. Blackburn, 582; cf. *Smith* v. *Goss*, 1808, 1 Camp. 282. See Carver, *Carriage by Sea*, 536 *sqq.*, for a discussion of this subject prior to the Act).

This rule suffers exception in the case of the indorsement and transfer of documents of title to the goods, *e.g.* a bill of lading. Such a transfer operates symbolical delivery of the goods themselves, and this, according to the intention of the parties, may either pass to the transferee the absolute property in the goods, or give him a right of security over them (Bell, *Com.* i. 214, M'Laren's note; *Saunders* v. *M'Lean*, 1883, L. R. 11 Q. B. D. 327, per Bowen, L. J., 341; *Sewell* v. *Burdick*, 1884, L. R. 10 App. Ca. 74). See

Bill of Lading. "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 . . . 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 . . . stoppage *in transitu* can only be exercised subject to the rights of the transferee" (s. 47). In the former case, the provision embodies the rule of *Lickbarrow* v. *Mason* (1794, Smith, *Leading Cases*, i. 674). In the latter, the right of the seller remains, but subject to a charge in favour of the transferee. When, however, that charge has been paid off, the seller who has exercised his right of stoppage stands in the same position as if no such transfer had been made (*in re Westzinthus*, 1833, 5 B. & Ad. 817; *Spalding*, 1843, 6 Beav. 376; *Kemp* v. *Falk*, 1880, L. R. 14 Ch. D. 446; 1882, 7 App. Ca. 573; cf. *ex parte Golding, Davis, & Co.*, 1880, 13 Ch. D. 628).

Thus, where the bill of lading has been transferred in security, the seller may still stop the goods on payment of the debt so secured, and his right remains to the effect of entitling him to any surplus of the proceeds after satisfying the creditor to whom the security has been granted (*in re Westzinthus*, *supra*; *Spalding*, *supra*). Whether the same principle applies in the case of a sub-sale, so as to entitle the original seller to recover a balance of the price due by the sub-purchaser, is an unsettled question (*ex parte Golding, Davis, & Co.*, 1880, 13 Ch. D. 628; *Kemp* v. *Falk*, *supra*; cf. Benjamin, *Sale*, 893 *sqq.*). The creditor secured by the transfer of a bill of lading and holding other securities for his debt, is in Scotland a catholic creditor, and as such is bound, in realising his securities, to respect the rights of the unpaid seller who has stopped *in transitu* (cf. *ex parte Alston*, 1868, L. R. 4 Ch. 168; see Bell, *Com.* ii. 418); and where the bill of lading was transferred in security of a specific debt, he is not at liberty to retain the goods, in a question with the seller, for a general balance due to him by the purchaser (*Spalding*, *supra*).

A "document of title" in the above provision has the same meaning as in the Factors Acts (52 & 53 Vict. c. 45, s. 1 (4)), and includes dock warrants, delivery-orders, etc. See Factors Acts and Documents of Title. The provision in the Sale of Goods Act practically re-enacts sec. 10 of the Factors Act, 1889 (extended to Scotland by 53 & 54 Vict. c. 40), and the result is, in effect, to put "documents of title" as there defined on the same footing as bills of lading.

To exclude either in whole or in part the right of stoppage, the transfer must be made by a person to whom the document of title has been lawfully transferred, and made in good faith for valuable consideration. A person with no title to the goods can create no right which is effectual against that of the seller (*Dracachi*, 1868, L. R. 3 C. P. 190; *Coventry*, 1867, L. R. 4 Eq. 493). A thing is done in good faith "when it is in fact done honestly, whether it be done negligently or not" (s. 62 (2); *Pease*, 1863, L. R. 1 P. C. 219). It is not enough, to prevent the exclusion of the right of stoppage, that the transferee knows that the goods have not been paid for (*Cumming*, 1808, 9 East, 506; *Salomons*, 1788, 2 T. R. 674). It is otherwise if he is also aware of the buyer's insolvency (*Cumming* v. *Brown*, *supra*; see also *National Bank* v. *Morris*, [1892] App. Ca. 287).

In Scotland an indorsement of a bill of lading to a creditor in security of a prior debt may be reducible, as a fraudulent preference, at common law, and under the Act 1696, c. 5 (*Stoppel*, 1850, 13 D. 61; *Adamson*,

Howie, & Co., 1868, 6 M. 347). The rule is apparently different in England. To entitle the seller to reduce, he must show that he exercised his right of stoppage before possession was taken by the buyer or anyone in his right under the bill of lading, and he must prove fraud on the part of the indorser and indorsee (*Adamson, Howie & Co., supra.*

[Bell, *Com.* M'Laren's ed., i. 223 *sqq.*; Blackburn, *Sale*, 2nd ed., 311; Benjamin, *Sale*, 4th ed., 841; Abbott, *Shipping*, 13th ed., 669; Carver, *Carriage by Sea*, 2nd ed., 507; Smith, *Leading Cases*, 10th ed., 719; Scrutton, *Charter-Parties*, 3rd ed., 138; Chalmers, *Sale of Goods Act*, 78; Brown, *Sale of Goods Act*, 201; Goudy, *Bankruptcy*, 2nd ed., 287.]

Stouthrief.—According to Hume, this is a generic term for "every sort of masterful theft or depredation" (Hume, i. 104). The presence of persons in custody of the property is essential for the constitution of this offence. Housebreaking, where there is nobody in the house, or where the inmates are asleep or unaware of the presence of the thieves, is not stouthrief. It is doubtful whether there is any real difference between stouthrief and robbery, and the former term, though the older of the two, is now never used. This matter is discussed under the article Robbery.

Straightening of Marches.—By the Act 1669, c. 17, "anent inclosing of ground" (ratified by the Act 1685, c. 39), it is provided: "That whensoever any person intends to inclose by a dike or ditch upon the march betwixt his lands and the lands belonging to other heritors contiguous thereunto, it shall be leisom to him to require the next sheriffs or bailiffs of regalities, stewarts of stewartries, justices of peace or other judges ordinar, to visit the marches along which the said dike or ditch is to be drawn, who are hereby authorised when the said marches are uneven or otherwise incapable of ditch or dike, to adjudge such parts of the one or the other heritor's ground as occasion the inconvenience betwixt them, from the one heritor in favour of the other, so as may be least to the prejudice of either party, and the dike or ditch to be made to be in all time thereafter the common march betwixt them; and the parts so adjudged *respective* from the one to the other being estimat to the just avail and compensed *pro tanto*, to decern what remains uncompensed of the price to the party to whom the same is wanting; and it is hereby declared that the parts thus adjudged *hinc inde* shall remain and abide with the lands or tennandries to which they are *respective* adjudged, as parts and pendicles thereof in all time coming."

This statute has been of great use; but the reported cases are few, as it has never been definitely decided whether the judgment of the Sheriff was subject to review on the merits (see opinion of Ld. Rutherfurd Clark, *E. of Kintore*, 13 R. 997). The following points have, however, been decided, viz.: It is competent to the Sheriff to lay down a longer line of march than the subsisting one, if in his judgment it is more convenient for fencing (*Kintore, cit.*). The procedure laid down in the Act directing the Sheriff to visit the march is imperative, and cannot be dispensed with even by the consent of parties to a remit to a man of skill, although the Sheriff is personally acquainted with the locality (*Ld. Advocate* v. *Sinclair*, 11 M. 137). It is no bar to carrying out the Act that one or both of the contiguous lands are entailed; but the lands added to the entailed lands by excambion fall under the fetters of the existing entail, and money awarded as compensation for entailed lands must be tailzied or employed on land (*Ramsay*, 1702, Mor. 10477). The terms of the Act were not exceeded by adjudging

a piece of land three and a half acres in extent from one heritor to another adjoining (*Peat*, 1754, Mor. 10484). In the case of *E. of Cassillis* (28 Feb. 1809, F. C.) it is laid down that the Act of 1669, c. 17, only applies where the advantage is mutual. This seems reasonable, but the context shows that the Court in that case were in fact referring to another Act (see Ersk. i. 4. 3, and ii. 6. 4, Ld. Ivory's Notes). See MARCHES.

Straw.—The matter of the consumption of the fodder and straw on a farm is generally matter of stipulation between landlord and tenant. In the absence of any stipulation, the rights of the tenant in the matter are limited by established rule. See DUNG; STEELBOW; CROP.

Strays.—See WAIFS AND STRAYS.

Streets.—See ROADS AND BRIDGES (vol. x. p. 374).

Subinfeudation.—One of the chief characteristics of the feudal system of land tenure, as it has been developed in Scotland, is that it presents to us a "system of vassalage progressively subordinate, the number of inferior feus being without any defined limit" (Menzies, 519). The king is the ultimate superior of all persons holding land on a feudal tenure, but between him and the lowest vassal there may be an indefinite number of intermediate superiors, for it has always been competent in Scotland for a vassal, unless specially prohibited by the terms of his grant, to feu the whole or part of his lands to others, to be held by them of him as their superior. It is right to state, however, that subinfeudation may have been prohibited in Scotland by a statute of Robert I., 1325, c. 24, similar in its terms to the English statute *Quia Emptores*, 1290, which put a stop to the practice of subinfeudation in that country, but its authenticity is very doubtful, and it is certain that it was never observed (Duff, 143; Menzies, 609; Bell, *Lect.* 682). Prior to 1874 it was competent for a superior, who desired to prevent his vassal sub-feuing the lands, to make it a condition of the grant that he should have no power to sub-feu them (*Campbell*, 1828, 6 S. 679). Such a clause, unless fenced with an irritancy, does not appear to have prevented the vassal granting a sub-feu which would be valid during his life, but on his death his superior might refuse to give his successor an entry, and so the lands being in non-entry, the superior might by obtaining decree of declarator of non-entry destroy the sub-vassal's right (Bell, *Com.* i. 29; Bell, *Pr.* s. 866). It did not prevent the vassal granting a disposition with an *a me vel de me* holding (*Colquhoun*, 1867, 5 M. 773). Prohibitions against subinfeudation made prior to the commencement of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), will still be given effect to, but any made subsequent to that date are invalid, for it is provided by sec. 22 of that Act that all conditions made after its commencement, "to the effect that it shall not be lawful to the proprietor of lands to sub-feu the same to be holden of himself as immediate lawful superior thereof . . . shall, with all irritant clauses applicable thereto, be null and void and not capable of being enforced."

The effect of a vassal transferring his lands on a *de me* holding is to convey the *dominium utile* to the grantee and to leave the *dominium directum* in the granter. A new feudal dependancy is thus created, with the granter as superior and the grantee as vassal. The creation of this new fee makes no difference in the relationship of the granter to his superior. He is still his vassal, liable in all the prestations, and subject to all the

conditions of the grant, and in the event of his not fulfilling them the superior's remedies for enforcing them are unimpaired. In consequence, the position of sub-feuars, who derive their right from the vassal and not from his superior, between whom and the sub-vassals no direct relationship exists, was formerly very precarious. In the event of their author losing his right to the lands through incurring any of the casualties which involved either a permanent forfeiture of the feu, or gave his superior a temporary right to the rents, their rights perished with his, either permanently or temporarily, as the case might be. Confirmation of the sub-feu by the over-superior might, however, be obtained. This had the effect of protecting the sub-vassal against such casualties as involved forfeiture of the feu, by substituting him for his author, as the vassal of the over-superior, in the event of forfeiture being incurred, but it afforded him no protection against such casualties as involved merely a temporary right to the rents (Stair, ii. 3. 28; Ersk. ii. 7. 9; Menzies, 609 and 635; Bell, s. 736). In modern times the position of a sub-feuar has been improved by the abolition of the ancient casualties, but it is still somewhat disadvantageous. It has been decided that if a feu is irritated *ob non solutum canonem*, any sub-feus which have been granted by the vassal will also be annulled (*Sandeman*, 1883, 10 R. 614; rev. 1885, 12 R. H. L. 67, 10 App. Cases, 553; *Cassels*, 1885, 12 R. 722). The sub-feuar, however, can always obviate this result by purging the irritancy at any time before registration of the extract decree in the register of sasines. Sub-feus will not be annulled by irritancy *ob non solutum canonem* if they have been confirmed or consented to by the over-superior (*Knight*, 1846, 8 D. 991; *Sandeman, supra*). Again, a superior has a real security over every portion of the land feued out by him, for payment of his feu-duty. He is therefore not bound to take cognisance of any divisions of the subject which may have been made by his vassal, but may proceed to attach any part of it in order to secure payment of the whole feu-duty; but a sub-vassal who has had to pay more than his share has a right of relief against the other owners of the feu. "There are," said Ld. Pres. Inglis in *Sandeman, supra*, "some principles of the feudal law, as applicable to the rights of superior and vassal, that are now incontrovertible. There is no doubt, for instance, that notwithstanding the granting of a feu-right, the superior remains *dominus* of his estate, and therefore, being creditor in an obligation for payment out of it of a sum of money, which is a *debitum fundi*, he has right to attach any portion of the estate by any real diligence, and, in particular, by an action of poinding of the ground." "A sub-vassal must certainly submit to have his estate carried off by real diligence" (*Blair*, 1682, 2 B. Sup. 13; *Creditors of Eyemouth*, 1757, 5 B. Sup. 556; *Wemyss*, 1836, 14 S. 233; *Little Gilmour*, 1839, 1 D. 403; *Knight, supra*; *Nisbet*, 1876, 3 R. 781; *Sandeman, supra*). The superior, of course, loses his right to come on any sub-vassal for the whole feu-duty if he has consented to an allocation of the duty. His consent is generally given either in the original grant, or by a memorandum in the form of Schedule D of the Conveyancing Act, 1874; less frequently by his concurring in the disposition by the vassal, to the effect of allowing the allocation, or by a charter of *novodamus*. It has been decided that a superior cannot raise a personal action against a sub-vassal for the recovery of the whole feu-duty due by his own vassal, if the amount of sub-feu duty is less than the original feu-duty, but he may bring one limited to the amount of the sub-feu duty, or possibly, if the sub-feu duty is elusory, or very small in proportion to the size of the feu, one limited to the amount of the original feu-duty which corresponds to the extent of the sub-feu (*Hyslop*, 1863, 1

M. 535; *Marquis of Tweeddale's Trs.*, 1880, 7 R. 620; *Sandeman*, 1881, 8 R. 790. Prior to 1874, it seems to have been doubtful whether proprietors of land held burgage could grant feus, and the better opinion seems to be that they could not (Bell, *Pr.* s. 486), but sec. 25 of the Conveyancing Act, 1874, places them in all respects in the same position as those holding by feudal tenure.

Subornation of Perjury—See PERJURY (vol. ix. p. 257).

Subrogation—This right arises in connection with contracts of insurance of property. The contract is treated as one of indemnity, and the insurer as a surety who is entitled to all the remedies of the assured, and to stand in his place. "As between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised, or has accrued, and whether such right could or could not be enforced by the insurer in name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished" (per Ld. Esher, *Castellain*, 1883, L. R. 11 Q. B. D. 380, 388). Consequently, where an insurance company pays for the destruction of the insured property caused by the negligence of a third party, the insurance company may use the name of the insured and sue the wrong-doer for damages (May on *Insurance*, s. 454). And where the insured proceeds, in the first place, against the insurance company and, after obtaining payment of the full amount of his loss, recovers an additional sum from a third party, he holds that sum as trustee for the insurer, and must communicate the benefit to him (*Castellain, supra*; *Darrell*, 1880, L. R. 5 Q. B. D. 560; and see *Caledonian Railway*, 1892, 19 R. 608, and *North British & Mercantile Assurance Co.*, 1877, L. R. 5 Ch. D. 569). It follows from the nature of the right that the insurer can only operate through, or by using the name of, the assured, as there is no privity of contract between the insurer and a third party liable to the insured as a wrong-doer, or liable under another contract (*Simpson*, 1877, L. R. 3 App. Ca. 279).

Subrogation applies, however, only in contracts of indemnity. It has no place in accident and life insurance, which are not contracts of indemnity, and the insured, or his representatives, can recover damages from the wrong-doer who has caused the injury, as well as the full amount of the insurance from the insurer.

[Porter on *Insurance*.]

Subscription of Deeds.—See DEEDS (EXECUTION OF).

Substitute; Substitution.—The person to whom any subject, heritable or moveable, is destined first in the order of succession under a testamentary deed or settlement is called the institute. A person who is to take the subject in the event of the institute not being alive at the date when the succession opens is called a conditional institute. But a person who is appointed to take the property after the institute has taken the property, and died in the possession of it, is called a substitute. We are here concerned with the last of these only, but for the sake of clearness it is necessary to keep the definitions of the former two in mind, as many points in regard

to substitutes can be made clear only by the contrast with conditional institutes. Where a proprietor during his life settles an estate on himself, whom failing on a series of heirs, he is himself the institute, and the heirs called after him take as substitutes. In this case there is no room for conditional institutes, and there is no such thing as conditional substitution. There are so many distinctions between substitution in heritage and substitution in moveables that, for convenience, we shall treat the two branches separately.

1. *Substitution in Heritage.*—One notable distinction between a conditional institute and a substitute in heritage is that the former takes as a disponee, directly under the deed, while the latter must serve himself as heir of provision or obtain a writ of *clare constat* from the superior (M'Laren, *Wills and Succession*, p. 468). Nor is this a purely formal distinction, but one which may ultimately affect the property in the subject. For if a person takes as disponee, a personal right vests in him at once, so that he may dispose of the property by deed although he die without making his right real. But if he succeed as heir, no right of any kind vests in him without service; and if he die without having expede service, his deeds cannot affect the property (*Fogo*, 4 D. 1063, see per Ld. Moncreiff, at p. 1103). In general, in the case of a destination of heritable property, there is a presumption in favour of substitution, which includes the lesser right of conditional institution. An heir substitute called as such in the destination is, so long as the property has not vested in someone called before him, potentially a conditional institute. In the most recent case in which this question was raised Ld. Kinnear said: "Mrs. Geddes is quite clearly a conditional institute, and the condition upon which her right is to arise is the death of all the younger children of [Mrs. Sandys] before attaining twenty-five. All the heirs following her are substitutes to her, or, as in the case of all substitutions, conditionally instituted in her place" (*Sandys*, 25 R. 261, at p. 275; *Tristram*, 22 R. 121, per Ld. Kinnear, p. 128; *Grant's Trs.*, 24 D. 1211; *Fogo*, 4 D. 1063; *Colquhoun*, 9 S. 911). This principle applies equally to destinations in which the institute is called by name and those in which he is called by description (*Hutchison*, 11 M. 229). As an instance of a case in which it was held that there was no substitution (and therefore no room for the application of this doctrine), reference may be made to *Groat*, 21 R. 961.

When heritage is left to a line of heirs in succession, not protected by the fetters of an entail or otherwise, the substitutes, after the property has once vested in an institute, have no more than a *spes successionis* (*q.v.*). That is to say, the person in possession may defeat the substitution by selling or gratuitously disposing of the subject in his lifetime, or by disposing of it testamentarily (Ersk. iii. 8. 44; *Greig*, 6 W. & S. 406; *Baine*, 7 D. 845). It was for long contended that a general testamentary disposition did not defeat a particular substitution, and this is in general true where the general deed and the particular substitution are both granted by the same person. "In such a case both the instruments express the mind and will of the same person—the one as to a particular part, the other as to the generality of his estate. . . . There was nothing, therefore, inconsistent or unreasonable in reading or construing two such instruments together, and treating the general as subordinate to and exclusive of the particular intention—the effect of which was to make the general words residuary in their operation, as they would have been if the particular disposition had been found in the same instrument" (per E. Selborne in *Campbell*, 7 R. (H. L.) 100; *Webster's Trs.*, 4 R. 101; *Glendonwyn*, 11 M. (H. L.) 33; *Farquharson*,

6 Pat. 724). But it is otherwise when the substitution has been made not by the granter of the general disposition but by his author. In that case, unless the contrary be shown to be his intention, a general settlement by one holding under a destination will evacuate the future substitutions in that destination. "No reason can be suggested why a testator should be presumed generally to have more regard for heirs-substitute not of his own making than for his own heir-at-law" (per E. Selborne in *Campbell*, 7 R. (H. L.) 100. *Watson's Trs.*, 21 R. 451; *Gray*, 5 R. 820; *Thoms*, 6 M. 704; *Baine*, 7 D. 845; *Lotel*, 3 W. & S. 366). In the later case of *Philip* (13 R. 329) a property bought subsequent to the execution of a general disposition in favour of his wife "and her assignees, whom failing his whole children," by a testator who took the title in favour of himself "and his heirs and assignees whomsoever," was held carried by the general disposition. But in this as in all other matters relating to the construction of testaments, the true criterion is the intention of the granter (*Gray*, 5 R. 820; *Ramsay*, 1 D. 83, per Ld. Fullerton, Ordinary).

Where the subject conveyed is mixed succession, *i.e.* partly heritable and partly moveable, the presumption is that conditional institution, not substitution, was meant: and, consequently, when an institute once takes the subject, those mentioned after him lose all interest in the subject though he should die intestate (*Henderson*, 20 D. 473; *Allan*, 7 D. 908; *Greig*, 6 W. & S. 406). But here also the intention of the testator prevails.

The description of a substitute or series of substitutes must be clear and unmistakable. If expressed so widely as to be unrecognisable in law, the destination will be of no avail (*M'Gillivray*, 24 D. 759). For the construction to be placed on particular words of substitution, and the extent to which these may be controlled by context, see HEIRS.

2. *Substitution in Moveables.* — Differing from the case of heritable destination, the presumption in destination of moveables is, in the absence of a clear expression of intention, in favour of conditional institution rather than substitution (per Ld. J.-Cl. Inglis in *Sutherland*, 4 M. 105; *Fyffe* 3 D. 1205; *Denholm*, 1726, Mor. 6346; *Greig*, 6 W. & S. 406; *Tait*, 15 S. 1273). But when a substitution is clearly expressed, it, as the greater right, includes conditional institution, just as in the case of heritage (*Aitchison*, 9 S. 454; *Henderson*, 3 D. 548; *Maclean's Trs.*, 16 R. 1095; *Neville*, 23 R. 351; *Sandys*, 25 R. 261).

A person taking under a destination of moveables may defeat the hope of succession (see SPES SUCCESSIONIS) of those substituted to himself in the destination, either gratuitously or onerously (*M'Dowall*, 9 D. 1284; *M'Clymont's Exors.*, 22 R. 411; *Bell's Exor.*, 24 R. 1120, per Ld. Moncreiff, p. 1127). In the case of moveables, no formal step is necessary to defeat the substitution. A change of the investments is sufficient to have this effect (*M'Dowall*, 9 D. 1284). And a substitution may be evacuated simply by the amount of the bequest being paid over to the institute and mixed with her own funds (*Buchanan's Trs.*, 6 M. 536, per Ld. Pres. Inglis, at p. 539). Of course *à fortiori* a general disposition or settlement will evacuate a substitution (*Buchanan's Trs., cit.*). But where the legacy is earmarked, and the legatee does not alter the investment or otherwise mix it with her own funds, the substitution will not be evacuated without an express declaration of intention, as by a general settlement (*M'Dowall*, 9 D. 1284).

Protected destinations, under which the substitution may not be

evacuated gratuitously, are sometimes made in marriage contracts and mutual settlements. These destinations are protected as they rest on contract, and the question to be decided in such cases is what was the contract. In the ordinary case the contract, while prohibiting gratuitous alienations, does not strike at onerous deeds (*Murray*, 22 R. 927; *Smitton*, 2 D. 225; *Turnbull*, 1 W. & S. 80; *Buchanan's Trs.*, 17 R. (H. L.) 53; *Ferguson's Curator Bonis*, 20 R. 835; *Croll's Trs.*, 22 R. 677; *Hagart's Trs.*, 22 R. 625). The doctrine of protected destinations was imported into testamentary provisions in the case of *Lady Massy* (11 M. 173), which was followed in *Gibson's Trs.* (4 R. 1038). But the later cases of *Houston* (5 R. 154) and *Newall's Trs.* (25 R. 1176), somewhat impair the authority of *Lady Massy's* case. But see further, REVOCATION; SUCCESSION; and VESTING.

Succession.—The law of succession is that branch of the law which deals with the transmission of rights upon the death of the person in whom they exist. Apart from certain restrictions imposed by the legal relations of husband and wife, and parent and child, the owner, if of full age and not subject to legal incapacity, is given by the law such control over his property that he can not only use it during his lifetime, but fix what is to be done with it when he has ceased to be capable of holding any right.

According to the institutional writers, succession is governed by the will of the owner, either express or implied: for in the event of his dying without any express direction competently given, his property is divided among his relations on such principles as it is presumed he would have adopted had he made express provision. A simple destination has this effect, that the order of succession pointed out is to be observed so long as no alteration is made by any of the heirs succeeding to the estate; but the heir in possession may alienate the lands or alter the order of succession (Sandford on *Entails*, p. 44).

A man's successors are therefore found either by certain rules clearly established by the common law or by statute; or they are those whom he has himself appointed directly or indirectly; directly if he appoints them by his own deed, indirectly if he allows an order of succession imposed by some predecessor to stand unaltered, or allows some substitute to appoint.

The case of entails of land at one time would have afforded an exception to this statement, but the facilities which the Legislature has introduced for securing disentails seem to have made the proposition of universal application.

Succession may accordingly be divided into succession *provisione legis*, or intestate succession; and succession *provisione hominis*, or testate succession.

It is convenient to notice here that mere words of exheredation will not exclude the legal heir. In order to exclude him, the rights that would have gone to him must be given to someone else. This is well settled in the case of heritage (*Stoddart*, 1734, Elch. *v.* "Succession," No. 1; *Ross*, 1770, Mor. 5019; affd. 1771, 2 Pat. 254; *Ayton*, 1742, Mor. 14935; *Blackwood*, 1833, 11 S. 443; *Sinclair*, 1840, 2 D. 694); and though in *Beisly*, 1739, Mor. 6591, it was held that a testamentary nomination of executors, accompanied by words excluding the next of kin, gave the executors a beneficial interest, it is said by Ld. M'Laren that there is no authority that establishes that the interest of a child in his father's succession can be

taken away by words of mere exclusion, whether in a testament or in a marriage contract (*Wilson*, 1840, 2 D. 1236; *Maitland*, 1843, 6 D. 244; *Robertson*, 1869, 7 M. 1114).

As a succession opens only upon a death,—leaving out of view at present the case of a forfeiture under an entail,—and as a right to succeed depends upon survivance, one of the first questions to be considered under the head of succession is that of the presumption of life.

In this article questions affecting the law of succession are treated under the following heads:—

Presumption of Life, p. 38.
Distinction between Heritage and Moveables, p. 40.
Conversion, p. 42.
Intestate Succession in Heritage, p. 44.
Terce, p. 49.
Courtesy, p. 50.
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Presumption of Life.

At common law a person is presumed, in the absence of contrary proof, to have lived to the extreme period of human life, and that is held to be the end of one hundred years. The presumption ceases entirely at the end of one hundred years. The presumption of life is stronger or weaker during that century according as more or less of the period has elapsed, and according as more or less time has elapsed since the party was heard of (*Carstairs*, 1734, Mor. 11633; *Bruce*, 1871, 10 M. 130). This presumption may be overcome, but the onus of proving a death lies on the person who avers it. In all such cases, presumptions, proofs, and inferences from the particular circumstances rule the decision (Bell, *Prin.* 1640). The evidence requisite to satisfy the Court varies with the circumstances of each case (*M'Lay*, 1876, 3 R. 1124; *Bruce*, 1871, 10 M. 130). It will be more easy to prove death when the person whose life is in question was engaged in a perilous mode of life, or lived in an unhealthy district (*Fairholme*, 1858, 20 D. 813; *Rhind's Trs.*, 1878, 5 R. 527); but, on the other hand, that a person has not been heard of for many years is not enough (*Campbell*, 1824, 3 S. 145: *Tait*, 1866, 4 M. 443; *Fife*, 1855, 17 D. 951; *Barstow*, 1862, 24 D. 790). The elapse of a long period is,

of course, an important element; the mere age of the person who has disappeared has not been considered of great importance.

In numerous cases the successor has been put in possession on finding caution to repay if necessary, he having proved long absence and silence (*Garland*, 1841, 4 D. 1; *Stirling*, 1847, 9 D. 923; *Fettes*, 1825, 4 S. 149; *Hyslop*, 1830, 8 S. 919; *Chambers*, 1849, 11 D. 1359).

The difficulty of dealing with cases of disappearance led to the passing of the Presumption of Life Limitation Acts. The first of these was passed in 1881 (44 & 45 Vict. c. 47), on the preamble that great hardships have arisen from the want of any limitation to the presumption of life as regards persons who have been absent from Scotland, or have disappeared for long periods of years, and it introduced a presumption "in all cases where a person has left Scotland, or has disappeared, and where no presumption arises from the facts that he died at any definite date," that death took place seven years after disappearance (*Craig*, 1882, 19 S. L. R. 358), and laid down various rules. These provisions were superseded by the Act of 1891 (54 & 55 Vict. c. 29), which is now the regulating statute. It provides (s. 3) that, in case any person has disappeared and has not been heard of for seven years, the Court may, on the application of any person entitled to succeed to any estate upon the death of the absentee, or entitled to any estate the transmission of which to the petitioner depends upon the death of the absentee, find that he has disappeared and the date at which he was last known to be alive. The Court may find that he died at some specified date within seven years of his disappearance, or, if there is nothing to justify such a finding, he is to be presumed to have died exactly seven years after the date at which he was last known to be alive.

Any number of persons may be joint applicants (9), and it is competent to the person who presented the petition, or to any other person entitled to succeed to any estate on the death of the person who has disappeared, or entitled to any estate the transmission of which, or the disburdening of which from a liferent depended upon such death, to proceed as if the absentee had actually died on the date so fixed by the Court.

The Act of 1881, it was decided, did not apply to the case of one who had never been in Scotland (*Rainham*, 1881, 9 R. 207).

If the absent person returns within thirteen years of his estate being taken possession of by his successors, he is entitled to receive it back, or the price or value of it, from the person who has become entitled to it, or anyone acquiring it from him by a gratuitous title, free of any burdens that did not affect it at the date of the judgment of the Court, but subject to a claim for meliorations. In no case is he entitled to demand any income accrued before the demand.

If a title has been made up by registration in a public register for thirteen years, or, in the case of estate the title to which does not admit of registration, if possession has been had for thirteen years, the right of the absent person to recover ceases.

The Act applies to all property, heritable and moveable, real and personal, and any right or interest therein of any description: but it does not apply to policies of assurance on lives.

Where the total value of the estate in Scotland does not exceed £500, the petition may be brought in the Sheriff Court of the county where the greater part of the estate is situated, otherwise it must be brought in the Court of Session.

For cases under this and the former Act, see *Rainham*, 1881, 9 R.

297; *Craig*, 1882, 9 R. 434; *Williamson*, 1886, 14 R. 226; *Minty*, 1887, 15 R. 262.

In the case of persons perishing in a common calamity, where there is no proof that one of them survived the other, our law recognises no presumptions such as obtained in the Roman law, by which the question of survivance may be settled. It lies with the person making an averment to prove it; if neither can be proved to have survived the other, then rights depending upon such survivance will be held not to be established. A testator bequeathed personal estate to A. in the event of his wife dying in his lifetime. They were drowned together. It was held that the onus of proving the death of the wife in the husband's lifetime was upon A.; that it was necessary to produce positive evidence in order to enable the Court to pronounce in favour of the survivorship; that no such evidence being produced, the next of kin were entitled (*Wing*, 1860, 8 H. of L. 183).

Heritable and Moveable.

As there is a far-reaching distinction drawn in the law of Scotland between heritage and moveables, it is important, before stating the rules of succession, to give a general statement of the manner in which this distinction is applied. In intestate succession the rule is, that things and rights considered heritable go to the heir, moveables go to the executor. In testate succession the importance of the distinction has been considerably modified by comparatively recent legislation, but it is still marked.

The question whether a subject or fund is heritable or moveable may have its answer fixed in one or other of the three ways:

1. It may be by nature immoveable or moveable.
2. It may be connected with or accessory to some subject which is by nature heritable or moveable.
3. It may have its character fixed by destination of the owner.

Corporeal Subjects.—Corporeal subjects are heritable by nature if they are incapable of being moved. Thus lands, houses, mines, minerals *in situ*, are heritable; whatever is capable of being moved from place to place without injury or change of nature is by nature moveable (Stair, ii. 1. 2; Ersk. ii. 2. 4, 7; B. P. 1472). Corporeal subjects in their own nature moveable may become heritable by accession. When a subject has been so annexed to land that it cannot be removed without destruction or change of nature or of use in one or in the other subject, it becomes heritable by accession. This is the case with buildings, fixtures in houses, mills, machines erected on a spot to which they are by their own weight immoveably fixed. "Where a certain amount of fixture coincides with any of the following elements:—(1) where the article is essential or material to the enjoyment of the fruits or the use of the heritable subject; (2) if there be a special adaptation in the construction of the article itself to the uses or improvement of the heritable property to which it is attached, which it would not possess if placed elsewhere; (3) express declaration by the owner of an intention that the article should be annexed to the real estate" (Ld. Moncreiff in *Dowall*, 1874, 1 R. 1180). "On the other hand, I think it is also certain that, where the circumstances clearly indicate that the object of the annexation was not the benefit of the real estate, and that the owner had no intention of attaching them thereto, the articles, if moveable in their nature, remain so." Trees and natural fruits not requiring cultivation are heritable so long as attached to the soil. Hay of the second crop is

heritable in succession (*Dalrymple*, 1744, Mor. 5422; *Wight*, 1796, Mor. 5446). Industrial fruits are, however, moveable. These include growing crops, and trees grown in a nursery for sale (see *Begbie*, 1837, 16 S. 232). Greenhouses and iron fences have been held to be heritable (*Tod's Trs.*, 1872, 10 M. 422); similarly, underground railways and steam-engines resting on foundations, and machinery (*Dixon*, 1843, 5 D. 775, 1845, 4 Bell's App. 286; *Brand's Trs.*, 1878, 5 R. 607; 1876, 3 R. (H. L.) 16). Things become heritable by destination, either when there is a manifest purpose to operate such connection of them with the proper heritage as would make them heritable by accession, or where there is a destination impressed upon them by appropriate words. Materials prepared for the construction of a house are held heritable (*Malloch*, 1867, 5 M. 335; *Robson*, 1861, 23 D. 429), as also is dung on a farm (*Reid's Exrs.*, 1890, 17 R. 579). So where money is required to complete a building contracted for at the death of the deceased and not fully paid, the money comes out of the moveable estate, but the building goes to the heir. Subjects which are *partes soli* become moveable by severance (*Anderson*, 1844, 6 D. 1315). Books, jewels, and furniture may be made heritable in succession (Stair, iii. 5. 6; Ersk. iii. 8. 17; *Sandys*, 1897, 25 R. 261; see *Kinnear*, 1875, 2 R. 765; *Baillie*, 1859, 21 D. 838; *Veitch*, 1808, Mor. App. "Service and Confirmation," No. 4; *Marq. of Bute*, 1880, 8 R. 191). Heirship moveables were heritable *destinatione*.

Incorporeal Rights.—Rights to land and debts secured upon land are heritable; as are titles of honour, and offices to continue after the grantee's life (Ersk. ii. 2. 6). Rights bearing a tract of future time, such as life-rents and annuities which give a periodical right without having relation to a capital sum or principal, are heritable (but see *Hill*, 1872, 11 M. 247; *Reid*, 1878, 5 R. 630). Bonds having a clause of infeftment were heritable; but if by a clause in the bond the infeftment was suspended, the debt was moveable (Ersk. ii. 2. 5; *Hadaway*, 1830, 8 S. 800). Heritable securities, whether by heritable bond, or by disposition in security, or by real burden, were heritable; but this was changed by sec. 117 of the Titles to Land Act of 1868 (31 & 32 Vict. c. 101). Under that Act, sec. 3, "heritable securities" includes all heritable bonds, bonds and dispositions in security, bonds of annual rent, bonds of annuity, securities under sec. 7 of 19 & 20 Vict. c. 91, and all deeds and conveyances whatsoever, legal as well as voluntary, which may be used for the purpose of constituting or completing or transmitting a security over lands, or over the rents and profits thereof, as well as such lands themselves, and the rents and profits thereof, and the sums, principal, interest, and penalties, secured by such securities, but does not include ground-annuals or absolute dispositions qualified by back-bonds. By sec. 30 of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), the provisions of sec. 117 of the 1868 Act are applied to real burdens upon land, still excluding ground-annuals.

By said sec. 117, such securities are made moveable as far as regards the succession of the creditor, unless executors are expressly excluded. They continue heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of the creditor: and they do not go to increase the *jus relictæ* or the legitim fund (see *Hughes' Trs.*, 1890, 18 R. 299). But where trustees were directed to hold, apply, pay, and convey a residue for behoof of their children, with a power to sell heritage and call up investments, and one of the children, a son, died when there was a heritable bond which had belonged to the testatrix still undivided, it was held that his right was a moveable *jus crediti*, and was

subject to *jus relicti* (*Gilligan*, 1891, 18 R. 387). The provisions of the Act apply only to successions opening on or after the 31st December 1868 (*Cunningham's Trs.*, 1889, 17 R. 218; *Brown*, 1870, 8 M. 439). Express destination by the exclusion of executors in a personal bond makes the bond heritable (Ersk. ii. 2. 12; Act 1661, c. 32). Sums directed to be laid out upon land by trustees are heritable (see *White*, 1860, 22 D. 1335; *Carfrae*, 1842, 4 D. 605; *Romanes*, 1865, 3 M. 348). In order to give the effect to a direction of this sort of making it heritable *destinatione*, there must be an actual destination one way or the other of the fee of the particular sum (Ld. Justice-Clerk in *Carfrae*). In our early law bonds bearing interest were held to be *quasi feuda*, but the debt was moveable before the term of payment, or where interest was not payable till the term of payment of the bond. By 1661, c 32, these bonds are declared moveable as to succession though still heritable *quoad* the fisk and *jus relicti*.

A lease is heritable, and the tenant's heir-at-law succeeds although there be no express destination to heirs; but a loan on an assignation of a lease was held moveable (*Stroyan*, 1890, 17 R. 1170). Things in their nature heritable may become moveable, as part of a *universitas*, which is regarded as moveable; where land or any heritable interest therein has become partnership property, it is, unless the contrary intention appears, treated, as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal and moveable and not as real or heritable estate (53 & 54 Vict. c. 39, s. 22). Rights of action (except real actions in reference to heritable estate), patents, and copyrights are moveable (*Advocate-General*, 1848, 10 D. 969; 5 & 6 Vict. c. 45, s. 25). Shares in a company are moveable, even though the company hold heritage (8 & 9 Vict. c. 17, s. 7; 25 & 26 Vict. c. 89, s. 22). Where lands are voluntarily sold or are surrendered under the Lands Clauses Acts, the price is moveable (*Heron*, 1856, 18 D. 917; *Stewart*, 1895, 32 S. L. R. 299; *Macfarlane*, 1895, 22 R. 405). But this was not the case where the sale was by an apparent heir. Where a bargain has been completed for the sale of the deceased's estate, the price is moveable (*Chiesley*, 1704, Mor. 5531). Trade marks and trade names are moveable. Goodwill may be heritable or moveable, according to circumstances (*Hughes*, 1892, 19 R. 840; *Bain*, 1878, 5 R. 416; *Donald*, 1893, 21 R. 246). Arrears of the annual returns of debts and funds, themselves heritable, are moveable, being considered as cash *in bonis* (Ersk. ii. 9. 64).

An assignee's right to a *spes successionis* of heritable property is heritable though merely a *jus crediti* (*Thain*, 1891, 18 R. 1196).

Conversion.

An important question in practice is that which determines whether the right of a beneficiary interested in a trust is heritable or moveable in his succession.

If trustees have been directed to hand over a heritable subject to a beneficiary, or to use money in acquiring a heritable subject for him, the right in him is heritable.

But if the heritable estate is disponed to trustees, and they are directed to sell it and pay over the proceeds, the right in a beneficiary is a moveable one. The rule is the same where there is merely a power to sell, if the intention of the testator is clear that a sale is to take place (*Baird*, 1890, 8 R. 233; *Nairn's Trs.*, 1877, 5 R. 128; *Kippen's Trs.*, 1889, 16 R.

668). The following rules were laid down in *Aitken*, 1883, 10 R. 1097, at p. 1108 :—

(1) Where there is a direction to sell, the direction will operate as an immediate conversion of heritable property into moveable, whether the property is sold or not (*Buchanan*, 1862, 4 Macq. 374).

(2) If there is no direction to sell, but a mere power or discretion given to trustees to sell, there is no conversion, unless where the sale is necessary and indispensable to the execution of the trust (*Brown's Trs.*, 1890, 18 R. 185; *Anderson's Exrs.*, 1895, 22 R. 254; *Sim*, 1895, 22 R. 921).

(3) If a sale be not necessary, the right remains heritable, so long as the discretion is not exercised by the trustees.

Constructive conversion, being a testamentary act, cannot affect the rights of children, widows, and husbands (*Lashley*, 1804, 4 Pat. 581). If there is an express direction to sell, the conversion takes place as soon as the direction becomes binding on the trustees. If there is only a power to sell, it is said not to be settled whether the conversion dates *a morte*, or from the time when the sale is seen to be necessary, or from the actual date of the sale.

In questions between the heir and executor of the testator himself with regard to subjects falling under a power of sale or a direction to sell, there is no room for conversion unless the persons to be benefited are pointed out by the deed (Bell, *Prin.* 1493). In the case of a person dying intestate, it is not competent to lead evidence of his intention to convert (*Ramsay*, 1887, 15 R. 25). A direction by a testator will not affect the legal rights of the heir and executor unless the succession is given to someone else.

Thus where a truster directed trustees (1) to pay debts, (2) to deliver to his wife furniture and personal effects, (3) "as soon after my death as possible to realise the remainder of my said estate and effects, and pay over the net proceeds thereof in such manner as I may direct"; and when the purposes of the trust were fulfilled, the moveable estate was exhausted and the heritage remained unsold, it was held that the direction to realise the estate must be held to have been carried out, and that the balance fell to be divided in the proportions in which the fund had been derived (*Cowan*, 1887, 14 R. 670; *Gardner*, 1857, 20 D. 105; *Stewart*, 1860, 22 D. 646). "It being clear that the heritable property was only held as an investment, that the direction appears to contemplate payment in money, that there is a considerable number of beneficiaries, and that the bequest is a bequest of residue, everything seems to lead to the result that there was conversion here" (Ld. Moncreiff in *Baird*, 1880, 8 R. 235). A direction to "realise and convert into cash" at a period of division does not operate conversion prior to that period (*Thomas*, 1868, 7 M. 114; *Cowan, supra*; *Logan's Trs.*, 1896, 23 R. 848). If a trust purpose fail, or if there is something left unprovided for, land will go to the heir-at-law, money to the executors.

The rule of law is clearly established, that to disinherit the heir or to defeat the executor it is necessary not only so to deal with the estate as to effect conversion, but to give it to some other person (*Cowan, supra*; *Logan's Trs., supra*). If the trustee leaves the property to his heirs *per expressum*, the question of whether conversion operates or not is said to be still open (*Gardner*, 1857, 20 D. 105; *Patrick*, 1838, 1 D. 207; *White's Trs.*, 1860, 22 D. 1335; *Dundas*, 1869, 8 M. 44). A beneficiary *sui juris* may elect to take his share in *forma specifica*, and so reconvert (*Nicolson's Assignee*, 1841, 3 D. 675; *Gray's Trs.*, 1863, 1 M. 936).

No act of mere administration by trustees or curators will affect the succession (*Monerieff*, 1856, 18 D. 1286; *Anstruther*, 1842, 13 D. p. 454; *Bruce's Trs.*, 1897, 24 R. p. 965).

Care must be taken not to confound the succession of the person who leaves the trust estate, and the succession to the heir himself; for although he be the party who succeeds to the heritable estate which belonged to his ancestor, even although subsequent to his death it be converted into money by the testator's directions, yet as what he is entitled to demand is the price, it might be held that were he to die before receiving payment, his claim for the price would be included in his moveable succession (*Gardner*, 1857, 20 D. at p. 110).

Intestate Succession in Heritage.

The distinguishing features of the descent of heritage in the law of Scotland are found in primogeniture, by which one out of the kindred of the deceased is chosen to take his place, and in the preference of males to females in the same degree of relationship. The character of heir of every class, whether of heritable or moveable estate, is based on a right of succession to the deceased in respect of the right of blood, and does not involve in any sense or degree a *jus crediti*.

Primogeniture is the rule of the feudal law by which the eldest son or his descendant is preferred to the younger ones. By a similar rule, where a succession opens to collateral kindred, the heritage goes to one person among them, though not necessarily the eldest.

The estate or property of a person deceased is called his *hæreditas*, and by the early law both heritage and moveables remained *in hæreditate jacente* of the deceased until they were taken out in the one case by service or some equivalent (except in the case of certain heritable rights which vested without service); in the case of moveables, by confirmation. This, however, is no longer the law; and in the case of heritage, by the 9th section of the Conveyancing Act of 1874 (37 & 38 Vict. c. 94) a personal right to any interest in land, whether in fee or in security, and whether beneficial or in trust, or any real burden on land, descendible to heirs, vests in the heir entitled to succeed thereto immediately upon the death of the ancestor.

In order to be capable of succeeding to heritage *ab intestato*, a person must have been conceived before the opening of the succession, and born alive; he must be legitimate from his birth or have been legitimated, and he must be of uncorrupted blood. An exception to the rule as to legitimacy of birth is that a bastard can succeed to his own descendants.[1]

There are three lines of consanguinity: the descending, the ascending, and the collateral. The first two are called lineal, in contradistinction to the third, because in them there is a direct line of descent from a common ancestor.

Lineal descent includes all the issue of the person from whom descent is traced, each generation forming a degree.

Lineal ascent starts with the father of the deceased, and proceeds in a direct line as far as evidence will reach.

Collateral kindred trace descent from an ancestor common to them and the deceased, but not from each other.

Persons are connected by the full blood who are themselves, or trace their relationship through, brothers or sisters born of the same father and

[1] A murderer cannot benefit by the succession of the person whom he has murdered (see *Cleaver*, 1892, L. R. 1 Q. B. 147; *Riggs*, 15 New York L. R. 506).

mother, that is to say, brothers or sisters german. The half blood consanguinean are, or are connected through, brothers or sisters born of the same father by different mothers.

Brothers and sisters uterine have the same mother but a different father. There is at common law no right of succession between the consanguinean and the uterine, nor can the mother or relations through her ever succeed to her child, in heritage, on intestacy.

Descent, in cases of intestacy, is traced from the person last vested in the lands or other heritable estate. The heir is to be sought, first, among the lawful issue of the deceased, males succeeding before females, and the eldest son and his issue, subject to the same rules of descent, excluding the younger children; you take, next, the next younger son and his issue; and so on till the sons and their issue are exhausted. Failing sons, the daughters succeed as heirs-portioners, dividing the estate equally among them. If one of the daughters has predeceased leaving issue, her issue succeed to her share in the same order; that is to say, sons excluding daughters, and taking in the order of their seniority, and the daughters, should they succeed, dividing the share equally among them.

Failing issue, the heir will be found among the brothers of the deceased, or his sisters will take equally among them, subject as before to representation. By a rule which makes heritage descend, the immediate younger brother of the deceased is his heir; if there is no younger brother, nor any descendant of a younger brother, the immediate elder brother is the heir. The full blood, whether male or female, must be exhausted before the half blood comes in. After brothers by the full blood, or their issue, sisters-german take as heirs-portioners. Then the half blood consanguinean comes in in the same order; if they are younger than the deceased, the oldest brother first, and so on; if older, then the youngest first.

Relations through the mother of the deceased are never called, nor are relations through the wife of any ancestor or other agnate, and it makes no difference that the estate came from the mother. Thus if a woman has two sons who are half-brothers, and the eldest succeed to her as her heir, upon his death the estate will pass to his heir, who may be a distant relative through his father (*Alexander*, 1696, Mor. 14873).

Even the Crown, as *ultimus hæres*, will take in preference to the brother uterine.

On the failure of the issue of the deceased, and of his brothers and sisters and their issue, the succession mounts to the father, who is thus postponed to his own descendants. Ld. Stair says this is because fees proceed for the most part from the father, and the paternal affection is presumed to be equally strong towards all his issue. Failing the father of the deceased, the father's brothers and sisters are similarly preferred to their father, and the succession goes to them in the same way as it would have done to brothers and sisters of the deceased, males always excluding females, the whole blood the half blood, in the same degree, and females succeeding as heirs-portioners.

Next comes the grandfather, the father's father, and if he be dead, his brothers and sisters or their issue, always subject to the same rules; and so upwards, the brothers and sisters of a nearer ascendant and their issue always coming in before a more remote ascendant.

Failing all the relations of the deceased through his father, the Crown comes in as *ultimus hæres*.

Though a mother cannot succeed to her children, they succeed to her estate according to the rules above stated.

The full blood excludes the half blood only when in the same degree of relationship to the deceased: thus while a full sister will exclude a half brother, the half brother comes before the father, or the father's collateral relations by the full blood. All the children of the deceased are of course equally related to him, no matter of how many marriages they may be the issue.

REPRESENTATION.—By representation one succeeds not from any title in his own person, but in the place of and as representing some of his deceased ascendants (Ersk. iii. 8. 11). Thus a grandchild by an elder son excludes a younger son; succeeding not in his own right but in that of his father. This doctrine applies both in the line of descent and in the collateral line, a possible heir and his issue to the most remote descendant always excluding that possible heir's brothers and sisters. A child represents his mother as well as his father.

These rules fix the identity of the heir in heritage of the person last vested in the heritable estate. The terms "heir-at-law," "heir of line," "heirs general," "heirs whomsoever," are practically synonymous.

An abstract of the order of succession may be stated thus:—

Descendants—

1. The eldest son of the deceased succeeds to the exclusion of all other children—
   - (*a*) The eldest son of the eldest son and his issue.
   - (*b*) The second son of the eldest son and his issue.
   - (*c*) The daughters of the eldest son, as heirs-portioners; the issue of such as predecease taking their mother's place under the same rules.
2. The second son of the intestate—
   - (*a*) The eldest son of the second son and his issue.
   - (*b*) The second son of the second son and his issue.
   - (*c*) The second son's daughters, as heirs-portioners.

And so on till the sons of the intestate and all their descendants are exhausted.

The daughters of the intestate, as heirs-portioners. Should any of the daughters have predeceased,—there being no son nor issue of a son alive,—her issue take her share, sons in their order; failing sons, the daughters equally among them.

Collaterals—

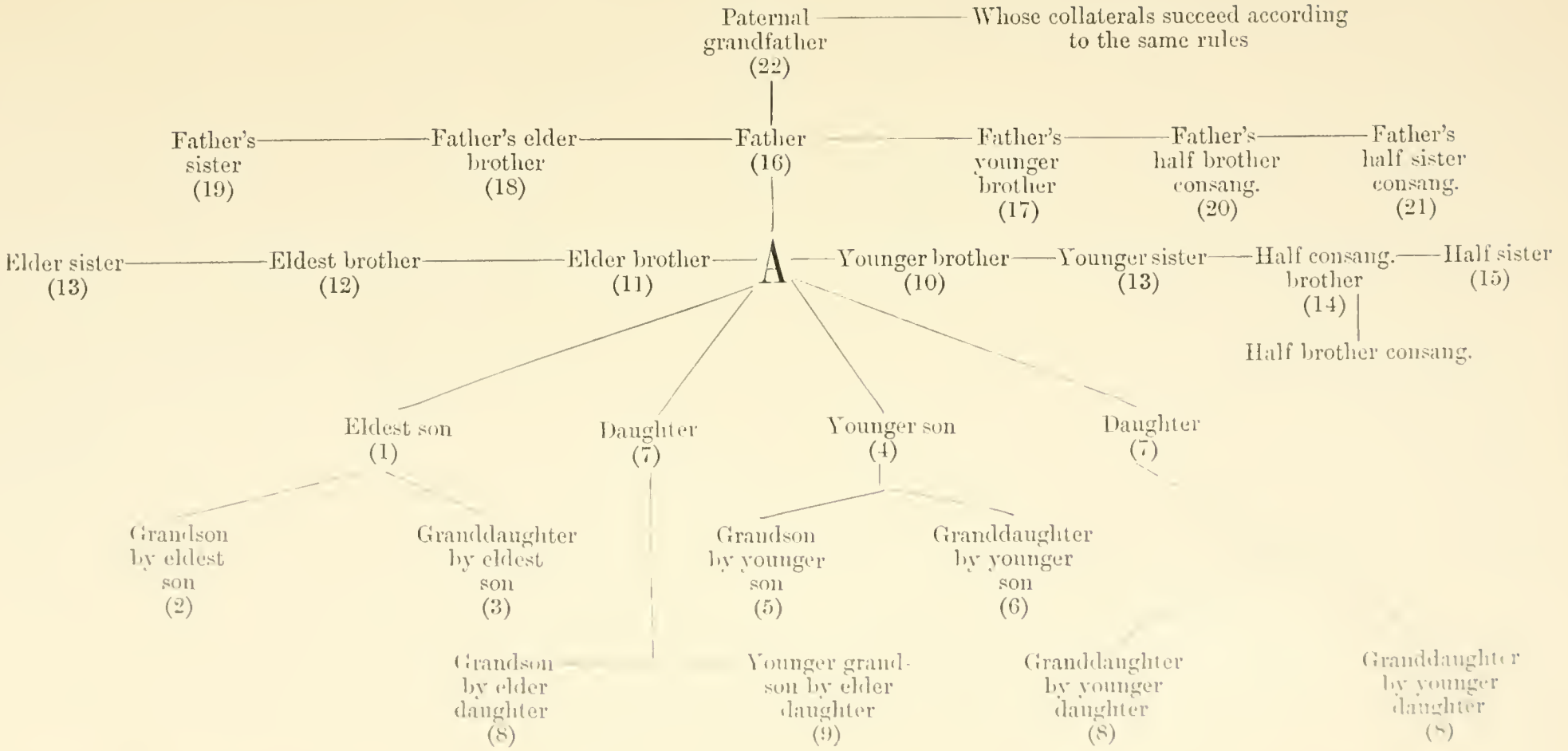
The immediate younger brother of the intestate—
The issue of such younger brother in the same order as above.
The next younger brother, and so on till the youngest is reached.
The immediate elder brother with his issue, following the same rules, and so on till the eldest brother is reached.
The sisters, as heirs-portioners, and their issue.
The eldest brother consanguinean and his issue, if the half brothers are of a later family: if of an earlier family, the youngest comes first, and so upwards through the brothers.
The sisters consanguinean and their issue, as heirs-portioners.

Ascendants—

The father of the deceased.

Collaterals of the father, in the same order and subject to the same rules as were applied to the collaterals of the deceased.

TABLE D OF HERITABLE SUCCESSION.



NOTE.—Representation applies universally in heritage; that is to say, if one who, by surviving A., would have been his heir, predeceases A., then the heir of such predecessor takes his place, or his heirs-portioners take it.

The grandfather—the father's father—grandfather's brothers and sisters and their issue in the same way. The process goes on as long as relationship through the father can be traced.

Finally, the Crown comes in as *ultimus hæres*.

In the line of ascent no female can form a connecting link, though rights can come through a female to her descendants.

Conquest.—In the case of successions which opened before the 1st of October 1874, it is necessary to distinguish between the heir in heritage and the heir in conquest. The Conveyancing Act of 1874 (37 & 38 Vict. c. 94, s. 37) abolishes the distinction between fees of heritage and fees of conquest, and enacts that in all successions opening since that date fees of conquest are to descend to the same persons, in the same manner, and subject to the same rules as fees of heritage.

Previous to that date the distinction became operative in the case where a man died leaving his heir to be sought among two or more brothers or uncles or their issue, some of the brothers being younger and some older than the deceased; or in the case of the more remote collateral line, the father's brothers being one older and the other younger than the father. It could not arise in the case of the succession going to sisters, for they divided the estate among them.

While heritage descended to the younger brother, conquest ascended to the immediately older brother. When the deceased was the youngest brother, the immediate elder brother was heir both of line and of conquest.

The conquest included new fees, as opposed to old fees, which formed the heritage.

An old fee is that to which one succeeds as heir of an ancestor; a new fee comes not by succession, but by purchase, donation, excambion, or some other singular title. Conquest ascended but once; in the person of the heir of conquest it became heritage. There was no room for the distinction if while the holder of the property had taken it as a disponee, he was heir entitled to succeed to it.

All rights that required or were capable of seisin might be conquest; but teinds, leases, pensions, and rights bearing a tract of future time were not conquest, but heritage.

In order that conquest should become heritage, it was necessary that it should be vested in the heir of conquest by titles made up in his person; otherwise it remained in *hæreditate jacente* of the acquirer, and went to his next heir of conquest.

In conquest, as in heritage, representation operated, the full blood excluded the half blood, and males excluded females in the same degree.

Heirs-Portioners.—As has been already seen, when a succession opens to females who are in the same rank in the order of succession, they take equally among them as heirs-portioners. They are not joint-proprietors, but part-owners, holding shares while the subject is undivided; but each has a title to her own part or share, which she may burden or alienate by her own act. The right of representation applies so that the heir or heirs of one who would have been an heir-portioner had she survived the defunct, takes in her place, dividing her share or succeeding to it under the rules already laid down.

The eldest of a number of sisters and the heir of her body have certain privileges above the others. Rights which are indivisible go to her; she enjoys titles of dignity when they descend to females; the principal mansion-house goes to her, and in the division of the estate she is entitled to the portion in which the mansion-house stands; but this claim does not

extend to ordinary dwelling-houses, whether in town or country, but only to a mansion-house. As the custody of the title deeds of an estate cannot be divided, the eldest sister has the keeping of them; but she is obliged to give transumpts to any of the other sisters that may have occasion for them, she herself bearing an equal share in the expense. Superiorities yielding sustantial feu-duties are divided, but the eldest heir-portioner is entitled to a blench superiority as a *præcipuum* (*M'Neight*, 1843, 6 D. 128). Any heir-portioner may insist on having the succession divided by the Sheriff and a jury, under a brieve of division retourable to Chancery. The eldest can take the share next the mansion-house; the others cast lots for their choice.

Before leaving the subject of intestate heritable succession, two legal burdens fall to be noticed which affect the heritable estate of married persons who die survived by a spouse. The first of these is terce: the other courtesy.

Terce.

The widow of one who dies infeft, as of fee in heritable estate, is entitled to a liferent of a third part of the heritable estate, if she has not accepted of a conventional provision. At common law, to entitle a widow to terce the marriage must have subsisted for a year and a day, or resulted in the birth of a living child; but this condition was abolished by 18 Vict. c. 23, ss. 2–7 (the Moveable Succession Act, 1855). Terce is only due provided she has not, in the full and fair knowledge of her right, accepted a conventional provision, or in accepting such provision has reserved her rights to terce (1681, c. 10). It is due from all heritable subjects and right in which the husband was infeft at the time of his death, unless he held them in trust, and that irrespective of the tenure (24 & 25 Vict. c. 86, s. 12). The husband's infeftment is the measure and security of the rights. Whatever burdens affect the husband's infeftment, affect the terce, and no burden which does not constitute a real burden on the lands affects it.

It is not due from leases, or heritable estate possessed on a personal title; nor from superiorities and feu-duties (*Nisbett*, 1835, 13 S. 517): nor from teinds, unless feudalised; nor from rights of reversion, minerals, or patronage, though the widow has right to coal for her own use. Neither is it due from personal bonds; nor from lands vested in trustees whose right did not flow from the husband, and who could not by him be compelled to denude (Fraser, ii. 1093); nor from reversions of wadsets (*Macdougall*, 1801, Mor. App. *voce* "Terce," No. 2); nor from the mansion-house (*Moncreiff*, 1667, Mor. 15733).

The right to terce is excluded—

1. By express discharge—but a gift *inter virum et uxorem* may be recalled—or by acquiescence and taciturnity (*Pringle's Exrs.*, 1870, 8 M. 622).

2. By the *inter vivos* deeds of the husband, if followed by infeftment.

3. By the widow's acceptance of a conventional provision, unless it is stipulated that she is to have both (Act 1681, c. 10; *Jankouska*, 1791, Mor. 6457; *Ross*, 1797, Mor. 4631).

4. By conviction of the husband for high treason.

Where an entail contains a clause excluding terce, it is not due from the entailed lands (*Hay Newton*, 1870, 8 M. (H. L.) 66). Though the widow has substantial rights in the terce without service, it is not clear that the rights vest in her, so as to be assignable or to pass to her executor, till she

has served to the teree. Till she has done this, she has no active title; but once obtained, the service draws back to the husband's death. A decree declaratory of the widow's right has been held equivalent to service (*Fea*, 1751, Mor. 16115; *M'Leish*, 1826, 4 S. 485; but see *Pringle's Exrs.*, 1870, 8 M. 622). The authorities on the point are conflicting. By statute 1503, c. 77, if the woman is holden and reputed as a lawful wife during the life of the deceased, she has right to teree. Kenning to the teree is a secondary process dividing the estate between the heir and the widow, and giving her liferent infeftment as to her third.

A brieve of service and cognition may be removed to the Court of Session by appeal at any time before trial. It has been questioned if this is competent after trial. The heir-at-law is not entitled to a sist of the service on the ground that he means to raise a declarator against the widow's right (*Craik*, 1891, 19 R. 339). When the lands are already subject to teree, in the person of the widow of a former proprietor, only the lesser teree is due, that is, a third of what remains. Similarly, a third teree may be due. On the death of the first tercer, the right of the second is enlarged (Fraser, ii. 1100; Stair, ii. 6. 16, ii. 6. 12; Ersk. ii. 9. 47, ii. 9. 44).

Courtesy.

Courtesy is the right of the surviving husband of an heiress when the marriage has resulted in the birth of a viable child who is or would have been her heir, or has legitimated an heir, to a liferent of such heritage, inherited by her, as she was infeft in at the date of her death (Stair, ii. 6. 19; Ersk. ii. 9. 52; *Clinton*, 1869, 8 M. 370). Although the wife's infeftment should be reducible for want of form, this will not disappoint the husband in a question with the heir (*Hamilton*, 1716, Mor. 3117). If the wife leaves a child by a former marriage who is her heir, no courtesy is due (*Darleith*, 1702, Mor. 3113; Fraser, ii. 1122; Bell, *Prin.* 1606). It is not due out of lands acquired by the wife by singular title (*Lawson*, 1709, Mor. 3114; *Knight*, 1786, Mor. 8815; *Watts*, 1885, 13 R. 218), unless she was *alioquin successura* (see Ld. Pres. Inglis in *Watts*). If the husband is the father of an heir-portioner who succeeds along with half sisters by another marriage, he has only courtesy out of the share of his own daughter (More, *Notes*, 219). The right attaches to entailed property unless excluded by the entail (*Clinton*, 1869, 8 M. 370), to heritable bonds (s. 117, 31 & 32 Vict. c. 101) and feu-duties, but not to casualties nor lands vested in trustees for behoof of the wife (*Clinton*, *supra*). It is subject to the interest on the wife's debts, with relief to the husband against her other property (*Monteith*, 1717, Mor. 3117). The right vests by survivance and needs no service; rents not levied do not vest in him, or transmit to his successors (Ersk. ii. 9. 55; *M'Aulay*, 1636, Mor. 3112). It is excluded by the husband's express discharge, but not by a conventional provision not declared to be in lieu of it (*Primrose*, 1771, Mor. App. *v.* "Courtesy," No. 1). It is also excluded by the wife's *inter vivos* deeds followed by infeftment. All questions about courtesy depend entirely on artificial rules fixed by authority, and it is inexpedient in such cases to attempt any exposition of legal principles. Courtesy is governed by rules, of which several rest on little better footing than that it has been so fixed.

Apparent Heir.

Under the law as it was before the 1st of October 1874, mere survivance of his ancestor gave the heir no completed right to the heritable

estate. Until he was declared heir, the succession did not vest in him; and if he died without taking the proper proceedings, the succession passed not to his heir but to whomsoever at the date of his death was heir to the ancestor. During the period when he had not made up his title he was known as the apparent heir. Making up titles subjected him in serious responsibility, seeing that he was considered *eadem persona cum defuncto*, and represented him not only actively, in his rights, but also passively in his obligations.

Certain rights vested in him without service. These were: Titles of honour and dignity (Ersk. iii. 8. 77); udal lands (*Bratton*, 1832, 10 S. 206); leases (*Boyd*, 1671, Mor. 14375) (see the Statute 20 & 21 Vict. c. 26, s. 8, as to long leases); corporeal moveables made heritable *destinatione* (*Veitch*, 1808, Mor. "Service and Confirmation," App. No. 4); rights which were heritable as running a course of future time.

He might without making up a title continue his ancestor's possession (Ersk. iii. 8. 58; *Ross*, 1770, Mor. 5019), and enter into possession of the lands, and levy rents and interest. He could not, however, remove tenants deriving right from the deceased. To an effectual removing, infeftment before decree was indispensable (*Scott*, 1832, 10 S. 284; *Macintosh*, 1854, 17 D. 99; *Mackenzie*, 1853, 16 D. 158). His right to the rents vested *ipso jure*, and his executor was entitled to arrears due at his death (*Wemyss*, 1864, 2 M. 461). The apparent heir was entitled to challenge deeds *ex capite lecti* (*Grahame*, 1779, Mor. 3186). He might bring his ancestor's estate to judicial sale, although the estate was not bankrupt (1695, c. 24), no third party having an interest to object. And he continued the ancestor's possession for the purpose of obtaining a prescriptive title.

In consequence of the 9th section of the Conveyancing Act, 1874, possession on apparency is no longer known to the law (*M'Adam*, 1879, 6 R. 1256).

Jus deliberandi.—The apparent heir was allowed twelve months and a day as a competent time to deliberate whether he would enter or not, during which period he could not be sued in any action or charged to enter; after the year, he had still forty days on being charged under 1540, c. 106, and 1621, c. 27. By practice he could be charged to enter within the year, though he was protected from any suit till the year ran out. By behaving as heir he lost this privilege.

The year ran from the death of the ancestor, or from the birth of a posthumous heir, or from the death of an intermediate heir who died in apparency. The period was reduced to six months by 21 & 22 Vict. c. 76, s. 27, and 23 & 24 Vict. c. 143, s. 16. The *jus deliberandi* was lost by service, or by passive representation; and it did not interrupt an action of judicial sale brought against the ancestor.

The apparent heir had also the right to demand exhibition of all deeds and obligations relative to the predecessor's lands and estate, and all debts due by him. This he might raise any time before service. He seems not to have been entitled to delivery of the ancestor's title deeds without a general service (*Smith*, 1871, 10 M. 211). A list of the deeds he could call for will be found in Bell, *Prin.* s. 1689. Now, by the Conveyancing Act, 1874 (37 & 38 Vict. c. 94, s. 12), an heir is not liable for the debts of his ancestor beyond the value of the estate to which he succeeds. If an heir renounces the succession, the creditors of the ancestor have the same rights against the estate, as upon a renunciation according to the law before the commencement of the Act. Where an heir has before renunciation intromitted with the ancestor's estate, he is liable for the ancestor's debts to the

extent of such intromission, and no further. This put him in a similar position to an heir who had entered *cum beneficio inventarii* under 1695, c. 24, or who had served with a specification under the Acts for the service of heirs.

Sec. 9 of the Conveyancing Act runs as follows :—"A personal right to every estate in land descendible to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed, whether such person shall have died before or after the commencement of this Act; and such personal right shall, subject to the provisions of this Act, be of the like nature and be attended with the like consequences, and be transmissible in the same manner, as a personal right to land under an unfeudalised conveyance according to the existing law and practice."

This assimilated heritable to moveable succession as far as the acquisition of a vested interest went. The heir may now dispose of the estate either *inter vivos* or *mortis causa*. His creditors can attach it. This section supersedes the Act 1695, c. 24; but the Act 1661, c. 24, which gives a preference to the ancestor's creditors, is left untouched. The completion of a feudal title in the case where the heir did not make up his title is provided for in sec. 10.

It is still desirable, for many reasons, that an heir should make his right real by completing a title without delay.

Under 1695, c. 24, an heir could be served *cum beneficio inventarii*, and so limit his responsibility; and under the Service of Heirs Act, 1847 (10 & 11 Vict. c. 47, s. 25), re-enacted in 1868 by the Consolidation Act (31 & 32 Vict. c. 101, s. 49), a general service might be applied for with a specification: by means of which liability beyond the value of the estate was avoided. This procedure is still competent, though it is now unnecessary.

If an apparent heir was cited by a creditor of his ancestor to pay a debt of his, and offered any peremptory defence against the debt, he incurred a limited passive title (*Lundy*, 1713, Mor. 12064). He also incurred this if he was charged to enter heir, and did not renounce (Ersk. *Prin.* iii. 8. 44, iii. 8. 93; *Richan*, 1832, 11 S. 237).

We have seen that but few of the rights of an ancestor vested in an heir until he entered. Certain rights, however, did vest in him by mere survivance.

Honours and dignities vest *jure sanguinis* (Ersk. iii. 8. 77).

The sovereign makes up no title to Crown lands, nor the prince to principality lands.

Leases vest in the heir without either service or possession (*Boyd*, 1671, Mor. 14375; *Campbell*, 1739, Mor. 14375; *Veitch*, 25 May 1808, F. C.). In order, however, to make up a title to a long lease registered under 20 & 21 Vict. c. 26, the Registration of Leases Act, 1857, service is necessary (s. 8).

Heirship moveables were vested by possession.

Moveables which were by settlement made heritable, as books and pictures destinated to pass along with an entailed estate, do not require a service to vest them, but are vested by possession. A service is, however, competent for vesting such subjects (*Veitch*, 25 May 1808, F. C.).

Udal lands in Orkney and Shetland were said to vest in the heir by survivance.

Rights which were heritable, as inferring a tract of future time, vested without service.

Deathbed.

"Our most ancient law from a jealousy of the weakness of mankind while under sickness, and of the importunity of friends, enacts that all deeds affecting heritage, if they be granted to the prejudice of the heir by a person upon deathbed are ineffectual" (Ersk. iii. 8. 95; Stair, i. 12. 34; 1 Bell's *Com.* 84). The rule was extended to guard wives and children against the defeat of their legal provisions, and to protect minors in the nomination of curators, or of tutors against exemption from the usual responsibility.

The Act 34 & 35 Vict. c. 81 provides that no deed, instrument, or writing made by any person dying after 16th August 1871 shall be liable to challenge or reduction, *ex capite lecti*, that is on the ground of deathbed. The principle is therefore now of comparatively little importance, but it may still affect deeds granted by persons dying before that date (*Gray*, 1872, 10 M. 854; *Thain*, 1891, 18 R. 1196; see *Hay*, 1890, 18 R. 244: see Deathbed).

Heirship Moveables.

The heir of line of a prelate baron or burgess was until 31st July 1868, when the right was abolished by the Consolidation Act of that year (31 & 32 Vict. c. 101, s. 160), entitled to the best of certain moveables "from the presumed intention of the deceased that his principal dwelling house, and the farm which he kept in his own natural possession for the use of his family, might go to the heir not quite dismantled by the executors" (Ersk. iii. 8. 17; Stair, v. 7. 9; Bell, *Prin.* 1903). Only the heir of a baron prelate or burgess had this right. Any feudal proprietor who dies vest and seised in lands, houses or annual rents forth of land was a baron; a burgess was either one infeft in burgage or a trading burgess.

The heir might claim them although the land was settled on another, but if he did not claim them they went to the executor. A right to them vested by possession without service; if not taken possession of they went to the heir of the person first deceasing.

Erskine says that the eldest heir-portioner was alone entitled to this privilege, but Bell says that heirs-portioners divided the heirship moveables (*Cruickshank*, 1801, M. H. P. App. 2). The moveables subject to this right were those appropriated to the person, and "inright and outright plenishing," but not fungibles or farm stock raised for sale.

Service.

Before the passing of the Conveyancing Act, a general service was the appropriate mode of vesting in the heir heritable rights, other than those first mentioned, which the ancestor possessed on a personal title, or which did not require seisin. Special service, or an acknowledgment from the feudal superior called a *clare constat*, was the appropriate way of vesting estate in which the ancestor died infeft.

Service is a judicial proceeding for establishing the opening of the succession, the acceptance of the *hereditas* by the heir, and the special character in which he takes. It is either special or general. General service establishes the general title of heir without application to any particular subject; special service, his specific right to enter and be infeft in the feudal right of subjects in which the ancestor died infeft.

Formerly, service proceeded by an inquest of a jury following upon a brieve issued from Chancery, but since 1847 it has proceeded by petition to

the Sheriff of a county or of Chancery, and is now regulated by the provisions of the Acts of 1868 and 1874.

Prior to the Service of Heirs Act of 1847, a special service implied a general service in the same character: but from the passing of that Act no special service implied a general service, except as to the particular lands embraced in the service.

The matter of the service of heirs is dealt with in the Consolidation Act of 1868, in secs. 27–38 inclusive. This Act not only supersedes but abolishes the old forms, enacting (s. 27) that from the 31st of December 1868 it shall not be competent to issue brieves from Chancery for the service of heirs, or for any person to obtain himself served heir by virtue of any such brieve, or otherwise than according to the provisions of the Act; that is to say, by petition to the Sheriff of the county, either of the domicile of the deceased, or, in the case of special service, to the Sheriff of the county in which the lands lie, or to the Sheriff of Chancery.

General Service.—The petition for general service sets forth the death of the ancestor, and its date, and that he had his ordinary or principal domicile in a particular county or furth of Scotland, as the case may be. If the deceased died upwards of ten years prior to the date of presenting the petition, it is not necessary to set forth or prove the domicile (s. 34).

2. The petitioner's relationship to the deceased, and that he is the nearest and lawful heir-in-general of the deceased; and the Sheriff is asked to serve the petitioner.

Should he refuse to do so, there is an appeal to the Court of Session. The Court of Session Act of 1868 is to apply to appeals and reductions, and it is competent to appeal against judgments of the Court of Session to the House of Lords in the same way as appeals are taken in ordinary civil causes.

On the Sheriff pronouncing decree, the petition and decree are transmitted to the office of the Director of Chancery to be recorded. An extract of the record constitutes the title of service.

The heir's title to heritable rights not requiring infeftment was thus completed, as were his rights to lands held by his ancestor on personal title. It also gives the heir a title to reduce infeftments prejudicial to his right (*Horn*, 1746, Mor. 16117; *Carmichael*, 15 Nov. 1810, F. C.).

No opposition is allowed in a general service, unless by one having a competing claim in the character alleged (*Forbes*, 3 July 1810, F. C.; *Cochrane*, 28 June 1821, F. C.; *Aitchison*, 1829, 7 S. 558), or on the ground that the succession is not open.

The service may be reduced within the period of the viennial prescription.

It is not competent to serve a second time to a deceased person until the first service be reduced (*Cochrane*, 1828, 6 S. 751; 1830, 4 W. & S. 128; *Young*, 1844, 6 D. 370: *Macara*, 1848, 10 D. 707; *Wilson*, 1851, 13 D. 636). Under 1695, c. 24, an heir could serve *cum beneficio inventarii*, and under the later forms of service he could serve with a specification, and so limit his responsibility; but this procedure has been superseded by the complete protection given by the 1874 Act.

A judgment *causa cognita* will not support a plea of *res judicata* where there has been no contradictor (*Fulton*, 1895, 22 R. 823).

Special Service.—Special service is the judicial proceeding for establishing the heir's right to heritable estate in which the ancestor died infeft. The petition sets forth, as nearly as may be in the form of Schedule Q of the Act of 1868, the death of the ancestor last vest and seised in the

lands, with a specification of the lands and heritages, and that the petitioner is the nearest lawful heir.

A title is made up by registration of the extract decree.

By sec. 46 a decree of special service has the operation and effect of a disposition from the deceased to the heir and his assignees. At common law a decree of special service fell, unless it was followed by sasine. The Service of Heirs Act, 1847, provided that, for the purpose of completing the feudal title of an heir who had obtained a decree of special service,—but his only,—such decree should be equivalent to a disposition. In *Morton's Trs.*, 1854, 16 D. 1108, it was held that this did not give the heir any transmissible right before infeftment. The section of the 1868 Act expressly confers a transmissible right. Except, however, as regards the question of making up a feudal title, the matter is of little importance, since sec. 9 of the Conveyancing Act of 1874 causes a personal right to the ancestor's lands to vest in the heir by mere survivance. A special service implies a general one, as far as regards the lands contained in it (s. 47). Formerly, it inferred a general service, with all its consequences, but this was altered by sec. 23 of the Act of 1847. This also is now unimportant, since sec. 12 of the Conveyancing Act provides that an heir shall in no case be liable for the debts of his ancestor beyond the value of the estate to which he succeeds.

By sec. 48 a petitioner for special service may combine with his petition one for general service.

By sec. 31 of the Conveyancing Act a general service to an ancestor who died infeft in lands is made equivalent, as far as making up titles is concerned, to a *mortis causa* general disposition.

An heir of provision under a destination in a heritable bond, may still complete his title by service (*Hare*, 1889, 17 R. 105).

The petition for special service may be opposed by competing claimants, and also by disponees of the ancestor, if infeft, but not if uninfeft (*Sutti*. 1733, Mor. 14457; *Douglas*, 1761, Mor. 14457). As long as the service stands, no other person can be served in the same character (*Cochrane*, 1830, 4 W. & S. 128). But a special service by A. does not exclude a general service by B., seeing that the special service no longer implies a full general service (Montg. Bell, 1113).

By sec. 11 of the Conveyancing Act it is provided that it shall be no objection to any precept or writ from Chancery, or of *clare constat*, or to any decree of service, whether general or special, that the character in which an heir is entitled to succeed is erroneously stated therein, provided such heir was in truth entitled to succeed as heir to the lands specified.

Sec. 13.—The right of any person to an estate in land by succession as heir, acquired after the commencement of this Act, may, at any time within twenty years of his infeftment as heir and his entering into possession of such estate, but not thereafter, be challenged by anyone who would have been entitled to challenge the decree of service of such person had he expede a service according to the practice existing prior to this Act: and in the absence of evidence to the contrary, the date of his infeftment shall, for the purpose of this limitation, be assumed to be the date of entering into possession; and such challenge may be made by an action to negative or set aside the alleged right of succession, or to reduce any title expede in virtue of such alleged right.

CLARE CONSTAT.—An heir could and can also be entered by precept, or now by writ of *clare constat*, by which the superior acknowledges the heir to be entitled to the lands described in the writ. If the superior is

infeft, the title is at once good: if not, it will become effectual by accretion upon the superior's infeftment (*Dickson*, 1801, Mor. App. "Tailzie," No. 7). A disjunct cannot be so entered (*Crichton's Cr.*, 1798, Mor. 15115). The heir must at the time be the immediate heir either at law or by destination (*Lovat &c.*, 1752, Mor. 14465).

The precept or writ used to fall by the death of either granter or grantee and could not be assigned, but by sec. 103 it is effectual during the life of the grantee.

It was and is a title only to the lands contained in it, and did not imply passive representation beyond the value of the subjects (*Farmer*, 1683, Mor. 14003): but the heir so entering was liable under the Statute 1695, c. 24, for the debts of an apparent heir three years in possession (*Brown*, 1852, 14 D. 1041). A title made up by *clare constat* is not within the protection of the viennial prescription.

Hasp and Staple.—In burgage property a similar entry was by hasp and staple. In this proceeding the bailie cognosced a person heir upon evidence led before himself, and infefted him in the subject by the symbol of the hasp and staple of the door. It is now superseded by entry by service or by writ of *clare constat* (31 & 32 Vict. c. 101, ss. 27, 102).

Adjudication upon a Trust Bond.—This mode of entry was used chiefly as a tentative title on the part of an heir who wished to challenge an adverse right, and yet was unwilling to incur passive liability. The heir granted a bond to a friend for a sum above the value of the estate. The holder charged the heir to enter, and on his refusal adjudged the estate. He then challenged the adverse deed, and if successful conveyed the bond and adjudication to the heir (Ersk. iii. 8. 72). At first it was held to infer no passive representation; afterwards, by Statute 1695, c. 24, it was made to infer liability, if intromission followed (*Rutherfurd*, 1830, 9 S. 3; *Dunlop*, 1824, 2 Sh. App. 115; *Hepburn*, 1781, Mor. 14487; *Beveridge*, 1793, Mor. 5296). It was not competent for an heir to make up a tentative title by means of an absolute disposition of the lands and adjudication following thereon (*Dunlop*, 1824, 2 Sh. App. 115; see also Lord Moncreiff in *Rutherfurd, supra*). Contrary to the general rule, that where the rights of the debtor and creditor concur, the debt is extinguished *confusione*, the adjudication on trust bond, even when conveyed by the trustee to the truster making him both debtor and creditor, is not only an active title to the effect of enabling the heir to challenge competing rights to the lands, but it is a valid feudal title which transmits to his own heirs (*Hepburn, supra*).

Statute 1661, c. 24.—By the Statute 1661, c. 24, it is provided that no right or disposition made by the apparent heir, so far as may prejudge his predecessor's creditors, shall be valid unless made and granted a full year after the ancestor's death (*Boyd*, 1851, 13 D. 1302).

The statute has been held to apply to—

1. All conveyances made by the heir, whether entered or not (*Mags. of Ayr*, 1780, Mor. 3135).

2. Even to onerous deeds to third parties not creditors of the heir (*Paton*, 1835, 13 S. 509).

While the estate may be conveyed to the ancestor's creditors, preferences must not be given (Ersk. iii. 8. 102; *Christie*, 1839, 1 D. 745; 1841, 2 Rob. 118; *Torrance*, 1842, 4 D. 774). Only the creditors of the ancestor have the right of challenge, and it is not necessary that they should do diligence within three years to exclude the creditors of the heir.

The statute goes on to say: "the creditors of the defunct shall be preferred to the creditors of the appearand heir in time coming, providing that the defunct's creditors do diligence against the appearand heir and the real estate belonging to the defunct within the space of three years after the defunct's death."

This part of the statute applies as between the creditors of an institute and those of a substitute (*Bruce*, 1831, 9 S. 695). The rule applies to all heritage (*M'Kay*, 1783, Mor. 3137). Doing diligence means completing the diligence (Stair, ii. 12. 29; Ersk. iii. 8. 101; *Menzies*, 1841, 4 D. 257). A judicial sale at the instance of the heir will secure the preference of the creditors of the ancestor (*Irvine*, 1748, Mor. 5264; *M'Lachlan*, 1826, 4 S. 712; 1829, 3 W. & S. 449). Sequestration is also sufficient if the ancestor's creditors have proved their debts within the three years (*M'Lachlan, supra*; 19 & 20 Vict. c. 79, 102–107; c. 91, 4). If the creditor should be delayed by litigation with the heir or other creditors, his preference would not be forfeited (*Ballenden*, 1685, Mor. 3127).

Statute 1695, c. 24.—Under the Act 1695, c. 24, now superseded by the provisions of the 1874 Act (37 & 38 Vict. c. 94, s. 10), which makes a personal title vest in the heir by survivance, it was provided that every person passing over his immediate ancestor who had held the estate on apparency for three years, and serving heir or succeeding by adjudication upon his own bond to the last person infeft, should be liable for the debts and deeds of the person interjected, the measure of his liability being the value of the succession (*Smith*, 1854, 16 D. 727). This did not extend to the gratuitous deeds of the intermediate heir (*Clydesdale*, 1726, Mor. 1274), nor to the case of a naked fiar (*Bogle*, 1745, Mor. 9748); so long as he continued to possess upon apparency, he was not liable (*Sinclair*, 1736, Mor. 9810; *Grant*, 1754, Mor. 9819: 1755, 1 Pat. 605): nor to the case of an heir infeft in the ancestor's lifetime (*Arniston*, 1685, 2 Br. Sup. 92). The last heir had a right of relief against the representatives of the deceased who had possessed on apparency (*Adamson*, 1832, 11 S. 40; *Russell*, 1852, 15 D. 192; *Taylor*, 1854, 16 D. 885; *Ogilvy*, 16 Dec. 1817, F. C.). A reasonable provision for wife or children has been held to be onerous in the sense of this statute (*Russell, supra*; *Orr*, 1871, 9 M. 500).

Passive Titles in Heritage.

Gestio pro hærede.—This is the name given to a passive title incurred by an heir who, either personally or by others on his behalf, used after the death of the ancestor any rights in the lands or other heritable subjects to which he might have completed an active title by service. It was implied from buying the estate otherwise than at a public sale; by taking possession of heirship moveables; or by intromitting with the ancestor's papers in a charter chest (Stair, iii. 6. 6, 16; Ersk. iii. 8. 83; *Ellis*, 1670, Mor. 9668; *Scott*, 1821, 1 S. 33; *Fergusson*, 1829, 7 S. 580). Mere examination of title deeds did not involve it.

It was avoided—

1. By any right in a third party taking the estate out of the ancestor's person.

2. By any singular title in the heir (*Grant*, 1676, Mor. 9763).

3. By adjudication during the ancestor's life (*M'Neill*, 1759, Mor. 9752).

4. By the insignificance of the intromission and the absence of fraud (*Jeffrey*, 1791, Bell's Oct. Ca. 482; *Penman*, 1775, Mor. 9836).

It was not incurred if the heir made up a title at the request of

creditors of the ancestor, to save expense (*Gordon*, 1789, Mor. 9733). There was no *gestio* where the succession was not open, or if the intromitter was not the apparent heir (*Irvine*, 1626, Mor. 9649; *Cunninghame*, 1629, Mor. 9664), or where the act done was ineffectual (*Jamieson*, 1670, 1 Br. Sup. 620; *Middleton*, 1682, Mor. 9651), nor where the intromission could be ascribed to some other title than the assumption of the succession (*Webster*, 1802, Hume, 436). Assuming a hereditary honour or a hereditary office was not *gestio* (*Semple*, 1622, Mor. 9706; *Bower*, 1682, 2 Br. Sup. 18), nor was making up a title for the mere purpose of disponing a trust estate (*Ayton*, 1784, Mor. 9732). It was not inferred from a general service, if nothing was taken by it (*Fife*, 1828, 6 S. 698; *Mackenzie*, 1834, 13 S. 31). It was inferred, without actual intromission, by the heirs conveying to a third party subjects to which he might have made up a title, or granting discharges of rents or debts to which he might have succeeded, or consenting to discharges (*Gordon*, 1785–1787, 3 Pat. 61); but not from the heir's bare renunciation of the succession.

Præceptio hæreditatis titulo lucrativo post contractum debitum.—This passive title was incurred by the heir if he accepted a gratuitous right from the ancestor to any part of the estate to which he might have succeeded as heir. If the right was onerous there was no passive title, but the heir was put to prove onerosity. He was not liable for any debts contracted after he entered into possession under the conveyance, unless they were made burdens upon it. To be liable, the party must have been heir *alioquin successionis*; but if he died before the maker of the conveyance, the responsibility transmitted to his heirs (Ersk. iii. 8. 90–92; *Smeiton*, 1639, Mor. 9774; *Scott*, 1665, Mor. 9775; *Henderson*, 1717, Mor. 9784). All the equitable results of this doctrine are attainable on the ground of fraud at common law, or on the rule of conjunct and confident set up by 1621, c. 18.

Pleading a peremptory defence in an action brought against an heir imports a passive title as to that debt (Ersk. iii. 8. 93; *Grieve*, 1871, 9 M. 582; *Kirkpatrick*, 1838, 16 S. 608; affd. 1841, 2 Rob. 475).

A charge to enter heir unanswered, or a summons in an action of constitution, infers a passive title, but it is limited to the particular occasion (Ersk. iii. 8. 93; Bell, *Prin.* 1925; *Montgomerie*, 1841, 4 D. 332).

Heritable Succession: Effect of Birth of nearer Heir.

Though in tailzied succession the birth of a nearer heir divests a more remote heir (*Bruce*, 1677, Mor. 14880; *Stewart*, 1859, 22 D. 72; *Mountstewart*, 1707, Mor. 14903), the rule in intestate succession is different.

It has been decided that when a father has completed a title as heir to his child, the subsequent birth of a child, who if he had been born or *in utero* at the time of the brother's death would have excluded the father, does not displace the father's right (*Grant*, 1859, 22 D. 53; Stair, iii. 5. 50; Bankt. iii. 5. 55; Bell's *Prin.* 1642; Ersk. iii. 8. 76). A child *in utero* is not regarded as in existence under the Entail Statutes. Accordingly, the birth of a nearer heir before the instrument of disentail was recorded was not allowed to interrupt the disentail (*Douglas*, 1885, 12 R. 916). This was an Outer House decision.

"Heir-apparent" is a term used in the Entail Acts to describe a substitute who, if he survives the heir of entail in possession, must succeed; that is to say, whose position in the destination is such that no nearer heir than he can come into existence before the death of the heir in possession (*Forbes*, 1888, 15 R. 797).

Testate Succession in Heritage.

By the common law of Scotland heritable estate was not transmissible by will or testament. The most clearly expressed will was ineffectual to transmit heritage, nor did it impose an obligation upon the heir to implement (*Ross*, 4 July 1809, F. C.; *Montgomery*, 1795, Bell's Fol. Ca. 203; *Kirkpatrick*, 1873, 11 M. 551; 1874, 1 R. (H. L.) 37). In all heritable succession the rules of legal descent were followed unless there was a disposition to some one who took as disponee, or the heritage was affected by a deed with substitutions. But a marriage contract, though containing only words of provision and not of disposition, will by force of the obligation be effectual (Ersk. iii. 8. 20; *Reid*, 1838, 16 S. 363).

As will be noticed later, this was altered by the Consolidation Act of 1868, but prior to 31st December 1868 a proprietor could not dispose of Scottish heritage by will, even though the instrument was executed in a country where real estate was disposable by will. In order to alter the legal succession he must have used *de præsenti* dispositive words, the word "dispone" being essential, either disponing the subject to himself, whom failing to the person whom he wished to favour; or giving it directly to the object of the gift, reserving his own liferent; or disponing and conveying the subject to another, reserving a power to alter. The deed might either be delivered, or it might be retained in the custody of the granter, provided it bore a clause declaring it effectual, though not delivered, at his death.

"A *mortis causa* deed remaining undelivered in the hands of the granter produces no change on the title of the property conveyed. The granter being infeft, remains the undivested proprietor in fee, and the usual clause in such deeds, reserving the granter's liferent, is intended only to provide for the contingency of the deed being delivered during his life. The other usual clause, dispensing with delivery of the deed, though found undelivered in the granter's repositories after his death, makes it a delivered deed, or gives it the effect of a delivered deed immediately upon his death. Though therefore the disposition is in form a conveyance *de præsenti*, as every conveyance of heritage must be still, if it remains undelivered, it is ambulatory, revocable, and absolutely inoperative as much as a testament nominating an executor, till the granter's death gives it the effect of a delivered deed" (Ld. Pres. Inglis in *Hutchison*, 1872, 11 M. 229).

Mere words of disinherison were quite inoperative (*Blackwood*, 1833, 11 S. 443; *Sutherland's Trs.*, 1893, 20 R. 925). The common method of settling heritage was by disposition, contract of marriage, or procuratory of resignation (Ersk. iii. 8. 21). Charters by progress are now abolished, and the other two are now the usual means employed. The power, says Erskine, of regulating succession by the express will of the owner is so unlimited that every owner of a land estate or other heritable subject, if he be not restrained by a former entail or destination, may settle his land on extraneous heirs, to the exclusion even of his own issue (Ersk. iii. 8. 29).

It did not invalidate a deed as a conveyance of heritage that it was in the form of a testament, provided words of disposition were used (*Douglas*, 1733, Mor. 15940; *Welsh*, 28 June 1809, F. C.). Even although it had neither precept nor procuratory, it founded an action against the heir of line to make up titles, and make over the estate to the disponee favoured by his ancestor.

A destination in a charter from a superior will regulate the succession of the lands until it is altered; or trustees may be directed to execute a

conveyance of heritable estate to heirs in succession; and generally, with regard to heritable subjects, all deeds containing substitution will be operative until altered, unless where, from the special nature of the right or conception of the clause, conditional institution is pointed at (Ersk. iii. 8. 44).

All heirs by destination may be called heirs of tailzie, from *tailler* to cut, because the lineal succession is cut off in their favour. It is well fixed that where a purchaser takes a title to heritable property containing a special destination, he is held by acceptance of the deed to make the destination his own (*Farquharson*, 1883, 10 R. p. 1253; *Paterson*, 1897, 24 R. p. 499).

Institution and Substitution.—The institute in a settlement is the person to whom the grant is made. Thus, in a disposition to A. and his heirs, A. is the institute—he is not an heir but a disponee; so in a disposition to the heirs of A., A.'s heir is institute.

A conditional institute is he who is made disponee upon some condition in the event of the failure of A. to take. He also is a disponee and not an heir.

A substitute is commonly pointed out by the words "whom failing," or "then to," or "and to." Substitution always implies conditional institution in the same character in the event of the institute or all the previous substitutes not living to take. But if an institute takes and then dies, the property goes not to the heirs-at-law of the institute, but to the person pointed out in the clause of substitution, who is known as the heir of provision, heir *facto* not *lege*.

In construing the words "whom failing," the nature of the right to which the failure applies must be considered. In a fee-simple destination the right fails only by death. In an entail the failure may take place in twenty different ways, according to the conditions of the deed of entail. In a lease the words are not to be interpreted as if they occurred in a destination of property (Inglis in *Macalister*, 1859, 21 D. at p. 565).

In the case of heritable estate a destination will be restricted so as to infer only conditional institution and not substitution, only on clear evidence of intention.

The dispositive words are applied provisionally to the substitutes or to those who come in by a power of nomination as directly as to the institute.

According to Lord M'Laren the destination must be to persons named, or to a series of heirs selected from among the heirs pointed out by the law.

The selection must be from the class of heirs who would succeed by operation of law to the individual disponees. This excludes from the category of heritable destinations grants to heirs in a line of descent distinct from that of the legal order of succession, *e.g.* to those connected in the maternal line. Such a destination would not exclude the heir-at-law of the first person to take.

2. A simple grant to A. and his heirs means to A. and the heirs pointed out by the law of intestate succession.

A disposition to A. is the same in legal meaning and effect as a disposition to A. and his heirs. The omission of the words "and his heirs" does not detract from the deed. Nothing is added by inserting them. It follows that the will of the disponer ceases to operate when his disposition is feudalised (*Moubray*, 1895, 22 R. 801; *Leny*, 1860, 22 D. 1272; *Macgregor*, 1864, 3 M. 148).

The brocard, *hæres hæredis mei est hæres meus*, has never been recognised in our system in any other sense, or to any other extent than this, that where rights of a neutral character (as heritable or moveable) are rendered

heritable *destinatione*, *e.g.* a bond secluding executors, the subject remains in its provisional character heritable until the heritable destination is altered by someone having the right of creditor in the instrument; and everyone who takes up the succession to this debt as heir is, in a certain improper sense, said to take it up under the destination, and so as *hæres hæredis* to be the heir of the original creditor, who, by the terms in which he took his bond, made that heritable *quoad* succession which *sua natura* was moveable" (Inglis, quoted in *Moubray*, at p. 810).

Where the granter of a deed dispones heritage to himself and to a series of substitutes, the first substitute on the death of the institute takes up the estate by service (*Young's Trs.*, 1867, 5 M. 1101; *Main*, 1880, 7 R. 688). The same is the rule when there has been delivery, and the estate has passed to the institute (*Hay*, 1758, M. 14369; see *Birnie*, 1893, 20 R. 481). In the case of *mortis causa* deeds if the institute survives the granter, he takes as disponee. Where the institute predeceases the granter, the first of the substitutes also takes as disponee (*Colquhoun*, 1828, 7 S. 200; *Fyfe*, 1840, 2 D. 651, 4 D. 1063). And the same rule applies to a disposition to the granter's heirs whom failing to other heirs (*Hutchison*, 1872, 11 M. 229). In bonds of provision in favour of children, a substitution is more strictly observed than in the case of legacies (Montg. Bell, 992). The substitution of two children to each other operates more than a mere destination (*Roughcads*, 1794, Mor. 6403; *Macreadie*, 1752, Mor. 4402). A bond of provision is usually vacated by the predecease of the grantee even if it be granted in favour of heirs and assignees, because they are granted in implement of the natural obligation incumbent upon a parent (*Wood*, 1789, Mor. 13043; *Russell*, 1769, Mor. 6372; see *Findlay*, 1875, 2 R. 909).

Meaning of the Word "Heir."—Heirs in a destination is a technical expression including all those who are heirs by law; namely, heirs of line, heirs of conquest, and heirs of investiture (Bell, *Prin.* 1695). "Heir of line" in a destination may sometimes mean the heir of conquest (*Brown*, 1855, 17 D. 759; *Miller*, 1833, 7 W. & S. 1; *Robison*, 1859, 21 D. 905; *Boyd*, 1774, Mor. 3070; see Conquest, Heir of). Heir of line is synonymous with heir-at-law, heir general, heir whatsoever (Stair, iii. 5. 10). A destination to A. includes the heirs of A.; but a destination to A., followed by an immediate substitution of B., will exclude the heirs of A. except in the case of gifts from parents to children, or where there is a manifest intention that the heirs of A. should come in (Montg. Bell, p. 585). The heirs of the body of A. are the heirs in direct line tracing descent from A.

The expression "heir-male" applies only to males connected with the person named by males, exclusive of females, and also of males connected by females. A destination to the eldest daughter or heir-female means to the heir-female (*Lyon*, 1739, 5 Br. Sup. 663; Sandford, p. 64). "To A. B. and the heirs-male of his body, and the heirs whatsoever of the bodies of the said heirs-male"—each stirps takes before the next (*Lockhart*, 1837, 15 S. 376; 1840, 2 D. 377; 1842, 1 Bell's App. 202). "To the heirs-male procreated of the marriage between A. and B., and the heirs-male of their bodies respectively, whom failing to the heirs whatsoever of the bodies of such heirs-male respectively" (*Forbes*, 1873, 11 M. (H. L.) 44; *Arbuthnott*, 1869, 7 M. 371). To the heirs-female of the body of A. B., and the heirs-male of the body of the eldest heir-female (or of the said heir-female *successive*) (*Johnstone*, 1839, 2 D. 73; *Eglinton*, 1842, 4 D. 425). To A. B. and his heirs-male, *whom failing* to their heirs-female. This is distinguished from *Lockhart's* case (Sandford, p. 66). Heir-male of line means the heir-male, excluding the heir of conquest (*Sinclair*, 1766, Mor.

14944, 1767, 2 Bell's Ill. 336). Heirs of a marriage means the issue of the marriage in their order. Heir-female means the nearest surviving heir of line on the failure of heirs-male. They need not be the heirs of the last heir-male at all (*Dalrymple*, 1739, Elch. "Prov. to H." 2; *Johnstone*, 1839, 2 D. 73). Heir-male of the body of A. means a descendant of A. connected with him exclusively by males. The use of the words heirs whatsoever enlarges the destination to the heirs-at-law, and thereafter the legal order is followed. A destination to "own nearest of kindred" means the nearest next of kin according to the rules of heritable succession, and carries the property to an individual (*Collow's Trs.*, 1866, 4 M. 465; *Connell*, 1867, 5 M. 379). In looking for an heir of provision it is important to bear in mind that it is the heir of the head of the stirps, and not the heir of the last proprietor that is to be sought. Accordingly, the rule, *paterna paternis, materna maternis*, is applicable (see *Macgregor*, 1864, 3 M. 148). It is said to be an open question whether the succession of heirs-female general is to be deduced from the *nominatim* disponee, or from the heir-female last seised in the estate (M'Laren, p. 452). Where a father, in a daughter's marriage contract, conveyed lands to himself in liferent allenarly, and to his daughter and the heirs of her body, or her assignees or disponees, whom all failing to the nearest heirs whomsoever of the father, upon the death of the daughter childless it was decided that the father's survivance made the destination to his heirs ineffectual, and that the succession devolved on him—the destination being exhausted (*Todd*, 1874, 1 R. 1203). The fee cannot be *in pendente*, and the father has no heir till he dies; though in *Campbell's Trs.*, 1891, 18 R. at p. 1004, one of the judges said: "I should indeed be prepared, if necessary, to go further, and hold that under the destination of the most formal conveyance to the heirs-male of the body of A. B. (A. B. himself being clearly excluded), his sons would take, although A. B. should himself happen to be in life when the succession opened, and that his survivance would not be either a hindrance to its opening or favourable in any way to heirs subsequently called."

A substitution of an individual named after the heirs of another takes effect only when the whole line of descent of the institute is exhausted (*Baillie*, 1766, Mor. 14941; 1770, 2 Pat. 243). When the intention of the maker is clear and unambiguous, it must govern the decision, and be held to interpret any phrase of doubtful meaning (Sandford, p. 49). Where a substitute is called by a description which points out the heir's place in the family, as the eldest son, or second son, the time to which reference is had is not the date of the making of the deed, but the date at which the succession opens (*Roxburghe* case, 1807, Mor. App. "Tailzie," No. 13; 1810, 5 Pat. 320; *Shepherd*, 1838, 3 S. & M'L. 255). But in this matter the intention of the maker of the deed gives the rule. Technical words in a destination, when consistently used, are to be taken with their technical meaning. "In construing a deed in which there is a question as to the true intent of the author of that deed, you are to adhere to that as the intent which is the *primâ facie* obvious meaning of those words, unless you are, by fair reasoning, by strong argument, by that which amounts to necessary implication or declaration plain, driven out of the obvious meaning, and unless you can satisfy yourself, that the author of the deed did not intend that such should be taken to be the meaning of the words he has used" (*Ker*, 1810, 5 Pat. 320, at p. 444). The dispositive clause is the ruling clause, and its effect is not to be controlled by inferences from the narrative or from collateral writings

(*Forrester*, 1826, 4 S. 824; *Grahame*, 1825, 1 W. & S. 353; *Campbell*, 1770, Mor. 14949; *Hay*, 1788, Mor. 2315; 1789, 3 Pat. 142; *Selkirk*, 1740, Mor. 5615, 1 Cr. St. & Paton, 271). If the dispositive clause is ambiguous, the executive clauses may be used to explain it (*Sutherland*, 1801, Mor. App. "Tailzie," No. 8; *Halliday*, 1802, 4 Pat. 346). A destination to A. and his heirs whomsoever will not by mere implication be confined to the heirs of the body of A. (*Baillie*, 1766–70, Mor. 14941, 14944; *Murray*, 1774, Mor. 14952; *Suttie*, 19 Jan. 1809, F. C.; *Richardson*, 1821, 1 S. 105; 1824, 2 Sh. App. 149; *Gordon*, 1866, 4 M. 501). But where there is a destination to A. and his heirs whomsoever, and it is expressly stated that the substitution is to take effect on the death of A. without issue, the substitute and not the heir whomsoever will take (*Tinnoch*, 26 Nov. 1817, F. C.; *Moodie*, 1829, 7 S. 743; *Hunter*, 1839, 2 D. 16; *M'Ewan*, 1865, 3 M. 779; *Barstow*, 1868, 6 M. (H. L.) 147). "If a destination be made to A., his heirs and assignees whatsoever, there is no room for further disposition, because the whole property and right of ownership are comprised in and exhausted by the first disposition, which, in the hypothesis of law, will never come to an end. In such a case nothing remains to form the subject of ulterior ownership. But a complete disposition of this nature may be followed by a conditional substitution—that is, by a new disposition or gift depending on a contingent event, the declared effect of which, should it occur, is to reduce or put an end to the anterior disposition, and give birth to a new or substitutionary gift. The condition when purified puts an end to the first disposition, and introduces the second (Ld. Westbury in *Barstow*). The expression "heir-male" has been sometimes read as if it was heir-male of the body. "That canon of construction may be stated as follows: Where an estate is settled by a destination in favour of a disponee or substitute by name and his heirs-male, and there follows in immediate sequence a substitution or a series of substitutions to other members of the family, then if the effect of the primary destination would be to carry the estate so as to defeat the right of succession of the other members of the family immediately substituted, 'heirs-male' is to be read as 'heirs-male of the body'" (*Ker*, 1810, 5 Pat. 320; *Braid*, 1860, 22 D. 433; *Campbell*, 1838, 16 S. 1004; *Connell*, 1867, 5 M. 379). "Unless there be some rule of law which says that the author of a deed shall not tell you by the deed itself that by 'heirs-male' he means 'heirs-male of the body,' the opinion of the Court of Session is right" (Ld. Eldon in *Ker*, p. 460). Heirs whatsoever has similarly been interpreted as heirs of the body. This was held to be a case of "necessary implication" (*Earl of Northesk*, 1882, 10 R. 77). Wherever the effect of the primary destination to heirs-male is to bring in immediate collateral relatives preferably to remoter substitutes, the term "heir-male" receives its natural meaning (*Hay*, 1788, Mor. 2315; 1789, 3 Pat. 142; Ld. Eldon in *Ker*, 5 Pat. 431–438). Aid may sometimes be had from the context (*Mowat*, 1823, 2 S. 186; *Swinton*, 1862, 24 D. 278). When the destination is couched in popular language, somewhat greater latitude is allowed. But evidence of intention is always to be found within the deed. (Heir-female and daughter.) (*Lyon*, 1739, 5 Br. Sup. 663; *Leslie*, 1774, 6 Pat. 792; *Martin*, 1853, 15 D. 950; *Essex Kerr*, 1812, 5 Pat. 579.) A power to someone to name heirs may be introduced as a branch of a substitution. When the power is duly exercised, the heirs so named become members of the destination (*Stewart*, 1826, 2 W. & S. 369; 1831, 5 W. & S. 515; *Strathmore*, 1837, 15 S. 449; affd. 1840, 1 Rob. 189).

Clause of Return.—A clause of return is a clause providing that the subject shall return to the granter and his heirs. Generally it is a mere substitution (Ersk. iii. 8. 45; *Clydesdale*, 1726, Mor. 4343, Rob. App. 564).

1. If the conveyance or grant be onerous, fulfilling a legal obligation, a clause of return is considered gratuitous, without any just consideration, and may be defeated gratuitously.

2. If the grant is gratuitous without any antecedent obligation, a clause of return is held to be a condition of the grant, so that the grant must be taken and held *secundum formam doni*, and cannot be defeated by any gratuitous grant of the donee.

3. If the clause of return be not in favour of the granter himself, but to a third party, it is held to be gratuitous in his person, without any due consideration given by him for it, and of course is defeasible by the grantee or substitute.

4. If the clause of return, even in a gratuitous grant, does not immediately follow the grant to the grantee and his heirs, but there are other substitutes prior to the clause of return, it may be defeated gratuitously by the grantee or his heirs, as the substitutes have no sufficient *jus crediti* to prevent the alienation, and of course the granter and his heirs have no right, as their interest has been by his own act still further postponed (Ld. Medwyn in *Mackay*, 1835, 13 S. 246; see *Douglas*, 1717, Mor. 4343; *Johnston*, 1804, Mor. 15112).

Effect of General Disposition on Destination.—When a person dies leaving a general disposition, the question sometimes arises whether this evacuates existing destinations. When he himself made the destination, whether the date of the general settlement is earlier or later than that which contains the special destination, it will not be evacuated (*Campbell*, 1878, 6 R. 310; 1880, 7 R. (H. L.) 100; *Thoms*, 1868, 6 M. 704; *Walker*, 1878, 5 R. 965; *Lang's Trs.*, 1885, 12 R. 1265; *Webster's Trs.*, 1876, 4 R. 101). But where the maker of the general settlement has himself succeeded as a substitute, it is thought that the general settlement will prevail (*Campbell*, 1878, 6 R. 310; *Thoms*, *supra*). In order to keep a special destination out of the embrace of a general settlement, it is the duty of the litigant who says that the special destination has not been defeated, to show to the satisfaction of the Court, either by the terms of the testator's settlement or by other documents to which it is legally competent to refer, that it was not the intention of the testator to disturb the standing investiture (*Hamilton*, 1894, 21 R. (H. L.) 35; *Walker*, 1895, 23 R. 347). Parole evidence is not admitted, but real evidence is (*Glendonwyn*, 1873, 11 M. (H. L.) 33; *Brydon's Cur. Bon.*, 1898, 25 R. 708). "The relation which the granter of the deed bears to the estate in question, the condition of the parties interested in the previous settlement of the estate, and their relation to the granter of the deed; the mode in which the granter of the deed has dealt with the estate which is said to be conveyed in other deeds and transactions regarding that estate, and also the way in which he has dealt with his succession generally, if the general disposition is a disposition intended to settle the affairs of the truster," are fair elements for consideration in dealing with the question of intention (*Gray*, 1878, 5 R. 820, p. 824). In the case of a destination with substitution, the destination regulates the succession until it is altered. It may be altered by the person in possession at his pleasure, unless he is fettered by an entail.

When two distinct titles to the same property coexist in the same person he may ascribe his possession to either as he pleases (*Ld. Advocate*,

v. *Balfour*, 1860, 23 D. 147). Where one who is heir-at-law or heir of a prior investiture has a personal right in a disposition of the lands containing a different destination, and makes up his title as heir rather than as disponee, no one can prevent him, but the personal title will regulate the succession (*Gray*, 1752, Mor. 10803; *Durham*, 1802, M. 11220; 1811, 5 Pat. 482; *Ogilvy*, 1837, 15 S. 1027; Ross, *Leading Cases*, vol. ii. 577, 596); see under Double Titles. When he obtains a new investiture with a different destination, the destination is evacuated (*Harris*, 12 December 1811, F. C.; *Molle*, 13 December 1811, F. C.). The heir in possession can evacuate by making a new settlement. "The act of alienation necessarily extinguishes or transfers every right that was in the granter, and puts an end to the destination" (*Edgar*, 1736, Mor. 3089; 1742, 1 Pat. 334). Consolidation of a base fee, under a special destination, with a superiority evacuates the destination (*Pattison*, 1868, 6 M. (H. L.) 147), but does not make the lands subject to a destination contained in the title to the superiority (*id.*).

The word "heir," or "heir whatsoever," is not to be construed as heir of the former investiture, in spite of the statement in Erskine, iii. 8. 47 (*Brodie*, 1749, 5 Bro. Sup. 466; *Rose*, 1784, Mor. 14955; *Molle*, 13 December 1811, F. C.; 1816, 6 Pat. 168; but see *Baillie*, 1766, Mor. 14941).

When there is a settlement on a particular line of heirs, and accessory subjects are purchased with a destination general in its terms, this will be interpreted to mean the heirs to whom the principal subject is destined (*Greenock*, 1736, Mor. 5612; *Duke of Roxburghe*, 1823, 2 S. 141; Ld. Cowan, in *M'Gregor*, 1864, 3 M. p. 168). Where in a marriage contract there is a destination to heirs and bairns, the heritage goes to the eldest son (*Fairservice*, 1789, Mor. 2317; *Bowie*, 23 February 1809, F. C.: *Duncan*, 9 February 1813, F. C.), unless a contrary intention is disclosed (*Wilsons*, 1769, Mor. 12845). If moveables are so destined, the children take equally; and if lands are destined to the children of a marriage, the result is the same (*Waddell*, 1828, 6 S. 999). A settlement on bairns or children implies a power of distribution in the father; failing the exercise of it, the division is equally among them (*Lamond*, 1776, Mor. 12991; *Herries*, 1806, Hume, 528); but without reserved power he cannot limit the right of a child to a liferent (*Moir's Trs.*, 1871, 9 M. 848).

Entail.

Heirs by destination, though they may all be called heirs of tailzie, are usually distinguished into heirs of tailzie or entail and heirs of provision. The latter designation is usually given to heirs pointed out in marriage contracts, bonds of provision, or other deeds containing clauses of substitution; the term heir of entail is chiefly used in connection with the settlement of land upon a series of heirs under the prohibitions against altering the order of succession, contracting debt, and alienating the property, fenced by irritant and resolutive clauses, or their equivalent, which constitutes a strict entail.

Where there is nothing but a destination in which heirs called to the succession are substituted to one another, each on obtaining the property is an absolute fiar, and can alter the order of succession at his pleasure, either for onerous causes or gratuitously.

A deed containing an appointment of heirs, with clauses prohibiting the heir from altering the order of succession, and from alienating or burdening the estate, or from doing some of these acts, was called a destination with prohibitions. These used to be effectual to prevent the heir in possession

from doing any gratuitous act in contravention. A deed prohibiting the alteration of the succession was effectual *inter hæredes* at common law. Even in questions *inter hæredes* the only mode of restricting a fiar in the enjoyment of his estate is to use the fetters of a strict entail (*D. of Hamilton*, 1868, 7 M. 139; affd. 1870, 8 M. (H. L.) 48; *Cathcart*, 1830, 8 S. 497; 1831, 5 W. & S. 315; *Lindsey*, 1863, 2 M. 249; 1867, 5 M. (H. L.) 12; *Gilmour*, 1838, 16 S. 1261; *Cochrane*, 1848, 11 D. 908; 1850, 7 Bell's App. 65).

An entail with simple prohibitions would not be sustained to any effect, for the Act provides that where an entail is ineffectual as to one of the cardinal prohibitions, then the entail is held to be defective as to all the prohibitions, and the entail becomes null and void without any action of declarator.

1. Prior to the Entail Amendment Act, an entail was effectual for all purposes when it contained prohibitive, irritant, and resolutive clauses, and a prohibition to alter the order of succession.

2. If there was no prohibition to alter the succession, there was no entail.

3. An entail could only be defeated by doing some act not forbidden.

4. A prohibition to alter the succession was binding *inter hæredes* (M'Laren, i. 498).

The requisites of a strict entail were laid down in the Act 1685, c. 22, which gave efficacy to strict entails, and declared it lawful to tailzie lands and estates, and to burden the heirs with such conditions as the entailer should think fit.

There must be—

1. A right of property in the maker of the entail.

2. A destination clearly expressed.

3. Such conditions as shall guard against the accidental disappointment of the entailer's intentions.

4. The three prohibitions.

The right of property may be real or merely personal (*Livingstone*, 1762, Mor. 15418; *Renton*, 1843, 2 Bell's App. 214; *Earl of Fife*, 1861, 23 D. 657; 1862, 24 D. 936; 1863, 1 M. (H. L.) 19).

A right of reversion may be entailed, or a *pro indiviso* share in a heritable estate (*M'Millan*, 1834, 7 W. & S. 441; *Chisholm*, 1864, 3 M. 202; *Howden*, 1869, 7 M. (H. L.) 110). But heritable securities cannot be entailed: the first heir-substitute takes in fee-simple (*Duthie*, 1841 3 D. 616). An entail, binding *inter hæredes*, may be made of heritable rights incapable of being feudalised, such as leases (*Maule*, 4 March 1829, F. C.; *Dalhousie*, 1782, Mor. 10963). Moveables cannot be entailed (*Kinnear*, 1877, 4 R. 705; *Baillie*, 1859, 21 D. 838).

1. The destination must be clear and intelligible—the question is, what is the meaning of the maker of the entail in the words he has employed?

2. The succession must be given to some line of heirs different from the legal order of succession.

3. The succession must be without division.

4. The heirs must either be named or form a recognised category of descent from someone named, or from the maker of the entail.

A destination to A. and his lawful heirs for ever gives A. an estate in fee-simple (*Long*, 1860, 22 D. 1272; *Macgregor*, 1864, 3 M. 148). "An estate which descends according to the succession appointed by law cannot be made subject to the fetters of an entail; in other words, a conveyance on which such a destination follows is nothing more than a

conveyance to a single individual" (Ld. Rutherfurd Clark in *Moubray's Trs.*, 1895, 22 R. 808). Where in an entail there is a destination to the legal heirs either of a substitute or of the maker of the entail, the estate is fee-simple in the person of the last substitute (*Leslie*, 1710, Mor. 15358; *Colvill*, 1843, 5 D. 861; *Primrose*, 1854, 16 D. 498; Stair, iv. 18. 8; Ersk. iii. 8. 32). The heir-substitute becomes fee-simple proprietor without any judicial procedure (38 & 39 Vict. c. 61; Act 1875, s. 13). Once the estate comes to heirs-portioners and there is division, the entail is at an end (*Macdonald*, 1842, 5 D. 372; *Farquhar*, 1838, 1 D. 121); but it is the heirs-portioners who take it, and not the preceding substitute (*Mure*, 1837, 15 S. 581; 1838, 3 S. & M'L. 237; see *Inglis*, 1894, 22 R. 266; 1895 22 R. (H. L.) 51; *Schank*, 1895, 22 R. 845). The contingency of the succession devolving upon heirs-portioners then in being may be met by giving separate estates to those persons by name (*Mure*, 1837, 15 S. 581; 1838, 3 S. & M'L. 237; *Craig*, 1839, 1 D. 545; but see *Sands*, 1844, 6 D. 365). Ld. M'Laren asserts as a general proposition, that the only kind of destination capable of supporting an entail is one to a series of persons named, with or without substitutions to heirs of a determinate class; that is to say, in a known order of relationship different from the legal order of succession, but constituting a recognisable group of heirs (*MacGillivray*, 1862, 24 D. 759). One claiming to exclude the heir-at-law "must be able to found on something plain and tangible and known to the law."

For a discussion of the forms and requisites of a deed of entail, reference must be made to that title (see ENTAIL).

An entail without registration is effectual against the heir of the granter, or against the institute who accepts of it; and any of the substitutes may enforce registration of it.

It may be pointed out that an heir of entail has full power over the entailed estate, except in so far as the fetters expressly bind him: and though in construing an ordinary testamentary deed the Court will endeavour to the utmost to discover the intention of the maker of the deed, and will give effect to it, in regard to the fetters of an entail the very opposite is the rule: the most plain and obvious intention of the maker will be allowed no weight if the words employed can be so interpreted as to leave the heir of entail free.

To propel the succession is not a breach of the prohibitions (*Craigie*, 4 December 1817, F. C.; *Padwick*, 1874, 1 R. 697; *Gordon's Crs.*, 1749, Mor. 15384). If an expression in the fetters of an entail admits of two meanings, both equally technical, grammatical, and intelligible, that construction must be adopted which destroys the entail, rather than that which supports it (Ld. Campbell in *Lumsden*, 1843, 2 Bell's App. p. 114; Ersk. iii. 8. 29; Stair, ii. 3. 58; 1 Bell's *Com.* 44). But this rule of strict interpretation is not acted upon in construing directions to trustees to make an entail (*Stirling*, 1838, 1 D. 130). Where trustees were directed to make a strict entail, and failed to do so, the institute was held not entitled to take advantage of their mistake (*Ochterlony*, 1877, 4 R. 587; *Graham*, 1853, 15 D. 558; 1855, 2 Macq. 295). But the trustees may not introduce limitations or call heirs without being instructed to do so (*Cuming's Tr.*, 1832, 10 S. 804; *Seton*, 1854, 16 D. 658; *Campbell's Trs.*, 1838, 16 S. 1004). The effect of contravention under the Statute 1685 is "the next heir of tailzie may immediately on contravention pursue declarators thereof, and serve heir to him who died last infeft in the fee and did not contravene, without necessity any way to represent the contravener."

The next heir must declare the irritancy, and, if necessary, obtain a reduction of the offending deed (*Fullarton*, 1825, 1 W. & S. 410; *Maxwell*, 1846, 5 Bell's App. 165: *Breadalbane*, 1877, 4 R. 667). Unless it be otherwise specially provided, contravention only affects the contravener (*Gordon*, 1749, Mor. 15384: *Bontine*, 1837, 15 S. 711; 1840, 1 Rob. 347). The irritancy may be purged by performance or by revocation, at any time before decree is pronounced (*Ross*, 1766, Mor. 7289; *Abernethie*, 1837, 15 S. 1167; 1840, 1 Rob. 434; *Mackay*, 1798, Mor. 11171). After the death of an heir who had contravened by granting long leases, the power of purgation was not allowed to the tenants (*Hislop*, 1821, 1 Sh. App. 64; *Earl of Wemyss*, 2 February 1821, F. C.). Any substitute heir may raise a declarator of contravention without calling intermediate heirs (*Simpson*, 1697, Mor. 15353: *Irvine*, 1723, Mor. 15369; *Dundas*, 1774, Mor. 15430). But if the heir of the body of the contravener is also deprived, he has no interest, and may not sue (*Gilmour*, 1801, Mor. App. "Tailzie," No. 9). Where descendants are not mentioned, the succession is merely propelled to the next heir.

The penal consequences of contravention cannot be enforced after the death of the contravener (*Mackay*, 1798, Mor. 11171; *Turners*, 1807, Mor. App. "T." No. 16: *Mordaunt*, 9 Mar. 1819, F. C.). Deeds of contravention are effectual until reduced, but they may be reduced even after the death of the contravener (*Mordaunt, supra*; *Agnew*, 23 June 1813, F. C.). Acts of ordinary administration done before contravention remain valid. The Entail Amendment Act, sec. 40, saves from the effect of irritancy the purchasers or creditors under deeds granted before execution of the summons of declarator of forfeiture, provided such deeds were validly granted in consistency with the provisions of the entail.

When trustees are directed to make an entail, it is their duty to make a valid and effectual entail.

In construing testamentary directions for making an entail, the Court is not tied down to the strict or malignant rules of construction which are applied to entails once they are executed.

An express trust to make a valid entail will not be impaired by a specific direction to insert clauses which, taken alone, would be inadequate for that purpose.

When a testator confers no power to make an entail, and the trustees are directed to carry out the intention of the truster by a definite method, they must conform their action exactly to the instructions given (*Sandys*, 1897, 25 R. 261: *Cuming's Trs.*, 1832, 10 S. 804; *Duthie*, 1841, 3 D. 616; *Cowan's Trs.*, 1860, 23 D. 167; *Leny*, 1860, 22 D. 1272; *Macgregor*, 1864, 3 M. 148).

Will of Heritage.

The law which declared that no conveyance of lands could be given by way of bequest has been changed by sec. 20 of the Consolidation Act of 1868, which enacts: "From and after the commencement of this Act it shall be competent to any owner of lands to settle the succession to the same, in the event of his death, not only by conveyances *de presenti*, according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings, and no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands which shall have been granted by any person alive at the commencement of this Act, or which shall be granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of the

lands to which such deed or writing applies, on the ground that the granter has not used with reference to such lands, the word 'dispone,' or other word or words importing a conveyance *de præsenti*; and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands, any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands within the meaning of the 19th section hereof by the granter of such deed or writing in favour of the grantee thereof, or of the legatee of such lands, and shall be held to create, and shall create, in favour of such grantee or legatee an obligation upon the successors of the granter of such deed or writing, to make up titles in their own persons to such lands, and to convey the same to such grantee or legatee; and it shall be competent to such grantee or legatee to complete his title to such lands in the same manner and to the same effect as if such deed or writing had been such a general disposition of such lands in favour of such grantee or legatee, and that either by notarial instrument or in any other manner competent to a general disponee: Provided always that nothing herein contained shall be held to confer any right to such lands on the successors of any such grantee or legatee who shall predecease the granter, unless the deed or writing shall be so expressed as to give them such right in the event of the predecease of such grantee or legatee."

There is no rule that any particular form of words is necessary to convey heritage. The residuary clause will do it if the tenor and contents of the will show that the testator so intended (*Wallace's Exrs.*, 1895, 23 R. 142). If the deed, taken as a whole, clearly imports an intention to make a conveyance of heritage, that is enough (*M'Leod's Tr.*, 1883, 10 R. 1056; *Campbell*, 1887, 15 R. 103); but the mere nomination of an executor will not carry heritage (*Grant*, 1893, 20 R. 404). It is no longer a question of technicality, but of common construction, whether heritage was intended to be conveyed or not (*Hardy's Trs.*, 1871, 9 M. 736; *Pitcairn*, 1870, 8 M. 604; see also *Edmond*, 1873, 11 M. 348; *Robb's Trs.*, 1872, 10 M. 692; *Studd*, 1883, 10 R. (H. L.) 53; *Oag's Curator*, 1885, 12 R. 1162; *Aim's Trs.*, 1880, 8 R. 294; *Ford's Trs.*, 1884, 11 R. 1129; *Farquharson*, 1883, 10 R. 1253; *Farquhar*, 1875, 3 R. 71; *Forsyth*, 1887, 15 R. 172).

Destinations in Conveyances.—Destinations inserted in conveyances and bonds at the request of a purchaser may be considered as testamentary instruments inasmuch as they regulate the succession, but are revocable until delivered to the person favoured. In *Balvaird*, 5 December 1816, F. C., a purchaser took a disposition in favour of a third party, but kept it in his possession, and neither delivered it to the third party nor caused infeftment to be taken upon it. He died leaving a general settlement. It was held that the property went to the disponee under the general settlement (*Hill*, 1755, Mor. 11580). They may be irrevocable where the father takes a title to himself as trustee for his children (*Gilpin*, 1869, 7 M. 807). In the case of a disposition taken, at the request of a purchaser, to himself in liferent allenarly and his heirs whomsoever in fee, the purchaser is only a liferenter, and the fee is not carried by his testamentary deeds. It is well fixed that when a purchaser takes a title to heritable property

containing a special destination, he is held by acceptance of the deed to make the destination his own (Ld. Justice-Clerk in *Farquharson*, 1883, 10 R. p. 1257).

Conjunct Fees.

Conjunct fees are granted (*a*) to strangers; (*b*) to husband and wife; (*c*) to father and children. In construing destinations, effect is to be given to the intention expressed in the deed, but technical terms receive their technical meaning.

Strangers.—"To A. and B. in conjunct fee and liferent and their heirs": the two are equal fiars while both live, the survivor has the liferent of the whole, the fee divides equally between the heirs of both (Ersk. iii. 8. 35). "To A. & B. jointly and their heirs": they are independent proprietors of one half share *pro indiviso* (*ib.*; *Dickson*, 1821, 1 S. 113; 1823, 2 S. 462). "To A. and B. jointly and the longest liver and their heirs": here, though the several shares belonging to the conjunct fiars are attachable by creditors, on the death of one of them the survivor has the fee of the whole (*Bissett*, 1799, Mor. App. "Deathbed," No. 2). "To A. and B. and the heirs of A.": gives B. merely a liferent (*Baillie*, 23 February 1809, F. C.). "To A. and B. jointly, and to B., if he shall survive, and his heirs": if B. predecease, the fee divides between A. and the heirs of B. If B. survives, he takes the whole, subject to the debts and deeds of A. "To A. and B. and the longest liver of them in liferent, for their liferent use allenarly, and to the said A. and his heirs and assignees in fee": A.'s heirs are the fiars; the longest liver of the two has a liferent of the whole. To A. and B. equally in liferent, and to A. and his heirs in fee," will give B. only a liferent of one half —the liferent of the other half and the fee of the whole will belong to A. and his heirs.

Husband and Wife.—The law will hold the person from or through whom the lands subject to the destination came, to be the fiar, unless the lands came from the wife, and are meant as tocher; or the deeds show that the parties intended otherwise (*Paterson*, 1780, Mor. 4212; *Muirhead*, 1824, 2 S. 617). The general presumption is that the fee is in the husband as the *dignior persona*. "To A. and B. in conjunct fee"; "in conjunct fee and liferent"; "To A. and B. and their heirs": in all these cases the husband is fiar; the wife has only a liferent. The heirs have only a *spes successionis*, though when the destination occurs in an antenuptial contract, the heirs of the marriage cannot be gratuitously deprived of their succession. "Their heirs" means the heirs of the husband (Ersk. iii. 8. 36; *Forrester*, 1835, 1 S. & M'L. p. 458: *Johnston*, 1667, Mor. 4199). The person from whom the right flowed is fiar (*Creditors of Earneslaw*, 1705, Mor. 4223; *Muirhead*, 1824, 2 S. 617; *Myles*, 1857, 19 D. 408; *Brough*, 1887, 14 R. 858). Where power of disposal is given to one spouse *in dubio* the fee is in that one (*Earl of Dunfermline*, 1676, Mor. 2941; *Fead*, 1709, Mor. 4240). Exclusion of the husband's creditors gives the fee to the wife (*Young*, 1835, 14 S. 85). That spouse is fiar whose heirs are most favoured in the destination, *i.e.* are first called after the issue of the marriage (*Cranston*, 1667, Mor. 4227; *Smith Cuninghame*, 1869, 7 M. 689). Where the conveyance is to spouses and the survivor and their heirs, the fee will belong to the survivor (Ersk. iii. 8. 36; *M'Gregor*, 1831, 9 S. 675; 1835, 1 S. & M'L. 441). But where it was by the wife to the spouses in conjunct fee and liferent, and the survivor and the heirs of the marriage, the fee was in the husband (*Neilson*, 1732, 1 Cr. & St. App. 65; *Mackellar*, 1840, 3 D. 172). A destination to spouses in conjunct fee and the survivor was held to give them equal rights, with benefit of survivorship (*Walker*, 1895, 23 R. 347). This presumption has not

the same strength in the matter of moveables (*Bartilmo*, 1632, Mor. 4222; *Bryson*, 1893, 20 R. 986). Where the property came from the wife and was destined to the spouses in conjunct fee and liferent, for their liferent use allenarly and to the children of the marriage in fee, the wife was fiar (*Reid*, 1827, 6 S. 198). Where spouses have a joint liferent, the right of the wife is in abeyance during the continuance of the marriage, but cannot be defeated by the husband (*Thom*, 1852, 14 D. 861). A conveyance in conjunct liferent may give a fee where an absolute power of disposal is reserved.

Destinations to Parents and Children.—It is generally presumed to be the intention of parties that the fee shall be or remain with the parent.

"To the father in liferent and the heirs of his body in fee": the father is fiar, the children merely heirs of provision (*Frog's Crs.*, 1735, Mor. 4262; *Kennedy*, 1825, 3 S. 554). This applies to both heritage and moveables. But by the use of taxative words, such as "allenarly," the parent's right is restricted to a liferent, in which case a beneficial right as disponee vests in each child at birth (*Douglas*, 1870, 8 M. 374). Where the children are called nominatim, the parent has merely a liferent (*M'Intosh*, 28 Jan. 1812, F. C.). Where the father has a liferent and power of disposal, he is fiar (*Porterfield*, 1779, Mor. 4277; *Cumming*, 1756, Mor. 4268; *Baillie*, 23 Feb. 1809, F. C.); but a reserved liferent, with full power to borrow, is not a fee (*Boustead*, 1879, 7 R. 139). If the destination is to the parent in liferent, and to a child nominatim, and other children to be born, the fee is in the child named, for himself and those to be born (*M'Gowan*, 1862, 1 M. 141; *Dykes*, 3 June 1813, F. C.). A special trust for behoof of the children will defeat the father's claim. The rule is not to be applied to the case of dispositions by married persons to one another in liferent and to their children in fee, especially if proper *mortis causa* and testamentary conveyances (*Fraser*, 1707, Mor. 4259; *Mackellar*, 1840, 3 D. 172).

Marriage Contract.

Where a settlement is made by marriage contract, the heir is in a different position from that which he would hold if the destination was contained in an ordinary disposition. The marriage contract is considered in law a highly onerous transaction. Accordingly, where the destination in a marriage contract is to heirs of the marriage, or to sons, or to sons in their order, or to heirs-portioners, or where the father is bound at a certain time to take investiture in these terms, the right of the children is a *spes successionis in obligatione*. The right of an heir or child of the marriage is not that of an heir but of a proper creditor, and requires or required no service (Ersk. iii. 8. 73; *Ogilvy*, 16 Dec. 1817, F. C.; *Gordon's Trs.*, 1821, 1 S. 185); but where the father had invested the money, or settled a stipulated sum on the heirs of the marriage, service was necessary; for the obligation in the marriage contract being fulfilled, the children had only a *spes successionis* (*Anderson*, 1747, Mor. 12868; *Cameron*, 1784, Mor. 12879). Heirs of a marriage are more favourably regarded than heirs substituted in a simple destination; which last, if gratuitous, gives only the hope of succession, and may be altered by the maker or any of the members who succeed before the substitute; whereas marriage contracts are onerous deeds. The heir of a marriage has therefore a mixture of two distinct characters in him. He is not only heir but *quodammodo* creditor: for the father is laid under an implied obligation not to defeat these provisions by any gratuitous deed (*Graham*, 1743, Mor. 13010). "They are creditors among heirs, but they are only heirs among

the creditors of their father" (Ld. Corehouse in *Browning*, 1837, 15 S. 999). The father cannot revoke or alter the provisions, or defeat them by any gratuitous deed, but they have no proper claim as his creditors until his death; nor can they then compete with creditors: but they have something more than an ordinary *spes successionis*, because their father cannot gratuitously defeat their right (*Goddard*, 1844, 6 D. 1018). It is only in favour of the heirs of the marriage that the father is under restraint; the substitutes who come after him in the destination are mere substitutes, whose expectation may be defeated gratuitously (Bell's *Lect.* i. 249). Once the heir succeeds, he is under no restraint (*Reid*, 1827, 6 S. 198; *Edgar*, 1736, Mor. 4325); and a destination may be changed by the spouses if there is no issue of the marriage (*Davidson*, 1870, 8 M. 807). The father may encroach upon the heir's expectations by settling a reasonable jointure upon a second wife, or by making a provision for children of a second marriage, if he has no other fund from which to provide for them (*Guthrie*, 1846, 9 D. 124; *Harvie*, 1847, 9 D. 1420; *Wilson's Trs.*, 1856, 18 D. 1096; *Cumming*, 1858, 20 D. 1280; *Walkinshaw's Trs.*, 1872, 10 M. 763; *Greenoak*, 1870, 8 M. 386; *Arthur*, 1870, 8 M. 928); but these must be suitable to his circumstances (*Bruce*, 1761, Mor. 13036). In case the father afterwards acquires a further fund, this will be liable to the heir in relief (*Henderson*, 1730, Mor. 12928). As the settlement can be pleaded only by the heir of the marriage, and the father can during his lifetime voluntarily convey the estate to the heir, calling what heir-substitutes he likes: this will be implement of the obligation in the marriage contract even if the heir-expectant predeceases the father, and is never truly his heir (*Trail*, 1737, Mor. 12985; *Monro*, 1760, 5 Bro. Sup. 880; *Fotheringham*, 1797, Mor. 12991; *M'Donald*, 1877, 4 R. 271). Accordingly, the heir-expectant can discharge (*Routledge*, 19 May 1812, F. C.: *Majendie*, 16 Dec. 1819, F. C.: 1820, 2 Bligh, 692; but see *Macdonald*, [1893] App. Ca. 642, reversing 19 R. 567; M'Laren on *Wills*, i. 426). One cannot with any propriety be called heir while the ancestor to whom he ought to be heir is alive (*Maconochie*, 1780, Mor. 13040).

"I understand the rule of the law to be, that under such marriage contracts the children have a *jus crediti*, giving them such a right against the creditors of their father, if the provision is so conceived as that there was or might be a direct interest accruing to them in the lifetime of the father. As, for example, if the provision is made payable on the marriage or majority of the child, though such event should happen in the lifetime of the father; or if the provision is declared to bear interest from any such term which might be in his lifetime; or if it is declared to be payable at the dissolution of the marriage, or to bear interest from and after that event, which may happen by the wife's predecease.

"2. But, on the other hand, that, if the provision is so conceived that the principal is not payable until 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* (but see *Gordon*, 1833, 11 S. 368).

"3. I understand it also to be a fixed rule, that 'it has no effect in conferring a *jus crediti* on the children, that, instead of the husband being simply bound to pay a sum to the children, he engages to provide and secure a sum so payable.'

"4. But if he actually lends out the money, or constitutes a trust, or grants heritable security to the wife, or any other person in name of the children, with absolute warrandice, it constitutes a fee in the children, which will prevail against onerous creditors" (*Goddard*, 1844, 6 D. p. 1023).

The right of the heir of the marriage under a marriage contract destination of heritable estate is of the same nature as that of the children in relation to provisions of moveable funds. Unless the father binds himself to infeft his son at a period which may happen in his own lifetime, the right of the son is postponed to that of creditors, and only bars gratuitous alienation (*Cunynghame*, 1804, Mor. 13029; *Speirs*, 1778, Mor. 13026; *Macneil*, 1826, 4 S. 393). The father may sell the estate, and in this case the son may at his death rank as a postponed creditor for the price as a surrogatum (*Cunninghame*, 20 Dec. 1810, F. C.; *Earl of Wemyss*, 1818, 6 Pat. 390). The onerosity of the provision arises from the obligation in the marriage contracts.

This all assumes that the father was solvent at the time of granting the provisions, unless the right is secured by a trust conveyance (*Morrice*, 1846, 8 D. 918; *Wood*, 1850, 12 D. 963). Where the father was insolvent at the date of an antenuptial contract, provisions to children will only be sustained as against creditors in so far as a moderate amount (*Ballantyne*, 7 Feb. 1814, F. C.; *Blackburn*, 29 May 1816, F. C.; *Watson*, 1874, 1 R. 882). In considering whether a preference has been secured by giving real security, the material question is whether the granter was solvent when he made the conveyance, and so gave the children security (*Herries, Farquhar, & Co.*, 1838, 16 S. 948). The father may grant rational provisions to wife and younger children, if he has no other funds available for the purpose (*Miller*, 1822, 1 Sh. App. 308; *Ouchterlony*, 1752, Mor. 13013); and similarly for a second marriage (*Haldane*, 1885, 13 R. 179). A provision to younger children out of the heir's inheritance must be given in the form of a burden upon the estate, and not as part of it (*Dykes*, 9 Feb. 1811, F. C.). Later cases have been unfavourable to the power of the father to provide for second families (*Bell's Trs.*, 1846, 9 D. 124; *Wilson's Trs.*, 1856, 18 D. 1096; *Harvie*, 1847, 9 D. 1420; *Cumming*, 1858, 20 D. 1280). The heir of a marriage is ascertained at the dissolution of the marriage (*Maule*, 1876, 3 R. 831). A destination to a parent in liferent allenarly and his heir in fee cannot be evacuated by the father and the eldest son, for the eldest son may not live to become his father's heir (*Ferguson*, 1875, 2 R. 627). Provisions to children in postnuptial contracts confer no *jus crediti* unless there was delivery of the deed, and the parent was solvent when the provision was granted.

Conditions in Settlements of Land.—Settlements of land, like settlements of moveables, are subject to the implied conditions, *si testator sine liberis decesserit* and *si institutus sine liberis decesserit*. These are treated under moveable succession. Express conditions, if clear, intelligible, and lawful, receive their effect (*Bell*, 1785). Impossible conditions are held *pro non scriptis*. Unlawful conditions, or those which are *contra bonos mores*, are held impossible (*Bell*, 1785).

See conditions in Legacies and in Moveable Succession.

Lease: Crofters Act.

Lease.—A lease of lands is heritable and descends to the heir. Heirs succeed though not expressly called (Ersk. ii. 2. 6; *Tailfer*, 1811, Hume, 857). The right vests without any service (Stair, iii. 5. 4; Ersk. iii. 8. 77;

Scott, 1754, Mor. 14376). In the absence of special destination, it is the heir-at-law who succeeds.

A lease, even if it excludes assignees, may be propelled to the heir (*Hepburn*, 1759, Mor. 10409; *Crawford*, 1778, 5 B. S. 620). The amplest power of disappointing the heir is conferred on the tenant when the lease is assignable.

If the lease is not assignable, the legal line of succession may be altered by destination, or by bequest under statutory authority.

By sec. 29 of the Agricultural Holdings Act, 46 & 47 Vict. c. 62, a tenant may, by will or other testamentary writing, bequeath his lease to any person, subject to certain provisions set forth in the Act.

If the legatee does not accept the bequest, or if the bequest is declared to be null and void, the lease descends to the heir of the tenant in the same manner as if the bequest had not been made.

In order to come under the Act, the holding must be either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden. The Act does not apply to the case of a holding let to the tenant during his continuance in any office, appointment, or employment of the landlord (s. 35).

The Rutherfurd Act, 11 & 12 Vict. c. 36, s. 49, enacts that if a lease, dated on or after 1st August 1848, is held directly or through trustees by a party of full age and born after its date, he shall not be affected by conditions or limitations of entail, or intended to regulate the succession, or to restrict his enjoyment, in favour of any future heir. The heir may accordingly alter the destination.

The heir in a lease, excluding assignees, takes in the character of conditional institute or substitute in the destination, and is not liable for his ancestor's debts even to the extent of the interest which he takes (*Bain*, 1896, 23 R. 528).

Crofters Act.—Under sec. 16 of the Crofters Holdings Act, 1886, 49 & 50 Vict. c. 29, a crofter may, by will or other testamentary writing, bequeath his right to his holding to one person, being a member of the same family,—that is to say, his wife or any person who, failing nearer heirs, would succeed to him in case of intestacy,—subject to certain provisions as to intimation to the landlord, and objections by him. Otherwise the right to the holding descends to the heir of the crofter. Under this section a bequest to a niece, an agnate, was held good (*M'Lean*, 1891, 18 R. 885); but a bequest to a nephew of the crofter's mother was held bad (*Mackenzie*, 1894, 21 R. 427).

Aliens.

Aliens were formerly incapable of holding heritage; but by sec. 2 of the Naturalisation Act, 33 Vict. c. 14, it is enacted that real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject: and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject.

Succession in Moveables on Intestacy.

"Moveable subjects are, upon the death of the owner, whether dying testate or intestate, put under the administration of persons authorised by the law to execute either the actual or the presumed will of the deceased, who are therefore styled executors; and hence the subject of moveable

succession is called executry. But the appellation of executors is sometimes applied *designative* to those who are barely entitled to the moveable succession of the deceased *ab intestato*, and have a right to claim the office of executors if they think proper. Thus bonds are commonly taken payable to the creditor, his heirs and executors" (Ersk. iii. 9. 1). See *Gray's Trs.*, 1895, 23 R. 199.

There is great diversity among the rules which have been adopted in different countries for reckoning proximity of kindred. The rules of the civil law, of the canon law, of the English law, and of the Scotch law differ from each other in many respects. And in the Scotch law there are different rules applicable to marriage and to succession; and those which are applicable to succession differ according as the subjects of the succession are heritable or moveable. Propinquity is distinguished by its different lines and measured by degrees.

The succession to the moveable estate goes by the common law to the next of kin of the deceased, who take as a class, dividing the moveables among them. There is therefore—and in this moveable is distinguished from heritable succession—no right of primogeniture, no representation, at common law (though a right of representation within certain degrees has been introduced by statute), and no exclusion of females by males. As in heritage so in moveables, the kinship considered is that of consanguinity; only those who are related to the intestate through his father are called to succeed to him—with the single exception that by statute the mother and brothers and sisters of the half blood uterine have certain rights under the Moveable Succession Act. Though property comes through the mother, it never at common law goes back to her or through her.

Relationship is divided into the three lines or orders: the descending, the ascending, the collateral. Each generation or filiation forms a step of degree, *e.g.* a son is one degree removed from his father, a grandson two degrees from his grandfather. Cousins german, being grandchildren of a common ancestor, may conveniently be considered as having four degrees between them; an uncle and his nephew as having three.

The nearness or remoteness of kinship may therefore be found—

1. In the line of descent, by counting the number of generations from the intestate.

2. In the line of ascent, by counting the generations upwards from the intestate.

3. In the collateral line, the members of which are either collaterals of the intestate, or their descendants, or collaterals of some ancestor of the intestate or their descendants, proximity may be calculated by counting up to the nearest common ancestor, and down to his nearest common descendant. It must be borne in mind that at common law the descendants of an ancestor of the intestate always come in before that ancestor. Brothers or sisters of the intestate, and their descendants, exclude his father; uncles or aunts and cousins, the grandfather. Accordingly, in counting towards collaterals, the steps which touch the common ancestor may be disregarded. The half blood collaterals of a nearer ancestor, though excluded by the full blood and its descendants, themselves exclude the full blood connected through a more remote ancestor; that is to say, brothers and sisters consanguinean will exclude an uncle of the full blood.

At common law, then, the rule was that the free moveable estate divided among the nearest in kin — a child *in utero* being considered already born—at the death, the full blood excluding the half blood in the same line, and neither the mother nor maternal relations succeeding. There

is, of course, no half blood in the direct line. The succession went first to descendants, then to collaterals, then to their descendants, each generation excluding the more remote; then to the father; next to his collaterals, and to their descendants; next to the grandfather, and next to his collaterals, to the most remote degree to which evidence will reach. The existence of one person of a nearer degree excludes all those who are more remote in the table of succession; that is to say, apart from statutory alteration.

Important changes were introduced by the Intestate Moveable Succession Act, 1855, 18 Vict. c. 23, which introduced within certain limits the rule of representation, altered the rights of the father, and conferred a right of succession in certain events upon the mother and upon brothers and sisters uterine and their descendants.

By sec. 1 when any person, who had he survived the intestate would have been among his next of kin, shall have predeceased, the lawful child or children of such person shall come in his place, and their issue in the event of their predecease shall come in their place, and shall respectively have right to the share of the moveable estate of the intestate to which their parent or ancestor would have been entitled had he survived the intestate. No representation is admitted after the descendants of brothers and sisters. The right of representation in moveables thus introduced is accordingly more restricted than that which prevails in heritable succession (*Ormiston*, 1862, 1 M. 10). It has been decided that this right of representation does not affect the rule that when next of kin succeed, they take *per capita*, and not *per stirpes*. Thus where two families of nephews and nieces are the next of kin, they take in their own right, and not as representing their parents, and the division is *per capita* (*Turner*, 1869, 8 M. 222). The rule of the Act is accordingly only applicable where one or more who would have been among the next of kin have died before the intestate, and others in the same degree have survived.

By sec. 3 it is provided that where any person dying intestate shall predecease his father without leaving issue, his father shall have right to one half of his moveable estate in preference to brothers and sisters and their descendants. Sec. 4 enacts that where the intestate dies without leaving issue, predeceased by his father, the mother shall have right to one third of the moveable estate in preference to brothers and sisters or other next of kin. By sec. 8, where an intestate dies without leaving issue, predeceased by both father and mother, and leaving no brother or sister german or consanguinean, nor any descendant of such brother or sister, but leaving brothers or sisters uterine, or a descendant or descendants of a brother or sister uterine, these have right to one half of the moveable estate, the other half going to the next of kin.

By the interpretation clause, the words "intestate succession" mean and include succession in cases of partial as well as of total intestacy; "intestate" means and includes every person deceased who has left undisposed of by will the whole or any portion of the moveable estate on which he might, if not subject to incapacity, have tested. "Moveable estate" means and includes the whole free moveable estate on which the deceased, if not subject to incapacity, might have tested, undisposed of by will, and any portion thereof so undisposed of.

Caduciary Rights of the Crown.—On the failure of next of kin, the Crown takes the moveable estate as well as the heritable; *quod nullius est fit domini regis* (*Finnie*, 1836, 15 S. 165). The Crown usually appoints a donatory. The liability for the debts of the deceased is in that case limited to the value of the estate (Ersk. iii. 10. 4).

Order of Succession.—The following tables give the order of succession in moveables, first, at common law, and, second, under the statute. It must be kept in view that the heir cannot claim as one of the next of kin unless he collates the heritage.

On the death of the proprietor of moveable estate intestate, before 1855, the following was the order of succession:—

1. The children took equally among them.
2. The grandchildren.
3. The great-grandchildren, and so on till the line of descent is exhausted, the members of each degree taking *per capita*, and surviving children excluding grandchildren; surviving grandchildren excluding great-grandchildren.
4. The brothers and sisters of the deceased equally among them, the survivors taking the whole estate.
5. Nephews and nieces, and after them their descendants.
6. Brothers and sisters consanguinean.
7. Nephews and nieces the children of brothers or sisters consanguinean, and after them their descendants.
8. The father of the intestate.
9. Uncles and aunts, full brothers and sisters of the father; after them their descendants, each generation being exhausted before the next is reached.
10. Half brothers and half sisters consanguinean of the father, and their descendants in the same way.
11. The grandfather, the father's father.
12. His collaterals, in the same order and subject to similar rules to those stated in 9 and 10.

Table of intestate succession in moveables under the Statute 18 Vict. c. 23:—

1. The children and the descendants of any child that may have predeceased *per stirpes*.
2. If no child survives, the grandchildren and the descendants of deceased grandchildren divide the estate *per stirpes*.

If there are none but children, or none but grandchildren, or none but great-grandchildren, the division will be *per capita*.

3. The line of descent being exhausted, the brothers and sisters take one half, the father takes the other. The half share to be taken by the brothers and sisters will, in the event of their predecease, go to their descendants, subject to representation. If there are no brothers or sisters and no descendants of brothers or sisters, the father will take the whole. Failing the father, the mother takes one third, the next of kin the other two thirds. Failing brothers and sisters german and consanguinean, and father and mother being both dead, brothers and sisters uterine and their descendants take one half the moveable estate, the other half going to the next of kin.

The moveable estate of a married person is subject, on the death of that person, to claims on behalf of the surviving spouse, and also on behalf of the children. Those on the estate of the husband are of old date in the law of Scotland, and are known as the *jus relictæ*, and *legitim*; those on the moveable estate of the wife were introduced by the Married Women's Property Act of 1881.

The amount of a married person's estate which is subject to his or her testamentary deeds, or which is distributed as intestate succession, depends upon whether or not there are children or a relict.

If children and a spouse survive, one third will go to the children as legitim, one third to the surviving spouse as *jus relictæ* or *relicti*; and the remaining third is the dead's part, which, if undisposed of by the acts or deeds of the deceased, falls to be divided according to the rules stated.

If there are children but no surviving spouse, or a surviving spouse but no children, the division is bipartite, one half being the share of the relict or children, as the case may be, the other half the dead's part.

Legitim.

Legitim (bairn's part of gear or portion natural) is a share in the father's free executry estate vesting *ipso jure* in a child on its survivance: a share of the actual amount which the executor ought to realise. As it does not include heritage, improvement expenditure on an entailed estate does not fall within the legitim fund (*Kintore*, 1885, 12 R. 1213). Children claiming legitim stand in the position of creditors of the executor, though they cannot compete with stranger creditors; for if the executry funds are insufficient to do more than pay the debts of the deceased, there is no legitim fund (*Earl of Dalhousie*, 1868, 6 M. 659). A child accordingly was not bound to suffer a diminution of his legitim through money being lost in the hands of the executor. Personal bonds are moveable as regards legitim, though heritable as regards *jus relictæ* and *jus mariti* (1661, c. 32). It is sometimes called a right of succession; but at least it is a burden laid upon the executor or general disponee of a person who dies domiciled in Scotland leaving legitimate children (*Monteith*, 1882, 9 R. 982; *Fisher*, 1840, 2 D. 1121; 1843, 2 Bell's App. 63). It expires with the predecease of the children, and does not transmit to their representatives.

If the wife survives the husband, the legitim fund is one third of the moveable estate, with certain exceptions. If there be no widow, it is one half (Ersk. iii. 9. 17; *Johnston*, 1814, Hume, 290). All the father's children of whatever marriage, including legitimated and posthumous children, are entitled to share, unless they have renounced or been forisfamiliated (Stair, iii. 8. 45; Ersk. iii. 9. 23). The eldest son cannot claim a share if he inherits heritage, unless he collates (*Breadalbane*, 1836, 14 S. 309; 1836, 2 S. & M'L. 377); but where the heir in heritage is the only child left with a claim for legitim, then, whether the father was testate or intestate, he can claim legitim without collating, *i.e.* taking heritage does not exclude the heir (*Trotter*, 1681, Mor. 2375; *Justice*, 1737, Mor. 8166; *Howden*, 1821, 1 S. 18). If the right of a child is excluded or discharged during the father's lifetime, his share goes to increase the legitim fund (*Panmure*, 1856, 18 D. 703; *Hog*, 1791, Mor. 8193). A child taking benefit from a settlement is entitled to found upon his claim to legitim in order to reduce the share to be taken by a child renouncing the settlement (*Fisher*, 1841, 3 D. 1181; 1843, 2 Bell's App. 63). The legitim fund may be diminished by every deed of the father's dealing with his moveable estate *inter viros*; though before the abolition of the law of death-bed he could only affect it in *liege poustie* (*Wilson's Trs.*, 1886, 18 D. 1096; *Millie*, 1803, Mor. 8215; 1807, 5 Pat. 160).

Before marriage a man is the free and uncontrolled proprietor of his whole disposable means and fortune. He is at liberty to enter into any obligation he chooses as to such property, and most certainly he is in a condition to contract effectually in favour of an intended wife any obligation he thinks proper over the whole property which may then or at any future time be at his disposal. Such obligation is a proper

debt, and a debt therefore under an onerous contract antecedent to marriage, which must be fulfilled before any claims to children can arise (*Fisher's Trs.*, 1844, 7 D. 129). The deed by which it is to be diminished must not be fraudulently contrived to reduce the legitim fund without touching the father's own right (*Hog*, 1804, 4 Pat. 581; *Buchanan*, 1876, 3 R. 556). And legitim cannot be defeated by a *mortis causa* deed, or by one which does not absolutely divest the father (*Millie*, 1803, Mor. 8215; 1807, 5 Pat. 160; *Wilson's Trs., supra*; *Nicolson's Assignee*, 1841, 3 D. 675); but it may be by an irrevocable deed *inter vivos* though the term of payment is after the granter's death, and though a liferent is reserved (Ersk. iii. 9. 16; *Collie*, 1851, 13 D. 506; *Lawrie*, 1816, Hume, 291; *Boustead*, 1879, 7 R. 139). If a father is to make a settlement *inter vivos*, it must be quite clear, in order to have the effect of preventing children from claiming their legal rights, that he deprives himself of all power of dealing with the funds (*Little*, 1856, 18 D. 701). The legitim fund may be diminished by rational provisions for a wife (*Balmain*, 1721, Mor. 8199; *Lawrie*, 1816, Hume, 291). No deed of settlement by the father can regulate the succession to the legitim (*Allan*, 1762, Mor. 8209; *Christie*, 1681, Mor. 8197; *Morton*, 11 Feb. 1813, F. C.).

Legitim may be discharged before the father's death, in which case the discharge operates as the child's death would have done; that is to say, it increases the share of the other children, or, if there are no other children, makes the division bipartite into dead's part and *jus relictæ*; or converts the whole into dead's part (*Henderson*, 1728, Mor. 8187; *Hog, supra*; *Breadalbane, supra*); or it may be satisfied after the father's death; and in that case the legitim set free goes to benefit the fund burdened with the payment in lieu of legitim (*Fisher*, 1840, 2 D. 1121; 1841, 3 D. 1181; 1843, 2 Bell's App. 63; *Campbell's Trs.*, 1862, 24 D. 1321; *Panmure*, 1856, 18 D. 703; *Nisbet's Trs.*, 1868, 6 M. 567; *Davidson's Trs.*, 1871, 9 M. 995; *Monteith*, 1882, 9 R. 982).

Legitim is discharged or satisfied:—

1. By express discharge (*Fisher*, 1840, 2 D. 1121; *Clark*, 1835, 13 S. 236; *Breadalbane*, 1836, 2 S. & M'L. 377; *Trevelyan*, 1873, 11 M. 516; *Rait*, 1892, 19 R. 687).

2. By acceptance of a provision having the condition annexed that acceptance shall discharge legitim (*Beg*, 1737, Mor. 12851; *M'Laren*, 1869, 8 M. 106; *Macfarlane's Trs.*, 1882, 9 R. 1138).

3. By acceptance of a special provision under a general settlement dealing with the father's whole moveable estate (*Breadalbane's Trs.*, 1840, 2 D. 731; *Panmure*, 1856, 18 D. 703; *Keith's Trs.*, 1857, 19 D. 1040); but not if the settlement deals only with part of the father's estate (*Collier*, 1833, 11 S. 912; *White*, 1861, 24 D. 38).

4. By a reasonable provision made for the child in an antenuptial marriage contract, accompanied by an exclusion of ligitim. The provision need not be substantial (*Maitland*, 1843, 6 D. 244; Ersk. iii. 9. 23; *Home*, 1757, 5 Br. Sup. 330; see *Kintore*, 1884, 11 R. 1013).

Where a father became bound in his son's marriage contract to leave to the son's marriage contract trustees one third of his moveable estate, this was held not to exclude a claim for legitim (*Rait*, 1892, 19 R. 687).

Legitim cannot be excluded by postnuptial contract without the assent of the child (*Johnston*, 1825, 4 S. 234). Where acceptance of provision is to bar legitim, the child must have been informed of the facts material to his election; and where election has taken place, funds set free are used to compensate those whose interests have suffered by the election (*Dixons*,

1833, 6 W. & S. 431: *Snody's Trs.*, 1883, 10 R. 599; *Kintore*, 1884, 11 R. 1013; 1886, 13 R. (H. L.) 93). If by antenuptial contract the whole moveable estate is settled, there is no fund from which legitim can be taken (*Fisher's Trs.*, 1844, 7 D. 129). The legitim fund may be lessened by a just and reasonable addition to the widow's conventional provision (*Lawrie*, 1816, Hume, 291: *Balmain*, 1721, Mor. 8199). To marry and leave the father's house is not forisfamiliation (*Hoy*, 1792, 3 Pat. 247); nor to give a child a provision as her portion (*Breadalbane*, 1836, 2 S. & M'L. 377; *Keith's Trs.*, 1857, 19 D. 1040); nor is a claim for legitim excluded by the fact that a large provision has been given to the child (*Howden*, 1821, 1 S. 18).

Collatio bonorum inter liberos.—A child claiming legitim must bring into account advances made to him by the parent for the purpose of setting him up in trade, or for a settlement in the world, or for a marriage portion (*Nisbet's Trs.*, 1868, 6 M. 567; *Kay*, 1844, 16 Sc. Jur. 550; *Nicolson's Assignee*, 1841, 3 D. 675: *Douglas*, 1876, 4 R. 105); but advances for aliment or education, or on loan, will not be imputed to the legitim (*Skinner*, 1775, Mor. 8172: *Webster*, 1859, 21 D. 915); nor advances made from the heritable estate (Stair, iii. 8. 46; Ersk. iii. 9. 25; *Buccleuch*, 1677, Mor. 2369; *Marshall*, 1829, 8 S. 110). A father may always, in making advances, reserve the child's right to legitim, or declare that it shall remain a bairn in the house (Stair, iii. 8. 45: Ersk. iii. 9. 25; *Corsan*, 1631, Mor. 2367; *Skinner*, 1775, Mor. 8172). It is only when the child demands a share of the legitim that he is obliged to collate; and that only in the interest of other children entitled to legitim (*Trevelyan*, 1873, 11 M. 516; *Monteith*, 1882, 9 R. 982). Where the advance is made *mortis causa*, there is no collation.

Collatio bonorum inter liberos is an equitable rule borrowed with much modification from the Roman law for the purpose of preserving equality in the distribution of legitim, and it arises *inter liberos* alone (Ersk. iii. 9. 25; *Breadalbane*, 1836, 2 S. & M'L. 377; *Hog*, 1804, 4 Pat. 581; *Keith's Trs.*, 1857, 19 D. 1040; *Monteith*, 1882, 9 R. 982; *Collins*, 1898, 35 S. L. R. 641; *Nisbet's Trs.*, 1868, 6 M. 567, not followed). When a child accepts conventional provisions, he discharges his claim to legitim: he does not assign it; he merely withdraws the restraint which, as a child, he possessed over the testamentary power of his father.

The plea of collation *inter liberos* can only be maintained by one entitled to a share of legitim (*Collins*, 1898, 35 S. L. R. 641).

A right to legitim is to be measured by the actual value of the moveable estate left by the father at his death (*M'Murray*, 1852, 14 D. 1048; *Gilchrist*, 1889, 16 R. 1118). The widow's aliment does not come before it where she has a liferent of the whole estate under a will (*Morrison*, 1888, 16 R. 247); but in the ordinary case the widow's alimony comes off the whole executry (*De Blonay*, 1863, 1 M. 1147). Interest used to be allowed at the rate of 5 per cent. when the executor delayed to pay without reason (*M'Murray*, 1852, 14 D. 1048; *Bishop's Trs.*, 1894, 21 R. 728), even when the money was not earning it; but in the last case, *Ross*, 1896, 23 R. 802, interest at the rate of 4 per cent. was allowed; see *Grant*, 1898, 25 R. 948.

Where part of a father's estate was a bond heritable *quoad jus relictæ*, but moveable *quoad* legitim, one half the bond fell into the legitim fund (*Dawson's Trs.*, 1896, 23 R. 1006).

Married Women's Property Act, 1881, 44 & 45 *Vict. c.* 21, *s.* 7.—This section enacts that after the passing of the Act the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scot-

land in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, and satisfaction thereof, as the case may be. (See *Bell*, 1897, 25 R. 310, which decided that until a liferent imposed by antenuptial contract was satisfied, the children could not enforce payment of legitim from their mother's estate.)

As heritable securities are by the Act 1868 excluded from the legitim fund (31 & 32 Vict. c. 101, s. 117), so debts due secured by heritable security cannot be deducted from the legitim fund (Fraser, ii. 986). Personal bonds are moveable *quoad* legitim (1661, c. 32). Mortgages in England, being moveable by the law of that country, go to increase legitim (*Breadalbane's Trs.*, 1843, 15 Sc. Jur. 389; *Monteith*, 1882, 9 R. 982; *Newlands*, 1832, 11 S. 65).

A *jus crediti* to a share of a trust estate which consisted of a heritable bond was subject to a claim for legitim (*Gilligan*, 1891, 18 R. 387). Sums expended under the Entail Act, 1875, may be bequeathed, but they are not included in the legitim fund (*Kintore*, 1885, 12 R. 1213).

Jus relictæ.

The widow is entitled in the absence of convention to *jus relictæ*. This is generally regarded as her share of the goods in communion, and, like legitim, vests on the death of the husband, and is a claim of debt against his executor (*Inglis*, 1879, 7 M. 435; *M'Intyre*, 1865, 3 M. 1074). "It is not an inheritance and the widow is not an heir. Both *jus relictæ* and legitim are claims upon the whole free executry, though a husband and father may so administer his estate as to defeat the claim, *e.g.* by investing in heritage" (*Muirhead*, 1867, 6 M. 95). If there are no children taking legitim, the *jus relictæ* is one half of the moveable estate of the husband. If there are children entitled to legitim, it is one third. Until the law was altered in 1855, when the wife predeceased without children one half of the goods in communion went to her successors or was carried by her will; if she left children, the division was into three shares, the husband retaining two of them—one as administrator for his children, the other for himself. He was accountable to the children for the mother's share, and liable for interest, setting off their aliment against it (*Steele's Trs.*, 1830, 8 S. 926; *Menzies*, 1839, 1 D. 601). Sec. 6 of the Intestate Moveable Succession Act provides that when a wife shall predecease her husband, her representatives shall have no right to any share of the goods in communion, nor shall any legacy or bequest or testamentary disposition thereof by the wife affect or attach to the said goods or any portion thereof.

The husband cannot encroach upon this right by *mortis causa* deed (Ersk. iii. 9. 15). *Jus relictæ* may be renounced, and that even in a postnuptial contract, provided it be onerous and irrevocable (*Keith's Trs.*, 1857, 19 D. 1040; *Johnstone*, 1843, 5 D. 1297), if the words of the deed are broad enough to embrace it (*Miller*, 1776, Mor. 6456). *Jus relictæ* is a right so favoured by the law that it will not be held discharged by implication (Ersk. iii. 9. 16; *Tod*, 1770, Mor. 6451). It may be satisfied by acceptance of a provision under a settlement disposing of the whole moveable estate (*Caithness' Trs.*, 1877, 4 R. 937; *Dunlop*, 1865, 3 M. (H. L.) 46; *Thomson*, 1849, 12 D. 276; *Durrant Steuart's Trs.*, 1891, 18 R. 1114); or by acceptance of a testamentary provision expressly in lieu of it, or part of a total settlement (*Edward*, 1888, 15 R. (H. L.) 33; *Keith's Trs.*, *supra*; *Campbell's Trs.*, 1862, 24 D. 1321). Acceptance of a liferent of the husband's whole estate excludes it (Ersk. iii. 3. 30; *Young*, 1664, Mor. 6447: *Edward*, 1888, 15 R.

(H. L.) 33; *Thomson*, 1849, 12 D. 276). Her consent may be given by subscribing a testamentary deed of the husband, unrevoked at his death (*Johnstone*, 1843, 5 D. 1297; *Dunlop*, 1865, 3 M. (H. L.) 46; *Edward, supra*).

Where there is no antenuptial contract and the husband makes a voluntary provision in favour of his widow as in full of her legal claims, she is put to her election; and in the event of her death before she has had an opportunity of making her choice, the right of election passes to her representatives. On the other hand, if the wife has during the subsistence of the marriage consented to accept the provision in substitution for her legal claims, she may retract her consent as a *donatio inter virum et uxorem*, but her right of revocation is strictly personal. If there is a marriage contract, and the wife's right to *jus relictæ* is not discharged, she takes both it and the conventional provisions; but this is a *quæstio voluntatis* (*Mackinnon*, 1763, Mor. 6451; *Tod*, 1770, Mor. 6451). The widow may be relieved against an express or implied discharge of her legal rights on showing that she was ignorant of them (*Ross*, 1843, 5 D. 483; *Hope*, 1833, 12 S. 222; *Bell*, 1801, Hume, 486). It affects the husband's moveable estate, but personal bonds bearing interest are excluded under 1661, c. 32 (*Muirhead*, 1867, 6 M. 95), and heritable bonds under the 1868 Act, s. 117.

Where in knowledge of her legal rights she accepts a provision in lieu of *jus relictæ*, her claim is barred; but if from ignorance of her rights or of the true state of affairs she takes some step which in ordinary circumstances would infer that her right was given up, she will not be foreclosed (*Logan*, 1869, 7 S. L. R. 40; *M'Fadyen*, 1882, 10 R. 285; *Donaldson*, 1886, 13 R. 967). Mere delay will not bar her claim (*Mackenzie*, 1873, 11 M. 681; *Dawson's Trs.*, 1896, 23 R. 1006; *Bruce's Trs.*, 1898, 25 R. 796; *Stewart*, 1898, 25 R. 965). Where a husband's estate fell into partial intestacy, the widow was held entitled to terce and *jus relictæ* out of it without forfeiting her testamentary provisions, though these were declared to be in full of them (*Hamilton's Trs.*, 1898, 35 S. L. R. 702). Her claiming terce and *jus relictæ* may accelerate a period of division (*Alexander's Trs.*, 1870, 8 M. 414). There is no *collatio bonorum* between the children and the widow (*Trevelyan*, 1873, 11 M. 516). "There is no rule analogous to that of *collatio inter liberos* applicable to widows" (Fraser, ii. 1067; *Ross*, 1627, Mor. 2366); nor does the heir collate with the relict (*Trotter*, 1681, Mor. 2375). Discharge of *jus relictæ* in the lifetime of the husband operates like the wife's death (Ersk. iii. 9. 20; *Johnston*, 1814, Hume, 290; *Nisbet*, 1726, Mor. 8181). Discharge after death benefits the husband's dead's part (*Fisher*, 1843, 2 Bell's App. 63; *Henderson*, 1728, Mor. 8187; *Campbell's Trs.*, 1862, 24 D. 1321).

Jus relicti.—By sec. 6 of the Married Women's Property Act, 1881, 44 & 45 Vict. c. 21, a similar right is given to husbands in the estates of their predeceasing wives (*Poe*, 1882, 10 R. 356; 1883, 10 R. (H. L.) 73; *Fotheringham's Trs.*, 1889, 16 R. 873; *Simons' Trs.*, 1890, 18 R. 135; *Buntine*, 1894, 21 R. 714). In dealing with this right a distinction has been made between the termination of a marriage by death, and that by divorce (*Eddington*, 1895, 22 R. 430).

Division of Husband's Property on his Death.—The fund that falls to be divided is the free moveable property of the husband which was his at his death, under deduction of his debts. Some debts come off the whole executry, some only off the dead's part. Similarly, the widow's share is not affected by some debts which do affect that of the children. The general rule is that those debts are to be deducted from the particular fund which, if they had been due to the husband, would have gone to increase that fund.

DISTRIBUTION of Moveable Estate on Intestacy, when the Legal Claims of Children and Spouses have not been altered by Convention.

I. Dead's part, one-third ;—to children, *per capita*, and the issue of predeceasing children, *per stirpes*.*	Legitim to children, one-third.	*Jus relictæ* to widow, one-third.	*Jus relicti* to surviving husband, one-third.
II. The children being all dead. Grandchildren *per capita*. Issue of predeceasing grandchildren, *per stirpes* ;— one-half as dead's part.		*Jus relictæ* to widow, one-half.	*Jus relicti* to surviving husband, one-half.
III. Brothers and sisters german, *per capita*, and issue of predeceasing brothers and sisters german, *per stirpes*.	Dead's part, one-half, of which one-half goes to father, or failing him, one-third to mother.		
IV. Nephews and nieces, full blood, *per capita*, and issue as above.			
V. The children of No. IV., *per capita*. And so on.			
VI. Brothers and sisters consang., *per capita*. Issue of predeceasing, *per stirpes*.			
VII. Children of No. VI., *per capita*, and issue as above.			
VIII. Children of No. VII., *per capita*.			
IX. Father.			
X. Father's full brothers and sisters, *per capita*.	On the failure of the father, mother takes one-third. Failing her, the brothers and sisters uterine and their descendants take one-half.		
XI. Children of No. X., *per capita*.			
XII. Children of No. XI., *per capita*.			
XIII. Father's half brothers and sisters consang., *per capita*. And so on.			
XIV. Grandfather, paternal, with his collaterals and their issue to follow, according to the same rules as in the case of the father.			

* Note the heir succeeding to heritage cannot claim a share of the legitim or the dead's part unless he collates.

If there is no surviving spouse, the legitim fund is one-half the moveable estate, the other half is dead's part.

If neither spouse nor child survives, the whole is dead's part.

Heritable debts do not affect the moveables in a question with the heir, but the creditors of the deceased are entitled to make use of the whole of his estate. Personal bonds, when they give the widow no *jus relictæ*, are not used to diminish her share, provided there is enough in the heritable estate, the dead's part, and the legitim fund to meet them (Ersk iii. 9. 22; *Ross*, 14 Nov. 1816, F. C.). Heritable securities, as they are still excluded from the *jus relictæ* and legitim, cannot be deducted from these funds.

Provisions to Wives are Debts.—If a wife has a provision secured by antenuptial contract, she is a creditor, and her claim is to be paid from the whole executry. Erskine says that "rational deeds granted by the father in relation to his moveable estate, if they be executed in the form of a disposition *inter vivos*, are sustained though their effect should be suspended till his death." By this he seems to mean provisions to wife and children. "I admit fully the principle in *Balmain's* case (1721, Mor. 8199) and others, that a reasonable provision for a widow does lessen the legitim. But still this must be under provision that the husband has no means of providing her otherwise. It is like a case of marriage contract, destining estate to heirs of marriage, which is subject to payment of provisions to younger children: but only if there is no other fund to pay them out of" (Ld. President in *Lawrie*, 1816, Hume, 291). Stair (i. 5. 6.) and Erskine (iii. 9. 22) require that bonds of provision to children, in order to be a burden on the whole executry, should be delivered to the child in the father's lifetime: but in *M'Kay*, 1744, Mor. 3948, a bond of provision to younger children, though found in the father's possession at his death, yet, being executed in *liege poustie*, and being a rational provision suitable to his circumstances, was found to affect the whole head of executry. Provisions in antenuptial contracts in favour of the children are also a debt against the whole executry (Ersk. iii. 9. 22). The funeral expenses of the husband are a debt against the whole executry; as are the widow's mournings, and her aliment until the next term after the husband's death.

Insurance Policies.—Policies of insurance current at death, and kept up by the payment of the premiums from part of the moveable estate of the deceased person by whom they have been effected. It is quite possible that the policies may not be due for many years, but their actuarial value as at the death of the party in right of them belongs to his moveable estate (*Chalmers' Trs.*, 1882, 9 R. 743; *Pringle's Trs.*, 1872, 10 M. 621; *Muirhead*, 1867, 6 M. 95). On the other hand, in *Wight*, 1849, 11 D. 459, it was held that a policy on the wife's life payable to her husband, his executors and assigns, was not part of the goods in communion at her death; and in *Smith*, 1869, 7 M 863, that where such a policy was payable to her heirs, executors, and assignees, it did not belong to the husband.

Aliment of Widow.

The widow of a person who has died possessed of means is entitled to aliment till the first term after the death. This claim, equally with a claim for mournings, is a burden upon the whole executry. It is calculated according to the position she occupied as the wife of the deceased (*Alexander*, 1830, 8 S. 602; *Kermack*, 1831, 9 S. 860; *M'Intyre's Trs.*, 1865, 3 M. 1074; *Blake*, 1840, 3 D. 317; *de Blonay*, 1863, 1 M. 1147; *M'Pherson*, 1869, 8 M. 246). Where a widow, besides annuities from the term subsequent to her husband's death, was given the liferent of the residue, she was found not entitled to aliment in addition (*de Blonay, supra*; *M'Wright*, 1799, Hume, 1; *Rennie*, 16 May 1800, F. C.). The widow's mournings, as part

of the funeral expenses of the husband, are a privileged debt (*Sheldan*, 15 May 1802, F. C.; *Palmer*, 27 June 1811, F. C.; *M'Gregor*, 1818, Hume, 8). The claim was sustained against the heir where the estate did not yield a sufficient terce. A claim for aliment where the widow has separate estate is not good against creditors (*Buchanan*, 1822, 1 S. 323). It is due if she has enjoyed the status of a wife (*Campbell*, 1827, 5 S. 344). If a suitable establishment is kept up for her at the expense of her husband's representatives, there will be no further claim for aliment (*Breadalbane's Trs.*, 1843, 15 Sc. Jur. 389). In *Hobbs*, 1845, 7 D. 492, an aliment of £60 was awarded against the husband's heir-at-law, where the free rental of the estate was £240.

A posthumous child has a right to be alimented out of the executry estate of his father (*Hastie*, 1671, Mor. 416; *Muirhead*, 1706, Mor. 5927), the persons liable being the representatives of the deceased father (*Spalding*, 1874, 2 R. 237). In *Spalding's* case he was held—dissenting, Ld. Pres. Inglis—to be entitled to aliment out of a trust estate consisting of the whole estate of a father, which had been vested in trustees by delivered deed during his lifetime.

In an old case (*Oliphant*, 1794, Bell's Folio Cases, 125) the principle of implied will was applied to the effect of allowing a posthumous child to share in a provision granted to other children *nominatim*. This case followed upon *Anderson*, 1729, Mor. 6590, and is approved in Home's *Principles of Equity*; but in *Spalding*, 1874, 2 R. 237, it was pointed out that that case had been reversed in the House of Lords (1874, 1 Pat. App. 138, footnote). *Spalding's* case is therefore against the application of the principle, and the view there stated has been followed in *Findlay's Trs.*, 1886, 14 R. 167, an Outer House judgment which was acquiesced in.

Collation.

Collation is the name of a privilege which belongs to the heir in heritage. The primary rule as to the moveable succession is that it is divided among the next of kin other than the heir in heritage; and there is a similar rule which prevents the eldest son, when he takes heritage, from sharing in the legitim. At common law the heir, if he be one of the next of kin, may insist that the moveables and the heritage shall be thrown into a common stock (*Law*, 1553, Mor. 2365), and that he shall share in the division. The Moveable Succession Act extends the right in favour of the descendants of a predeceasing person who, had he survived, would have been the heir (Stair, iii. 4. 24; Ersk. iii. 9. 3). "The eldest son, although he may be heir in heritage of his father, has as good a right as any of the other children to legitim, although if he avail himself of that right he must collate any heritage to which he may have succeeded, that is to say, he must communicate that heritage, or the value thereof, to such of his brothers and sisters as may also have right to participate in the legitim" (Ld. Curriehill in *Panmure*, 1856, 18 D. 703; *Murray*, 1678, Mor. 2372). An only child who was both heir and executor, was not bound to collate with the relict (*Trotter*, 1681, Mor. 2375). To be entitled to collate, at common law, though this has been altered by the Moveable Succession Act, the heir had to be one of the next of kin (*Macaw*, 1787, Mor. 2383; *contra*, Ersk. iii. 9. 3).

The rules of collation at common law are laid down in *Anstruther*, 1836, 14 S. at p. 282:—

"With regard to the persons who are entitled or bound to collate, the following propositions are indisputably established:—

"1. If the heir-at-law claim a share of the moveable estate as one of the

next of kin, he is bound to collate the heritage. This is the general and fundamental rule.

"2. If the heir-at-law is himself next of kin, and if there are no kindred in the same degree, there is no place for collation, for he is both heir and executor.

"3. In the case of heirs-portioners being themselves exclusively next of kin, there cannot be collation, for they are all heirs and all executors (*Jack*, 1673, Mor. 2368; *Riccart*, 1720, Mor. 2378).

"4. Heirs-portioners being in the same degree of kindred with others not heirs-portioners, the former, claiming a share of the moveables, are bound to collate with the latter (*Balfour*, 1789, Mor. 1378).

"5. One of the next of kin, not being heir-at-law, may take his share of the moveables, and is not bound to collate though he should succeed to the whole heritable estate by destination.

"6. The heir-at-law, not being one of the next of kin, is not entitled to collate."

If the heir dies without collating, his representatives are not entitled to a share of the moveable estate when they cannot collate the heritage (*Newbigging's Trs.*, 1873, 11 M. 411). It is only the heritage that comes or would have come to him by disposition of the law that he must collate.

Where he takes as heir of provision and is not heir *alioquin successurus*, he need not collate (*Rae Crawfurd*, 1794, Mor. 2384; *Buccleuch*, 1677, Mor. 2369); it is only heritage that comes from the ancestor that he need collate. If heir *alioquin successurus*, he must collate heritage coming to him under a settlement (*Anstruther*, 1836, 2 S. & M'L. 369; *Fisher's Trs.*, 1844, 7 D. 129; *Little Gilmour*, 13 Dec. 1809, F. C.). If he claims moveables in Scotland, he must collate heritage situated abroad: though in claiming moveables abroad, he need not collate Scottish heritage (*Robertson*, 16 Feb. 1816, F. C.; *Robertson*, 18 Feb. 1817, F. C.; *Trotter*, 1826, 5 S. 78; 1829, 3 W. & S. 407). If he cannot fully communicate, he must communicate the value of the interest he acquires by the succession (*Fisher's Trs.*, 1850, 13 D. 245; *Napier*, 1868, 6 M. 264). An heir of entail is bound to collate when he is *alioquin successurus*, but not otherwise (*Sinclair's Trs.*, 1881, 8 R. at p. 757; *Little Gilmour*, *supra*; *Breadalbane*, 1836, 14 S. 309, 2 S. & M'L. 377).

In *Blair*, 1849, 12 D. 97, where a stranger gave her heritage to the heir of A. and her moveables to his next of kin, it was held that the heir could not share without collating. This doctrine is criticised with disapproval in *Sinclair's Trs*, 1881, 8 R. 749.

The privilege of collation, as to the dead's part, may be excluded by the will of the deceased. Thus if the will bequeath legacies, and leave the residue to a residuary legatee, or clearly bequeath the succession to the next of kin as specifically under the will, the heir will have no right to demand collation (Bell's *Com.*, 5th ed., i. 101; *Sinclair's Trs.*, *supra*).

Collation is usually settled by private arrangement, the heir and the executor completing their titles and dividing the funds: otherwise the heir may take action against the executor for a declarator of his right, and an accounting (Bell's *Com.* i. 104). The heir may retain the heritage and pay over its value (*Innes*, 1897, 25 R. 23; *Fisher's Trs.*, 1850, 13 D. 245). If he communicates the heritage, it remains heritable as regards the succession of the next of kin sharing in it (*Napier*, 1868, 6 M. 264; see *Kennedy*, 1843, 6 D. 40).

By sec. 2 of 18 & 19 Vict. c. 23, the Moveable Succession (Scotland) Act, it is provided that where a person predeceasing would have been the heir in heritage of an intestate, his child, being the heir in heritage of the

intestate, shall be entitled to collate the heritage, to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue, the share of the moveable estate which the predeceaser might have claimed on collation. And daughters of the predeceaser being heirs-portioners shall be entitled to collate to the same effect. Where the heir shall not collate, his brothers and sisters and their descendants in their place shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent would have taken on collation.

Where the heir under this section collates for himself and brothers and sisters, these share only in the moveable estate, not in the combined heritable and moveable fund (*Innes*, 1897, 25 R. 23). The heir in heritage is entitled under this section to call upon the next of kin to allow her to collate, even though her relationship to the deceased is too remote to give her a right to a share in the moveables with the next of kin (*Jamieson*, 1896, 23 R. 547). As there is no right of representation in legitim, it may be necessary to have a separate division of that fund. The heir cannot dispense with his privilege in a state of insolvency to the prejudice of his creditors (Bell's *Com.*, 5th ed., i. 103). The heir is not liable to collate, as to his legitim, with anyone but a brother or sister, or their assignees; or as to the moveable succession, with anyone but the next of kin (*Balmain*, 1719, Mor. 2378; *Trotter*, 1681, Mor. 2375; *Murray*, 1678, Mor. 2374).

Testate Succession in Moveables.

Testate succession in moveables is regulated by the will or settlement of the deceased. Other ways in which the line of legal succession may be disappointed are, by the insertion of a particular destination in the investments of money, by destinations in marriage contracts, by donations *mortis causa*, and by verbal legacies.

A judge is to construe and not to make a will; and if an event has happened for which a testator has not provided, from not having foreseen it, although, if he had foreseen it, there is a strong probability that he would have provided for it in one particular way, his supposed wishes shall not prevail, *quod voluit non dixit*: we are to give effect to the expressed, not the conjectural or probable, intention of testators (Ld. Chan. Campbell, *Wing*, 1860, 8 Clark, H. L. 202).

The power of making a will belongs to every person not subject to legal incapacity. Our law allows perfect freedom of bequest not only in the original limitations of a will, but in conditional institutions and other rights of a subsidiary character, intended to have effect in certain contingencies.

A pupil cannot make a will.

A minor can test upon moveables, and possibly upon property that is merely heritable *destinatione*, but he cannot alter the succession to heritage except by selling it.

Married persons are under certain restrictions in the interests of each other and of their families. At common law, and apart from such modifications as may have been made in the particular instance by marriage contract, a husband or wife cannot by will disappoint the claim of the children to legitim, or that of the surviving spouse to *jus relicti* and courtesy or to *jus relictæ* and terce.

The regular mode of dealing with the succession to moveable property on the death of its possessor is by testament. This, in its ultimate analysis,

is the appointment of an executor to ingather and divide the property; and "I appoint A. B. to be my executor" is, by the law of Scotland, a complete testament conferring upon A. B. the right of being confirmed executor, and imposing upon him the duty, upon acceptance of the office, of ingathering the estate, satisfying the creditors, and dividing the residue among those entitled to it on intestacy. A testament, as we have seen, could only in exceptional cases have any effect upon heritage; and an instrument intended to take effect upon a mixed estate had to take, and in practice still takes, the form of a disposition and settlement.

A trust disposition and settlement is the usual form adopted in Scotland for the regulation of a mixed succession: the whole estate being disponed to trustees, who are usually also named executors, and instructions being given to them as to the provisions which the disponer wishes to have carried out upon his death.

In marriage contracts it is not unusual to have destinations inserted in favour of persons who are to come in in case of the failure of the children or descendants of the marriage. Such destinations have the effect of substitutions, and carry the property unless they are innovated upon.

The nomination of an executor, though usual, is no necessary part of a testamentary writing. If no executor has been named by the deceased, the Sheriff, as Commissary, will appoint an executor-dative, whose duty it will be to carry out the wishes of the defunct, if he has competently stated them.

It is convenient to notice here that a verbal or nuncupative legacy will be sustained to the amount of £8, 6s. 8d., or one hundred pounds Scots, even if what the deceased meant to deal with was a larger sum (*Kelly*, 1861, 23 D. 703). If a nuncupative legacy is expressly left, it will be effectual even though the testator directed that it should be put into writing; but an informal will will not be sustained as importing nuncupative legacies (*Crosbie*, 1865, 3 M. 870; *Bradford*, 1884, 11 R. 1135).

With this exception, a testamentary deed must be in writing. If it is not written by the testator himself, it requires to be attested in the ordinary way, that is to say:

1. It must be subscribed by the granter at the end; and, if it is written on more than one sheet, at the foot of each page.

2. The deed must be signed on the last page by two witnesses, who must be fourteen years old at least, and who must either see the granter sign or hear him acknowledge his signature. It is not fatal to the deed that the witness takes some benefit under it (*Simson*, 1883, 10 R. 1247; *Ingram*, 1801, M. "Writ," App. No. 2; *Grahame*, 1685, M. 16887); but no one ought to be made a witness to a deed who takes anything under it, and no party to the deed is a competent witness.

3. The designations of the witnesses must be set forth in the deed, or be appended to their signatures.

Testamentary deeds are privileged in the matter of notarial execution. Before 1874, when two notaries and four witnesses were required to execute a deed for a person who could not write, a testament of moveables could be executed by one notary and two witnesses.

A parish clergyman in his own parish may act as a notary in the matter of testaments or other testamentary deeds, whether relating to land or not. And by the 1874 Act, s. 41, a justice of the peace may execute a deed for anyone who from any cause is unable to write (see *Irvine*, 1892, 19 R. 458; *Campbell*, 1895, 22 R. 443).

A will may be holograph, and in that case no witnesses are required.

Every holograph writing of a testamentary character shall, in the absence of evidence to the contrary, be deemed to have been executed or made of the date it bears (37 & 38 Vict. c. 94, s. 40).

A holograph writing, to be valid, should be subscribed; otherwise it is understood to be an incomplete act from which the party hath resiled (*Dunlop*, 1839, 1 D. 912; *Skinner*, 1883, 11 R. 88; *Pettierew's Trs.*, 1884, 12 R. 249; *Goldie*, 1885, 13 R. 138). This rule was not applied in two cases (*Russell's Trs.*, 1883, 11 R. 283; *Burnie's Trs.*, 1894, 21 R. 1015). In *Speirs*, 1879, 6 R. 1359, two holograph documents were found in an envelope in a locked desk, the one superscribed and the other subscribed by initials. It was held that these constituted a valid will.

The privileges of holograph deeds have been extended to those that were holograph in the important clauses, "the substantials thereof" (*Vans*, 1675, Mor. 16885; *Panton*, 1824, 2 S. 632); but in *Macdonald*, 1890, 18 R. 101, it was held that a printed form of a will, containing blanks for the name of the testator, for the names of the legatees, and for the name of an executor, filled up and signed by a domiciled Scotsman resident in Shanghai, could not receive effect as a holograph will. From this finding Ld. M'Laren dissented, holding it much to be desired that this convenient mode of making a simple will should be recognised.

In *Maitland's Trs.*, 1871, 10 M. 79, writing on the back of an envelope containing a deposit receipt, only partially holograph but signed, was held not to be effectual as a bequest. In that case Ld. Deas said: "There are three classes of cases in which such questions have arisen: (1) where there is a probative deed declaring that any writing, formal or informal, under the hand of the granter is to receive effect; (2) where some essential part or parts of the writing are said to be holograph, and so to give the character of holograph to the whole writing; (3) where a writing which is not holograph is adopted by the party by some writing which is holograph."

The testator may in a regular writing dispense with the usual forms or solemnities: he may adopt papers already written, as part of his will (*Inglis*, 1831, 5 W. & S. 785; *Callander*, 1863, 2 M. 291; *Baird*, 1856, 18 D. 1246). He may also, if he pleases, impose formalities not required by the law (*Nasmyth*, 1821, 1 Sh. App. 65); or he may declare by anticipation that informal writings are to be held good, at least as conveying instructions to trustees (*Rankine*, 1849, 11 D. 543; *Dundas*, 1807, Hume, 917; *Baird*, *supra*; *Wilsone's Trs.*, 1861, 24 D. 163; *Gillespie*, 1831, 10 S. 174; *Young's Trs.*, 1864, 3 M. 10). A lady executed a general trust disposition, and gave instructions to her trustees to pay all legacies or bequests which she might, by any writing or writings under her hand thereunto annexed, or on papers apart, make or settle. In such circumstances the question is whether the paper is of the kind contemplated by the maker of the trust deed.

The learned author of *Wills and Succession* considers that these decisions are contrary to principle, p. 290.

For the case of adoption by docquet, see *M'Intyre*, 1 Mar. 1821, F. C. This principle was approved in *Gavine's Trs.*, 1883, 10 R. 448; see *Maitland's Trs.*, 1871, 10 M. 79; *Macmillan*, 1850, 13 D. 187.

A deed which bears that it is holograph is receivable as such till the contrary is proved (Ersk. iii. 2. 22; *Turnbull*, 1844, 6 D. 896; *Robertson*, 1844, 7 D. 236; *Waddell*, 1845, 7 D. 605). But if the deed is silent as to who wrote it, it is for the executor or other person founding on it to show that the will is holograph (*Anderson*, 1858, 3 Macq. 180). When an untested writing, bearing to be holograph, is produced by the person therein

named to be executor, confirmation is granted *de plano* if there is no opposition (*Cranston*, 1890, 17 R. 410).

A will, to receive effect, must be the completed expression of the testator's will; jottings and memoranda which point to a purpose not carried into effect, will not be received; but the mere title put upon the document has not much effect given to it.

"The law has not made it requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property; and if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded" (Jarman on *Wills*, quoted with approval by Ld. Chan. Selborne in *Hamilton*, 1882, 9 R. (H. L.) at p. 56). In that case a writing headed "Notes of Intended Settlement" was sustained as a will. Ld. Watson said: "I cannot understand upon what principle a mere ambiguity occurring in the descriptive title written by the testator can be held to qualify the terms or to destroy the validity of the document which it professes to describe, when the legal character and effect of the document, taken by itself, are not doubtful. Such an ambiguity will justify inquiry, which may confirm the testamentary character of the document, and may, on the other hand, lead to the conclusion that the writer intended it to be nothing more than a paper of notes or jottings for the preparation of a will at some future period; but should the parties lead no proof, or should the proof adduced by them be inconclusive, the document must receive effect according to its tenor and substance."

If there is on the face of the document something to suggest a doubt whether it was intended to be testamentary, the Court must be put in possession of some extrinsic circumstances by which to judge whether the deed was in point of fact testamentary or not. Failing that, the deed is testamentary, if the intention of the testator collected from it is sufficiently clear. But nothing can be used as a will which was not intended to be a testamentary act by a testator (see *Magistrates of Dundee*, 1857, 19 D. 918; *Forsyth's Trs.*, 1872, 10 M. 616; *Ritchie*, 1880, 8 R. 101; *Lamont*, 1887, 14 R. 603). When a signature was written on erasure, but the deed was otherwise *ex facie* valid, the onus was held to be on the challenger to prove that the signature was not genuine, or had not been duly tested (*Brown*, 1888, 15 R. 511).

Destinations in Bonds, etc.

The succession to stock certificates, bonds, and certificates of debt of public companies, assignations of moveable estate, and railway debentures, can be regulated by destinations in the instrument, just as a deed dealing with heritage containing substitutions regulates the succession (*Connell's Trs.*, 1886, 13 R. 1175; *Buchan*, 1879, 7 R. 211; *Walker's Exr.*, 1878, 5 R. 965; *Paterson's Jud. Fact.*, 1897, 24 R. 499). This does not apply to deposit receipts.

When a person takes these securities with a destination, while it is not to be overlooked that the element of mandate may enter into the design of the creditor in taking the bond payable to himself and another person, this consideration can only have weight to the effect of casting on the second payee or survivor the onus of proving, as conditions of the right which he claims, first, that the destination was inserted with the authority

of the true creditor or investor; and, secondly, that the bond was delivered to the person claiming under it.

If the owner of property holds it in virtue of the deed of another man, who has left it to him and his heirs, a general conveyance will evacuate the standing destination. But a general revocation or general conveyance will not usually affect a destination made by or at the instigation of the testator, because the destination is like a special legacy, and is presumed to be excepted (*Campbell*, 1880, 7 R. (H. L.) 100; *Thoms*, 1868, 6 M. 704; *Lang's Trs.*, 1885, 12 R. 1265). In order to keep a special destination out of the embrace of a general settlement, it is the duty of the litigant who says that the special destination has not been defeated, to show to the satisfaction of the Court that it was not the intention of the testator to disturb the standing investiture (*Hamilton*, 1894, 21 R. (H. L.) 35). As to the competency of extrinsic evidence, see *Glendonwyn*, 1870, 8 M. 1075; *Farquhar*, 1875, 3 R. 71). Probative deeds and holograph deeds of subsequent date may be looked to; but see *Ritchie*, 1880, 8 R. 101.

Forms necessary in Wills.

There is no positive rule as to the materials with which a will shall be written—these are not matters of solemnity; and whether the document be written in ink or in pencil, the Court, before sustaining it as a will, must be satisfied that it is the *enixa voluntas* of the testator (*Muir's Trs.*, 1869, 8 M. 53; *Simsons*, 1883, 10 R. 1247). There is, however, apparently a presumption that pencil markings are deliberative and not final (*Lamont*, 1887, 14 R. 603; *Munro*, 1890, 18 R. 122). As to the effect of erasures and interlineations, reference is made to the case of *Pattison's Trs.*, 1888, 16 R 73, where it is laid down—

(1) If a will or codicil is found with the signature cancelled, or with lines drawn through the dispositive or other essential clause of the instrument, then, on proof that the cancellation was done by the testator himself, or by his order, with the intention of revoking the will, the will is to be held to be revoked; otherwise it is to be treated as a subsisting will.

(2) If only some of the legacies are scored out, this only raises a question as to these particular provisions; these will not be held to have been revoked unless upon evidence that the scoring was done by the testator himself, or by his direction; and the authentication of the deletion by the testator's initials is sufficient evidence of such intention.

(3) Marginal additions and interlineations, even apparently in the handwriting of the deceased, would only be held good if authenticated by signature or initialling.

(4) When words are scored out and others are inserted in their place, the cancellation is conditional on the substituted words taking effect. If the substituted words are rejected on the ground that they are unsigned, the will ought to be read in its original form.

But in the case of *Robertson*, 1844, 7 D. 236, it was laid down that a holograph deed depends mainly on the handwriting of the granter in which it is proved or admitted to be. Then the ordinary doctrine of erasure and superinduction cannot apply, for there is no room to say that the alteration or change was not made by the granter. On the contrary, being in his handwriting proves that it was made by him; so it stands in the same situation as an ordinary deed when it has an express clause mentioning that the alterations were made by the granter (see *Mags. of Dundee*, 1858, 3 Macq. 134). Between what is written and what is obliterated, there is the distinction that what is written must have been

intentional, while what is obliterated may have been accidental. Deeds of a testamentary nature are more favoured, and therefore receive a more liberal interpretation, than obligations *inter vivos*: "and in general, though the words should be ambiguous or even improper, they ought to be interpreted according to the presumed will of the testator, if by any construction they can be brought to it" (Ersk. iii. 9. 14).

A signed list of objects and sums of money does not constitute a will. "What are the essentials of a testamentary gift? We see from the decisions that testamentary effect has been given to writings which, to all appearance, were in their inception mere drafts or memoranda to be used in the preparation of a will or codicil, on the principle that where a testator puts up the writing or memorandum with the principal will, he may be assumed to be willing that his testamentary intentions should stand on the words there used. But the Court has never gone so far as to hold that a mere specification of names and sums of money, without words of gift, would amount to a will. The contrary has been distinctly affirmed by both Divisions of the Court. I refer specially to Ld. Cowan's opinion in *Lowson*, and that of the Lord President in *Colvin*" (Ld. M'Laren in *Waddell*, 1896, 24 R. p. 194; *Lowson*, 1866, 4 M. p. 636; *Colvin*, 1885, 12 R. p. 955); but in *Colvin* the Ld. Pres. (Inglis) demurred to the statement that the words of gift must contain a verb. "I do not think it matters how inelegant, or how imperfect grammatically, a testator's language may be, if it can fairly be construed to mean that he bequeaths certain sums of money to certain individuals, sufficiently designed in the writing itself." A testament may be made in the last moment of life, and under the heaviest sickness or bodily distress, provided the maker be of sound judgment when he signs it. It speaks from the last moment of life, and is held to be approved of and confirmed down to the last hour that he is of sound disposing mind (*Hyslop*, 1834, 12 S. 413; *Nimmo*, 1864, 2 M. 1144).

To reduce the will, proof of insanity or imbecility, or want of sound disposing mind, or of deception and fraud, will be required. A deed granted by a person labouring under mental incapacity may be reduced. Insanity does not, as matter of law, constitute incapacity to test. It is evidence of incapacity more or less conclusive according to the extent to which it has affected the mental operations of the testator. A will made during a lucid interval may be sustained, and the reasonable character of the deed in question is an important element (*Nisbet's Trs.*, 1871, 9 M. 937; *Ballantyne*, 1886, 13 R. 652; *Forsyth*, 1862, 24 D. 1435). But if you can connect the insane delusions with the subject of the will, the will cannot stand (*Maitland's Trs.*, 1871, 10 M. 79). There is no legal presumption that a deed was made during insanity (*Waddell*, 1845, 7 D. 605; see *Hope*, 1897).

A more frequent objection taken to wills is that the testator was at the time weak and facile, and that some person took advantage of this to impetrate a will from him. But the circumvention need not have been at the instance of those who benefit by the will (*Taylor*, 1865, 3 M. 928; *M'Culloch*, 1857, 20 D. 206; *Love*, 1870, 9 M. 291; see *M'Callum*, 1894, 21 R. 824; *Rooney*, 1895, 22 R. 761; *Munro*, 1874, 1 R. 1039). Essential error induced by false or fraudulent representations will also furnish a ground of reduction (*Collie*, 1891, 18 R. 419). A will in favour of a law agent was set aside (*Paterson*, 1809, Hume, 921). Where a law agent takes from a client a deed in favour of himself, he must overcome by evidence the presumption which arises against the deed (*Grieve*, 1869,

8 M. 317). In many, perhaps in most, cases the presumption against the deed, created by the mere circumstance that the party favoured is the law agent who prepared it, will supply the want of all other elements of fraudulent impetration (see *Weir*, 1898, 25 R. 739).

Settlements obtained from testators who are old, or are in ill health, by interested parties, are looked upon with suspicion (*Gillespie*, 11 Feb. 1817, F. C.; *M'Culloch*, 1857, 20 D. 206; *Halliday*, 1857, 19 D. 929; *M'Kellar*, 1861, 24 D. 143). Formerly deeds were more liable than they are under the present law to be reduced for informalities; and there was a rule that after a will was produced in judgment or recorded, mistakes in the testing clause could not be put right (*Brown*, 11 March 1809, F. C.; *Caldwell*, 1871, 10 M. 99). Under sec. 39 of the Conveyancing Act, 1864, no deed subscribed and bearing to be attested by two witnesses is to be deemed invalid because of any informality of execution, "but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses, shall lie upon the party using or upholding the same (see *Addison*, 1875, 2 R. 457; *Smyth*, 1876, 3 R. 573; *M'Laren*, 1876, 3 R. 1151; *Thomson's Trs.*, 1878, 6 R. 141; *Tener's Trs.*, 1879, 6 R. 1111; *Brown*, 1883, 11 R. 400; *Geddes*, 1891, 18 R. 1186; *Richardson's Trs.*, 1891, 18 R. 1131). This section of the Act does not apply to deeds executed before 1st October 1874 (*Gardner*, 1878, 5 R. (H. L.) 105).

"I do not think the proof competent and requisite under the statute was intended to the bare fact that the subscriptions are genuine. On the contrary, I think that the surrounding facts and circumstances attending the subscriptions both of the granter and witnesses,—everything, in short, tending to satisfy the mind of the Court that the deed was intelligently and deliberately subscribed when in the state in which it appears when submitted to the Court,—may be and ought to be elicited in the proof" (Ld. Deas in *M'Laren*, at p. 1158). Though obvious mistakes are corrected, a will cannot be corrected or construed by means of a paper of instructions (*Blair*, 1849, 12 D. 97). Subsequent writings may be looked to (*Glendonwyn*, 1873, 11 M. (H. L.) 33; *Farquhar*, 1875, 3 R. 71; but see *Ritchie*, 1880, 8 R. 101). It is a principle of the law of Scotland that where a deceased person has left various writings, probative in themselves, for disposing of his property, they constitute one settlement, in so far as they have not been revoked, and are not inconsistent with one another (*Grant*, 1849, 11 D. 860; *Ogilvie's Trs.*, 1870, 8 M. 427). "If you can execute the whole of the papers as one testament, you are bound to do so" (Ld. Truro in *Grant*, 1852, 1 Macq. 163). Testamentary directions are of course frequent in marriage contracts, which then have the effect of a will (*Gregory's Trs.*, 1889, 16 R. (H. L.) 10; *Bertram's Trs.*, 1888, 15 R. 572).

A deed *mortis causa* may be irrevocable, and in one sense a testamentary deed; but in a more strict and proper sense, not so (Inglis, J.-C., in *Alves*, 1861, 23 D. 717).

Friendly Societies.—Under the Act consolidating the Friendly Society Acts, 59 & 60 Vict. c. 25, a species of statutory will is legalised. By secs. 56 and 57 every member of a registered friendly society, other than a benevolent society or working-men's club, may by writing under his hand nominate a person to whom any sum of money not exceeding £100 shall be paid on the death of the nominator.

The person so nominated must not be an officer or servant of the society, unless he or she is nearly related to the nominator; the nomination may be revoked by marriage. Any purely testamentary writing may be

revoked at any time while the testator is of disposing mind (see *Wightman*, 1879, 6 R. (H. L.) 13). By sec. 58, if a member dies intestate entitled to a sum not exceeding £100, the society has power to distribute, without confirmation, among such persons as seem to a majority of the trustees to be entitled by law to receive the sum. If the member is illegitimate, the trustees may give the money to those who, had he been legitimate, would have been his next of kin.

Depositors in savings banks may nominate persons to receive sums not exceeding £100 (50 & 51 Vict. c. 40, s. 3 (2); 45 & 46 Vict. c. 51, s. 6).

Revocation of Wills.

A clause in a *mortis causa* deed declaring it to be irrevocable, will not make it so, but may itself be revoked (*Dougal*, 1789, Mor. 15949). And where a person executed a deed on the narrative of its being *mortis causa* reserving her liferent, and dispensing with delivery, and delivered it to the disponee, she was still held entitled to revoke and alter it (*Miller*, 1826, 4 S. 822). Any purely testamentary writing may be revoked at any time while the testator is of disposing mind (see *Wightman*, 1879, 6 R. (H. L.) 13).

A will may be revoked (1) by express revocation; (2) by the execution of a subsequent settlement inconsistent with it; (3) by the destruction or cancellation of the instrument; (4) by the birth of children to the testator; but where in a testamentary writing a provision has once been regularly created, it is not to be held to be taken away in a subsequent writing except by clear words of revocation, unless one of the presumptions afterwards noticed applies (*Scott*, 1865, 3 M. 1130). The implied revocation of the earlier one will depend on whether the later one is valid or not (*Kirkpatrick's Trs.*, 1874, 1 R. (H. L.) 37).

(1) A holograph or tested deed containing an express revocation will be effective according to its terms. A testamentary act cannot be recalled by intention alone; there is required some definite act of the testator's will, which in the case of alteration by subsequent writing can only be by probative instrument (*Scott*, 1865, 3 M. 1120; *Stirling Stuart*, 1885, 12 R. 610; *Reynolds*, 1884, 11 R. 759).

(2) A subsequent will or settlement of the deceased's property revokes a prior one if they cannot stand together (though the Court will take pains to give effect, if possible, to every testamentary writing) (*Grant*, 1849, 11 D. 860; *Tronson*, 1884, 12 R. 155; *Bertram's Trs.*, 1888, 15 R. 572; *Dalglish's Trs.*, 1891, 19 R. 170; *Tennent*, 1878, 6 R. 150). Revocation of a revocation sets up the original deed (*Howden*, 8 July 1815, F. C.; *Dove*, 1827, 5 S. 734; *Best*, 1880, 8 R. 66; see Jarman, p. 153, 5th ed.), unless the testator's intention appears to be otherwise. But just as expressed intention does not make a will, so neither will it revoke one when made; and the clearest evidence of intention to revoke the deed will not affect it if the revocation does not take place (*Walkers*, 1825, 4 S. 323). If destroyed by some third party, it can be set up (*Leckie*, 1884, 11 R. 1088).

(3) A will may be revoked by cancellation of the instrument (*Nasmyth*, 1821, 1 Sh. App. 65; *Falconer*, 1848, 11 D. 220; *Dow*, 1848, 10 D. 1465), or by giving instructions to have it destroyed (*Chisholm*, 1673, Mor. 12320; *Buchanan*, 1704, M. 15932; see *Crosbie*, 1865, 3 M. 870). "But if a man were to throw the ink upon his will instead of the sand, though it might be a complete defacing of the instrument, it would be no cancelling; or, suppose a man having two wills of different dates by him, should direct the former to be cancelled, and through mistake the person should cancel the latter, such an act would be no revocation of the last will; or, suppose a man,

having a will consisting of two parts, throws one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in such part. It is the intention, therefore, that must govern" (Ld. Mansfield, quoted in *Mags. of Dundee*, 3 Macq. at p. 152; see *Lamont*, 1887, 14 R. 603; *Pattison's Trs.*, 1888, 16 R. 73). Where a will cannot be found, the presumption is for revocation (*Bonthrone*, 1883, 10 R. 779; *Winchester*, 1863, 1 M. 685).

(4) A will may be revoked by the birth of children to the testator. When at the date of making the will the testator had no children, and thereafter a child is born, there is a very strong presumption that the will is not to be acted on. This is the *conditio si sine liberis testator decesserit*. But the presumption may be overcome. "If the testator had afterwards children, and, notwithstanding their existence for some competent time before his death, made no alteration of the settlement in their favour, it is presumed that he neglected them from design, especially if the settlement was not of the whole or greatest part of his estate" (Ersk. iii. 8. 46). In *Hughes*, 1892, 19 R. (H. L.) 33, Ld. Watson observed that, according to the law of Scotland, the question whether the testament of a parent is revoked by the subsequent birth of a child is wholly dependent on the circumstances of the case. The presumption also applies in favour of a child born after a settlement which provides for children already born.

The *conditio* has been held not to apply to a will which was not a general settlement of a whole estate, and which was executed in the knowledge of the wife's pregnancy (*Adamson's Trs.*, 1891, 18 R. 1133; see also *Millar's Trs.*, 1893, 20 R. 1040). It has been said that the *conditio* will apply unless it was made "as plain as a pikestaff that the testator did not intend the succession to go to the child" (Ld. Glenlee in *Colquhoun*, 1829, 7 S. 709). In *Dobie's Tr.*, 1887, 15 R. 2, Ld. Rutherfurd Clark said: "I am much inclined to the opinion that the revocation was absolute, and that, even had the maker survived the birth of the child for a long time, the will could receive no effect." This, however, has not been supported in later cases (*M'Kie's Tutor*, 1897, 24 R. 526; see also *Spalding*, 1874, 2 R. 237; *Findlay's Trs.*, 1886, 14 R. 167; *Elder's Trs.*, 1894, 21 R. 704). The presumption applies even in a question with other children (*Elder's Trs., supra*). It has been said that wherever a last will is cut down by the operation of the rule, all previous testamentary settlements must fall with it except such as are obligatory and matter of contract (*Elder's Trs.*, 1895, 22 R. 505). The Court will not allow a proof of declaration of the deceased (*ib.*, *M'Kie*, 1897, 24 R. 526; *Smith's Trs.*, 1897, 35 S. L. R. 129). The right is personal to the child (*Smith's Trs., supra*; *Watt*, 1760, Mor. 6401).

We have seen that a proper will is ambulatory and may be revoked at any time; but one may become bound by an irrevocable deed *inter vivos* to grant a legacy or not to alter one already bequeathed (Stair, iii. 8. 28). An *inter vivos* agreement to make a testament or grant a legacy will bar revocation of a will or legacy made in implement of it (*Turnbull*, 1825, 1 W. & S. 80; *Murison*, 1854, 16 D. 529; *Duguid*, 1831, 9 S. 844; *Curdy*, 1775, Mor. 15946; *Paterson*, 1893, 20 R. 484). A voluntary settlement is revocable so long as undelivered. The usual clause dispensing with delivery simply means that, when found on the maker's death, it is to be acted upon.

Delivery is a bar to revocation if the deed confers a vested interest.

"A party may grant an irrevocable deed and put it beyond his power by delivery, and vest effectually the property so conveyed against his own subsequent acts and deeds for the benefit of existing parties, in whom, by

that deed, he creates an interest" (Ld. Rutherfurd in *Murison*, 16 D. 529; cf. *Torry*, 1837, 15 S. 1073; see *Napier*, 1864, 3 M. 57; *Spence*, 1826, 5 S. 18; *Smitton*, 1839, 2 D. 225; *Braidwood*, 1835, 14 S. 64; *Robertson*, 1892, 19 R. 849; *Williamson*, 1890, 17 R. 927; *Murray*, 1895, 22 R. 927).

Where a deed contains a destination to parents in liferent and children in fee, and only liferent infeftment is taken, there is no delivery affecting the fee (*Stewart*, 1883, 10 R. 463; *Gilpin*, 1869, 7 M. 807).

A letter promising payment of a sum after the death of the writer is presumed to be testamentary, and therefore revocable (*Trotter*, 1842, 5 D. 224; *Miller*, 1859, 21 D. 377). But if proper words of obligation are used, the gift may be irrevocable (*Duguid*, 1831, 9 S. 844).

Mutual Wills.

It has been said that a mutual will has this consequence: that it is not merely a declaration of intention, but an obligation not to revoke. Thus far a mutual will is a sort of contract (Ld. Fullerton in *M'Millan*, 1850, 13 D. 187). But a mutual settlement is, besides, a separate settlement of each of the makers of it (*Millar*, 1876, 4 R. 87); and accordingly, though the execution by one of the parties was informal, the deed was sustained as settling the succession of the other.

"If there is reciprocity, the deed is interpreted on the principles which regulate contracts; but in the absence of a special declaration that the will is a mutual one, I think in the ordinary case it is to be understood that there is not reciprocity merely because two wills are contained in one and the same instrument. That merely shows that the parties wished it to be understood that they knew about each other's settlement. It does not take from either the right to alter his or her will" (*Kay's Tr.*, 1892, 19 R. 1071). "Mutual remuneratory grants between the spouses, made in consideration of each other, are not revocable where there is any reasonable proportion between the value of the two (Ersk. i. 6. 30). If the grants made between spouses are not onerous, they are revocable (*Stiven*, 1873, 11 M. 262; *Rae*, 1875, 2 R. 676; *Beattie*, 1884, 11 R. 846; *Kay's Tr.*, *supra*). If the deeds are onerous and contractual, they cannot be revoked (*Buchanan's Trs.*, 1890, 17 R. (H. L.) 53; *Croll's Trs.*, 1895, 22 R. 677; *Mudie*, 1896, 23 R. 1074). They may be revocable as regards rights conferred on third parties, while contractual as between the spouses (*Hogg*, 1863, 1 M. 647; *Lang*, 1867, 5 M. 789; *Martin*, 1893, 20 R. 835). If there is no mutuality, the deed may be revoked by either of the makers (*Beattie*, *supra*; *Mitchell*, 1877, 4 R. 800; *Hunter*, 1831, 5 W. & S. 455; *Melville*, 1879, 6 R. 1286). The exercise of a power of revocation operates the withdrawal of the estate of the person so revoking from the embrace of the settlement. Thus it was held that a legacy of £1000 bequeathed by two sisters in a joint settlement was in reality two legacies of £500, and that revocation by one sister left a valid legacy of £500 (*Wilsone's Trs.*, 1861, 24 D. 163). It is usual to have in mutual wills an express power of revocation. There is a presumption that they are testamentary and not contractual (*Traquair*, 1872, 11 M. 22); and in *Morris*, 1882, 9 R. 952, the mutual will was held not to affect the savings of the surviving spouse (see *Berwick's Exr.*, 1885, 12 R. 565). "The law in the general case is well settled. When there is a mutual settlement, under which each party gives and receives an onerous consideration, the deed usually becomes irrevocable after the death of any of the parties to it. It is not always so indeed, as whether it can be

revoked by the consent of survivors depends on the interests created by the deed. Nay, in some cases the deed is not revocable by the consent of all the granters, as, for instance, where a *jus crediti* is conferred on third parties." As a general rule, however, none of the granters can revoke without the consent of the others; and when one dies, the settlement becomes final. That, however, applies only to the case of remuneratory deeds. The deceased must have had an interest in maintaining the deed, to render it irrevocable on his death. When that was not so, the Court has frequently refused to prevent revocation even by the survivor alone (Ld. Moncreiff in *Craich's Trs.*, 1870, 8 M. p. 903; *Lang*, 1867, 5 M. 789; *Fernie*, 1854, 17 D. 232). When a mutual will executed by a brother and sister was reduced after the death of the brother on the ground of the sister's mental incapacity, the deed remained effectual *quoad* the brother's estate (*Graeme*, 1869, 7 M. 1062).

Marriage Contracts.

In marriage contracts, rights are presumed to be contractual and irrevocable which are—

(1) Given or promised by one spouse, or the parent of a spouse, to the other spouse.

(2) Given or promised to the children or issue of the marriage (*Macdonald*, 1893, 20 R. (H. L.) 88; rev. 1892, 19 R. 597).

(3) Where rights arising to third parties are part of the stipulations of the contract by which the spouses intended to be bound (*Mackie*, 1884, 11 R. (H. L.) 10; *Ferguson's Curator*, 1893, 20 R. 835).

Where a husband and wife have entered into an antenuptial contract, postnuptial deeds are revocable in so far as they add to or diminish the provisions of the first contract without valuable consideration on the other part (Ersk. i. 6. 30; *Rae*, 1875, 2 R. 676; *Beattie's Tr.*, 1884, 11 R. 846); but it is still a contract, and not merely testamentary (*Buchanan's Trs.*, 1890, 17 R. (H. L.) 53).

If the purposes of a marriage contract either fail or are satisfied, the estate becomes the absolute property of the person who conveyed it (*Ramsay*, 1871, 10 M. 120; *Laidlaw*, 1884, 11 R. 481; *Simon's Tr.*, 1890, 18 R. 135, Lord President, at p. 137).

Postnuptial contracts are of full power *intra familiam*. "In a question with creditors a postnuptial marriage-contract may not have the same power as an antenuptial marriage-contract, but *intra familiam* I think that it has. Marriage-contracts, whether antenuptial or postnuptial, are entered into for the same purposes and ends, and should, I think, have the same legal effect, when the interest of third parties is not involved" (Ld. Rutherfurd Clark in *Peddie*, 1891, 18 R. 491; *Allan*, 1869, 8 M. 34; *Low*, 1877, 5 R. 185).

A conveyance by a husband to his marriage-contract trustees of all property now belonging to him, or which shall belong to him at the time of his decease, does not deprive him of control during his life of property acquired in the interval. It did include a *spes successionis* belonging to the husband at the date of entering into the marriage contract (*Wyllie's Trs.*, 1891, 18 R. 1121).

A conveyance by a wife to a husband, who had made certain provisions for her *in case she should survive him*, of all that should be belonging to her at the date of her death, was subject to the implied condition that he should survive her (*Russell's Trs.*, 1887, 14 R. 849; *Wardlaw*, 1880, 7 R. 1066). Nothing short of the most explicit and express words should be permitted

to support a claim by the heirs and assignees of the predeceasing spouse to take the estate of the survivor.

"Provisions to the issue of a marriage may be so conceived as to give them either a right of fee, or a *jus crediti* which will vest as soon as they come into existence, or as in this case to give them a *spes successionis*, which will not open until the death of the settlor. It is not disputed that all such provisions made by parents *intuitu matrimonii* are onerous and obligatory in so far as immediate children of the marriage are concerned. But the effect of the obligation differs in each of these cases. Provisions of fee to children on their birth, through the medium of a trust or otherwise, need not be referred to, because they throw no light upon this case. When the child takes a proper *jus crediti*, he can compete with other onerous creditors, and can restrain his parents by legal diligence from alienating or burdening the subjects destined to him. When the provision is of all the estate of which the parent may be possessed at the time of his death, the parent remains full owner, and may during his lifetime squander his entire means if he thinks fit. The interest of the child is not that of a creditor, but of an heir. Yet inasmuch as the provision is contractual, his *spes successionis* is held to consist, not in *destinatione* merely, but also in *obligatione*; so that his parents cannot by any gratuitous deed create rights which will impair or defeat his *spes*" (Ld. Watson in *Macdonald*).

Rules for Interpreting Wills.

"In the construction of an instrument, whether will or deed, every word and mark are *primâ facie* to be assumed to have been intended to be used in their ordinary sense, and if they have technical meaning, that meaning must likewise prevail, unless it is apparent from the context or from the whole purview of the instrument that they require a different interpretation" (Ld. Selborne in *Diggens*, 1867, 5 M. (H. L.) p. 76).

The meaning of the maker of a will is to be gathered from the words he has used, and the circumstances in which he has used them, to the exclusion of extrinsic evidence of intention.

Words are to be understood in their plain, ordinary, grammatical meaning, the meaning which persons of ordinary intelligence would give them, unless you are driven from this by something in the deed.

If some part of the deed shows that the testator has used a word in a peculiar sense, that will be the meaning in other similar places.

Words unknown in ordinary phraseology may be explained by extrinsic evidence. When their meaning is discovered, the deed will be read as if the meaning so discovered was introduced in place of the words in which the will is expressed. If the words used are insensible with reference to the circumstances, you may show that a word was used with a peculiar meaning.

Though there cannot, except in a very limited number of cases, be any inquiry into the unexpressed intention of the testator, or the bias of feeling in his mind, extrinsic evidence of the circumstances which surrounded him, both before and after the execution of the deed,—the state of his family and of his estate, and the state of his knowledge,—is competent in order to place the Court in the point of view from which the testator would have regarded the deed. The intention of the testator is to be gathered from the language he has used in it. The condition of the estate may also afford light, and the actings of the testator with regard to it. If a description be sufficient to point out some individual person or thing, extrinsic evidence is admissible for the purpose of identification. Erroneous additions to a description are

disregarded. An express gift is not qualified by a reason assigned. When the words of a will, explained by the surrounding facts, are insufficient to give the testator's meaning, the deed is void from uncertainty, and no evidence of intention will be allowed, except in the one case to be mentioned later; the duty of the Court being to expound what the deed declares. Proof of intention is inadmissible to clear up a patent ambiguity, that is, an ambiguity appearing on the face of the deed; but it may be invoked to clear up a latent ambiguity. When the person or thing intended is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which was meant, including expressions of intention. Where a question arises as to whether both legacies left in separate deeds are payable, evidence of the circumstances is admissible: but anything in the nature of a declaration of intention, or any statement of the testator's from which an inference can be drawn, subsequent to the execution of the will, is quite inadmissible.

To solve the question of whether a special destination is or is not evacuated by a general settlement, extrinsic evidence is competent, but not evidence of declaration of intention. Writings or instructions of earlier date than the will cannot be used to interpret it, but formal deeds or holograph writings of subsequent date may be looked at (*Campbell*, 1880, 7 R. (H. L.) 100; *Gendonwyn*, 1870, 8 M. 1075; *Farquhar*, 1875, 3 R. 71); but in a subsequent case (*Ritchie*, 1880, 8 R. 101) it was observed that in cases of patent ambiguity only documents of a testamentary nature could be looked at.

Extrinsic evidence of intention is refused in cases where the maxim *Debitor non præsumitur donare* is alleged to apply, that is to say, you may not use it to prove that a legacy was meant to be in satisfaction of a provision (*Johnstone*, 1896, 23 R. (H. L.) 6). In order to disappoint the heir in heritage, the estate must be given to someone else. This is said to be probably true also in moveables, but in *Beizley*, 1739, M. 6591, an appointment of executors with an exclusion of the next of kin was held to give the estate to the executors. A will speaks, for some purposes, from its date. It only becomes operative on the death of the testator, and is always revocable. It is therefore the last expression of his wishes. Every word is, if possible, to receive a meaning. In dispositions of heritage the dispositive clause prevails; in wills of moveables the later clause prevails, unless this is inconsistent with the context and general tenor.

The Court must try to find a rational meaning; but if a will is clear and unambiguous, it should be carried out even if inconvenient or absurd. Partial intestacy is to be avoided. The whole will is to be read together, and, if possible, a meaning is to be found for every word. Of two modes of construction, that is to be preferred which will prevent intestacy. Words used more than once are presumed to be used in the same meaning. Different words point to differences of meaning. Obvious mistakes may be corrected, and the testator's intention is to be carried out as far as it can be.

"Or" may sometimes be read "and," and *vice versâ*. "A will may be construed so as that the word 'or' should be considered as if it had been 'and,' where such appeared from the context to be the meaning of the testator. The former part of the will gave the title absolutely in the events either of attaining the age of thirty-one or marrying, and then followed the passage '*that in case the son died under thirty-one or unmarried, the residue was to go to the daughters*'; the effect of which latter clause, unless the word 'or' should be construed as if it were 'and,' would be this, that though by the former clause the son was to have the residue either on attaining the age

of thirty-one or marrying, whichever should first happen, by the latter clause he might have it neither in the one event or the other" (Ld. Eldon in *Grant*, 1813, 2 Dow, at p. 87). The literal meaning must yield to the obvious intention of the granters.

In the case of a mutual deed by two brothers *pro indiviso* owners of a heritable subject, a conditional destination ran: in the case of any more children being born to A., AND in the event of one, B., becoming married and leaving issue. The Court read the word "and" as if it had been "or" (*Dunlop*, 1884, 11 R. 1104: *Campbell*, 1757, Mor. 2991). The Court, *ex æquitate*, may reject the express words, and explain their meaning from the intention of parties, which is clear on the other hand.

The Court is always reluctant to find a will null for uncertainty, either in the subject or object of the bequest (*Mags. of Dundee*, 1858, 3 Macq. 134; *Bryce's Trs.*, 1878, 5 R. 722). When a testator makes a bequest to a class of children, and states the number inaccurately, the Court will reject the number, and all the children will take (*Bryce's Trs.*, *supra*; *Smith's Trs.*, 1883, 10 R. 1144; *Millar's Trs.*, 1891, 18 R. 989).

If the Court comes to the conclusion, from a study of the will, that the testator's real intention was to benefit the whole of a class, the Court will not defeat that intention because the testator has made a mistake in the number he has attributed to that class; that is to say, the number will be struck out; but according to a recent English case, you cannot add something, and so make a will for the testator (*Donaldson*, 1896, L. R. 1897, 1 Ch. 75).

"Survivor" has sometimes been read as "other" (*Ramsay's Trs.*, 1876, 4 R. 243; *Paterson's Trs.*, 1893, 21 R. 253), but the general rule is found in *Forrest's Trs.*, 1884, 12 R. 389, which has been frequently followed, and in which the word received its natural meaning.

In *Morrall*, 1845, 14 L. J. Ch. 266, Baron Parke laid down the following rules:—

1. Technical words are *primâ facie* to be understood in their strict technical sense.

2. The clause is, if possible, to receive a construction which will give to every expression in it some effect.

3. All the parts of the will are to be construed so as to form a consistent whole.

4. Of two modes of construction, that is to be preferred which would prevent an intestacy.

5. When two provisions of a will are totally irreconcilable, so that they cannot possibly stand together, the last shall be considered as indicating a subsequent intention, and prevail, if there is nothing in the *context* or general *scope of the will* which leads to a different decision.

When it is apparent that words have been omitted, and also what they are, the Court may supply them (*Carleton*, 1867, 5 M. (H. L.) at p. 155). You may read in a word scored out (*Mags. of Dundee*, *supra*). "If it is necessary to make sense of the deed, you must read the part of it obliterated as if it was not obliterated—a doctrine very new to me certainly, but to which I must now subscribe" (*Chapman*, 1860, 22 D. 745).

When a testator himself expressly declares what his meaning is, no other construction can be admitted (Ld. Eldon in *Brodie*, 1817, 6 Pat. 270). No absurdity in the principle of division ought to prevail against the meaning of clear words. "Moveable" was introduced into a clause which bore to restrict the rights of daughters in the testator's "heritable" estate,

so as to make the restriction apply to the share of a mixed succession: the testator's intention to do this being gathered from the general scope of his settlement (*Clouston's Trs.*, 1889, 16 R. 937). It was held to be a case of palpable mistake, but in that case there was repugnancy from his giving a full gift of fee and then trying to restrict it.

"It must always be remembered that nothing can justify the insertion of words to fill up a blank but the assurance that those words, and no others, are the words omitted." Accordingly, the words must usually be supplied from the context (M'Laren, p. 363).

"There is one rule of construction, which to my mind is a golden rule, viz. that when a testator has executed a will in solemn form, you must assume that he did not intend to make it a solemn farce: that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not to an intestacy" (Ld. Esher in *Harrison*, 1885, L. R. 30 Ch. D. 390). Every word shall have its effect, and not be rejected if any construction can possibly be put upon it.

The Court is to construe the will as made by the testator, not to make a will for him, and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has by blunder expressed what he did not mean. And the general rule, we believe, is undisputed, that in trying to get at the intention of the testator we are to take the whole of the will, construe it altogether, and give the words their natural meaning (or, if they have acquired a technical sense, their technical meaning), unless when applied to the subject which the testator presumably had in his mind, they produce an inconsistency with other parts of the will, or an absurdity or inconvenience so great as to convince the Court that the words could not have been used in their proper signification, and to justify the Court in putting on them some other signification which, though less proper, is one which the Court thinks the words will bear (Blackburn in *Allgood*, 1873, L. R. 8 Ex. 160, p. 162). "If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires" (Ld. Chan. Cairns in *Hill*, 1873, L. R. 6 Eng. & Ir. App. 285). The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainty applied (Ld. Cairns in *Charter*, 1874, L. R. 7 E. & I. App. 377). You are never to introduce and interpolate words in a will, nor even to give a construction to any clause of a will contrary to what the plain words import, without an absolute necessity by intention declared or carried in some other part of the will (*Eden*, 1852, 4 H. L. Ca. 284).

Power of Appointment.

Powers of appointment given under the deeds of a third party are met with in questions of succession: thus a power is frequently given to a liferenter to appropriate the fee of the property or to encroach on capital. A general power may be exercised in favour of himself; but a power to encroach upon capital will not entitle the holder of the power to exercise it by testamentary deed (*Sprot*, 1855, 17 D. 840; *Miller's Trs.*, 1890, 18 R. 301). A father has an implied power to apportion marriage-contract funds (*Herries*,

1806, Hume, 528; *Ormiston*, 1809, Hume, 531: *Ponton*, 1837, 15 S. 554; *Erskine*, 1826, 4 S. 357: *Edmonston*, 1706, Mor. 3219; Ersk. iii. 8. 49). A liferent by reservation combined with a general power of appointment is truly equivalent to a fee (*Davidson*, 1687, Mor. 3255; *Baillie*, 23 Feb. 1809, F. C.; *Cumming*, 1756, Mor. 4268); but a liferent by constitution, even with a general power of appointment, is not a fee. The person appointed takes not from him, but from the granter of the power (*M'Goun*, 1835, 14 S. 105; *Morris*, 1853, 15 D. 716; 1855, 18 D. (H. L.) 43; *Alves*, 1861, 23 D. 712). To give a full fee, and then give a power of disposal, is to do nothing more than give the fee (*Simson's Trs.*, 1890, 17 R. 581). "A liferent coupled with the largest and most general power of disposal, if there is a destination over, cannot give a fee" (Ld. St. Leonards in *Morris*).

"If an estate or sum of money be given to an individual, who is *sui juris*, without words of limitation, or a declaration to the extent of his ownership, but with words indicative of the intention of the testator that he should have the absolute *jus disponendi*, then, in any case, those words are to be taken as indicating an intention that he should be the absolute owner. But if a gift is made to a *femme couvert*, and provision is made for her children, and then these words are annexed to the gift, that in the event of her having no children the property is committed to her discretion alone, as she may thereafter think fit to deal with it, those are words which, having regard to the reference to her discretion, and to the cause for the exercise of that discretion, and to the fact that they are annexed to a gift made to a *femme couvert* who is not *sui juris*, must, I think, in conformity with every principle, and, so far as I know, in conformity with every authority, be held to amount only to an indication of intention that the *femme couvert* shall have a power of appointment or of disposition, and not to be indicative of an intention that the *femme couvert* shall become the absolute owner" (Ld. Westbury in *Pursell*, 1865, 3 M. (H. L.) at p. 68). The effect to be given to a power of apportionment is the same whether the person who is to exercise the power be the original owner of the fund or be merely the donee of the power. It is also immaterial whether the power be applicable to a *universitas* or to a specified sum (*Gillon's Trs.*, 1890, 17 R. 435).

In exercising a power of appointment it is not necessary that the power should be recited (*Dalgleish's Trs.*, 1893, 20 R. 904). A testament appointing an executor for the distribution of the residue of the testator's personal estate is not an exercise of a power to dispose by settlement of an estate (*Mackenzie*, 1874, 1 R. 1050; *Bowie's Trs.*, 1889, 16 R. 983; *Whyte*, 1888, 16 R. 95); but the general rule is that a general settlement affects property over which the testator has a power of appointment (*Hyslop*, 1834, 12 S. 413: *Clark's Trs.*, 1894, 21 R. 546; *Smith*, 1826, 4 S. 679; *Mackie*, 1885, 12 R. 1230; *Buchanan's Trs.*, 1890, 17 R. (H. L.) 53; *Montgomery's Trs.*, 1895, 22 R. 824). It must be possible that he meant to exercise the power (*Lord Advocate* v. *Methven's Exrs.*, 1893, 20 R. 429). Such a power may be exercised from time to time (*Smith-Cunninghame*, 1872, 10 M. (H. L.) 39).

Under the law as it existed before 1874, when a power was given to apportion a fund among several persons, it was fatal to the exercise of the power that one or more of these persons was not allowed to share in the fund (*Marder's Trs.*, 1853, 15 D. 633; *Eccles*, 1856, 18 D. 778; *Smith's Trs*, 1873, 11 M. 630).

In 1874 the Act 37 & 38 Vict. c. 37 was passed, which provides: 1. That no appointment, which from and after the passing of this Act shall be

made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to such power. 2. Provided always, and be it enacted, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded.

The Act has been held to apply to Scotland (*Campbell*, 1878, 5 R. 961; *Mackie*, 1885, 12 R. 1230; *Hamilton's Trs.*, 1879, 6 R. 1216). Where a power is given to appoint under "conditions, provisions, and limitations," the shares of the appointees may be restricted to a liferent with a power to test (*Wallace's Trs.*, 1891, 18 R. 921; *Lennock's Trs.*, 1880, 8 R. 14). Where conditions which are not warranted are imposed, they are, if separable from the gift, disregarded (*Wallace's Trs.*, *supra*; *M'Donald*, 1875, 2 R. (H. L.) 125). "From all those cases the plain rule is to be derived that if you cannot disconnect that which is imposed by way of condition or mode of enjoyment from a gift, the gift itself may be found to be involved in conditions so much beyond the power that it becomes void. But when the conditions are separable from the gift, then the gift may be valid, and may take effect without reference to these conditions" (M'Laren on *Wills*, ii. 1106; *Wright's Trs.*, 1894, 21 R. 568; *Stirling*, 1898, 36 S. L. R. 194). When the appointment is *ultra vires* or no appointment is made, the fund is divided equally (*Gillon's Trs.*, 1890, 17 R. 435; *Baikie's Trs.*, 1862, 24 D. 589; *Best's Trs.*, 1885, 13 R. 121). A gift to persons to be selected by trustees falls by the predecease of the trustees (*Robbie's Jud. Fact.*, 1893, 20 R. 358).

An object of a power who complains of the way in which it has been exercised may be barred by acquiescence, on the principle of approbate and reprobate (*Smith-Cunninghame*, 1872, 10 M. (H. L.) 39; *Bonhote*, 1885, 12 R. 984; *Mackie*, 1885, 12 R. 1230). A parent having a power of appointment among his children is not allowed to bargain with his child to purchase a share in this species of expectancy (*Smith-Cunninghame*, *supra*; *M'Donald*, 1874, 1 R. 817).

Donatio mortis causa.

An exception to the general rule that writing is necessary to regulate the succession of a deceased person, and to disappoint the expectations of his legal representatives, is found in the case of *mortis causa* donations.

"*Donatio mortis causa* in the law of Scotland may, I think, be defined as a conveyance of an immoveable or incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee, upon the condition that he shall hold for the granter so long as he lives, subject to his power of revocation, and, failing such revocation, then for the grantee on the death of the granter. It is involved of course in this definition, that if the grantee predecease the granter the property reverts to the granter, and the qualified right of property which was vested in the grantee is extinguished by his predecease. Such, I apprehend, is the doctrine laid down by Erskine, more largely expounded by Bankton, and supported by the general tenor of the decisions of the Court" (Ld. Pres. Inglis in *Morris*, 1867, 5 M. p. 1041; Bankton, i. 9. 6, and 17, 18, 19; Ersk.

iii. 3. 91, iii. 3. 11). It is effectual without writing, and may be proved by parole. The gift is revocable (*Wright's Trs.*, 1870, 8 M. 708; *Macfarquhar*, 1869, 7 M. 766; *Irvine*, 1707, Mor. 6350). The presumption that the law implies against donation requires strong and unimpeachable evidence to overcome it, and it must be independent. The evidence of the alleged donee cannot be held as sufficient, otherwise there would be no presumption against donation (*Sharp*, 1883, 10 R. 1000; *Gibson*, 1872, 10 M. 923; *Ross*, 1871, 10 M. 197, p. 200). A donation cannot be established without proof of a verbal or written declaration of intention to make a gift: but the declaration may be made to a third party (*Ld. Advocate* v. *Galloway*, 1884, 11 R. 541; *Gibson*, 1872, 10 M. 923; *Sharp*, *supra*; *Connell's Trs.*, 1886, 13 R. 1175). Some of the judges think that delivery is necessary. "In all previous cases of the kind there has been at least some act of the deceased donor which is admitted or proved by real evidence to have taken place. The money is invested in name of the donee, or the deposit-receipt is indorsed in his favour under the hand of the donor." Accordingly, a blank indorsation of a deposit receipt will not prove donation (*Dawson*, 1891, 19 R. 261; *M'Nicol*, 1889, 17 R. 25). But in *Gibson*, 1872, 10 M. 923, the Lord President (Inglis) said: "I do not think that actual delivery is necessary to make a donation *mortis causa* effectual, especially if the money stands in the name of the donee." The existence of the *animus donandi*, and the clear expression of that as a present intention, are enough, but less is not enough (*Thomson's Exr.*, 1882, 9 R. 911). In *Blyth*, 1885, 12 R. 674, it was held that it was not necessary that the alleged gift should have been made under an immediate apprehension of death, nor that the subject of the gift should be actually delivered. In *M'Nicol*, 1889, 17 R. 25, opinions were delivered that the donation must be made in apprehension of death. Delivery of the document of debt is not necessary (*Macfarlane's Trs.*, 1898, 25 R. 1201; *Crosbie's Trs.*, 1880, 7 R. 823; *Gibson*, *supra*; *Blyth*, *supra*).

"*Donatio mortis causa* is a *donatio*, and resembles any ordinary gift in many respects, but it differs from one in these two respects, viz. first, that it is always revocable, and, second, that it is made in contemplation of death, and in contemplation, I think,—whatever may have been said to the contrary,—of immediate death, in the immediate apprehension of death; then if that apprehension is not realised,—that is to say, if death does not follow, but the apprehensive donor recovers,—the donation is revoked by that very fact" (Ld. Young in *M'Nicol*).

Deposit Receipt.—It is settled law that a deposit receipt can never be a testamentary paper, and though it be conceived in favour of a person other than the depositor, it cannot constitute a good legacy (*Jameson*, 1880, 7 R. 1131). A destination in a deposit receipt has no effect in succession (*Cuthill*, 1862, 24 D. 849; *Watt's Trs.*, 1869, 7 M. 930; *Miller*, 1874, 1 R. 1107; *Crosbie's Trs.*, 1880, 7 R. p. 826; *Dinwoodie*, 1895, 23 R. 234).

Approbate and Reprobate.

There is a rule of law that no person can accept and reject the same instrument (Ld. Eldon in *Kerr*, 1819, 1 Bligh, 1). Accordingly, an heir could not attack a deed as incapable of conveying heritage, or as being granted on deathbed, and at the same time claim a benefit under it. Similarly, a child cannot claim his legal rights and a share under a total settlement of his father's property; he is put to his election if the rights are expressly or by implication excluded by the deed.

Where a condition is expressly imposed which is possible and lawful,

and within the power of the settler to impose, the rule is applied (*Dundas*, 1829, 7 S. 241; 1830, 4 W. & S. 460; *Bennet*, 1829, 7 S. 817; *Stewart*, 31 May 1809, F. C.). The condition will be enforced if the person imposing it had uncontrolled power to give or withhold the benefit which the condition qualifies (*Ker*, 1819, 1 Bligh, 1; *Douglas' Trs.*, 1862, 24 D. 1191). To raise an implied condition upon which the choice must be taken, the intention to make a condition must be clear beyond all doubt.

Such an intention may be inferred from the fact that the deed or deeds are framed to regulate the whole of a succession.

Some person who is in the position of donor makes to another an offer of two different things, upon the footing, express or implied, that the person favoured may either take or reject the two things offered.

Where it is clear that several deeds are meant to stand together, a person cannot take a benefit from one and reject the other (*Black*, 1841, 3 D. 522; *Stewart*, 1832, 11 S. 139; *Harvey's Trs.*, 1860, 22 D. 1310; 1863, 1 M. 345). But if the deeds are not so connected, he may (*Urquhart*, 1851, 13 D. 742; *Somerville's Trs.*, 1887, 14 R. 770; *M'Donald*, 1876, 4 R. 45). Where a child prefers his legal rights to a testamentary provision, any fund set free is applied in compensating those who have suffered by the choice (*Dixons*, 1833, 6 W. & S. 431; *Ross*, 1896, 23 R. 1024; *Snody's Trs.*, 1883, 10 R. 599). It will depend upon the terms of the will whether any provisions in favour of the issue of such a child fall or remain (*Campbell's Trs.*, 1889, 16 R. 1007).

"The true ground of decision in *Fisher* v. *Dixon*, as explained by the Lord President in *Jack's Trs.*, is that in a family provision the children have a separate and independent interest, which is not affected by the acts of the parent derogating from the authority of the will. It is not necessary that the gift to the children should be separate in form; if it is substantially a separate and independent interest, the law will protect it, and will not involve the children in the consequences of the parent's election to claim legitim" (*Snody's Trs.*, *supra*, at p. 602; *Jack's Trs.*, 1879, 6 R. 543; see *Urie's Trs.*, 1896, 23 R. 865). In a case in which the child claiming legitim was not expressly excluded from benefit under her father's will, it was held that when full compensation had been provided for those whom her choice disappointed, and there was still a balance, that balance went to her under the original gift (*Macfarlane's Trs.*, 1882, 9 R. 1138). "To make a proper case of election, the facts of the case must be such as to satisfy three conditions.

"In the first place, the party who is put to his election must have a free choice, and whichever alternative he chooses, he shall have a right absolutely to that which he has chosen.

"In the second place, the necessity of making the election must arise from the will, express or implied, of someone who has the power to bind the person put to his election.

"And in the third place, the result of the election of one or other of the alternatives must be to give legal effect and operation to the will so expressed or implied" (Inglis in *Douglas' Trs.*, 1862, 24 D. p. 1208).

In order to put a legatee to his election, it must be in his power, by waiving some claim which he has, to perfect the right of the testamentary disponees; accordingly, a legatee, who has also a legal claim on the estate of the testator, cannot be put to his election if his abandonment would only lead to a partial intestacy (*Hewit's Trs.*, 1891, 18 R. 793).

An election made in ignorance of legal rights may be recalled. The choice must be a deliberate act done in knowledge of the circumstances

(*Brodie*, 1827, 5 S. 900: *Rose*, 1821, 1 S. 154; *Johnstone*, 1825, 4 S. 234; *Hope*, 1833, 12 S. 222; *Silkirk*, 1854, 16 D. 715; *Inglis' Trs.*, 1887, 14 R. 740; aff. 1890, 17 R. (H. L.) 76; *Dawson's Trs.*, 1896, 23 R. 1006; *Countess of Kintore*, 1886, 13 R. (H. L.) 93; *M'Fadyen*, 1882, 10 R. 285; *Donaldson*, 1886, 13 R. 967). In *Inglis' Trs.* an opinion was expressed that even if the error under which the child made her election was an error of law, whether induced by another or not, the child would be entitled to withdraw her election.

An election made by a minor is reducible on the grounds of minority and lesion (*Brodie*, 1827, 5 S. 900). The *curator bonis* of an insane person may, if the interests of his ward and those of third parties require it, make election for him: but whether a minor or lunatic should, before majority or convalescence, elect by his curator is completely within the power of the Court, and will be exercised for him by the Court only where it is absolutely necessary, with a view to the interests of other persons (*Cowan*, 1845, 7 D. 872: *Turnbull*, 1848, 6 Bell's App. 222; *Paterson*, 1866, 4 M. 706; *Kennedy*, 1843, 6 D. 40; *Hope*, 1858, 20 D. 390; *Morton*, 11 February 1813, F. C.). Where a person is mentally incapable of making his election, the right is not lost by his failing to make it, or by his taking a benefit under the testamentary provisions; the right will be effectual to him, if he recovers his sanity, or to his representatives if he dies insane (*Young*, 1880, 8 R. 205). In *Miller*, 1886, 13 R. 764, it was held that a married woman is not entitled to discharge a claim for legitim without the consent of her husband. But where a wife has made a fair election in her own interest and that of her family, the Court would not allow the election to be opened up in the interests of the husband's creditors (*Stevenson*, 1838, 1 D. 181: *M'Dougal*, 1858, 20 D. 658; *Lowson*, 1854, 16 D. 1098; *Millar*, 1876, 4 R. 87). A provision by a husband to a widow of the liferent of all his goods and gear, moveable and immoveable, excludes the legal right which she would otherwise have had to the property of the third or half of his moveables (Ersk. iii. 3. 30). "When there is no antenuptial contract, and the husband makes a voluntary provision in favour of his widow, as in full of her legal claims, she is put to her election on his predecease; and, in the event of her death before she has had an opportunity of making her choice, the right of election passes to her representatives. On the other hand, if the wife has, during the subsistence of the marriage, consented to accept the provision in substitution for her legal claims, she may retract her consent as a *donatio inter virum et uxorem*, but her right of revocation being strictly personal cannot be exercised by her representatives" (*Baxter's Trs.*, 1888, 15 R. (H. L.) p. 34). "By the law of Scotland, as well as by that of England, a married woman may make an effectual gift of her separate income to her husband, with this difference, that by Scotch law she has the privilege, even after her husband's death, of reclaiming the subject of her gift in so far as it has not been *bonâ fide* consumed. The wife's consent to give need not be in writing, nor in terms express, but may be matter of inference from the circumstances of the case or the conduct of the spouses" (*Edward*, 1888, 15 R. (H. L.) 37). A conveyance by a daughter to marriage-contract trustees of the share she would take under her father's will was held not to bar her representatives from claiming legitim (*Crellin*, 1892, 20 R. 51). If a legatee elects between a marriage-contract provision or legal rights and a testamentary gift, the person whose interests are hurt by the election has a right to compensation out of the unpaid provision (*Harvey's Trs.*, 1863, 1 M. 345; *Dixon*, 1833, 6 W. & S. 431; *Russell's Trs.*, 1886, 13 R. 989).

Conditio si sine liberis instituti decesserit (Ersk. iii. 8. 46).

This is a condition implied in settlements of land and in marriage contracts and settlements by which a succession is regulated, and involves an equitable extension of the scope of the bequest to persons who have been altogether overlooked in the testator's scheme of settlement; founded on the relationship of the parties, and on the presumption that the maker of the deed had not intentionally disinherited persons having a claim on his goodwill.

"The *conditio* has been held to apply where the settlement is universal, where the beneficiaries are a class, and the provision is of the nature of a family settlement, and where the testator, if not a parent, is at all events *in loco parentis* to the beneficiaries. Where all these elements concur, the *conditio* will be applied. The effect given to these elements depends on two principles: first, that the *delectus personæ* implied in a *nominatim* bequest is excluded when the provision is to a class; and, secondly, that when the provision is of the nature of a family provision, and where the granter is *in loco parentis* to the beneficiaries, there is a presumption that the granter prefers the issue of a predeceasing beneficiary to any substitute named in the deed" (Ld. Moncreiff in *Blair's Exs.*, 1876, 3 R. 362). The state of the testator's knowledge at the date of the will is what is looked to: his survivance of the legatee makes no difference (*Neilson*, 1822, 1 S. 458; *Booth*, 1832, 6 W. & S. 175). That the *conditio* applies to the case of marriage contracts was settled by the House of Lords in the case of *Hughes*, 1892, 19 R. (H. L.) 33.

In *Crichton's Tr.*, 1890, 18 R. 260, it was questioned whether the *conditio* was ever applicable to deeds granted *inter vivos* on which infeftment had followed, but the question was not decided. For the application of the *conditio*, the bequest must be of the nature of a family provision (*Marquis*, 1896, 23 R. 595; *Douglas' Exrs.*, 1869, 7 M. 504), and must be made by one who is *in loco parentis*. It does not apply to bequests in favour of brothers and sisters of the granter (*Hall*, 1891, 18 R. 690; *Blair's Exrs.*, 1876, 3 R. 362; *Berwick's Exr.*, 1885, 12 R. 565), or of cousins (*Rhind's Trs.*, 1866, 5 M. 104), or of illegitimate children (*Martin's Trs.*, 1864, 3 M. 326). Nor does it apply to the case of legatees called in a general character, as heirs or next of kin (*Cockburn's Trs.*, 1864, 2 M. 1185), or to a purely personal legacy, as of plate or pictures (*Brown's Trs.*, 1882, 10 R. 441; *M'Alpine*, 1883, 10 R. 837; *Douglas' Exrs.*, 1869, 7 M. 504). The *conditio* applies to bequests to children or grandchildren (*Mags. of Montrose*, 1738, Mor. 6398; *Dixon*, 1836, 14 S. 938; 1841, 2 Rob. 1; *Wilkie*, 1836, 14 S. 1121; *Lawson's Trs.*, 1859, 21 D. 286). "I am of opinion that the *conditio si sine liberis* applies in the direct line, however remote the descent may be" (Ld. Shand in *Grant*, 1882, 10 R. 92). The children who take under the condition, as a general rule take only the share that would have gone to their deceased parent: they do not share in accretions (*Henderson*, 1890, 17 R. 293; *M'Nish*, 1879, 7 R. 96; *M'Culloch's Trs.*, 1892, 19 R. 777). In the last of these cases it was remarked by one of the judges, that he would not be disposed to assent to the proposition that there is any artificial rule of construction which obliges the Court to hold, where a residue is disposed of among different members of a family, that the children of one of the residuary legatees who may die leaving issue are cut out from what their parent would have taken by accretion. It only applies to the case of nephews and nieces if they are called as a class (*Thomson's Trs.*, 1851, 13 D. 1326; *Nicol*, 1876, 3 R. 374; *Gauld's Trs.*,

1877, 4 R. 691; *Bryce's Trs.*, 1878, 5 R. 722), not if they are only called as individuals (*Hamilton*, 1838, 16 S. 478; *Gillespie*, 1876, 3 R. 561; *M'Call*, 1871, 10 M. 281; *Blair's Exrs.*, 1876, 3 R. 362; *Bruce's Trs.*, 1898, 25 R. 796).

The expression *in loco parentis* does not mean that the uncle has during his life occupied such a position, or treated his nephew and nieces with that kindness which a parent would show to his children. What is meant is, that in his settlement he has placed himself in a position like that of a parent towards the legatees, that is to say, that he has made a settlement in their favour similar to what a parent might have been presumed to make (*Boyle's Trs.*, 1882, 9 R. 453). "I cannot find in previous decisions any definite or distinct limitation of the condition which is said to qualify the application of the general rule that the testator must have placed himself *in loco parentis* to the legatees, except that the person claiming the benefit of the *conditio* must show that the testator made the bequest in consideration of relationship, and not for any more special reason applicable exclusively to the individual legatee" (Ld. Kinnear in *Waddell's Trs.*, 1896, 24 R. 189).

The *conditio* may be excluded by evidence of contrary intention (*Greig*, 1835, 13 S. 607), as where a testator makes other provision for those who would benefit by it (*Carter's Trs.*, 1892, 19 R. 408; cf. *Forrester's Trs.*, 1894, 21 R. 971). In *Allan*, 1893, 20 R. 733, the *conditio* was applied to shares of residue, but denied to general legacies left to the same people. It has been doubted if it applies to the issue of a mere conditional institute (*Carter's Trs., supra*).

Kinds of Legacy.

General Legacy.—A legacy is a gift made by a testator to take effect upon or after his death. A general legacy is a legacy of so much money or other property not identified or rendered specific. This confers upon the legatee merely a claim against the executor or other representatives, the executor being liable if he has sufficient free executry to meet it.

Special Legacy.—A special legacy is a bequest of a particular sum or debt or subject specially distinguished and identified. A special legatee has an action direct against the possessor of the fund or subject, the executor being made a party to the action in order that the rights of creditors of the deceased may be secured. A special legacy is not revoked by implication by a posterior general disposition, but it will not be due if the subject of it has perished or been disposed of by the testator. If the subject of a special legacy has been pledged, it is taken *cum onere* (*Stewart*, 1891, 19 R. 310; *Lady Balmerino*, 1746, Mor. 8074).

Universal Legacy.—A universal legacy or residuary bequest comprehends all the testator's estate, or what remains after satisfying expenses, debts, and other legacies. As a general rule, where there is a residuary clause, there can be no partial intestacy. The residuary legatee is not substituted to other legatees whose gifts may fall in: he is *ab origine* the object of a gift, the subject of which may be more or less according as it is or is not affected by contingencies. The residuary legatee is so called because his universal legacy is burdened with the payment of the particular legacies to others. When you find the word "residue" occurring in a testamentary writing, the presumption is that it carries the residue of the whole estate, and not merely that of a particular fund (*Millar*, 1894, 21 R. 921); though there may be a partial residue (*Stobie's Trs.*, 1888, 15 R. 340; *Downie's Trs.*, 1882, 9 R. 749; *Brown*, 1877, 5 R. 37).

There is no presumption against a residuary legatee getting also a

quantitative legacy, whether in his own name or as one of a class (*Kirkpatrick*, 1878, 6 R. (H. L.) 4).

The general rule is that the testator is assumed to have intended to convey a benefit, and the Court is to arrive at the intention of the testator as expressed in his will, aided by their knowledge of the circumstances of the case, the state of the testator's fortune, his family and relationships; but what they will enforce is the intention he has expressed, not the intention he would be likely to express where he has failed to do so.

Demonstrative Legacy.—A demonstrative legacy is a bequest payable out of or secured upon a particular fund or security (*Douglas' Exrs.*, 1869, 7 M. 504). When a legacy is to be paid out of a particular fund, if that fund perishes or is exhausted, the legacy falls, unless it appears that the reference to a particular fund was merely to indicate a source of payment, and in case of doubt the presumption is in favour of the reference being demonstrative and not taxative. A demonstrative legacy will not abate until after the fund out of which it is payable is exhausted (*Arbuthnot*, 1756, Mor. 8080).

Legatum rei alienæ.—This is a legacy of something which does not belong to the testator. Whether this legacy be exigible or not depends upon the state of the testator's knowledge. If he did not know that the thing bequeathed belonged to someone else,—and *in dubio* this is to be presumed,—there is no legacy; but if he knew that he was dealing with something not his own, the legacy is good, and the executor is bound to make it good to the legatee.

There is no distinction now between a legacy of heritage and one of moveables, so long as there is an intention made clear that heritage shall pass.

Nuncupative Legacy.—A legacy may be left by word of mouth, in which case it will be valid up to but not beyond £100 pounds Scots (*Kelly*, 1861, 23 D. 703).

Abatement.—If the free estate of the deceased is not sufficient to pay the legacies, they suffer a proportional abatement. The testator may of course give preferences if he pleases, but in the absence of other indication the rule is that residuary legacies abate first, next general legacies, and last of all special legacies (*Tait's Trs.*, 1886, 13 R. 1104). A legacy for mournings is preferable to other legacies, to the extent of the cost of suitable mournings (*Caldwall*, 1736, Mor. 8066).

Legacy of Annuity.—Where a testator gives a legacy in the shape of an annuity to be purchased for the legatee, it is quite settled that the legatee is entitled to payment of the sum directed to be invested, because it is always in the power of the legatee to realise the annuity, and it is not right that he should be subjected to the disadvantage of having to buy up the investment at a diminished price (*Murray*, 1895, 22 R. p. 941; *Dow*, 1877, 4 R. 403; *Miller's Trs.*, 1890, 18 R. 301). This principle will be applied even in the case of annuities declared to be alimentary unless they are protected by a trust. If there are neither conditional institutes with an interest in the fund, nor trustees charged with the duty of holding it, no one is in a position to challenge the sale; and a qualification of a right which no one is in a position to enforce is no qualification at all.

Perpetuities and Accumulations.

Perpetuities are illegal both as regards heritage and moveables (11 & 12 Vict. c. 36, ss. 1–3, 47–49; 31 & 32 Vict. c. 84, s. 17). A liferent in moveable estate may be constituted or reserved only in favour of one in

life at the date of the deed. Where any person of full age and born after the date of the deed (which in testamentary deeds is the date of the death of the testator) is in right of a liferent of moveable estate under any deed dated after 31st July 1868, such moveable estate belongs to him absolutely, and if held by trustees must be made over to him.

Accumulations.—The Thellusson Act, 39 & 40 Geo. III. c. 98, enacts: "Whereas it is expedient that all dispositions of real or personal estate, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained: Be it enacted that no person or persons shall, after the passing of this Act, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits, or produce thereof, shall be wholly or partially accumulated; for any longer term than the life or lives of any such grantor or grantors, settler or settlers; or the term of twenty-one years from the death of any such grantor—or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mère* at the time of the death of such grantor—or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated: And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, proceeds, and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

This Act as originally passed did not apply to dispositions of heritage in Scotland, but was extended to them by the Rutherfurd Act. The period of twenty-one years is reckoned from the truster's death although accumulation may not commence till long after (*Campbell's Trs.*, 1891, 18 R. 992; *Logan's Trs.*, 1896, 23 R. 848). If there is a good gift of the estate of which the revenue is directed to be accumulated, then the direction is held to be a burden upon the gifts, and the person entitled to the estate takes the income (*Ogilvie's Trs.*, 1846, 8 D. 1229; *Mackenzie*, 1877, 4 R. 962; *Maxwell's Trs.*, 1877, 5 R. 248). On the other hand, when there is no prior gift of the estate, the revenue has been regarded as undisposed of, and been given to the representatives *ab intestato* of the testator (*Keith's Trs.*, 1857, 19 D. 1040; *Lord*, 1860, 23 D. 111; *Cathcart's Trs.*, 1883, 10 R. 1205; *Campbell's Trs.*, 1891, 18 R. 992: *Logan's Trs.*, 1896, 23 R. 848). The rents of heritage go to the person who would have been heir at the time the rents accrue. Arrears and other moveable funds go to the next of kin as at the death of the testator (*Campbell's Trs., supra*; *Logan's Trs., supra*); the reasoning by which the heir is found seems to be inconsistent with what was laid down in *M'Adam*, 1879, 6 R. 1256, that there is now no such thing known in the law of real property in this country as any heir possessing an estate on apparency; and that the moment the breath was out of the body of the last heir, the next becomes owner under a complete personal title, a right to the lands as complete as any right to land can be without feudalisation.

The Statute 55 & 56 Vict. c. 58, s. 1, provides that no person shall settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or

respective minorities of any person or persons who, under the deed or trust of the instrument directing such accumulation, would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated.

Conditional Institution and Substitution.

"This is common to all legacies, that, if the legatee die before the testator, the legacy becomes void, and is not transmitted to the heirs and successors of the legatee" (Stair, iii. 8. 21). A bequest to A. and his assignees is interpreted in the same way (*Bell*, 1845, 7 D. 614). But if a legacy is given to A. and his heirs, or A. and his executors or successors, it is not evacuated by the predecease of A. It is taken by the heirs as conditional institutes, that is to say, as a direct gift from the testator (*Halliburton*, 1884, 11 R. 979; *Cleland*, 1891, 18 R. 377; Ersk. iii. 9. 9). But when, from the terms of the deed or the circumstances, it appears that this rule is excluded, it will not be applied (*Donald's Trs.*, 1864, 2 M. 922; *Findlay*, 1875, 2 R. 909; *Lawson's Trs.*, 1859, 21 D. 286). A legacy to A. and his heirs and anyone to whom he shall leave it, gives A. no power of disposal before the legacy vests in him (*Henry*, 1824, 2 S. 725).

In dispositions of heritage the presumption is in favour of substitution. If you have a destination to A. whom failing to B., and A. takes, then, unless he disposes of the estate, B. will be entitled on his death to succeed as heir under the substitution (*Ogilvie*, 1852, 14 D. 363). In destinations of moveable and mixed estate, the presumption is against substitution (*Watson*, 1884, 11 R. 444). But "substitution in moveables is recognised in the law of Scotland. It is not a favourite and it is not readily presumed, and the substitution if effectually created will be evacuated either by any clearly expressed intention of the institute to evacuate it, as by assigning or spending the money, or by its becoming immixed with his own funds, or by his disposing of it by will. But if not evacuated, a substitution must receive its effect" (Ld. Moncreiff in *Bell's Exr.*, 1897, 24 R. 1120; *M'Clymont's Exrs.*, 1895, 22 R. 411; *Buchanan's Trs.*, 1868, 6 M. 536; *Davidson*, 1870, 8 M. 807; *Dyer*, 1874, 1 R. 943). It is said that there is only one safe formula for creating a substitution in moveables, that is to say, by using some such expression as "whom failing either before or after the interest has vested." It must be expressed either in proper technical language or by a direction to trustees to insert a clause of substitution in the conveyance of the securities of the trust estate (*Greig*, 1833, 6 W. & S. 406). It is usual to protect it by means of a trust. The Crown, though *ultimus hæres*, is not included in a destination to heirs (*Torrie*, 1832, 10 S. 597).

Joint Bequest.—A bequest to persons as a class, *e.g.* to the children of A., is a joint bequest whether the children be named or not, and nothing lapses by the predecease of one of the class, the legacy being divided among the survivors. An exception is admitted in the case where the testator has used such expressions as "equally and proportionally among them" (*Macpherson*, 1894, 21 R. 386).

Joint and Several Legacies—Accretion.—A legacy to A. and B. jointly, or jointly and severally, goes to them equally in case they both survive the period of vesting: if one of them predecease, the other takes the whole, and the share of him who predeceases is said to accresce to the survivor. But if the legacy is to them equally, or if it is to be equally divided among them, there is no *jus accrescendi*, each takes only his own share. The leading case on this subject is *Parton's Trs.*, 1886,

13 R. 1191, where the rule is thus laid down by Ld. Pres. Inglis: "There is a rule of construction settled by a series of decisions beginning in the last century, and coming down to the case of *Buchanan's Trs.* in 1883, to the effect that when a legacy is given to a plurality of persons named or sufficiently described for identification 'equally among them,' or 'in equal shares,' or 'share and share alike,' or in any other language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the predecease of one or more of the legatees. The rule is applicable whether the gift is in liferent or in fee to the whole equally, and whether the subject of the bequest be residue or a sum of fixed amount or corporeal moveables. The application of this rule may, of course, be controlled or avoided by the use of other expressions by the testator, importing an intention that there shall be accretion in the event of the predecease of one or more of the legatees" (*Wilson's Trs.*, 1894, 22 R. 62; *Muir's Trs.*, 1889, 16 R. 954; *Stobie's Trs.*, 1888, 15 R. 340).

General Words in a Will or other Mortis Causa Disposition.

An enumeration will or will not limit a generality, according as it is or is not sufficient to satisfy the Court that it was intended to do so (Ld. Young in *Oag's Curator*, 1885, 12 R. 1162; *Mackie*, 1883, 11 R. 255).

1. If a legacy is given in the form of an enumeration of particular subjects, followed by general words, the general words are held to include only such as are *ejusdem generis* with those specified (*Ker*, 1745, Mor. 2274; *Dunbar's Trs.*, 15 Jan. 1808, Hume, 267; *Carswell*, 1858, 20 D. 516). But where the general words precede the enumeration, the rule is not so strict (*Mackie*, 1883, 11 R. 255).

2. If the general words follow a particular enumeration of subjects constituting a different description of estate, they receive effect according to the natural meaning of the words; that is, general words following an enumeration are not confined to subjects *ejusdem generis* unless they are connected by words of relation with the antecedent enumeration (*Glover*, 7 Dec. 1810, F. C.; *Welsh*, 28 June 1809, F. C.).

3. The general words, whether heritable or moveable, must be appropriate to the quality of the estate to be given (*Paterson*, 9 Feb. 1800, Hume, 128; *Sutherland*, 1805, Hume, 133; *Clouston's Trs.*, 1889, 16 R. 937). In this last case the word "heritable" was interpreted so as to affect the whole of a mixed estate (see also *Neilson*, 1860, 22 D. 646).

The modern tendency of the Courts has been to construe general words in their ordinary sense. You are not justified in taking away from them their common meaning unless you can find something reasonably plain upon the face of the document itself to show that they are not used with that meaning, and the mere fact that general words follow specific words is certainly not enough (*Anderson*, L. R. [1895] 1 Q. B. 749).

It may be useful to set down here a number of decided points on the interpretation of general words in bequests, but this must be done under reference to the rule that every deed is its own interpreter:—

"Goods, gear, and sums of money" will carry corporeal moveables, not debts (*Mochrie*, 1736, Mor. 5018; *Brown*, 3 Dec. 1805, Mor. "Clause," App. No. 5). "Goods, gear, debts, etc.," will not carry heritable debts secured by adjudication (*Ross*, 1771, 2 Pat. 254; *Galloway*, 12 Jan. 1802, F. C., 57 Mor. 15950; *Crawford*, 1838, 16 S. 1017). "Goods and gear, whether heritable or moveable," does not carry a lease (*Sutherland*, Feb. 1805, Hume, 133; *Paterson*, 1800, Hume, 128). "Moveables whatsoever," with words

descriptive of corporeal moveables, will not carry moveable bonds (*Dunbar's Trs.*, 1808, Hume, 267). "Moveable estate" following corporeal moveables does not include moveable rights (*Carswell*, 1858, 20 D. 516). "Cash" includes current coins and bank notes, but not bonds, bills, or securities (*Jarvie*, 1860, 22 D. 1395). "Money wherever deposited" was held equivalent to residue of moveable estate (*Easson*, 1879, 7 R. 251; *Grant's Trs.*, 1886, 13 R. 646). A gift of "income" has been distinguished from a gift of the liferent of a capital sum, in that under "income" recurring payments will be included (*Freer's Trs.*, 1897, 24 R. 437; *Strain's Trs.*, 1893, 20 R. 1025). "Furniture" includes articles of domestic use, but not books or wine (Bell's *Prin.* 1872). "The whole of the furniture in her own bedroom and any other she may choose for furnishing her house," was held to give a power of choosing liberally but fairly similar articles to those in her own bedroom (*Reed*, 1835, 13 S. 810; see *Macdonald's Trs.*, 1896, 23 R. 913). Where a testator disposed separately of his heritable and moveable estate, "moveable estate" included heritable bonds, because they are moveable *quoad* succession (*Cunningham*, 1889, 17 R. 218; *Hughes' Trs.*, 1890, 18 R. 299). "Property and estate" are the two most general words, and they include both heritage and moveables (*Grant*, 1893, 20 R. 404; *Ong's Cur.*, 1885, 12 R. 1162). "Effects" does not apply to heritable estate (*Pitcairn*, 1870, 8 M. 604; but see *Forsyth*, 1887, 15 R. 172). A legacy of the interest of a particular sum has sometimes been interpreted so as to carry the capital (*Sanderson's Exr.*, 1860, 23 D. 227). "Free money" includes moveable funds, not merely cash in bank, less debts but not legacies (*Smith*, 1829, 7 S. 734).

It is necessary in order to carry heritage in a testament that it shall be clear that the words used refer to heritage; and where neutral or equivocal words are used, the intention will be determined from the context (*Grant*, 1893, 20 R. 404).

Falsa demonstratio non nocet.—Errors in describing the thing bequeathed, or the person to whom it has been bequeathed, are disregarded as long as the thing or person is capable of identification. Thus a bequest of all the gas shares bought by the testator for £300 from certain trustees was held to carry all the shares bought from the trustees, although these had cost £798, and not £300 (*Bruce's Trs.*, 1875, 2 R. 775; *Donald's Trs.*, 1864, 2 M. 922). Errors in dividing the estate will not invalidate the bequest. So where one-third of an estate was left to one person, two-thirds to another, and one-third to another, it was held that by thirds fourths were meant (*Smith's Trs.*, 1883, 10 R. 1144). *Falsa enumeratio non nocet* (*Bryce's Tr.*, 1878, 5 R. 722). Though a fact be stated as the cause of giving a legacy which is not actually true, the legacy is due for *falsa causa non nocet* (Ersk. iii. 9. 8). Nor will a false cause given for the revocation of a legacy make the revocation ineffectual (*Grant*, 1846, 8 D. 1077).

In *Melvin*, 1824, 3 S. 31, a testator left his estate to a general disponee, under burden of paying all legacies he might thereafter appoint by writing under his hand, however informal. He then, in a letter addressed to a third party, bequeathed a legacy payable out of a sum which he said was in a certain bank. At the date of the letter there was no such sum in the bank, but at the date of his death there was. The legacy was held to be good to the testator's intention as expressed in the deed or deeds. And with regard to the description of the legatee, it is enough *dummodo constat de persona*. A legacy was sustained although both the Christian and married name of the legatee were wrongly given (*Keiller*, 1824, 3 S. 396).

Again, where legacies were left to each of the daughters procreate of the marriage betwixt A. B. and C. D. £400 . . . £1200, and there were four daughters, each was held entitled to £400 (*M'Lehose*, 28 Feb. 1815, F. C.; see also *Macfarlane's Trs.*, 1878, 6 R. 288; *Millar's Trs.*, 1891, 18 R. 989; *Bryce's Tr.*, 1878, 5 R. 722). The principle applied in these cases seems to be that if there is an inaccurate enumeration of the persons composing a class, the enumeration will be disregarded, and the legacy will be payable to the class (see Broom, p. 584).

A designation may be defective in that it does not indicate with certainty, to a person ignorant of the circumstances of the testator and the legatee, whom it is meant to favour. In that case the maxim applies *Certum est quod certum reddi potest.* A legacy to my late brother James' son was held effectual though the only child of James was a daughter (*Macfarlane's Trs.*, 1878, 6 R. 288).

This applies both to bequests to individuals and to societies. Thus a bequest in favour of "godly persons" and "godly preachers of Christ's Holy Gospel" was interpreted in accordance with the religious opinions of the testator (*Shore*, 1842, 9 Cl. & Fin. 355). You may prove that a testator was likely to favour a particular society by such means as showing that he was in the habit of supporting it, etc. A direction to trustees that plate and furniture was to be divided equally, was held to mean equally among the testator's next of kin (*Dundas*, 1837, 15 S. 427). Where a bequest was left to each of the testator's domestic servants who should be in his service at the time of his death, a claimant who proved that she had taken charge of the place of business of his firm, and had been in the habit of waiting on him at the office, and had sometimes assisted at his residence, was found entitled to share (*M'Intyre*, 1863, 2 M. 94; *Stirling Maxwell's Exrs.*, 1886, 13 R. 854).

Where a legacy is left to a society, secular or religious, and it has changed its name or been amalgamated with another, if the elements of continuity of title and identity of purpose are present, the legacy will still be due (*Pringle*, 1823, 2 S. 588; *Sommervail*, 1830, 8 S. 370; *Wilson's Exrs.*, 1869, 8 M. 233; see *Ferguson's Bequest*, 1898, 36 S. L. R. 157). A bequest "to all my creditors of whatever sums shall be necessary for making up full payment of the balances remaining due to them, as the same shall be set forth in a list which I intend to leave," did not fail for want of a list (*Sprot*, 1855, 17 D. 840). A letter of a testamentary character addressed to one of the beneficiaries has been held a competent means of interpreting an ambiguous bequest (*Ritchie*, 1880, 8 R. 101). A bequest to the testator's second cousins has been held to include, in the circumstances of the case, first cousins once removed (*Drylie's Factor*, 1882, 9 R. 1178). Bequests left to trustees for "any of the testator's blood relations that the trustees should think the most fit," "to such of the truster's mother's relations as they should appoint," "to such of his friends and relations as should be pointed out by his wife," and other similar bequests, have been sustained (*Wharrie*, 1760, Mor. 6599; *Murray*, 1729, Mor. 4075; *Snodgrass*, 1806, Mor. "Service of Heirs," App. No. 1; *Crichton*, 1828, 3 W. & S. 329; *Brown's Trs.*, 1762, Mor. 2318; *Cairnie*, 1837, 16 S. 1). But in these cases, if the trustees predecease or fail to take up the trust, the bequest lapses (*Robbie's Jud. Factor*, 1893, 20 R. 358; *Dick*, 1758, Mor. 7446). "Relations" includes relations on the mother's side as well as those on the father's (*Brown's Trs.*, 1762, Mor. 2318); and under "nearest relations" were included the children of a sister uterine, who was named in other parts of the settlement along with the testator's brother german

(*Scott*, 1855, 2 Macq. 281; *Norris*, 1838, 2 D. 220). When a person leaves his property to trustees or executors for the purpose of being divided among or bestowed upon benevolent or charitable objects, this is by the law of Scotland a good bequest, and is not void for uncertainty (*Cobb*, 1894, 21 R. 638; *Hill*, 1826, 2 W. & S. 80; *Miller*, 1837, 2 Sh. & M'L. 866). But to leave a residue to trustees to be disposed of as they see fit, gives them no right, and the property will pass as on intestacy (*Sutherland's Trs.*, 1893, 20 R. 925). Where there is no power of selection given, a bequest to "charities" is void from uncertainty (*Low's Exrs.*, 1873, 11 M. 744). A bequest to children, whether of the testator or of a third party, means *primâ facie* legitimate children (*Turnbull*, 1895, 3 S. L. T. No. 250); and if there be legitimate children in existence, in the absence of express direction to include illegitimate children within the scope of the benefit, only legitimate children will take. Gifts to illegitimate children *nominatim* are good, as is probably a gift to the illegitimate children of A. in life at the date of the will (*Ballantyne*, 17 Feb. 1814, F. C.). It is well established in England that a bequest to unborn illegitimate children is void as being *contra bonos mores*. The general rule in bequests to a class specifically defined as "children" or "issue" or "heirs," is that only those in existence at the period of distribution take a share. This of course applies where the children, etc., are described as "then in existence" or "surviving at the time" (*Rogerson's Trs.*, 1865, 3 M. 684; *Black*, 1844, 6 D. 689; *Grant*, 22 May 1810, F. C.; *Stewart's Trs.*, 1868, 7 M. 4; *Whittet's Trs.*, 1892, 19 R. 975; *Wood*, 1861, 23 D. 338; *Ross*, 1878, 5 R. 833; *Hayward's Exrs.*, 1895, 22 R. 757). But where no precise period of distribution is named, or the distribution is to take place on the death of a parent, the expression may be read so as to include both persons born and persons to be born (*Kennedy*, 1841, 3 D. 1266; *Scheniman*, 1828, 6 S. 1019; *Martin's Trs.*, 1864, 3 M. 326; *Hunter's Trs.*, 1865, 3 M. 514; *Carleton*, 1867, 5 M. (H. L.) 151). A legacy to the children of A. *primâ facie* includes all the children of A. who are alive at the date of vesting, whether they were born at the date of the will or not. A legacy to the *n.* children of A. *primâ facie* is limited to the children of A. who were in existence at the date of the will; but the Courts will always lean to a demonstrative and not a taxative construction (*Miller's Trs.*, 1891, 18 R. 989). A legacy to the heirs of A. is a legacy to the person who would on intestacy succeed to A. in the ownership of the subject; that is to say, if the subject is moveable it means next of kin as extended by the statute, if heritable, heir (*Gregory's Trs.*, 1889, 16 R. (H. L.) 10; *Blair*, 1849, 12 D. 97; *Irvine*, 1851, 13 D. 1367). Where the testator is himself the heir or successor of the institute, then on the predecease of the institute the bequest fails (*Birnie*, 1893, 20 R. 481). A destination of moveable property to the nearest heirs and successors of A. calls those who would take under the Moveable Succession Act (*Nimmo*, 1864, 2 M. 1144; *Maxwell*, 1864, 3 M. 318). "Successors" has the same meaning as "heirs" (*Blair, supra*). A destination to A. and his assignee gives no right to anyone unless A. survives to take (*Graham*, 1807, Mor. "Legacy," App. No. 3; *Bell*, 1845, 7 D. 614). "Heirs *in mobilibus*" does not mean testamentary representatives (*Haldane's Trs.*, 1890, 17 R. 385). A destination to the next of kin of A. is no longer equivalent to legal heirs *in mobilibus*: it is applicable to those members of the class who would have been the sole heirs before the passing of the Act (*Young's Trs.*, 1880, 8 R. 242; *Gregory's Trs.*, 1889, 16 R. (H. L.) 10). In the common law of Scotland next of kin and heirs *in mobilibus* meant the same thing: but another meaning might be impressed upon the term in a written instrument if the context showed, either expressly or by

reasonable implication, that it was used in a different sense (*Connell*, 1867, 5 M. 379; *Scott*, 1855, 1 Paters. App. 507). "Personal representatives" generally means next of kin (*Stewart*, 1802, Mor. "Clause," App. No. 4; *Manson*, 1874, 1 R. 371). "Executors" may mean those entitled to the office, or executors-nominate (*Scott's Exrs.*, 1890, 17 R. 389). In that case, where it was held that a legacy went to the executor under the will of A., an attempt to exact payment of duties as if the bequest had been part of A.'s succession failed.

In the ordinary case the executor would not take the beneficial estate unless there was something to show that the testator meant him to do so (*Jamieson*, 1872, 10 M. 399). The word "executor" will receive a construction consistent with associated words, such as "heirs" or "next of kin" (*Lawson*, 1826, 4 S. 384; *Stodart's Trs.*, 1870, 8 M. 667). "Issue" has no technical meaning, and includes all descendants (*Turner's Trs.*, 1897, 24 R. 619). "Family" means children, not grandchildren (*Low's Trs.*, 1892, 19 R. 431; *Fyffe*, 1841, 3 D. 1205; *contra*, *Irvine*, 1873, 11 M. 892). "Children" does not include grandchildren (*Adam's Trs.*, 1896, 23 R. 828). "Relations" generally means next of kin (*Williamson*, 1865, 4 M. 66; *Cunningham*, 1891, 18 R. 380; *Johnston's Trs.*, 1891, 18 R. 823; 1892, 20 R. 46). In one reported case the word "children" has been held to include a grandchild (*Ranken*, 1878, 8 M. 878); but "children" is not interpreted to include both grandchildren and immediate issue (*Rhind's Trs.*, 1866, 5 M. 104).

A legacy to the lawful heirs or next of kin of A. goes to those who are alive at the death of the testator (*Lord*, 1860, 23 D. 111; *Cockburn's Trs.*, 1864, 2 M. 1185; *Ewart*, 1870, 9 M. 232; *Gregory's Trs.*, 1889, 16 R. (H. L.) 10; *Logan's Trs.*, 1896, 23 R. 848; *Pearson*, 1825, 4 S. 119). Where a class to be benefited can be ascertained at the death of a testator, *primâ facie*, that is the period of time at which the members of the class are to be identified (*Biggar's Trs.*, 1858, 21 D. 4). A gift to the heir of A. who survives the testator would probably not vest till the death of A., as only then could his heir be found; though in *Campbell's Trs.*, 1891, 18 R. at p. 1004, Ld. Young is reported to have said: "I should indeed be prepared, if necessary, to go further, and hold that under the destination of the most formal conveyance to the heirs-male of the body of A. B. (A. B. himself being clearly excluded), his sons would take although A. B. should himself happen to be in life when the succession opened, and that his survivance would not be either a hindrance to its opening or favourable in any way to heirs subsequently called." This is inconsistent with the opinions of the Lord President and Ld. Deas in *Todd*, 1874, 1 R. 1210–1212, where it is said that a man's heir has no existence until he dies, and it never can be ascertained till he dies who will be his heirs. A legacy is only a succession and cannot compete with a *jus crediti*, in a bond of provision granted upon deathbed (*Mitchell*, 1676, Mor. 8056).

Legacies have been sustained which have been made to the "heirs of A. B.," and A. B. being in life, his children have been held entitled to the legacies. This construction requires an explanatory context (*Loveday*, 1755, Amb. 273; *Bull*, 1858, 25 Beav. 540; *Symers*, 1848, 16 Sim. 267). *Primâ facie* a gift to a class is to be divided *per capita*. In order that the division should be *per stirpes*, it must appear from the will, from its language or its scope, that the division is to be among families (*Macdougall*, 1866, 4 M. 372; *Bogie's Trs.*, 1882, 9 R. 453). Legacies to two or more families jointly, or to a family and individuals by name, are divided *per capita* (*M'Kenzie*, 1781, Mor. 6602; *M'Courtie*, 15 Jan. 1812, Hume, 270; *Renny*,

1822, 2 S. 60). A gift to issue of the fee of what their parents liferented, or a conditional institution of children to their parents, implies that the division is to be *per stirpes* (*Home's Trs.*, 1884, 12 R. 314; *Allen*, 1886, 13 R. 975; *Low's Trs.*, 1892, 19 R. 431). Where a residue was left to children named, the children of a deceased son, the division was into five shares (*Galloway's Trs.*, 1897, 25 R. 28). Where there is a gift to the children of A., and no intention shown to include those who may be born after the death of the testator, *post nati* are excluded (*M'Kenzie*, 1781, Mor. 6602; *Stewart's Trs.*, 1868, 7 M. 4; *Whittet's Trs.*, 1892, 19 R. 975). Where a liferent is given to a parent and the fee to his children, some of whom exist, the legacy vests in the children, but *post nati* may claim a share unless there is some direction, express or implied, that excludes them (*Calder*, 1842, 4 D. 1365; *Hunter's Trs.*, 1865, 3 M. 514; *Ross*, 1878, 5 R. 833). A gift to a father in liferent and to unborn children in fee gives the fee to the father (*Ferguson's Trs.*, 1860, 22 D. 1442; aff. 1862, 4 Macq. 397). Where a benefit is given by will, and it is provided that in the event of the person benefited dying, the benefit is to go to someone else, that will be held *primâ facie* to mean in the event of his dying before the testator, unless there is a clause of survivorship (*Peacock's Trs.*, 1885, 12 R. 878; *Wood, Smith's Judicial Factor*, 1896, 24 R. 105). Where there was a destination to "the nearest legitimate male issue of my ancestor, namely, T. A. F.," it was held that the destination was in favour of T. A. F. even if the description was in point of fact inaccurate (*Lord Lovat*, 1884, 11 R. 1119). Similarly, a legacy to "J. S., one of my second cousins," was good though J. S. was not a second cousin (*Drylie's Judicial Factor*, 1882, 9 R. 1178).

Veritas nominis tollit errorem demonstrationis.—If a legatee is mentioned by name, and an inaccurate description is added, if no one answers to the description, a person answering to the name will take. If no one answers to the name, a person answering to the description will take. Where someone answers to the name and someone else to the description, either the name or the description will prevail according as it is reasonably certain in which a mistake has been made (*Drake*, 1860, 8 H. L. 172; *Charter*, 1874, L. R. 7 E. & I. App. 377).

Per capita or Per stirpes.

When a succession is divided *per capita*, it is divided into as many separate parts as there are *capita* or heirs; when it is divided *in stirpes*, or by the stock, the partition is according to the number of *stirpes* from whom the heirs derive right. To take an example: If a father dies intestate leaving two children, the dead's part will be divided between them *per capita*, and each will take one-half. If he leaves a child and grandchildren the issue of a predeceasing child, the division will be *per stirpes*, and the grandchildren take the half that would have gone to their parent. Similarly, in testate succession, if a grandfather leaves money to his grandchildren *per capita*, each takes a share; if he leaves it *per stirpes*, there will first be a division into as many shares as there are separate families of grandchildren.

Gift by Implication.

Where a truster has directed a capital sum to be invested for certain beneficiaries, there is an inference *primâ facie* that the money so invested is to be held for them, or, in other words, that there is a gift to them of the capital sum, if there is nothing in the will to set aside or displace that inference (Ld. Kinnear in *Whitehead's Trs.*, 1897, 24 R. 1032).

If a testator in his testamentary writings shows that he supposes that he has bequeathed to someone a legacy, and refers to the bequest as an accomplished fact, this may be held to be equivalent to a bequest (*Grant*, 1851, 13 D. 805). Where a testator provided for the payment of an annuity of £150 as the annuity provided in his marriage contract, and it turned out that the marriage contract referred only to a provision of £100, the larger sum was found due (*Forbes's Trs.*, 1893, 20 R. 248). A gift has been implied where there has been an expression of an intention to give, not followed by an express gift (*Mearns*, 1775, Mor. 13050; *M'Gowan*, 1842, 4 D. 1546). This is said to have a special force in family settlements.

Such an expression of intention will not by itself be allowed to burden a gift (*Bryce's Tr.*, 1878, 5 R. 722). If a legacy is given, to take effect on the death of a particular person, or upon his death in minority or without issue, there is a strong presumption that he is meant to take a liferent of the fund, or that if he survives minority or has issue, a vested interest is to be taken (*Aberdein's Trs.*, 1870, 8 M. 750). A fee can be conferred by implication upon the children of A. if an annuity or liferent be given to him, and some third party is made a conditional institute, the condition being the death of A. without issue (*Douglas*, 1843, 6 D. 318; *Campbell*, 1852, 15 D. 173). There is no rule that the bequest of the interest of a sum of money will carry the principal sum where not specially destined (*Sanderson's Exr.*, 1860, 23 D. 227). But where a testator directed his executors to invest £2000 for the benefit of his son and daughter equally, and as to each of the shares to pay the interest thereof or apply it to the use of his said son and daughter, declaring, "I leave it to my executors entirely in what manner to apply these sums: whether to pay the same directly, or apply it, and pay it to others for behoof of my son and daughter," this was held to be a bequest of capital (*Sanderson's Exr.*, *supra*; see also *Lawson's Trs.*, 1890, 17 R. 1167). Where there is a residuary legatee to take the fee, a gift of a liferent with a power of disposal is not a gift of the fee (*Alves*, 1861, 23 D. 712).

Precatory Trusts.—In the later cases in England there has been shown a tendency to relax the doctrine of precatory trusts. In considering whether a precatory trust is attached to any legacy, the Court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed. While it is important that rules for the construction of wills should be adhered to where they have been laid down, they must not be used to defeat the intention of the maker of the will as gathered from the scope of the will, the words used, and the circumstances in which they are used (*In re Hamilton*, L. R. [1895] 2 Ch. 370; *In re Williams*, L. R. [1897] 2 Ch. 12; *Macpherson*, 1894, 21 R. 386; *Wilson*, 1878, 5 R. 539; *Bruce*, 1880, 7 R. 477).

Double Legacies.—One rule is well settled, and that is that when exactly the same amount is given twice in the same paper, the presumption is that it is a mere repetition, arising from some mistake or forgetfulness; but where the same amount is bequeathed in two distinct testamentary papers, both equally formal, then both legacies are payable, unless it can be shown from the settlement of the deceased, or by other competent evidence, that his intention was to give one legacy only (*Edinburgh Royal Infirmary*, 1881, 9 R. 352; *Trs. of F. C. of Scotland*, 1887, 14 R. 333).

The presumption in favour of giving the legatee all the legacies is strengthened if they are given under different conditions, or if the reversion

is given to different persons (*Straton's Trs.*, 1840, 2 D. 820), or if the sum given is charged upon different subjects (*Frew*, 1828, 6 S. 554), or if the legacies are given to the legatee in a different character (*Horsbrugh*, 1848, 10 D. 824), or if the legacies themselves are of a different kind (*Dewar*, 1880, 8 R. 83; *Bryce's Tr.*, 1878, 5 R. 722). That the different legacies carry interest from different dates, or whatever else distinguishes the various legacies, is favourable to the claim of the legatee to all.

It has been said by Ld. M'Laren that substitution may legitimately be inferred—

1. Where a second instrument expressly refers to the first in such terms as to indicate an intention to revise it.

2. Where it is plain that both are not meant to be operative.

3. Where the instruments are identical, or nearly identical, in their terms, the absence of any material variance between two provisions is an argument against both being due.

4. Where the form of the disposition is altered to meet the altered circumstances of the legatee, or to constitute a liferent or benefit of some kind in favour of another legatee (*Free Church of Scotland*, 1887, 14 R. 333).

5. Where the second provision is demonstrative, *i.e.* where it only points out a fund from which the original provision shall be paid or made good (*Chiras' Trs.*, 1893, 21 R. 1).

Payment of Debts and Legacies.—Legacies are always postponed to the payment of the testator's debts. Accordingly, executors or trustees, before paying legacies, should see that the estate is solvent; otherwise they may subject themselves to personal responsibility.

Apart from the case of a special term for payment being pointed out, a legacy is due at the date of, and bears interest from, the death of the testator; but payment cannot be enforced till six months have elapsed (Act of Sed., February 1662: *Duff's Trs.*, 1862, 24 D. 552; *Glasgow's Trs.*, 1830, 9 S. 87; *M'Alister's Trs.*, 1836, 15 S. 170). Three general rules have been laid down for the payment of legacies—

1. Executors cannot be compelled to pay either debt or legacy until the expiry of six months from the death of the testator.

2. After six months, if they have reasonable ground to suppose that the estate will meet all its burdens, they may pay *primo venienti*, even to a legatee (*Beith*, 1875, 3 R. 185; *Stewart's Trs.*, 1871, 9 M. 810).

3. On the expiry of twelve months from the death, after making provision for the payment of debts, they may proceed to distribute the estate.

Ld. Redesdale, in *Stair*, 1827, 2 W. & S. 614, expressed the rule as follows: "According to the law of Scotland, twelve months are allowed for the purpose. No person has a right to claim against the executors of a testator before the end of a twelvemonth: six months for the collection of the debts, and six months for the distribution of them, according to the disposition of the testator."

This must be regarded as fixing a maximum in respect of delay, and probably only means that the executor will not be held liable for interest in excess of what he actually receives until the year has elapsed.

When the time has come for the payment of debts, if there be any question as to particular debts the executor is entitled to insist upon their being constituted by decree, though he is not entitled to cause expenses by unnecessary opposition (*Jackson's Trs.*, 1832, 10 S. 597: *Law*, 1875, 3 R. 1192).

"Though a decree of constitution is not always necessary, yet, where the executry estate is small, and the amount of claims uncertain, and the existence or amount of the alleged debt at all doubtful, the executor is entitled to protect himself and the estate by requiring formal constitution (Ld. Pres. Inglis in *M'Gaan*, 1883, 11 R. 249). An executor may obtain exoneration in an action of multiplepoinding, and for the competency of this action it is not necessary that there should be technical double distress; but he may not adopt this procedure if he can obtain exoneration without judicial proceedings (*Mackenzie's Trs.*, 1895, 22 R. 233); and the position of a beneficiary is different (*Macnab*, 1894, 21 R. 827; *Robb's Trs.*, 1880, 7 R. 1049). In the case of the executor or trustee it is enough that there should be reasonable doubt as to the meaning of the instructions he has to carry out, or that the fund should be insufficient to meet all the claims upon it (see Ld. Young in *Jamieson*, 1888, 16 R. 15; *Fraser's Executrix*, 1893, 20 R. 374; *Winchester*, 1890, 17 R. 1046).

In *Stewart's Trs.*, 1871, 9 M. 810, at p. 813, Ld. Moncreiff stated the law as follows: "It is therefore not doubtful in point of law that if trustees and executors, after six months, pay away the funds, even to legatees, in the reasonable belief that all debts have been satisfied, they cannot be made personally responsible, although, if there was from the first a deficiency of funds, the legatees may be obliged to pay back what they have got to the unpaid creditor. Creditors are bound to make their claim in reasonable time; and if they so act as to induce executors to believe that the debt is abandoned or discharged, they cannot make them responsible for acting on a belief they have themselves created; although their debt may remain entire against the estate."

But where personal estate has been paid away under the mistaken belief that securities were sufficient to meet the debts secured on them, trustees and executors have been held personally liable (*Lamond's Trs.*, 1871, 9 M. 662; *Heritable Secur. Invest. Assoc.*, 1892, 20 R. 675). In this case the following remarks were made: "The estate is insolvent, some of the creditors are not paid, and yet the trustees have paid away a portion of the estate to beneficiaries. There can be no doubt that they are liable to replace what they have thus paid away, for no trustees are entitled to pay away one shilling of the estate to beneficiaries until all the truster's debts are paid, and if they do so before ascertaining with certainty that the estate is solvent, they do so at their own risk."

In this case there was a strong expression of dissent on the part of Ld. M'Laren.

Legatees having right to specific sums are not bound to grant a formal discharge upon obtaining payment, or to pay *ad valorem* fees to the agent of the party making the payment. Except in the case of a residuary legatee, a simple receipt is all that can be required (*Fleming*, 1861, 23 D. 443; *M'Laren*, 1869, 8 M. 106).

Repetition.—Legatees may be called upon to pay back what they have received in order to meet the claims of creditors where it turns out that the estate is not solvent, even although the payments were not made to them precipitately or prematurely. But two points must be attended to in regard to such claims for repetition: (1) Until the legal representative has been sued and found to have no funds, such a claim cannot be entertained. (2) Each legatee is only liable for his proportion of the debt (*Poole*, 1834, 12 S. 481; *Wyllie*, 1853, 16 D. 180; *Threipland*, 1855, 17 D. 487; *Mags. of St. Andrews*, 1893, 31 S. L. R. 225).

The claim is one of repetition of money paid in error, and will lie

against relicts, bairns, legatees, because they received payment out of an estate which was insufficient to pay debts. Accordingly, if creditors omit to make the general representative liable while he has funds, they will fail in an attempt to secure payment from the legatees, who are only liable *subsidiarie* (*Threipland, supra*; *Clelland*, 1845, 17 D. 487). In case the legatees have not actually received payment, they will still be postponed to creditors, although the testator left funds originally sufficient to pay both debts and legacies (*Wallace*, 16 May 1821, F. C.).

A legatee who has received payment is not bound to repeat to creditors if it appears that there was originally enough in the executor's hands to pay all, and the executor has become bankrupt; for legatees cannot by any action compel an executor to clear off the executry debts (*Robertson*, 1760, Mor. 8087; Ersk. iii. 9. 46).

Prescription.—A claim for a legacy may be barred by the negative prescription, because an executor is just a debtor with a limited responsibility; he must pay debts and legacies within a certain time, and is liable in interest if he does not. The difficulty is to fix the term of payment from which prescription is to run (*Jamieson*, 1872, 10 M. 399). A claim for a legacy is saved from the operation of the negative prescription by being acknowledged by the executor within the years of prescription (*Briggs*, 1854, 16 D. 385), and thirty-two years' taciturnity was held no bar in the case of *Scath*, 1848, 10 D. 377.

Interest Payable on Legacies.—The general rule is that, apart from special instructions in the will, no higher rate of interest is exigible than that which the estate has earned. "It has often been said, and I think it is a rule of law, that interest is only due when there is either a contract to pay interest, or a duty to invest, or in respect of *morata solutio*" (Ld. M'Laren in *Ross*, 1896, 23 R. 802). There is no statutory rate of legal interest; five per cent. was at one time considered the rate to be allowed in claims for legitim or *jus relictæ* (*Bishop's Trs.*, 1894, 21 R. 728; *M'Murray*, 1852, 14 D. 1048; *Smith*, 1857, 19 D. 267). In *Ross* only 4 per cent. was found due in a question of legitim, but the executrix was not in *mora*. In *Melville*, 1896, 24 R. 243, where the question was as to the proper investment of trust funds, 3 per cent. was the rate allowed to the beneficiaries (see also *Inglis' Trs.*, 1891, 18 R. 487; *Campbell's Exrs.*, 1898, 25 R. 687). In the last case interest at 3 per cent. was allowed on a sum left to trustees by a person who died otherwise intestate.

Conditions in Legacies.

Legacies are pure or contingent, and in contingent legacies the conditions, if clear, intelligent, and lawful, will be effectual. If they are physically impossible, or inconsistent with law, or *contra bonos mores*, they will be held *pro non scriptis* (Stair, i. 3. 7; Ersk. iii. 3. 85; Bell, *Prin.* 1785). Conditions are implied or express. The most important implied conditions are the *conditio si testator sine liberis decesserit* and the *conditio si institutus sine liberis decesserit*, which are elsewhere considered. Conditions are also divided into casual, potestative, and mixed conditions. Casual conditions depend upon something out of the power of the legatee—upon mere accident, on something to be done by a third party, or upon some occurrence which it is no part of the testator's intention to bring about. Such conditions, if lawful and possible, obtain their effect.

A potestative condition depends upon an act in the power of the legatee. It is obligatory on the legatee by his accepting the legacy, which indeed may be meant to secure the performance of some act by him.

Where a legacy is given to a person in the character of trustee or executor, the gift would seem to be conditional on acceptance of the office (see *Bryce*, 19th June 1827, More's *Notes*, ccexliv; *Orphoot*, 1897, 24 R. 871). A prohibitory condition may be inoperative where it has a tendency to interfere with the liberty of the legatee or with the rights of property. A condition adjected to a legacy that the legatee should not reside with her mother, who was of good character, was entirely disregarded (*Fraser*, 1849, 11 D. 1466; *Grant's Trs.*, 1898, 25 R. 928).

Total prohibitions of marriage are illegal, but not prohibitions to marry a particular person (*Forbes*, 1882, 9 R. 675; *Ommaney*, 1792, Mor. 2985; 1796, 3 Pat. 448; *Graham*, 1823, 1 Sh. App. 365). A condition that a legatee shall not marry in minority without certain consents has been held good. Trustees cannot refuse their consent except upon reasonable grounds; it is sufficient that they do not object, and their consent given after the event will suffice (*M'Kenzie*, 1750, Mor. 2977; *Buntin*, 1710, Mor. 2972; *Pringle*, 1688, Mor. 2972; *Wellwood's Trs.*, 1851, 13 D. 1211). In the ordinary case a testator may attach to any of his gifts such conditions as to the marriage of the legatee as may seem reasonable (*Brown*, 1890, 17 R. 517; *Smith's Trs.*, 1883, 10 R. 1144; *Sturrock*, 1875, 2 R. 850; *Kidd*, 1863, 2 M. 227; *Foulis*, 1672, Mor. 2965). When a full gift of fee is made directly to a legatee, conditions superadded are held to be repugnant to the gift, and are disregarded (*Ballantyne's Trs.*, 1898, 25 R. 621; *Stewart's Trs.*, 1897, 25 R. 302).

Whoever has the income of a fund, and also the control of the capital, has the entire estate; and it is legally impossible to protect the life-interest of a person to whom the fee is also given against his creditors or his own acts (*Kinmond's Trs.*, 1898, 25 R. 819; *Gibson's Trs.*, 1877, 4 R. 1038). Where a power is given to trustees to restrict the right of a legatee to an alimentary liferent and give the fee to his issue, creditors can only take this right *tantum et tale* (*Chambers' Trs.*, 1878, 5 R. (H. L.) 151). A granter of a liferent is entitled to fix the conditions upon which it shall continue to subsist. He can make it terminate upon the occurrence of certain events, or upon a sale (*Chaplin's Trs.*, 1890, 18 R. 27); but clauses of forfeiture are to be construed strictly, and nothing will be struck at unless but what the deed clearly expresses (*Chaplin's Tr.*, 1891, 19 R. 237). Where a person had a liferent, with power during her life to sell, burden, or otherwise dispose of the *corpus*, it was held that this could not be done by *mortis causa* deed (*Miller's Trs.*, 1896, 24 R. 114). A declaration as to irrevocability really goes for nothing if the bequest is in its nature revocable. No man, by calling his will his last and irrevocable will, can bar himself from altering it (*Mitchell*, 1877, 4 R. at p. 808). A mutual deed of settlement, partaking of the nature of contract, cannot be altered or revoked except by both of the parties to it.

Satisfaction: Debitor non præsumitur donare.

There is no rule in Scotland that a settlement on a daughter by marriage contract is presumed to be satisfaction of previous provisions unless these provisions are *ex obligatione*. It is not possible to define what are slight differences between two provisions, and is wrong to argue from one case to another. It is contrary to the law of Scotland to lead evidence that the testator did not intend to give both (*Johnstone*, 1896, 23 R. (H. L.) 6, L. R. [1896] App. Ca. 95; *Keith Johnston's Trs.*, 1894, 22 R. 28).

But if the legacy is given when the father is bound to grant a provision, that is, succeeds the onerous provision, then the maxim *Debitor non præ-*

sumitur donare applies, whether the provision is equal or not, and even though there be different destinations over (*Kippen*, 1856, 18 D. 1137; aff. 1858, 3 Macq. 203; *Gallie*, 1782, Mor. 11374; *Yester*, 1688, Mor. 11479; *Nimmo*, 1841, 3 D. 1109). An express declaration that a bequest is additional will of course have effect given to it (*Cruikshank*, 1845, 4 Bell, 179). Satisfaction is not implied where the legacy and the provision are not of the same kind (*Clark*, 1823, 2 S. 313; *Dundas*, 1827, 5 S. 790; *Elliot*, 1873, 11 M. 735; *Somerrell*, 1884, 11 R. 1004; *Haviland*, 1895, 22 R. 396). The same maxim, *Debitor non præsumitur donare*, applies where the testator has contracted an ordinary debt to the legatee; that is to say, the general rule is that the legacy is to be regarded as in satisfaction of the debt (*Balfour*, 1842, 4 D. 1044). Though the legatee has the onus thrown on him of displacing the presumption, this may often be readily done from the terms of the bequest, *e.g.* it may be displaced by the existence of a destination over (*Balfour*, *supra*), or the legacy may be conditional (*Hunter*, 1836, 15 S. 159), or it may be indefinitely postponed (*Spaden's Trs.*, 1822, 1 Sh. App. 164), or the two may be of different kinds (*Macdowall*, 1833, 11 S. 952), or the debt may be to marriage-contract trustees, and the gift to a daughter (*Keith Johnston's Trs.*, 1894, 22 R. 28).

Ademption is a word also used as the name of the principle adopted from England by which it is held that when a particular sum is left for a particular purpose, and a similar sum is given to the legatee during the testator's life, then it is competent to show, from the nature of the gift and the circumstances in which it is given, that it was the intention of the donor that it should be taken in satisfaction of the legacy (*Johanson*, 1898, 36 S. L. R. 169); and if the Court are judicially convinced, *i.e.* by competent evidence, that such was the intention of the testator, they will give effect to this intention.

Where a testator stands *in loco parentis* to a legatee, and after the execution of a will or bequest in his favour pays him money, there is no presumption that the advance is in satisfaction of the legacy, though slight evidence will raise such a presumption (*Robertson*, 1838, 16 S. 554: *Fyfe*, 1847, 9 D. 853; *Webster*, 1859, 21 D. 915). But the contrary is the rule in the case of a stranger legatee—the payments are to be set against the legacy in the absence of proof to the contrary (*Buchanan*, 1824, 2 Sh. App. 445; *Murray*, 1843, 6 D. 176). A legacy may be satisfied by the payment of a similar sum in the lifetime of the testator (*Robertson*, 1838, 16 S. 554: *Mollison*, 1822, 1 S. 346; *Burrell*, 1828, 6 S. 801). A declaration that advances are to be taken as in satisfaction of legacies is frequent in practice, and receives its effect (*Smith's Trs.*, 1894, 21 R. 633). Where the intention to satisfy a provision to a family by advances to the parent is expressly declared, it is no answer to say that the children are receiving no benefit from the advance (*Hutchison*, 1856, 2 Macq. 492). In England it seems to be settled that where a person, not *in loco parentis* to a legatee, gives a legacy for a particular purpose, and afterwards advances money for the same purpose, a presumption arises that the legacy is taken away. "Suppose A. bequeathed to his brother £5000 to buy a house in Merrion Square, and afterwards bought one which he gave to his brother, are there two houses to be bought?" (*Monck*, 1810, 1 Ball. & B. 298: *Roscrit*, 1744, 3 Atk. 77.)

Vesting.

With regard to the question of vesting in legacies, the primary rule is to give effect to the intention of the testator; and the intention of the

testator means the effect upon the judicial mind of the language used by the testator, illustrated by the circumstances in which he has used it.

Accordingly, if the testator expressly and unambiguously fixes the time of vesting, his express intention will settle the question, unless his direction is inconsistent with the general tenor of the will. There is a general rule that vesting is to take place as soon as possible, and therefore the presumption is for vesting *a morte testatoris*, and this rule holds though the beneficial enjoyment should be suspended by the existence in another of annuity or liferent rights, and whether the fee be given to an individual or to a class.

The postponement of payment to a day that must come does not suspend vesting. But where the right is made conditional on a contingency personal to the legatee, as his majority or marriage, there will be no vesting till the condition is purified—*dies incertus pro conditione habetur*. Where a gift of residue is made, subject to the exercise of an unqualified power of disposal given to some third person, there can be no vesting while the power subsists. But that the sum a residuary legatee will get is of uncertain amount will not interfere with the leading presumption for vesting *a morte*. A conditional institution of the heir or next of kin or issue of the members of a class or of an individual does not suspend vesting (*Ross's Trs.*, 1897, 25 R. 65). The considerations that point to suspended vesting are—

1. The existence of a suspensive condition personal to the legatee adjected to the gift.
2. A proper destination over, on the expiry of a liferent or similar right.
3. A survivorship clause pointing to a future date of payment.
4. An unqualified power of disposal given to a third party.
5. A plain statement in the will as to when vesting is to take place.

A fee may vest subject to defeasance. Where there is vesting in children as a class, when it is provided that later-born children shall have a share, a right of fee vests in the child first born, subject to its being partially defeated by the birth of other children. Where a fund is settled on children or those to whom the testator stood *in loco parentis*, for their liferent use allenarly and their children in fee, and to another person or persons in fee, then when these persons were known and existing at the death of the testator, or if the individuals constituting a class were known and existing at that date, the fee will vest in them, subject to defeasance if issue appear.

If an absolute gift is made by a testator to his children, and he then directs trustees to hold a fund for the children in liferent and their issue in fee, the fee vests *a morte* in the parent, subject to defeasance in the event of issue existing. A gift to be divided among the members of a family will not be cut down to a liferent by subsequent directions. Where there is a full gift of fee, subsequent directions to restrict are regarded as void from repugnancy, especially where there is a direct gift (*Ballantyne's Trs.*, 1898, 25 R. 621; *Stewart's Trs.*, 1897, 25 R. 302). The rules of vesting may be thus summed up:

1. The primary presumption is for vesting *a morte testatoris*.
2. A declaration by the testator not inconsistent with the tenor of his will fixes the date of vesting.
3. There is a presumption that a *dies incertus* attached to the gift is to suspend vesting. If there is a full gift, and the condition is attached merely to the payment, vesting will take place.
4. That income is given in the interval is in favour of vesting: that the income is given to someone else makes in the other direction: that a provision is given in lieu of legitim is in favour of vesting.
5. A power of division given to someone does not *per se* suspend vesting.

6. A survivorship clause pointing to a future date of payment does suspend vesting.

7. That there is no direct gift, but only a direction to trustees to divide, is less favourable to vesting than a direct gift. The question is always, what did the testator mean to be the time of vesting?

8. Where there is a condition personal to the legatee, till the condition is satisfied there will be no vesting.

A beneficiary who has an absolute right of fee, and is of full age, will be relieved of a trust management which he can show to be unnecessary or inconvenient.

Where all the members of a class are known, payment may be accelerated with common consent.

An annuitant or liferenter whose unassignable right is merely alimentary cannot discharge that right (*Duthie's Trs.*, 1878, 5 R. 858).

In cases where the final distribution of a trust estate is to take place on the death of an annuitant, and the testator had no other purpose to serve in postponing payment than the protection of the annuity, the Court may, on the annuitant's right being discharged, order immediate distribution, provided the beneficiaries have a valid and indefeasible right in their provisions. When a man says that his estate is not to be divided until the death of an annuitant, he may mean one of two very different things. He may either mean to secure the annuitant, or he may mean to secure some interest other than that of the annuitant. If it be the last which is meant, then it will not signify in what position the interest of the annuitant may stand: and the death of the annuitant must be taken as a time fixed which is to regulate the distribution of his estate. But if he mean only the first, then with the extinction of the annuitant's interest the condition attached to his or her death will also be extinguished (*Alexander's Trs.*, 1870, 8 M. 414; *Lucas' Trs.*, 1881, 8 R. 502). There is no presumption that a woman is past child-bearing at any age (*Beattie's Trs.*, 1898, 25 R. 765). Where postponement of payment is not required in order to protect or provide for any other present or ulterior interest or trust purpose, and is merely a restriction on the enjoyment of a fully vested right of fee, a direction to postpone payment is to be disregarded as repugnant to and inconsistent with a right of fee (*Miller's Trs.*, 1890, 18 R. 301; *Wilkie's Trs.*, 1893, 21 R. 199; *Greenlee's Trs.*, 1894, 22 R. 136; *Ballantyne's Trs.*, 1898, 25 R. 621). "A direction to hold for A. B. is a gift to that person according to the decisions" (Ld. Justice-Clerk in *Ballantyne*). See LEGACIES.

RESULTING TRUST.

If a will does not dispose of the whole of the testator's estate, the right to the part undisposed of falls to the legal representatives of the deceased, as on intestacy. A distinction is to be drawn between a gift of an estate burdened with certain payments, and the gift of an estate in trust for purposes which fail. In the first case, if it turns out that the burdens do not require to be discharged by the donee, they enure to the principal estate; in the second, there results a trust in trustees or executor for the heir or next of kin.

But the resulting trust will be excluded if the gift contains expressions showing an intention that the holder shall have a beneficial interest. In England expressions of kindness used in the will towards the donee have been allowed weight, but merely describing a trustee as "my cousin," "my brother" will not give a beneficial interest (*Rogers*, 1733, 3 P. Wms. 193; *Conningham*, 1691, 2 Vern. 247). The exclusion of the heir, as has been

seen, does not operate in heritage: in moveable the point does not seem free from doubt (*Baisley*, 1739, M. 6591).

A legacy to trustees can only be constituted by proper words of bequest (sec. 21 of Consolid. Act; *Miller*, 1837, 2 Sh. & M'L. 888). The disponee of heritable property has the benefit of the lapse of legacies charged upon it (*Breadalbane Trs.*, 1841, 3 D. 357; *Wyllie*, 1830, 8 S. 337).

Of old the executor took the free succession under deduction of debts and legacies.

By 1617, c. 14, he was ordained "to make count, reckoning, and payment of the whole goods and gear appertaining to the defunct, and intromitted with by them, to the wife, children, and nearest of kin according to the division observed by the laws of the realm." But the executor-nominate still got one-third.

The Moveable Succession Act enacts: "So much of an Act of the Parliament of Scotland, passed in the year 1617, and entituled *Anent Executors*, as allows executors-nominate to retain to their own use a third of the dead's part in accounting for the moveable estate of the deceased is hereby repealed, and executors-nominate shall, as such, have no right to any part of the estate."

He is therefore a trustee for the next of kin, children, and widow, according to their respective interests (Stair, iii. 4. 24; Ersk. iii. 9. 26). Whether the executor can claim one-third as against the Crown is not decided (*Finnie*, 1836, 15 S. 165; *Murray*, 1852, 1 Macq. 178). The *onus* lies upon the executor to show that he is entitled to anything in a beneficial way (Ld. Truro in *Murray*, 1 Macq. 185). In *Finnie's* case the executors were also trust disponees, and in that character they could not claim any part of the estate for themselves as against the Crown.

British Ships.

No one can hold shares in a British ship who is not a British subject (57 & 58 Vict. c. 60, s. 1). Accordingly, special provision has had to be made for the succession to such shares when the person to whom they would go by the law of succession is not capable of holding them.

By sec. 28 of the Act, when the property in a registered ship is transmitted on death to a person not qualified to own a British ship, the Court—that is, if the ship is registered in Scotland, the Court of Session—may on application by or on behalf of the unqualified person order a sale of the property so transmitted, and direct that the proceeds of the sale, after deducting the expenses thereof, be paid to the person entitled under such transmission, or otherwise as the Court direct. The application should be made within four weeks; but the Court can extend the time, but not beyond one year from the date of the death. If the application is not made within the time, or if the Court refuse an order for sale, the ship or share transmitted is subject to forfeiture under the Act (*The Millicent*, 1891, W. N. 162). Where any ship or share has become liable to forfeiture, any commissioned officer in full pay in the navy or army, any officer of customs, or any British consular officer, may seize and detain the ship, and bring her for adjudication before the Court of Session in Scotland (s. 76).

The Board of Trade has powers under the Merchant Shipping Act of 1894, ss. 169–181, of dealing with the property of British seamen. The Board may obtain payment of wages due to a deceased seaman, and the value of effects which he had on board ship.

(*a*) If the property exceeds in value £100, they are to pay the residue, after deducting expenses, to the legal personal representative of the deceased.

(*b*) If the property does not exceed £100, the Board may pay it to any claimant who is proved to their satisfaction to be the widow or a child of the deceased, or to be entitled to the personalty of the deceased, either under his will or otherwise, or to be a person entitled to take out representation, although no such representation has been taken out.

(*c*) The Board may require representation to be taken out, and pay and deliver the residue to the personal representative of the deceased, to be dealt with in due course of administration.

Where a deceased seaman or apprentice has left a will, the Board of Trade may refuse to pay or deliver the residue of wages and effects.

(*a*) If the will was made on board ship, to any person claiming under the will, unless the will is in writing and is signed or acknowledged by the testator in the presence of, and is attested by, the master or first mate of the ship.

(*b*) If the will was not made on board ship, to any person claiming under the will, and not being related to the testator by blood or marriage, unless the will is in writing and is signed or acknowledged by the testator in the presence of, and is attested by, two witnesses, one of whom is a superintendent, or is a minister of religion officiating in the place in which the will is made, or, where there are no such persons, a justice, British consular officer, or an officer of customs.

Whenever the Board of Trade refuse to pay or deliver under a will, the residue is to be dealt with as if no will existed. Wills of persons in the Royal Navy may be affected by 28 & 29 Vict. c 72.

Liability of the Estate of the Deceased for his Debts.

The whole of the estate of a deceased person, whether that estate be heritable or moveable, is liable for the payment of his debts. The creditor may proceed against the heir or against the executor at his pleasure; but if he chooses to go against the heir, unless the benefit of discussion has been given up, he must proceed against the heirs, when there are more than one, in a certain order. If the heir pays a moveable debt, he has relief against the executor; and similarly, if the executor is made to pay a heritable debt, he has relief against the heir; so that in the end heritable debts fall on the heritage, and moveable debts on the moveable estate.

Personal debts fall upon the personal representative, and a cash-credit bond is effectual against the cautioner's representatives for a balance incurred after the cautioner's death (*British Linen Co.*, 1858, 20 D. 557). Cautioner's obligations as a rule fall on the personal estate (*Lowthian*, 1797, 3 Pat. 621). The price of a heritable estate, bought but not paid for, falls on the executor (*Arbuthnott*, 1773, Mor. 5225); but where the purchaser adopts a heritable debt over the property he has purchased, or makes it his own, the debt will fall on his heir. Thus when a purchaser of an estate over which there was a heritable bond, bound himself to pay it as part of the price, and granted a personal bond of corroboration to the creditor, the debt formed a burden on the heir (*Clayton*, 1826, 2 W. & S. 40; *Murray*, 1837, 16 S. 283). The Court will only look at the condition of the estate as it was at the death of the ancestor. The executor is liable for the price of a heritable estate even though the money go to pay off heritable debts secured upon it, which the seller is bound to pay (*Ramsay*, 1887, 15 R. 25; *Macnicol*, 16 June 1814, F. C.). But where heritable subjects were sold, and the price, payable at a future period, was declared a burden on the subjects, the price was held to be heritable (see *Murray*, 1837, 16 S. 283; *Carrick's Trs.*, 1840, 2 D. 1068; *Mackenzie*, 1830,

4 W. & S. 328). Loss on a lease falls on the moveable estate (*Rossborough's Trs.*, 1888, 16 R. 157).

Where one sold land, and invested part of the price in the funds, and intimated to a heritable creditor his intention of paying the debt in six months, it was found that the residuary legatee was bound to relieve the heir (*Minto*, 1825, 1 W. & S. 678). Arrears of feu-duty fall upon the executor (*Johnston*, 1829, 7 S. 226). As do arrears of rent (*Exrs. of Kinloch*, 1811, Hume, 178; *Cranstoun*, 1814, Hume, 192). An obligation to free lands of debt arising under a warrandice clause falls on the executor (*Duchess of Montrose*, 1887, 15 R. (H. L.) 19; affirming 14 R. 131). *Millar*, 1853, 1 Macq. 345, and *Burns*, 1887, 14 R. (H. L.) 20, are said to point to the conclusion that the personal obligation in a ground-annual, and the obligation in a lease where "heirs, executors, and successors" are taken bound, fall upon the executor; but see *M'Gillivray's Exrs.*, 1857, 19 D. 1099. Where a proprietor makes contracts for the erection of buildings on his property, the debt is a personal debt, and the executors are liable in payment of it. The heir paying it has relief against the personal estate (*Robson*, 1861, 23 D. 429).

Debts secured by infeftment, or declared to be real burdens, fall upon the heir; the same principles determine the liability of the debtor's representatives, and the rights of succession of the representatives of the creditor (*Clayton*, 1826, 2 W. & S. 40; *Campbell*, 1817, Hume, 180; *Macnicol*, 31 January 1816, F. C.; *M'Donnell*, 1824, 3 S. 51; *Duncan*, 1883, 10 R. 1042). If the grantor clearly shows his intention to make a bond heritable, the debt will fall on his heir (*Bell's Trs.*, 1884, 12 R. 85).

In *Waterson*, 1881, 9 R. 155, the question was raised, but not decided, as to whether an heir of entail in possession who grants a lease, creates obligations binding the succeeding heirs or his own representatives (see *Todd*, 1825, 1 W. & S. 217; *Fraser*, 1831, 5 W. & S. 69).

"The question whether a succeeding heir of entail would be liable in obligations undertaken by his predecessor in the entailed estate is one of difficulty. The cases as to meliorations, on the one hand, and those as to the *naturalia* of leases on the other, throw some light on it. But apparently there is no direct authority" (Ld. J.-Cl. Moncreiff, 9 R. p. 159).

The question seems to be touched by the Entail Amendment Act, 1878, 41 Vict. c. 28, which provides that obligations to tenants for improvements of the description contained in 38 & 39 Vict. c. 61 are to devolve on the heir to the relief of the executor; as are also liabilities for improvements on the mansion-house or offices, or any part of the estate not under lease. Debts due by the ancestor to the heir are extinguished *confusione* (*Wrights*, 1716, Mor. 5209). If the ancestor has undertaken a liability for behoof of the heir, the executor will be entitled to full relief of that obligation (*Hughson*, 1822, 1 S. 415). Obligations accessory to lands bind the heir and entitle the executor to relief (*Carmichael*, 1821, 1 S. 25); as do annuities and rights having a tract of future time, unless a contrary intention is made to appear.

By the law of Scotland, as a rule, a liferent annuity, or a debt secured on heritable estate, is to be borne by the heir succeeding to the heritage (*Wallace*, 1846, 8 D. 1038; *Mackintosh*, 1873, 11 M. (H. L.) 28; *Breadalbane's Trs.*, 1873, 11 M. 912; *Ewing*, 1752, M. 5476). In the case of intestate succession, annuities fall as a natural burden upon the heir. Of course a testator may make other provision (*Mackintosh*, 1873, 11 M. (H. L.) 28; *Gordon*, 1873, 11 M. 334; *Smith*, 1874, 1 R. 358; *Heatlie's Tr.*, 1871, 8 S. L. R. 344). Provisions by marriage contract to younger children are a debt, and pay-

able even by the heir of the marriage taking under the same deed (*Leslie*, 1870, 8 M. (H. L.) 99). Executors of an heir of entail were not bound to rebuild a mansion-house pulled down by him with a view to rebuilding (*Breadalbane*, 1877, 4 R. 667). A direction to pay heritable debts out of personal estate may be implied as well as express (*Macleod's Trs.*, 1871, 9 M. 903). A person taking under a testament a foreign property charged with an annuity, has no relief against the heir taking Scotch heritage (*Ogilvie*, 1826, 2 W. & S. 214).

An heir of entail who pays off provisions may take an assignation and keep up the debt against the estate (see *Crawford*, 11 March 1809, F. C.; *Fraser*, 1854, 16 D. 645); but when one who succeeds under a simple destination makes up a title and pays debts, the liability is extinguished, and is not kept up by an assignation (*Codrington*, 1824, 2 Sh. App. 118). For the apportionment of current liabilities, see *Learmonth*, 1878, 5 R. 548; *Maitland*, 1877, 4 R. 422; *Hard*, 1862, 1 M. 14.

A charge to enter heir unanswered, or a summons in an action of constitution, infers a passive title, but it is limited to the particular occasion (Ersk. iii. 8. 93; Bell's *Prin.* 1925; *Montgomerie*, 1841, 4 D. 332).

Pleading a peremptory defence in an action brought against an heir imports a passive title as to that debt (Ersk. iii. 8. 93; *Grieve*, 1871, 9 M. 582; *Kirkpatrick*, 1838, 16 S. 608; affd. 1841, 2 Rob. 475).

"An heir of provision represents the deceased, and in representing him he has to perform all the onerous obligations which his ancestor has undertaken, just as much as the heir of line, unless the estate is held under the fetters of an entail. He may be liable in a different order; if the debt is moveable he may have relief from the executor, and as heir of provision in a special subject he may have relief against the heir-general. But his representative character and his consequent liability to creditors are undisturbed" (Ld. Kinnear in *Bain*, 1896, 23 R. p. 533). The heir who takes up a lease secluding assignees does not represent (*M'Leod*, 1868, 6 M. 445).

Relief between Heir and Executor.

The heir paying a debt due by the executor has relief against him; and an executor paying a debt of the heir has relief against that heir (Ersk. iii. 9. 48; Bell's *Prin.* 1936; Stat. 1503, c. 76). The law itself has divided succession into two branches, the heritable and the moveable; and as each of these ought to bear the burdens which naturally attend it, the heir is the proper debtor in heritable debts, and the executor is primarily liable in the moveable debts. As already pointed out, the creditors may proceed against either as they think proper (*M'Gillivray's Exrs.*, 1857, 19 D. 1099). Between the heirs and executors the question of liability turns upon the character of the obligation, or the security which has been given for its implement. This holds both in testate and in intestate succession.

"No loose expressions in a settlement will be allowed to defeat the general rule of law" (*Douglas's Trs.*, 1868, 6 M. 231). It is in general a good defence for the executor to plead against the heir that the executry fund is exhausted (*Renton*, 1851, 14 D. 35). The right of relief cannot be exercised to the prejudice of creditors or legatees. Where heritable estate was used to pay legacies in the belief that the moveable property was insufficient, it was held that, on an accession of value to the moveable estate, a sum equal to the value of the heritage sold went to the heir (*Stainton's Trs.*, 1868, 6 M. 240). Where a debt is secured on more than one subject, each estate is responsible for the debt secured upon it (Stair, iii. 5. 17; Ersk. iii. 8. 52; *Ogilvie*, 1826, 2 W. & S. 214), and the liability is rateably

divided (*Rose*, 1787, 3 Pat. 66; *Sinclair's Exrs.*, 1798, Hume, 176; *Moncreiff*, 1825, 1 W. & S. 672; *Mackenzie*, 1847, 9 D. 836). When a particular subject is burdened, he who takes that subject is liable in the obligation; and without a special provision to that effect, he will not be entitled to relief (*Henderson*, 1858, 20 D. 473; *Carrick's Trs.*, 1840, 2 D. 1068; *Broadalbane Trs.*, 1842, 4 D. 1259). If in the obligation particular heirs are bound, they are first to be called upon (Ersk. iii. 8. 52; *Blair*, 1663, Mor. 3571). In taking action against heirs, the creditor must follow a certain order (Ersk. *Prin.* iii. 8. 24; Ersk. iii. 8. 52; Stair, iii. 5. 17); but general disponees are primarily liable for debts not charged upon particular estates or on particular beneficiaries or legatees (*Weir*, 1738, Mor. 5857; *Mercer*, 1745, Mor. 9786).

The right the heirs have to be called in their order is known as the *beneficium discussionis*. When an heir who is liable only *subsidiarie* pays a debt due by the ancestor, he has an action of relief against the heir primarily liable; and that even though the obligation bears to be without benefit of discussion, for that stipulation is only meant to benefit the creditor.

Discussing an heir implies not merely calling him in an action and obtaining a decree against him, but also proceeding either to personal diligence, or the adjudging of any heritable estate that can be pointed out as belonging to him (Ersk. iii. 8. 53; *Innes*, 1773, Mor. 3567). It is, of course, to be kept in mind that no heir is now liable beyond the value of what he succeeds to. The order in which they fell to be discussed was:—

1. The heir of line.
2. The heir of conquest.
3. The heir-male.
4. Heirs of tailzie and provision by simple destination, when they represent the deceased.

Lastly, heirs under marriage contracts where they are not entitled to rank with creditors.

The institutional writers do not agree as to whether the heirs of a marriage or other heirs of provision are to be taken first (see Bell's *Lect.* vol. i. 250). Heirs-portioners, as long as they are solvent, are only liable each for her own share of an ancestor's debt; but if one of them is insolvent, then the creditor, after discussing her, may proceed against the others for the balance; they are never, however, liable for the share of the bankrupt heir beyond the value of their succession.

The heir must ultimately pay heritable debts, the executor moveable debts (*Duncan*, 1883, 10 R. 1042; *Fraser*, 1812, 5 Pat. 642). The same rule holds in testate succession unless it be excluded by the testator (*Macintosh*, 1873, 11 M. (H. L.) 28). A general direction to trustees or executors to pay debts does not alter the rule (*Mackintosh*, 1870, 8 M. at p. 631; *Fraser*, 1812, 5 Pat. 642). No loose expressions in a settlement will be allowed to defeat the general rule. There must be express words or clear implication to do so (*M'Leod's Trs.*, 1871, 9 M. 903). Where a limited fee is given, an intention that the estate is to be given free of debt is liberally interpreted.

The intention of a testator, if clearly expressed, will give the rule (*Mackintosh*, 1873, 11 M. (H. L.) 28).

Executor.

Executry is the general name given to the moveable estate of a defunct, and it includes the widow's share, that of the children, and the dead's part

(Stair, iii. 8. 1; Ersk. iii. 9. 1). The moveable estate of a deceased person falls regularly to be administered by an executor, who has authority from the Sheriff, as Commissary, to administer, intromit with, uplift, receive, discharge, and if needful, to pursue; in short, to recover and distribute, as trustee for all concerned, the moveable estate belonging to a person deceased (Ersk. iii. 9. 27). Confirmation is the sentence by which the authority is given; and while it was never necessary in order to vest the succession in case of testacy (*Robertson*, 1828, 6 S. 446; *Elder*, 1859, 21 D. 1122), yet it was necessary in order to vest the succession in the next of kin, till the passing of the Act 4 Geo. IV. c. 98. Prior to the passing of that Act, if the next of kin died before confirmation, no right passed to his representatives: but now the right vests by mere survivance (*Milligan*, 1826, 4 S. 432: *Frith*, 1837, 15 S. 729; *Mein*, 1844, 6 D. 1112). Confirmation is still necessary for an active title. A debtor of the deceased is not bound to pay without it (*Taylor*, 1830, 4 W. & S. 444; *Buchanan*, 1842, 5 D. 211). A licence to pursue, from the Commissaries, gave the executor a right to raise an action, but not to take decree (Ersk. iii. 9. 39; Stair, iii. 8. 56) The general rule is that no diligence is effectual in a competition where confirmation has not preceded it. A special legacy is exigible without confirmation (1690, c. 26; *Wright*, 1855, 17 D. 629; *Innerarity*, 1840, 2 D. 813; *Lyle*, 1842, 5 D. 236); and confirmation is not required if the debtor has corroborated his debt to the executor (*Watson*, 1782, Mor. 7009), or if actual possession has been had (*Dobie*, 1707, Mor. 14390; *M'Whirter*, 1744, Mor. 14395; *Smith's Trs.*, 1862, 24 D. 1142).

Although legitim and *jus relictæ* vest without confirmation, the widow and children have no direct action against the deceased's debtors. They must claim through the executor (*Mackie*, 1628, Mor. 1788; *White*, 1861, 24 D. 38). An executor-nominate is one appointed by the will of the deceased. He is not required to find caution (4 Geo. IV. c. 98, s. 2). An executor-nominate is appointed by order of the judge. Certain persons are entitled to this office in their order (Ersk. iii. 9. 32):

1. A universal disponee (*M'Gowan*, 1835, 14 S. 105).

2. The next of kin, even though they should have no beneficial interest (*Dowie*, 1871, 9 M. 726; *Bones*, 1866, 5 M. 240). Representatives of a deceased father have been conjoined with brothers of the deceased (*Webster*, 1878, 6 R. 102). The mother may, in the absence of next of kin, be confirmed as executrix-dative *qua* mother in consequence of the interest conferred upon her by the Moveable Succession Act; and two parties may be confirmed jointly though they are appointed in different characters (*Muir*, 1876, 4 R. 74).

3. The widow. The husband comes in in the same place as the widow (*Stewart*, 1890, 17 R. 707; *Campbell*, 1892, 19 R. 563).

4. A creditor.

5. A legatee.

6. The procurator-fiscal of Court; but this appointment is said to be now obsolete, and in a case where, under the old practice, this official would have been appointed, a judicial factor is sought for.

On the death of a foreigner in this country, the Consul representing his nation may be appointed executor (24 & 25 Vict. c. 121, s. 4). The executor lodges a full inventory on oath. The forms of procedure in obtaining confirmation are regulated by 21 & 22 Vict. c. 56, as amended by the Sheriff Court Acts. He does not incur responsibility for the debts of the deceased *ultra vires inventarii*.

"An executor must pay legacies and debts within a certain time, and is

liable in interest if he does not. An executor is nothing else than a debtor to the legatees or next of kin. He is a debtor with a limited liability, but he is nothing else than a debtor; and the creditors of the deceased, and the legatees who claim against him, do so as creditors" (Ld. Pres. Inglis in *Jamieson*, 1872, 10 M. 399). He is not a depositary: his duty is to ingather and distribute the estate. He is not a trustee for the creditors of the deceased (*Globe Insurance Co.*, 1849, 11 D. 618; 1850, 7 Bell's App. 296; *Stewart's Trs.*, 1896, 23 R. 739). The executor's fund is a trust fund, which may be vindicated against the private creditors of the executor (*Tait*, 1779, Mor. 3142; Bell's *Com.* ii. 86). The executor is not bound to pay anything until six months after the death. After six months he may be compelled to pay, and is safe in paying *primo venienti* if the estate is solvent (*More's Exrs.*, 1835, 13 S. 313; *Beith*, 1875, 3 R. 185; *Stewart's Trs.*, 1871, 9 M. 810). Trustees and executors have been held responsible when they paid away estate to beneficiaries without seeing that the debts were met (*Lamond's Trs.*, 1871, 9 M. 662; *Heritable Securities Investment Association*, 1892, 20 R. 675). In *Stewart's Trs.* it was said: "It is therefore not doubtful in point of law that if trustees and executors, after six months, pay away the funds even to legatees in the reasonable belief that all debts have been satisfied, they cannot be made personally responsible"; but with this statement must be contrasted the law laid down in *Lamond* and the *Heritable Securities* cases, that no trustees are entitled to pay away one shilling of the estate to beneficiaries until all the truster's debts are paid. Ld. M'Laren dissented, holding that the only duty was to make the estate forthcoming in due course of administration.

An executor has no title to institute an action of damages for personal injury to the deceased person whom he represents. *Actio personalis moritur cum persona* (*Bern's Exr.*, 1893, 20 R. 859). The brocard just given has, however, been said to be of comparatively small importance in Scots law (*Darling*, 1892, 19 R. (H. L.) 31); but if the action has been commenced in the lifetime of the defunct, it may be carried on; and if there are averments of patrimonial loss, this is in favour of the executor's title (*Bern, supra*; *Auld*, 1874, 2 R. 191; *Neilson*, 1853, 16 D. 325; *Borthwick*, 1896, 24 R. 211). If a delinquent should die, an action of damages lies against his heirs or representatives; for though penalties are not transmissible against a delinquent's heirs, yet as the reparation of damages is grounded on an obligation merely civil, the heir of the person obliged must be subjected to it (Ersk. iii. 1. 15, iv. 1. 14, iv. 1. 70). A claim of damages for injured feelings may be constituted against the representatives of the wrong-doer (*Evans*, 1885, 12 R. 1295: *Wright*, 1883, 11 R. 217). In a competition between the creditors of a deceased person and those of the next of kin, the former have a statutory preference for a year and a day (1695, c. 41).

In the institutional writers it is laid down that the executor ought not to pay without decree; but the modern law seems to be laid down in *M'Guan*, 1883, 11 R. 249: "Though a decree of constitution is not always necessary, yet where the executry estate is small and the amount of claims uncertain, the executor is entitled to protect himself and the estate by requiring formal constitution." Certain debts are privileged and can be paid without decree in any case.

These are:

1. Medical attendance on deathbed, drugs, and funeral expenses (*Douglas*, 1674, Mor. 11826; *Crawford*, 1680, Mor. 11832; Ersk. iii. 9. 43). A wife's funeral expenses are privileged upon her own estate (*Auchinleck*, 1697, Mor. 11834), but not on the husband's.

2. The expenses of moderate and suitable mournings for the family; or at least (*Thomson*, 1856, 18 D. 1240; *Rowan*, 1742, Mor. 11852; *Sheddan*, 1802, Mor. 11855) for such of them as have to be at the funeral. The *creditor funerarius* was held to be preferable upon the moveables of the defunct to all other creditors (*Rowan, supra*).

3. The current rent of the dwelling-house in which the tenant dies (*Lady Dunipace*, 1750, Mor. 11852). This decision is doubted in Mr. Goudy's work on *Bankruptcy*, at p. 545.

4. The wages of domestic and farm servants for the current term (*M'Lean*, 1832, 10 S. 217; *Maben*, 1837, 15 S. 1087; *Hall*, 1675, Mor. 11829; *Crawford*, 1680, Mor 11832); but not of mechanics or overseers of works (*White*, 1781, Mor. 11853; *Ridley*, 1789, Mor. 11854). The Ministers' Widows' Fund (19 Geo III. c. 20). Under the Friendly Societies Act, 1896, 59 & 60 Vict. c. 25, ss. 33–37, these societies have a prior claim, in the case of the death or bankruptcy of an officer of the society, for debts due by them in virtue of their office. Rates and taxes are a privileged debt. The expense of realising and administering the estate is also privileged. Debts which are acknowledged by the deceased in his testament may be paid without decree. Creditors doing diligence within six months of the death of the deceased are entitled to be ranked *pari passu*.

Small estates can be administered under the Acts 38 & 39 Vict. c. 41, and 39 & 40 Vict. c. 24, as amended by the Sheriff Court Act, 1876, which provided a cheap method of administering estates whose total value was under £100, by application to the sheriff clerk. Sec. 34 of the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), extended these Acts so as to apply to any case where the whole personal estate and effects of a person dying after 1st June 1881, without any deduction for debts or funeral expenses, does not exceed £300, whoever may be the applicant for representation, and wheresoever the deceased may have been domiciled at the time of death. The fees payable under the schedules of the Act are not to exceed 15s.

Vitious Intromission.

"Wherever anyone having access to the effects and moveable estate of a person deceased, unwarrantably takes possession of and intermeddles with it, the law infers a universal responsibility from the uncontrolled intromission" (Bell's *Com.* i. 705; Stair, iii. 9. 9; Ersk. iii. 9. 49). What intromission is vitious is not clearly defined. Generally mere continuance of possession, or even taking possession for preservation, will not be held vitious (*Thomson*, 1834, 13 S. 143; *Dudgeon*, 1844, 6 D. 1015). Once an estate has been confirmed, it has no place, unless the confirmation be merely that of an executor-creditor.

Confirmation by an executor-creditor of the whole estate does not protect from the passive title those who do not claim under the executor-creditor (*Montgomerie*, 1841, 4 D. 332). In *Adam*, 1854, 16 D. 964, Ld. Justice-Clerk Hope considers the authorities, and lays down the following propositions:

1. That while it is not easy to give a definition of the doctrine, and while the application of the principle has been relaxed, it still stands in full force as a check on unauthorised proceedings, to prevent personal appropriation of the funds of the deceased without a title and without regard to the interests of others; and further, to visit one who has generally intromitted as heir or executor, meaning to take up the whole succession

with full liability, if he attempt at last to draw back after having assumed and acted in the character of universal representative, and when matters are no longer entire. If fraud is excluded, equity interposes for his relief if the facts admit of it.

When these two elements concur in favour of an alleged vitious intromitter,—first, the absence of any fraudulent purpose, and, second, the absence of any ground for presuming from the acts founded upon the intention of taking up the *universitas*, and of representing,—it may safely be said that no case has supported the liability on the passive title of vitious intromission, or indeed on the other passive title of *gestio pro herede*. Every person who intromits without title with the moveable effects of a person deceased is a vitious intromitter, according to the legal acceptation of the term. He may have intromitted in perfect *bonâ fide*, and if so he may not suffer the penal consequences of vitious intromission. Universal liability is by no means the necessary consequence of vitious intromission (Ld. Cowan in *Wilson*, 1865, 3 M. 1060; see *Gardner*, 1802, Mor. 9840). Any probable title will accordingly exclude it (*Stark*, 1713, Mor. 9830; Ersk. iii. 9. 53; *Gardner*, 1830, 8 S. 600; *Young*, 1831, 9 S. 638; *Thomson*, 1834, 13 S. 143; *Dudgeon*, 1844, 6 D. 1015; *Adam*, *supra*). If the value of the intromission be very small, it will not be inferred. If confirmation be carried through before the action is brought, the vitious intromission is purged (*Barbour*, 1824, 3 S. 299). If he has a right to confirm executor, confirmation within year and day will free him (*Gardner*, 1830, 8 S. 600; *Drummond*, 1709, Mor. 14414; *Stevenson*, 1663, Mor. 9873). Vitious intromission is pleadable only by creditors and not by legatees, or a widow or anyone with a right of succession to the deceased (Ersk. iii. 9. 54). No action grounded upon vitious intromission will lie against the heirs of the intromitter, except in so far as they are *lucrati* by the transactions (*Cranston*, 1666, Mor. 10340; *Penman*, 1775, Mor. 9836). It may be pleaded by way of exception against a claim raised by the heir or assignee of the intromitter (*Simpson*, 1854, 17 D. 33; overruling *Buchanan*, 1842, 5 D. 211). Vitious intromitters are liable not *pro rata* but *pro virili*, that is to say, the debt is equally divided among those sued (*Chalmers*, 1662, Mor. 14715; *Wilson*, 1865, 3 M. 1060). They are liable *in solidum*, at least to the amount of their intromissions (Stair, iii. 9. 4; *Wilson*, *supra*). If the creditors have approved the intromission and taken a dividend, no passive title is inferred (*French*, 1797, Hume, 435; *Walker*, 1827, 6 S. 204). The passive title has been inferred from secretly opening sealed repositories (*Scott*, 1821, 1 S. 33), privately removing effects (*Campbell*, 1755, 5 Br. Sup. 838), recovering funds and paying debts (*Forbes*, 1823, 2 S. 395; *Cunninghame*, 1827, 5 S. 315). Stair says vitious intromission is simply excluded by those who acquire by way of commerce *bonâ fide* for a just price (Stair, iii. 9. 15).

Act of Sederunt, 23rd Feb. 1692.—By this Act of Sederunt, where one is dying, and a minor or pupil will succeed him, the duty of locking and sealing up the repositories of the moribund person is laid upon the nearest relation to the defunct on the father's side or the mother's side who shall be present at the time, who is to deliver the keys to the Judge Ordinary. If a man in similar case dies in the house of another, the duty is laid on the master or mistress of the house. If he or she fail in this duty, there is a presumption that they have intromitted with his writs and moveables.

International Law.

What law determines the character of the thing as heritable or moveable? The principle has been recognised and settled that the character of a

subject as heritable or moveable depends on the law of the country where it is placed (*Downie*, 1866, 4 M. 1067; *Clarke*, 1836, 14 S. 488; *Newlands*, 1832, 11 S. 65; *Downie*, 1866, 4 M. 1067). Accordingly, mortgages on land in England, being moveable in English law, were held to form part of the legitim fund, Ld. Young dissenting, *Monteith*, 1882, 9 R. 982; see *Trevelyan*, 1873, 11 M. 516. In Scotland the law of the last domicile regulates the construction of testamentary deeds as to moveables, unless there be something to point to another law as intended by the testator to apply (*Cormack's Tr.*, 1875, 3 R. 208; *Smith*, 1891, 18 R. 1036; *Brown's Trs.*, 1890, 17 R. 1174). "The real question, as in every testamentary deed, is what was the intention of the testator? In solving that question, it no doubt becomes necessary to inquire what system of jurisprudence the testator had in view in making his settlement. But it does not follow of necessity that that must be the law of his domicile. It might be his intention that his settlement should be construed by the law of a different country, and that intention might be expressed in his will. If so, the law of that country would regulate the construction; and if from other circumstances it can be shown that he had in view the law of a particular country, although that may not be the law of his domicile, it must govern the construction of his settlement" (*Stair*, 1844, 6 D. 904; Ld. Pres. Inglis in *Cormack's Trs., supra*; *Smith, supra*; *Ferguson*, 1853, 15 D. 637; *Trotter*, 1829, 3 W. & S. 407).

"The place of execution of the deed, the place of performance, the estate specially conveyed, were in Scotland, the trustees also were resident in Scotland." In questions of heritage the *lex rei sitæ* rules. Ordinary non-technical language, or technical language, of the country in which the lands are situated will be interpreted by that law, but foreign technical terms must be translated so as to give effect to the intention of the testator (*Studd*, 1880, 8 R. 249; affd. 1883, 10 R. (H. L.) 53; *Connel's Trs.*, 1872, 10 M. 627). By the Act of 1868, the intention, as manifested by the will, is to prevail as to heritage in the same way that it is to prevail as to moveables.

Where a domiciled Scotsman left English heritage to charitable purposes, the Scotch Courts sisted procedure to await the decision in the English Courts as to the right to administer English heritage (*Hewit's Trs.*, 1891, 18 R. 793). Moveables directed by Scottish trust settlement to be settled as heirlooms on the heir to English settled estate were settled by deed of settlement in English form (*Marq. of Bute*, 1880, 8 R. 191). A decision of the House of Lords in an English case ought to be conclusive in Scotland as well as England as to the questions of English law and English jurisdiction which it determined. It cannot conclude any question of Scottish law, or as to the jurisdiction of any Scottish Court in Scotland (*Orr Ewing*, 1885, 13 R. (H. L.) 1). Ld. Westbury's doctrine in *Enohin*, 1862, 10 H. of L. 1, that the Court of the domicile is the *forum concursus* to which the legatees under the will of a testator, or the parties entitled to the distribution of the assets of an intestate, are required to resort, was there questioned. The *lex domicilii* of the deceased at the date of his death regulates succession to his moveable property (*Bruce*, 1790, 3 Pat. 163; *Hoy*, 1792, 3 Pat. 247). The class of persons to be benefited, and the extent and amount of the interest, are to be determined by the same law (*Ommanney*, 1796, 3 Pat. 448; *Craigie*, 12 June 1817, F. C.). The Court will itself construe a will executed abroad in popular language (*Thomson's Trs.*, 1851, 14 D. 217; *Rainsford*, 1852, 14 D. 450). *Lex rei sitæ* interprets deeds as to heritage (*Blackett*, 1832, 10 S.

590). That the law of the domicile can alone settle what is the will is a principle of international law of extensive if not universal acceptation; that law must determine not only what is the true meaning and construction and effect of any will or deed of settlement he may have left disposing of his moveable estate, but also as regards his moveable estate, whether he died testate or intestate (*Purvis' Trs.*, 1861, 23 D. 812). The law of the domicile of the deceased determines questions as to legitim and *jus relictæ* (*Hog*, 1792, 3 Pat. 247: *Nisbett*, 1835, 13 S. 517: *Newlands*, 1832, 11 S. 65; *Maxwell*, 1860, 3 Macq. 852). The capacity to make a will is determined by the law of the domicile (*Cooper*, 1888, 15 R. (H. L.) 23). A settlement of heritage could be revoked by a foreign will (*Purvis' Trs.*, 1861, 23 D. 812).

PACTUM SUPER HEREDITATE VIVENTIS.

By the law of Scotland a right or estate in expectancy, or *spes successionis*, may be sold and assigned, so as to give the purchaser a good title, in a question with the seller, to the right estate or succession when it comes to be vested in the seller. But such right or estate in expectancy, or *spes successionis*, is not attachable by the diligence of creditors of the person in expectancy or entitled to succeed, and would not be carried to the trustee in his sequestration, if he should be discharged before such right estate or succession was vested in him (Stair, iii. 8. 28; *Trappes*, 1871, 10 M. 38; *Reid*, 1893, 20 R. 510; *Obers*, 1897, 24 R. 719). Creditors have a right to challenge gratuitous alienations. In *Kirkland*, 1886, 13 R. 798, opinions were expressed that it was for the Court to determine whether in the circumstances the creditors are fairly entitled to require from the bankrupt an assignation of a *spes successionis*; and that the trustee is entitled to obtain an assignation under the 81st section of the Bankruptcy Act, 1856, if that would benefit the estate.

Succession in Roman Law.—In Roman law the estate of a deceased person formed a *universitas*, which passed in its entirety, with all its rights and liabilities, to an heir or heirs. *Hereditas nihil aliud est quam successio in universum jus quod defunctus habuerit* (*Dig.* 50. 17. 62). The *hereditas*, consisting of rights and liabilities, might for a time have an independent existence (*hereditas jacens*), and might even acquire new rights and incur new liabilities. *Hereditas enim non heredis personam sed defuncti sustinet* (*Dig.* 41. 1. 34). The offer of the *hereditas* is technically *delatio*; the vesting of the estate in the heirs is *acquisitio*. The persons to whom *delatio* is made depends on whether or not the deceased has made a valid designation of heirs by testament, *i.e.* on whether the deceased died testate or intestate. Testamentary succession takes precedence over intestate succession. *Quamdiu potest ex testamento adiri hereditas, ab intestato non defertur* (*Dig.* 39. 29. 2). Testate and intestate succession are, in Roman law, mutually exclusive. A man cannot dispose of part of his estate by testament, and leave the rest to devolve on his heirs *ab intestato*. *Nemo pro parte testatus, pro parte intestatus decedere potest* (*Dig.* 50. 17. 7).

SUCCESSION BY TESTAMENT.—The Twelve Tables recognised the power of disposing of property by will in these terms: *Uti legassit super pecunia tutelave suæ rei, ita jus esto* (*Ulp.* 11. 14). A testament is defined by *Modestinus* as follows: *Testamentum est voluntatis nostræ justa sententia de eo, quod quis post mortem suam fieri velit* (*Dig.* 28. 1. 1 pr.). The power of making a testament belonged only to citizens above puberty who were *sui juris*. Peregrines, Junian Latins, lunatics, and various other classes of persons were incapable of making a testament.

Form of Testament.—The form varied at different periods of Roman law. In the earliest times testaments were made either before the *comitia calata*, which were held twice a year for the purpose; or *in procinctu*, in presence of the assembled army. Subsequently the *testamentum per aes et libram* was introduced. The testament *per aes et libram*, in its original form, was a fictitious *mancipatio* of the estate *inter vivos* in presence of five citizen witnesses and a libripens to a *familiæ emptor*, who at first was the heir himself. When the art of writing became common, important changes took place in this form of will. The will was reduced to writing, the heir ceased to be a party to the *mancipatio*, and, though a *familiæ emptor* still officiated, he was there only for form's sake. The procedure now consisted of two parts: (1) the *familiæ venditio*, the formal purchase by the *familiæ emptor* of the *universitas* of the testator's estate; and (2) the *nuncupatio testamenti*, in which the testator, holding the closed tablets on which his testament was written, declared that they contained his will, and called upon the witnesses to grant him their testimony. A mistake in, or an omission of, any part of the solemnities rendered the testament null and void. The prætors, however, in order to prevent the intention of testators being thus defeated, granted *bonorum possessio secundum tabulas* to heirs nominated in any testament, which was made by one who was a citizen *sui juris* at the date of testation and the date of his death, and which bore the seals of seven citizen witnesses. This is known as the prætorian testament. Under Justinian the ordinary form of will—derived from three sources, the *jus civilis*, the prætorian law, and the Imperial constitutions—required the signature (*subscriptio*) of the testator and of seven witnesses present at the time, as well as the seals of the seven witnesses. In executing the will, there must be *unitas actus*, *i.e.* its execution must not be interrupted by any intervening act. A nuncupative or oral will might be made without writing, by a verbal declaration, addressed by the testator to the witnesses and expressing his last wishes. In addition to these ordinary forms of will, there were, in Justinian's time, certain special forms of wills, *e.g.* the *testamentum militare*, a will made by a soldier on active service, which was valid without any formality whatever; *testamentum pestis tempore*, in case of which, being made in time of plague, the witnesses need not all be present at one and the same time; *testamentum principi oblatum*, executed by the delivery of the will to the emperor, without further solemnity; *testamentum apud acta conditum*, executed by entering the testamentary dispositions in the records of the Court; *testamentum parentis inter liberos*, a will benefiting none but the descendants of the testator, which, if oral, was validly executed in the presence of only two attesting witnesses, or, if written, was validly executed by means of a holograph memorandum bearing the date of its execution.

Contents of Testament.—The essential part of a will was the institution of an heir. The institution of *incertæ personæ* was void; but gradually the law recognised the validity of the institution of a *postumus suus* and of public juristic *personæ*, though both belonged strictly to the category of *incertæ personæ*. A peregrine could not be instituted heir, but a slave might be instituted whether he belonged to the testator or to another. If the testator's own slave is instituted, the slave is enfranchised by implication; if the slave of another is instituted, the slave acquires the inheritance for his master. Substitution, *vulgaris substitutio*, is the appointment of a second heir, who is to take in the event of the first-appointed heir—*heres institutus*—not succeeding to the inheritance. By pupillary substitution (*pupillaris substitutio*) a testator may, when making a will for himself, practically make a will for

an *impubes* in his *potestas*, to take effect in case the latter should die *intra pubertatem*. By quasi-pupillary substitution, one who has a child or other descendant insane, may, when making a will for himself, make a will for his insane descendant, to take effect in case the latter should die without recovering his sanity. As the law was modified by the prætors, not only *sui heredes*, but all *liberi*, of the testator had to be instituted heirs or disinherited. If they were passed over (*præteriti*), the result was in prætorian law a grant of *bonorum possessio contra tabulas*, in virtue of which the *præteriti* were enabled to obtain, as against the testamentary heir, their share *ab intestato*. Further, the rights of the nearest relatives of the testator were safeguarded by their being entitled, if passed over in his will, to impeach and set aside the will by the *querela inofficiosi testamenti*. (See LEGITIMA PORTIO.)

Position of Heir.—Among co-heirs in testamentary succession there was a right of accretion, so that if one of them could not, or would not, take his portion, it fell to the other heirs according to their shares in the *hereditas*, to the exclusion of the heirs *ab intestato*. A *heres extraneus*, *i.e.* an heir who was neither a slave of the testator nor in his *potestas*, had to make an act of entry (*aditio hereditatis*), in order that his right of succession might vest in him. A period of deliberation (*tempus deliberandi*) was allowed him to decide whether or not to enter, and, in the later law, the intention to take the inheritance might be manifested by word or act. A *heres suus*, *i.e.* an heir in the *potestas* of the testator, on the other hand, took the inheritance *ipso jure*, without any act of entry on his part. Indeed, under the *jus civile*, such an heir, being *heres necessarius*, was not permitted to repudiate the inheritance. This, however, was altered by the prætors, who gave *sui heredes* the so-called *beneficium abstinendi*, *i.e.* the right to disclaim the inheritance. When once a man had accepted an inheritance, his choice was irrevocable, on the principle *semel heres, semper heres*. The only exception to this was that if a minor had rashly entered on a *damnosa hereditas*, the prætor might grant him *restitutio in integrum* on attaining majority. By introducing the *beneficium inventarii*, Justinian rendered all questions as to *tempus deliberandi* and *restitutio in integrum*, in relation to succession, unnecessary. Any person to whom a *hereditas* was offered, whether under a testament or *ab intestato*, was granted the privilege of entering *cum beneficio inventarii*. Within a month of his becoming aware of his right, the heir, if he chose to avail himself of this privilege, had to begin to make up an inventory of the property of the deceased. The inventory, which was made with the assistance of a notary (*tabellio*) and under the supervision of three witnesses, had to be finished within three months of the date when he first knew of the offer (*delatio*) of the inheritance. By adopting this procedure, the heir effected a complete separation between the *hereditas* and his own property. He was exempted from all liability for the debts of the deceased beyond the amount of the assets set forth in the inventory. He paid the funeral expenses of the deceased, the cost of the inventory, the debts of the deceased, and any legacies bequeathed by the testator. If there was a surplus, he took it; if there was a deficit, he was not responsible for it. This was a fundamental change in the law. The old theory that the heir was *eadem persona cum defuncto*, and bound accordingly to see all the debts of the deceased paid in full, no longer held. An heir who entered *cum beneficio inventarii* was in the position of a mere executor, who is also residuary legatee.

INTESTATE SUCCESSION.—A man might die intestate either because he had not made a testament, or by his having made one which was null *ab initio*

owing to its being defective in some of the formalities required by law, or by his testament, though valid when made, being subsequently *ruptum* or *irritum*, or *destitutum*. A testament was *ruptum* by the testator cancelling or destroying it; by his making a new will, unless the second will confirmed the first; by the subsequent adoption or birth of a child to the testator, the child not being instituted or disinherited in the will. A testament was *irritum* by the testator subsequently undergoing *capitis deminutio*. A testament was *destitutum* where the heir instituted could not or would not enter on the inheritance.

In regulating succession, the Roman law made no distinction between heritable and moveable estate.

Order of Intestate Succession under XII. Tables.—By the law of the XII. Tables, the estate of an intestate devolved on: (1) his *sui heredes*, *i.e.* those persons who were in the immediate *potestas* of the deceased at the time of his death, and who became *sui juris* on his death, the division being *per stirpes*, and not *per capita*; (2) the nearest agnates (*proximi agnati*) of the deceased at the date when the fact of intestacy was ascertained, the division being *per capita*; (3) the *gens* of the deceased.

The defects of the system were that it excluded emancipated children, and agnates who had undergone *capitis deminutio*. Further, though the XII. Tables made no distinction between male and female agnates, the *media jurisprudentia* excluded female agnates of more remote degree than sisters. Again, on the failure of the *proximi agnati*, *i.e.* agnates of the nearest degree, there was no devolution to agnates of the next degree. Also all purely cognatic relations, including children in relation to their mother and *vice versâ*, were ignored.

Prætorian Order of Intestate Succession.—Many of the *iniquitates* of the earlier law of succession were remedied by the prætors granting *bonorum possessio ab intestato* to certain classes of persons in a certain order. *In omnibus vice heredum bonorum possessores habentur* (*Dig.* 38. 9. 7). Accordingly, the effect of the action of the prætors was practically to establish a new order of succession, consisting, in the case of freeborn persons, of four *ordines*: (1) *liberi*, the descendants of the deceased, including emancipated children; (2) *legitimi heredes*, *i.e.* the deceased's nearest agnates; (3) *cognati*, *i.e.* all persons related to the deceased by blood, down to the seventh degree, including agnates who had undergone *capitis deminutio*, agnates of the second or remoter degree on failure of the first degree, and female agnates more distantly related than sisters, each degree forming a *gradus*, and there being *successio graduum*; (4) *vir et uxor*, *i.e.* the survivor of husband and wife in a marriage *sine manu*.

Changes under the Empire before Justinian.—In 158 A.D. the SC. Tertullianum permitted a mother who had three children to succeed *ab intestato* as an agnate to her son or daughter dying without issue. The mother was, however, excluded by consanguinean brothers of her deceased child. In 178 A.D. the SC. Orphitianum permitted children to succeed to their mother dying intestate. The children were preferred to agnates of the deceased in the second degree. Both these *senatus consulta* applied to illegitimate children. In 503 A.D. the Emperor Anastasius allowed emancipated brothers and sisters to succeed as agnates to one-half of the share they would have got if they had not been emancipated. Justinian gave them their full share and admitted their children, as well as uterine brothers and sisters and their children.

Justinian's Final Settlement of the Order of Intestate Succession.—By Novels 118 and 127, Justinian revolutionised the whole system of intestate

succession. Agnation was eradicated altogether, and the canons of descent were based solely on blood kinship, whether through males or females, and whether there had, or had not, been *capitis deminutio minima*. The order of intestate succession thus established was:—(1) Descendants of the intestate, male and female alike, whether *in potestate* or emancipated, the division being *per stirpes*; (2) ascendants, the nearer excluding the more remote, and, concurrently with them, brothers and sisters of the full blood, the division being *per capita*, and the issue of predeceasing brothers and sisters taking the share which would have fallen to their parents had they been alive: (3) brothers and sisters of the half blood, consanguinean and uterine, the division being *per capita*, and the issue of a predeceaser taking their parent's share: (4) all other collaterals of the deceased, without distinction between full blood and half blood, according to their nearness in degree of propinquity, the nearest degree excluding the more remote, and all those of the nearest degree taking *per capita*. These classes formed a *successio ordinum*, there being in each *ordo* a *successio graduum*, and each *gradus* enjoying the *jus accrescendi*. It appears that the Prætorian law as to the right of succession of the survivor of husband and wife was retained as subsidiary. On the failure of all heirs and successors, testate or intestate, the succession devolved on the Treasury, as *ultimus hæres*, under the burden of paying the debts of the deceased to the extent of the value of the estate.

See LEGACY IN ROMAN LAW; LEGITIMA PORTIO; CODICILLI; FALCIDIA PORTIO; FIDEICOMMISSUM.

Succession Duty.—See LEGACY AND SUCCESSION DUTY.

Sucken; Suckener (A. S., *Soken*, the area within which a franchise granted by the king to a subject is exercised).—The sucken was the name given to the lands astricted under the obligation of thirlage to the mill of the thirl. The suckeners were the possessors of the lands within the thirl, and on them lay the obligation of bringing their corns to be ground at the mill of the thirl. See THIRLAGE

Summar Roll.—The rolls of the Inner House of the Court of Session are: (1) the SINGLE BILLS (*q.v.*) Roll; (2) the Long Roll; (3) the Short Roll; and (4) the Summar Roll. The Long Roll, which is put out at the end of the session, contains a list of the causes which have come into the Division during the session and which have not been disposed of. The Short Roll may be described as the ordinary Debate Roll of the Division, and contains the cases which are to be heard in ordinary course and without despatch. From the beginning of the session the Short Roll for each week contains a section of cases from the Long Roll, until all cases standing in that roll have been disposed of. For the rest of the session the Short Roll consists of such cases as have come into Court since the commencement of the current session and have not been sent to the Summar Roll. They are, as a general rule, heard in the order of their date. The Summar Roll contains such cases only as are entitled to more than ordinary despatch. It is in the discretion of the Court to send any case to the Summar Roll; but among the cases which are sent to this roll as matter of course are Bill Chamber cases, petitions (those originating in the Outer House as well as those presented to the Inner House), Bankruptcy cases, reclaiming notes in the course of the preparation of the cause, and motions for the adjustment of issues (Mackay, *Manual*, 288). When it is desired to have

a case sent to the Summar Roll, counsel must appear at the Single Bills and move to that effect.

Summary Diligence on Bills of Exchange.—One of the many privileges attaching to bills of exchange by the law of Scotland is that of founding summary diligence against those liable under them. The former law on this point has not been altered, for by the 98th section of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), it is provided that nothing in the Act or in any repeal effected thereby shall extend or restrict or in any way alter or affect the law and practice in Scotland in regard to summary diligence. The existing enactments relating to summary diligence on bills are: 1681, c. 20 (which had reference exclusively to foreign bills, but the provisions of which were extended to inland bills by the Act 1696, c. 36); 5 Geo. III. c. 49, ss. 4, 5, 6; 12 Geo. III. c. 72, ss. 36, 42, 43; 1 & 2 Vict. c. 114, ss. 1 and 9.

At whose Instance Diligence Competent.—Summary diligence is competent at the instance of any holder of a bill whose title thereto appears on the face of the bill, and does not require any other evidence to set it up. The chain of endorsations, if the protest be at the instance of an endorsee, must present a series of names terminating in the holder, at whose instance there may be a valid registration of the protest (*Fraser*, 1853, 15 D. 756). Where a bill is drawn and held by two or more payees jointly, the protest will run at their instance. A protest following on a bill held by a married woman will be at her instance, although it is advisable to insert the concurrence of her husband (*Lyle*, 1849, 11 D. 404). Where a company with a descriptive name is the holder, the protest should run in the name of the company, with the addition of at least three partners, if there are so many (*Antermony Coal Coy.*, 1866, 4 M. 1017). Where the bill is signed in the company name, with the addition of certain of the partners, the protest should be at the instance of the company and the partners named. With regard to corporations as holders of bills, the protest runs at the instance of the corporation in its corporate name. Where, subsequent to the maturity of a bill, the holder dies, his executor, on being confirmed, is in right of the bill. As, however, the notary will require to extend the protest at the instance of the deceased, the executor cannot proceed by summary diligence. His course is by letters of horning (*Kennedy*, 1849, 11 D. 1198). A similar course must be followed by the trustee in bankruptcy of the creditor if he is unable to get the bill endorsed to him (*Shand & Co.*, 1848, 11 D. 162). A protest of a bill which was blank endorsed was extended and recorded at the instsance of A., and on the following day, without any new presentment or noting, in the name of B., who thereupon charged the debtor. In a suspension, B. alleged that he was the holder of the bill, and that the extending and recording of the protest in the name of A., who was his agent, was the result of a clerical error. The Court, however, suspended the charge (*Service*, 1867, 6 M. 172). If a bill be endorsed after protest, the protest may be assigned to the endorsee, to the effect of enabling him to proceed with diligence already begun on it. The holder of a bill, although a foreigner, does not require to sist a mandatory as a preliminary to summary diligence (*Ross*, 1849, 11 D. 984; *Orbay*, 1849, 21 Jur. 349). But the person sought to be charged must be subject to the jurisdiction of the Scotch Courts (*Davis*, 1897, 24 R. 297, and cases there cited), although it does not necessarily follow that the bill should be drawn, accepted, or made payable in Scotland (*Mackenzie*, 1854, 17 D. 1041).

Against whom Diligence Competent.—Diligence is competent, in the case

of an accepted bill, against any party liable on it, provided due notice of dishonour is given to the party charged, other than the acceptor (Act, s. 49); and in the case of an unaccepted bill, against the drawer and prior endorsers, but not the drawee (Act, s. 55 (3)), even although he have funds in his hand sufficient to meet it. As regards the acceptor, summary diligence is competent against him at any time within the six months, although no notice of dishonour has been given. Where a bill is granted by a company, diligence can be used against any member of the firm, although his name does not appear on the bill (*Wallace*, 1841, 3 D. 1047). Where the acceptor or endorser required to be charged is dead, the holder of the bill cannot proceed with summary diligence against his personal representatives, but must proceed by an ordinary action (*Kippen*, 1822, 2 S. 105 (N. E. 99)).

When Summary Diligence Competent.—Summary diligence is competent on an extract registered protest from the books of Council and Session or of the Sheriff Court within the jurisdiction of which the person sought to be charged resides. The extract contains a warrant to charge the party liable on the bill to pay the sum in the bill, with interest and expenses, within six days if resident in Scotland, and fourteen days if resident furth thereof. The extract registered protest follows on a protest (for form of which, see BILLS) by a notary public, or in certain special cases by a householder, as after explained. In the case of protests for non-acceptance, the protest must be registered in six months after the date of the bill, and in the case of protests for non-payment, in six months after the due date of the bill (Act, s. 14). In bills payable on demand, the six months are reckoned from the date of demand, and not from the date of the bill (*M'Rostie*, 1849, 12 D. 124; *Bon*, 1846, 12 D. 1310). Where a bill is payable at sight, and accepted by an undated acceptance, the six months run from the date of the bill (*Moffat*, 1838, 16 S. 406). If the protest is not timeously registered, the only course open to the holder within the prescriptive period is an ordinary action.

When Summary Diligence Incompetent.—In order to warrant summary diligence, the document founded on must be a proper bill of exchange or promissory note (*Shepherd*, 1833, 2 S. 346 (N. E. 304), 3 W. & S. 384). Summary diligence is incompetent upon the following documents, namely: an undated bill, one wanting in any material particular (Act, s. 20), or irregular in form, or *ex facie* vitiated or altered; on a bill accepted conditionally (*Hughson*, 1857, 20 D. 271); on a lost bill (*Kennedy*, 1897, 4 S. L. T. 247); on one past due, found in the holder's repositories torn in pieces, and thereafter pasted together (*Thomson*, 1850, 12 D. 1184); on a bill where there is a discrepancy between the words and the figures as to the amount payable (Bell, *Prin.* s. 325); on an improperly or irregularly stamped bill, or on a bill so long as an ordinary action on it is in dependence (*Denovan*, 7 D. 378). If, however, the action is abandoned, and there is no question of *res judicata* or prescription, summary diligence would seem to be competent (*Clark*, 1875, 3 R. 166).

Bills signed by initials (Bell, *Com.* vol. i. pp. 413, 415) or by mark (Bell, *Com.* vol. i. p. 416) do not warrant summary diligence; but a bill signed by a notary public on behalf of a third person in conformity with the statutory solemnities, or a bill signed by a person duly authorised to that effect, provided the authority is well known and recognised, will authorise summary diligence. Where the signature of the party sought to be charged is forged, or placed on the bill without the authority of the person whose signature it purports to be, summary diligence is incompetent (Act,

s. 24). As to adoption of forged signature, see *M'Kenzie*, 1880, 7 R. 836, rev. 8 R. (H. L.) 8. If the Court is not satisfied that the signature is forged, caution will be required before a threatened charge is suspended (*Beveridge*, 1870, 7 S. L. R. 430; see also Graham Stewart on *Law of Diligence*, pp. 374, 375).

Summary Diligence on a Householder's Certificate of Protest.—By sec. 94 of the B. of E. Act, it is provided that "where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate signed by them attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill." A form of the certificate is given in the schedule to the Act (see BILLS). Under this section the question arises, Is this certificate a good ground for the founding of summary diligence, keeping in view the provision of sec. 98? In *Somerville*, 1898, 5 S. L. T. 310, 35 S. L. R. 443, the Lord Ordinary (Kyllachy) decided the question in the negative, but the Court, while adhering to the judgment of the Lord Ordinary, proceeded upon a different ground, and expressed no opinion as to whether summary diligence proper includes the protest of the bill, or does not begin till after protest. In a Sheriff Court case (*M'Robert*, 1898, 5 S. L. T. 317) the question determined by the Lord Ordinary against the competency of summary diligence was decided by the Sheriff-Substitute in favour of the competency. We agree with the Sheriff-Substitute (see opinion *contra*, Thorburn on *B. of E. Act*, p. 207). It may be stated that not long after the Act came into force, a certificate, framed in accordance with the schedule to the Act, was presented at the Register House, Edinburgh, for registration, in order that use might be made of summary diligence. The Keeper of the Register, founding on sec. 98, declined to register the certificate, and the question was then referred to the law officers of the Crown, who instructed the keeper to record the certificate: and since then the practice at the Register House has been in accordance with this opinion. The opinion is published in the *Scotsman* of 5th December 1882. (For history of sec. 94, see *Juridical Review*, vol. x. p. 462.)

Sum for which Diligence Competent.—Diligence is only competent for non-payment of the contents of the bill, and for interest, damages, expenses, exchange, and re-exchange (as to interest, see Act, s. 9). If a payment has been made to account, diligence is only competent for the balance due. If, notwithstanding the payment, diligence is commenced for the full sum in the bill, the diligence is not wholly null, but would be suspended to the extent of the sum paid (*Wilson*, 1862, 24 D. 271).

See BILLS; PROMISSORY NOTES; CHARGE; SUSPENSION.

Summary Procedure; Summary Prosecution.—See CRIMINAL PROSECUTION (SUMMARY); COMPLAINT (SUMMARY).

Summons.—By derivation *summons* is an elliptical expression for the writ *summoning* a defender to attend the Court mentioned therein to answer the demand made on him. Formerly actions in all the Civil Courts in Scotland were originated by a summons, but by the Sheriff Courts (Scotland) Act, 1876 (39 & 40 Vict. c. 70), summonses were superseded by petitions, in the form given in Schedule A to that Act, in ordinary actions in the Sheriff Court. Actions in the Small Debt Court and Debts Recovery Court are still commenced by the issue of a summons (Debts Recovery

(Scotland) Act, 1867 (30 & 31 Vict. c. 96), incorporating 1 Vict. c. 41). The summonses still in use in the inferior Courts will be treated of afterwards.

Summons in the Court of Session.—The summons in the Court of Session is a writ in the sovereign's name passing under the signet and signed by a writer to the signet, whose signature is the warrant for affixing the signet. The form of the summons is prescribed by the Act of 1850 "to facilitate procedure in the Court of Session in Scotland" (13 & 14 Vict. c. 36, s. 1, and Schedule A). The summons consists of four parts: (1) the address; (2) the instance or statement of the names and designations of the parties; (3) the conclusions; and (4) the will. Prior to the passing of this Act the grounds of action were stated immediately before the conclusions; but by sec. 1 of the Act it is provided that "the pursuer of any summons before the Court of Session shall set forth in such summons, in such way and manner as the Court having regard to the forms set forth in Schedule (A) hereunto annexed may from time to time prescribe by Act of Sederunt as applicable to the various forms of action now in use, the name and designation of such pursuer, and the name and designation of the defender, and the conclusions of the action without any statement whatever of the grounds of action; but the allegations in fact which form the grounds of action shall be set forth in an articulate condescendence, together with a note of the pursuer's pleas in law, which condescendence and pleas in law shall be annexed to such summons and shall be held to constitute part thereof."

(1) The address of a summons is as follows:—

"VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith; To , messengers-at-arms, our sheriffs in that part, conjunctly and severally, specially constituted, greeting:"

This portion of the summons is the same in all kinds of actions, and is usually printed "Victoria, &c."

(2) The statement of the parties follows:—

"Whereas it is humbly meant and shewn to us by our lovite, *A.* [*insert name and designation*], pursuer, against *B.* [*insert name and designation*], defender, in terms of the Condescendence and Note of Pleas in Law hereunto annexed:"

(3) The conclusions of a summons are the most important part, and of course they vary with the action. Some special conclusions will be given later, but there follows here the conclusion in any ordinary action for payment of money:—

"Therefore the defender Ought and Should be Decerned and Ordained, by decree of the Lords of our Council and Session, to make payment to the pursuer of the sum of £ sterling [*where any liquid document of debt is libelled on, whether bond, bill, or other document, as the case may be, set it forth here as shortly as possible, describing it merely by its date and the names of the parties by and to whom granted*], with the legal interest thereon from the day of until payment, together with the sum of sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland used and observed in the like cases as is alleged:"

(4) The will of a summons, like the conclusions, varies according to circumstances, but the usual form is as follows:—

"Our will is herefore, and we charge you that on sight hereof ye pass and in our name and authority lawfully summon, warn, and charge the said defenders personally, or at their respective dwelling-places, to compear before the said Lords of our Council and Session at Edinburgh, or where it may happen them to be for the time, the seventh (*or if in Orkney or Shetland, the fourteenth*; but see CITATION) day next after the date

of your citation in the hour of cause, with continuation of days, to answer at the instance of the pursuer in the matter above libelled: That is to say, to hear and see the premises verified and proven, and decree and sentence pronounced by our said Lords, in terms of the conclusions above written, or else to allege a reasonable cause in the contrary; with certification as effeirs [*if warrant to arrest on the dependence is desired, add:*—Attour that in the meantime ye lawfully fence and arrest All and Sundry the whole readiest moveable goods and gear, debts and sums of money, and other moveable effects belonging or addebted to the defender wherever or in whose hands soever the same can be found; all to remain under sure fence and arrestment, aye and until sufficient caution and surety be found acted in the Books of our Council and Session that the same shall be made forthcoming to the pursuer as accords of law [see ARRESTMENT]. *If warrant of Inhibition is desired, add:*—And also that ye lawfully inhibit the said personally or at his dwelling place if within Scotland, and if furth thereof, at the office of the Keeper of the Record of Edictal Citations at Edinburgh, from selling, burdening, disponing, alienating, or otherwise affecting his lands or heritages, to the prejudice of the pursuer; and that ye cause register this summons and the execution hereof in the General Register of Inhibitions at Edinburgh for publication to our lieges [Court of Session Act, 1868, 31 & 32 Vict. c. 100, s. 18; see INHIBITIONS]].—According to Justice, as ye will answer to us thereupon, which to do we commit to you and each of you, conjunctly and severally, full power by these our letters, delivering them by you duly executed and indorsed again to the bearer.—Given under our signet at Edinburgh (*the date of signeting is added by the official representing the Keeper of the Signet*)."

The following forms for the conclusions of particular actions are taken partly from the Court of Session Act, 1850 (13 & 14 Vict. c. 36, Schedule A), and partly from the Session Papers in the Advocates' Library. Each example has been tested in practice. Where not otherwise mentioned, the conclusions are alone altered, the other portions remaining as in the example given above:—

(1) *Count, Reckoning, and Payment.*

"Therefore the defender Ought and Should be Decerned and Ordained, by decree of the Lords of our Council and Session, to exhibit and produce before our said Lords a full and particular account of his whole intromissions as factor for the pursuer [*or otherwise, as the case may be*], whereby the true balance due by him to the pursuer may appear and be ascertained by our said Lords: And the defender Ought and Should be Decerned and Ordained, by decree foresaid, to make payment to the pursuer of the sum of sterling, or of such other sums as shall appear and be ascertained by our said Lords to be due by the defender as the balance of his said intromissions, with the legal interest thereof from the day of until payment; or in the event of the defender failing to produce an account as aforesaid, he Ought and Should be Decerned and Ordained, by decree foresaid, to make payment to the pursuer of the sum of sterling, which shall in that case be held to be the balance of his said intromissions, with the legal interest thereof from the said day of until payment; and whether the said account is produced or not, the defender Ought and Should be Decerned and Ordained, by decree foresaid, to make payment to the pursuer of the sum of sterling, or such other sum as our said Lords shall modify as the expenses, &c. &c."

(2) *Declarator of Trust.*

"Therefore it Ought and Should be Found and Declared, by decree of the Lords of our Council and Session, that a disposition dated , whereby for the causes therein specified the pursuer sold, alienated, and disponed to the defender and his heirs and assignees whomsoever, heritably and irredeemably, All and Whole the lands of , was a trust in the person of the defender for the use and behoof of the pursuer and his heirs or assignees: And the defender Ought and Should be Decerned and Ordained, by decree foresaid, to denude of the said lands, and to convey the same, with the writs and evidents thereof, to the pursuer and his heirs and assignees, with warrandice from the defender's own facts and deeds [*insert conclusion for expenses, and will, as before*]."

(3) *Summons of Reduction.*

In this case the will follows immediately on the address:—

"VICTORIA, &c.—Our Will is, and we charge you that on sight hereof ye pass and in our name and authority lawfully summon, warn, and charge *B.* [*design him*], defender,

personally or at his dwelling-place if within Scotland, and if furth thereof by delivery of a copy hereof at the office of the Keeper of the Record of Edictal Citations, to compear before the Lords of our Council and Session at Edinburgh, or where it may happen them to be for the time, the said defender, if in Scotland, the seventh day, and if furth of Scotland the fourteenth day next after the date of your citation in the hour of cause, with continuation of days, to answer at the instance of our lovite *A.* [*design him*], pursuer; to whose great hurt and prejudice the pretended trust disposition and settlement [*or as the case may be*] aftermentioned was made and granted, whereby the pursuer has good and undoubted right to call for exhibition and production thereof, and to prosecute and follow forth the present action of reduction; That is to say, the defenders to bring with them, exhibit, and produce before our said Lords a pretended T. D. and S. by *C.*, and bearing to be dated , or of whatever other date, tenor, or contents the same may be: To be seen and considered by our said Lords, and to hear and see the same, with all that has followed or may follow thereon, reduced, retreated, rescinded, cassed, annulled, decerned and declared by decree of our said Lords to have been from the beginning, to be now, and in all time coming null and void, and of no avail, force, strength, or effect in judgment or outwith the same in time coming, and the pursuer reponed and restored thereagainst *in integrum* for the reasons and causes set forth in the Condescendence and Note of Pleas in Law hereunto annexed: Therefore and for other reasons to be proponed at discussing hereof, the said pretended Trust Disposition and Settlement [*or as the case may be*], with all that has followed or may follow on the same, Ought and Should be reduced, retreated, rescinded, cassed, annulled, decerned and declared, by decree of our said Lords, to have been from the beginning, to be now, and in all time coming, null and void, and of no avail, force, strength or effect in judgment or outwith the same, in time coming, and the pursuer restored thereagainst *in integrum*. And the defender Ought and Should be Decerned and Ordained, by decree foresaid, to make payment to the pursuer of the sum of sterling [*insert conclusion for expense as before*], or else to allege a reasonable cause in the contrary: With certification to the defender, if he fail, our said Lords will proceed in the said matter and reduce, decern, and declare in manner foresaid.—According to Justice, &c." See *supra*, REDUCTION.

(4) *Summons of Multiplepoinding.*

"VICTORIA, &c.—Whereas it is humbly meant and shewn to us by our lovite *A.* [*name and design him*], pursuer; against *B.* [*name and designation*], common debtor, and *C. D.* and *E.* [*insert names and designations of each in order, and state who is the real raiser*], creditors or pretended creditors of the said *B.*, all defenders in terms of the Condescendence and Note of Pleas in Law hereunto annexed: Therefore it Ought and Should be Found and Declared, by decree of the Lords of our Council and Session, that the pursuer is only liable in once and single payment of the principal sum of sterling contained in a bond dated ,granted by him to the said *B.*, his heirs, executors, or assignees, and interest thereon from the day of until payment, or until consignation in this process, and that to the person or persons who may have just right thereto; for determining which the said several persons, creditors or pretended creditors foresaid, and the said *B.*, common debtor, for his interest, and all others pretending right thereto, ought to produce their respective grounds of debt and diligences thereon, or other interest in the said sum, and dispute their preferences thereto: And the pursuer should be found entitled to retain the expenses of this process as the same shall be ascertained in the course thereof, and Decerned and Ordained to make payment of what sum shall remain in his hands after such retention to such of the defenders or others as may be found to have best right thereto; and the defenders who shall be found to have no right to the sums *in medio* and all others Ought and Should be Decerned and Ordained, by decree foresaid, to desist and cease from further troubling the pursuer with respect to the premises in time coming, conform to the laws and daily practice of Scotland used and observed in the like cases as is alleged.—Our will is herefore, &c."

(5) *Summons of Divorce.*

"VICTORIA, &c.—Whereas it is humbly meant and shewn to us by our lovite *A.* [*design him*], pursuer; against *B.*, his wife, defender; and against *C.* [*design him*], co-defender, in terms of the Condescendence and Note of Pleas in Law hereunto annexed: Therefore the Lords of our Council and Session Ought and Should find facts, circumstances, and qualifications proven relevant to infer the guilt of adultery of the defender *B.* with the said co-defender *C.*, and therefore find her guilty of adultery with him accordingly: And our said Lords Ought and Should divorce and separate the defender

from the pursuer, and from his society, fellowship, and company, and Find and Declare the defender to have forfeited all the rights and privileges of a lawful wife, and that the pursuer is entitled to live single or to marry any free woman as if he had never been married to the defender, or as if she were naturally dead: And also that the defender, the said *B.*, has lost and amitted the whole goods, gear, money, and others whatsoever which were anyways contracted or agreed to be paid to the defender in respect of said marriage, or whatever she had right to claim in virtue thereof: And the said *C.* Ought and Should be Decerned and Ordained, by decree of our said Lords, to make payment to the pursuer of sterling in name of damages and solatium: And the said *B.* [*if she has separate estate*] and *C.* Ought and Should be Decerned and Ordained, conjunctly and severally, to make payment to the pursuer of the sum of sterling, or such other sum as our said Lords shall modify, as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland used and observed in the like cases as is alleged.—Our will is herefore, &c."

These will serve as examples, but forms for every kind of summons will be found in the *Juridical Styles*, vol. iii.

Different conclusions may be combined in one summons, and that even in the case of alternative conclusions which are irreconcilable. Thus in common practice a conclusion for declarator of marriage is almost always coupled with a conclusion for damages for breach of promise of marriage (see, for example, Session Papers in *Imrie*, 19 R. 185; *Stewart*, 15 S. 1198; the case of *Maloy*, 12 R. 431, was a case in which declarator of marriage was sought on two alternative grounds which were inconsistent). Further, a conclusion may be inserted to take effect at a future time—usually called an *eventual* conclusion. Thus one who has arrested a fund which has vested in his debtor, though burdened with a liferent, may follow up his arrestment by an action of furthcoming, concluding, not for immediate payment, but for payment at the death of the liferenter (per Ld.-Pres. Inglis in *Jameson*, 14 R. 643).

While several pursuers and several defenders may be conjoined in one summons where there is a common object to be attained (*D. of Buccleuch*, 4 R. (H. L.) 14; *Mitchell*, 21 R. 367), yet two parties cannot be sued on different grounds in the same summons (*Barr*, 6 M. 651; *Taylor*, 12 R. 1304; *Smyth*, 19 R. 81).

By the Act 13 & 14 Vict. c. 36, above referred to, it was provided that every summons passing the signet required to be signed by a Writer to the Signet on every page. By the Court of Session Act, 1868 (31 & 32 Vict. c. 100, s. 13), any agent entitled to practise before the Court of Session may sign, provided that, if he be not a Writer to the Signet, the last page must be signed by a Writer to the Signet; "and any Writer to the Signet shall, on a fee of two shillings and sixpence being tendered to him, be bound so to sign any summons which may be presented to him for that purpose, but he shall not by so signing incur any responsibility." This provision destroyed the practical monopoly of Court of Session business formerly enjoyed by the Society of Writers to the Signet. A compearer once presented a note to the Court stating that he was about to raise an action against certain members of the College of Justice, and was unwilling in these circumstances to ask a Writer to the Signet to sign the summons, and craving the Court to authorise the Keeper of the Signet to affix the signet to a summons signed by the pursuer alone. The Court refused this application, but authorised the Keeper to signet printed copies of the summons instead of manuscript (*Hocy*, 13 R. 207) The signeting of the summons is not in any sense a judicial act, and the true date of the commencement of an action is the date of the execution of the summons (*Alston*, 15 R. 78). Therefore where jurisdiction is to be founded against a foreigner by letters of arrestment *jurisdictionis fundandæ causa*, it is

unnecessary to execute them before the summons is signeted, and indeed it is enough, in the opinion of some judges, if they are executed before defences are lodged (*Wall's Trs.*, 15 R. 359). But see opinions of Lds. Shand and Adam in *Morley*, 16 R. 78, which seem to imply that at the commencement of the action (*i.e.* the execution of the summons) the jurisdiction must have been already founded.

In former times a very slight inaccuracy in the names or designations of the parties in the summons was enough to make the citation bad. In the case of *Guthrie*, 11 S. 465, an objection was taken by a compearing defender that in the summons he was called "William Munro," whereas his full name was "William John Munro," and the Inner House, to whom the objection was reported, only repelled the objection with much difficulty, on the special ground that the defender's signature was illegible. By the Court of Session Act, 1868 (31 & 32 Vict. c. 100, s. 21), no party appearing shall be entitled to state any objection to the regularity of the execution or service of the summons convening him. Even when the defender does not appear, a trifling error of this sort would not now be sufficient to ground a suspension or reduction of the decree (*Cruickshank*, 15 R. 326; *Spalding*, 10 R. 1092; *Turnbull & Co.*, 14 D. 45; cf. *Brown*, 12 R. 340). The description of parties must, however, still be reasonably accurate and sufficient to be recognisable. Thus a description of a party as "residing in London" was held insufficient (*Sceales*, 4 M. 300), and a description of a hatter in Paisley as "merchant in Glasgow" was held fatal (*Ramage*, 6 S. 853). Of course it would be a good answer to such an objection, that the defender mislead the pursuer (*Guthrie*, 11 S. 645). To omit the names of defenders, describing them generally as "A.'s trustees" or "B.'s executors," is incompetent (*Bell*, 3 D. 380). The position of Bishop in the Episcopal communion in Scotland is not recognised in law (*Dunbar*, 11 D. 945; *Drummond*, 6 July 1809, F. C.). See CITATION.

AMENDMENT OF SUMMONS.—(*a*) *In Undefended Actions.*—By the Court of Session Act, 1868 (31 & 32 Vict. c. 100, s. 20), it is provided that: "In undefended actions any error or defect in any summons or other pleading, whereby the action is commenced in the Court of Session, may be amended upon application to the Lord Ordinary or the Court before whom it depends, if the Lord Ordinary or the Court think such amendment should be allowed; and such amendment shall be made in writing either upon the summons or pleading or in a separate paper, and shall be authenticated by the signature of counsel; and the Lord Ordinary or Court may, if he or they think fit, order the amended summons or other pleading to be served upon the absent defender or defenders, with liberty to him or them to enter appearance within such time as shall seem proper; provided that the expenses occasioned by such amendment shall not be chargeable against the defender or defenders; and provided also that such amendment shall not have the effect of validating diligence used on the dependence of the action so as to prejudice the rights of creditors of the defender interested in defeating such diligence, but shall be operative to the effect of obviating any objections to such diligence when stated by the defender himself or by any person representing him by a title or in right of a debt contracted by him subsequent to the using of such diligence." Prior to this enactment, there was no power of altering a summons in an undefended action. It will be seen that this section gives the power of amendment in very wide terms, without the proviso in sec. 29 (to be afterwards noticed) that such amendment shall not subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the original

pleading. It may therefore be competent to amend the summons by adding entirely new conclusions, but there is no reported decision on this section.

(*b*) *In Defended Actions.*—The very limited powers of amendment after closing the record which parties had under the Judicature Act, 1825 (6 Geo. IV. c. 120, s. 10) (see RES NOVITER VENIENS AD NOTITIAM), did not extend to alterations on the summons. The only warrant for alterations on summonses is contained in the Court of Session Act, 1868 (31 & 32 Vict. c. 100, s. 29), which is as follows: "The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session, upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made; provided always that it shall not be competent by amendment of the record or issues under this Act to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons or other original pleading, unless all the parties interested shall consent to such amendment; and provided also that no such amendment shall have the effect of validating diligence used on the dependence of the action so as to prejudice the rights of creditors of the defender interested in defeating such diligence, but shall be operative to the effect of obviating any objections to such diligence when stated by the defender himself or by any person representing him by a title or in right of a debt contracted by him subsequent to the execution of such diligence."

This clause has no application to alterations made by parties at the adjustment of the record (*Cairns*, 20 R. 16).

It is in the discretion of the Court to allow or disallow any amendment proposed under this section (*Taylor*, 12 R. 1304). It is not competent to amend a summons by the addition of a new pursuer without defender's consent (*Hislop*, 8 R. (H. L.) 95; *Anderson*, 10 M. 217); unless in exceptional circumstances (*Morison*, 1 R. 116). But striking out certain pursuers from the summons and the relative conclusions was held to be a competent amendment, but did not, under the second proviso of the section, validate diligence so as to confer on the remaining pursuer a preference in competition with other creditors (*Fischer*, 23 R. 395). A new defender cannot be added without his own consent (Mackay's *Manual of Practice*, p. 186; but see under TITLE TO SUE AND DEFEND).

The conditions which the Lord Ordinary may impose in granting leave to amend are not limited to payment of expenses, but may include such conditions as agreeing to the other side sisting new parties (*Duthie Brothers & Co.*, 19 R. 905). Further, when a party has been informed of the conditions on which he will be allowed to amend, he may amend on these conditions or he may decline to amend, but he cannot make the amendment and repudiate the conditions. "If he considered the terms of the Lord Ordinary too onerous, he should have asked leave to reclaim against the interlocutor prescribing those terms; but even if that had not been granted, his proper course would have been to go on and take his fate on the existing record, and, if need were, raise the question of the conditions of amendment as soon as he was able to ask our judgment upon it on a reclaiming note" (per Lord President in *Duthie Brothers & Co.*, 19 R. 905). Amendments have been held competent by which the summons concluding for payment to the pursuers personally was altered so as to conclude for payment to a trust estate (*Carruthers*, 17 R. 769), or to the pursuers "as trustees foresaid" (*Brown's Trs.*, 24 R. 1108).

The proviso that amendments shall not be competent which would subject to the adjudication of the Court any larger sum or other fund or property than that originally mentioned, must be construed with reference to the facts of each case, but the following illustrations may be referred to:—*Cases where amendment was allowed: Rottenburg*, 24 R. 35; *Govan Rope & Sail Co.*, 24 R. 368; *Caledonian Rly. Co.*, 24 S. L. R. 120. *Cases where amendment not allowed: Russell, Hope, & Co.*, 23 R. 256; *Leny*, 21 R. 749; *Laming & Co.*, 16 R. 828; *Loudon*, 18 R. 549; *Gibson's Trs.*, 4 R. 1001; *Gillespie*, 1 R. 423. There are certain "conclusions of style," such as the conclusion for expenses, or the conclusion for a random sum in a count, reckoning and payment, the omission of which was not fatal to the summons under the older law, and which therefore may be admitted as amendments under this section (*Scott*, 7 S. 566; *Dobson*, 20 D. 610). But a conclusion for interest cannot competently be added, as it would submit to the adjudication of the Court a larger sum than was originally concluded for (*Shotts Iron Co.*, 8 M. 383).

Supplementary Summons.—Before the passing of the Court of Session Act, 1868, above mentioned, a supplementary summons was frequently used for the purpose of correcting any fault or error in a principal summons. The wide powers of amendment contained in secs. 20 and 29 of that Act, above narrated, have for the most part superseded the need for this step, and it is now seldom resorted to except for the purpose of meeting the defence of "all parties not called," since, as above mentioned, a new defender cannot be added by amendment except with his own consent. A supplementary summons cannot contain statements inconsistent with those in the principal summons, but new facts and grounds of action may be stated, provided the conclusions are the same (*Howatson*, 9 S. 534; *Cargil*, 5 S. 48; *Scott*, 7 S. 338; *McDougall*, 7 S. 460). A supplementary summons cannot be raised when the original summons is null (*McIndoe*, 5 S. 92 (N. E. 85); *Stewart*, 14 S. 989), or when the time has expired within which the action requires to be brought (*Paul*, 2 S. 626 (N. E. 533)). A supplementary summons may not be raised for the interest when the principal summons concludes for the capital only (*Edinburgh & Glasgow Canal Co.*, 1 Bell's App. 316; rev. C. of S.). A supplementary summons requires to be signeted and served, and fee-fund dues have to be paid just as in the case of an ordinary summons; but as certain intermediate steps are sometimes saved, and as the original action cannot be abandoned without payment of all the defender's expenses, the use of it is sometimes an economy. The form of a supplementary summons is as follows:—

"Victoria, &c.—Whereas it is humbly meant and shewn to us by our lovite *A.*, *pursuer*, against *B.*, *C.*, and *D.*, *defenders*, in terms of the Condescendence and Note of Pleas in Law hereunto annexed: *Therefore* the present action ought to be conjoined with an action raised on at the pursuer's instance against *B.* and *C.* before named and designed [*or as the case may be*], and in the conjoined actions it Ought and Should be Found and Declared [*give conclusions as in the principal summons*].—Our will is herefore, &c."

Repeating a Summons.—There are certain defences which can only be maintained by way of action. For example, where a defender is sued on a deed executed by himself, and he alleges in the defence that the deed was fraudulently obtained from him, he can only maintain this defence by bringing an action of reduction. To obviate the extra expense which this course would cause, the parties may agree to "repeating the summons." That is to say, in the example given above, a summons of reduction at the instance of the defender would be signeted, but not further proceeded with, and this summons would be lodged in process, and an interlocutor pro-

nounced by the Lord Ordinary in the original process, holding the summons of reduction repeated *incidenter*; and it may be conjoined with the original action or not. This would enable the defence to be proved without objection; but it would have no effect except as a defence to the original action (*Weir*, M. 4034). This can only be done with the consent of the other party (Ivory, *Forms of Process*, ii. 61). A repeated summons, being purely incidental to the original action, cannot be sustained where the original action is incompetent (*Bridges*, 1 S. (N. E.) 351). The repeating of a summons, being merely a technical formality, is seldom resorted to now, the same end being attained by the pursuer not pressing his objection to the defence (see Shand's *Practice*, pp. 503 and 652).

Summons in the Inferior Courts.—As above mentioned, ordinary actions in the Sheriff Courts are now commenced by "petitions" in place of summonses (Sheriff Courts (Scotland) Act, 1876; see SHERIFF COURTS).

But cases in the Small Debt Court and Debts Recovery Court are still commenced by a summons, which is in the following form:—

"*A. B.*, Sheriff of the Shire of , to , officers of Court, jointly and severally: Whereas it is humbly complained to me by *C. D.* [*design him*], that *E. F.* [*design him*], defender, is owing the complainer the sum of [*here insert the origin of debt or ground of action, and, whenever possible, the date of the cause of action or last date in the account*], which the said defender refuses or delays to pay; and therefore the said defender Ought to be Decerned and Ordained to make payment to the complainer, with expenses: Herefore it is my will that on sight hereof ye lawfully summon the said defender to compear before me or my substitute in the Court-house at , upon the day of at of the clock, to answer at the complainer's instance in the said matter, with certification, in case of failure, of being held as confessed; requiring you also to deliver to the defender a copy of any account pursued for, and that ye cite witnesses and havers for both parties to compear at the said place and date to give evidence in the said matter; and in the meantime that ye arrest in security the goods, effects, debts, and sums of money belonging to the defender as accords of law.

Given under the hand of the Clerk of Court at the day of .

J. P., Sheriff Clerk."

(1 Vict. c. 41, Schedule A, incorporated with the Debts Recovery (Scotland) Act, 1867 (30 & 31 Vict. c. 96). Schedules B, D, and E give forms for summonses of sequestration and sale, forthcoming, and multiplepoinding respectively; and the Small Debt Amendment (Scotland) Act, 1889 (52 & 53 Vict. c. 26), Schedules A and B, give forms of summonses for delivery of articles not exceeding £12 in value. It is unnecessary to quote these here, since, as aftermentioned, the printed forms must be obtained from the Sheriff Clerk.)

There is no Condescendence or Note of Pleas in Law annexed, the grounds of debt being stated in the summons, or in an account affixed to the summons and served with it. The Sheriff Clerk keeps at his office printed forms of Small Debt and Debts Recovery summonses, which are filled up and signed by the Sheriff Clerk or his depute (1 Vict. c. 41, ss. 25 and 37) on the application of the suitor or his agent, and on payment of one shilling for the summons, including precept of arrestment, and sixpence for each copy for service. It is then served by the officer of Court on payment of corresponding fees (1 Vict c. 41, s. 32).

There is also a Justice of Peace Small Debt Court, in which a summons is used in the same terms, except that the commencement is:—

"The Honourable Her Majesty's Justices of the Peace for the Shire [or Stewartry] of "[12 & 13 Vict. c. 34, Schedule (A)].

The Justice of the Peace Court has only jurisdiction in cases in which the sum in dispute does not exceed £5.

See SHERIFF and JUSTICE OF THE PEACE.

Sunday.—Certain recent Acts contain provisions regarding Sunday. Thus the employment of young persons under the age of eighteen years and of women in factories and workshops on Sunday is prohibited, with certain specified modifications, by 41 Vict. c. 16, s. 21; and the selling of exciseable liquors on Sunday, with certain exceptions, is prohibited by 25 & 26 Vict. c. 35, s. 7 (*Macdonald*, 1895, 21 R. (J. C.) 38).

No judicial acts can legally be performed on Sunday. Diligence executed on Sunday is therefore null, from which rule, however, warrants against persons in *meditatione fugæ* are excepted *ex necessitate* (*Kempt*, 1786, M. 8554). But the voluntary acts of private parties are binding though dated on Sunday (*Duncan*, 1684, M. 15003; *Elliot*, 1844, 6 D. 411). Decrees-arbitral also may be valid (Bankt. i. 456).

[In this connection *vide* Stair, bk. iii. tit. 1, s. 37; tit. 3, s. 11; bk. iv. tit. 47, s. 27; Ersk. bk. iii. tit. 2, s. 33; bk. iv. tit. 4, s. 17; bk. i. 360, 456; iii. 31; Hume, i. 573; Bell, *Com.* ii. 460; Bell, *Prin.* s. 44; Macdonald, *Criminal Law*, 204; Blair, *Justice Manual*, 253.] See also Sabbath-Breaking.

Supercargo.—A supercargo is an agent of the shipper who sails with the goods, and is empowered to dispose of them and to purchase others with the price. The cargo-owner thus retains possession during the voyage, and maintains full control over the cargo (Ersk. iii. 3. 44; Bell, *Prin.* s. 219). The supercargo, in virtue of his control, may decide or alter the destination of the cargo, and thus change the destination of the ship, unless some restriction is placed upon his authority which prevents this (*Davidson*, 1810, 12 East, 381, 11 R. R. 420). It was at one time held in Scotland that he could bind his principals to repay money borrowed by him, although his commission did not bear any express authority to borrow, and the money was not applied to their behoof (*Rogers*, 1732, Mor. 3954).

Superiority.—Superiority is the estate reserved by law to the granter in every feudal grant of land. Erskine (ii. 3. 10) defines it as "the interest which the superior retains to himself in all feudal grants"; but by this he must not be taken to mean any interest which a proprietor may choose to reserve in conveying his lands, for, as he explains in regard to the definition of a feu, "the radical right is said to remain in the granter because there is not in any feudal grant an absolute or total cession of the subjects disponed, made by the granter; he reserves to himself, or rather the law reserves for him, an interest in it" (ii. 3. 7). It is essential to the constitution of a feu that the superiority should remain with the granter while the property is transferred to the grantee, and that the grantee should acknowledge the superiority by some service or payment; so that no right wanting these characteristics can be a feu (Ersk. ii. 3. 11; Bell, *Lect.* 563). This reserved right to, and interest in, lands feued, because it is regarded as the highest right, is called the Superiority. For the same reason it is also called the *dominium directum* (Ersk. ii. 3. 10; cf. Stair, ii. 3. 7). Similarly, the granter is called the superior because he is feudally higher than the grantee, who by taking infeftment in the lands under the grant (see Infeftment) becomes his vassal.

The nature of the superior's right appears most clearly by comparison with the correlative right of the vassal. The term *feu* is most commonly used to denote the subjects granted, more particularly in their relation to the superior; but it more properly expresses the vassal's right to them, and may be defined as a right to lands given under condition of a certain

return to be made by the grantee, the radical right remaining with the granter (Ersk. ii. 3. 7; Menzies, 519, 520). The right so given is the vassal's estate, which is called the *dominium utile*, or property (Stair, ii. 3. 7; Ersk. ii. 3. 10). It is not a usufructuary right, but a right of property in the subjects carried by the charter. The superior's beneficial interest is under ordinary circumstances confined to the services and payments due by the vassal; yet the superiority also is not a mere burden on the lands. Rather the relation of superior and vassal with regard to their respective interests in the lands resembles that of joint proprietors (Bell, *Lect.* 562); but the joint ownership is a most abnormal one, consisting of two concurrent ownerships, each in its nature absolute over the whole subjects (Stair, ii. 3. 7; Menzies, 520, 527; Bell, *Prin.* 676; see FEUDAL SYSTEM). On the one hand the vassal, as has just been said, is absolute proprietor, while, except in certain contingencies, the superior can exercise no right of ownership. Thus the superior has no right to possess the lands or to draw the rents (Bell, *Lect.* 563), nor can he sue an action of maills and duties (*Prudential Assurance Co.*, 1884, 11 R. 871), nor is he regarded as a heritor in respect of the lands feued (Bell, *Lect.* 642; *Dundas*, 1778, Mor. 8511). On the other hand, the superior holds the radical right to the land. After making the grant, he holds his estate of superiority on the title on which he formerly held the *dominium plenum* or undivided estate (Ersk. ii. 5. 1); and when that was necessary, he could demand from his own superior a renewal of that title, including lands feued by him (*ib.*). He is also entitled to pursue real actions relating to his feued lands against any but his vassals, as to whom he is barred by his own grant (Ersk. ii. 5. 1; Menzies, 598; *Edmonstone*, 1886, 13 R. 1038; *M. Breadalbane*, 1851, 13 D. 647; *Laird of Lagg*, 1624, Mor. 13787). In alienating or burdening the superiority, he dispones the lands (p. 182, *infra*); and on resuming possession, whether by resignation or by forfeiture, he thenceforth, without taking sasine, possesses the *dominium plenum* on his original title (see CONSOLIDATION).

The superior may be either the Crown or a subject holding land immediately or mediately of the Crown. Crown superiorities, like Crown lands, are allodial, for the Crown, as the original owner of all lands in the kingdom and source of feudal rights, can have no superior; but every subject proprietor must hold his lands either of the Crown directly or of some other subject. Udal lands in Orkney and Shetland and Church lands form exceptions to this rule. These are, like Crown lands, allodial; that is to say, their proprietors, though subjects, have in them the absolute right which the Crown has in its property (Ersk. ii. 3. 8; Menzies, 516; *Dundas*, 1777, 5 Bro. Supp. 609. See FEUDAL SYSTEM). Also when a title is completed under the Lands Clauses Act (8 & 9 Vict. c. 19, s. 80), no feudal relation with the superior of the lands is created (*Mags. of Inverness*, 1893, 20 R. 551; cf. *M'Corkindale*, 1893 (O. H.), 31 S. L. R. 561).

As every feudal proprietor may sub-feu his lands, an indefinite number of feudal estates may be created in any one parcel of land (see FEUDAL SYSTEM). For example, A. may feu to B., B. to C., and C. to D. In this case, A. is B.'s superior, and over-superior to C. and D.; but unless A. be the Crown, he must in turn be a vassal. B. is vassal to A., superior to C., and over-superior to D. C. is vassal to B. and sub-vassal to A., but superior to D. Superiors lower in the feudal series are, in contrast with the over-superiors, called mid-superiors or subaltern superiors, and their estates are called mid-superiorities. The estate of an over-superior as such is called an over-superiority, and that of a sub-vassal as such, a sub-feu.

All these feudal designations are strictly relative. They are not appropriated to particular individuals in the feudal series, but apply each to every one, according to the relation in which he is considered. In this way one person may be, in respect of one piece of land, sub-vassal to a first superior, vassal to a second, and, as regards his own interest, proprietor, or in turn superior. His property, also, is to his over-superior a sub-feu, to his superior a feu, and to himself, his property or superiority, as the case may be.

The mid-superiorities created by successive feus frequently were created to confer a vote, and had no pecuniary value. But they were real indefeasible estates, which could only be extinguished by Consolidation (p. 183, *infra*). That is to say, as a feu-charter contains a holding *de me* only, the feuar could not at his own hand pass over his immediate superior to hold of a higher superior. But before superiors were compelled to grant entry to disponees (p. 155, *infra*), defeasible mid-superiorities used frequently to be created under deeds containing double holdings *de me* or *a me de superiore meo*. The disponee by taking infeftment *de me* created a mid-superiority in the disponer, but on his being acknowledged by the disponer's superior, his title was attributed to the *a me* holding as if the defeasible mid-superiority had never existed (see DISPOSITION).

Originally feudal grants were not so much alienations of property as temporary cessions of the rights of property, but without the right of alienation, to a favoured individual. This is only in accordance with the primary design of feudalism,—the maintenance of a military following. It is probable that the superior originally had the right of resuming possession at will, and certain that he at one time might do so on the death of the vassal to whom the grant had been made. But this was never the law of Scotland. From the introduction of feudalism into this country feus have been held to descend to the heir of the investiture, or, if there be no destination in the charter, to the grantee's lawful heir (Ersk. ii. 7. 5). But the theory that the feu was only given to one single vassal at a time, on whose failure the superior's original right came again into force, was an operative principle in our law up to 1874. The practical results of the theory were the necessity for writs by progress and the right to casualties. Each heir or singular successor, in order to become entered in the lands as vassal, had in turn to receive them under a precept from the superior, as the original feuar had done, the theory being that the lands were in the superior's hands either by non-entry (p. 167) or by resignation (see DISPOSITION). When a vassal died, until the heir had been ascertained and acknowledged there was no vassal, and so the lands came into the superior's hands under the casualty of non-entry. When the heir was ascertained, the superior in all tenures but ward then issued a precept to infeft him in the lands on his paying the casualty of relief for their recovery. In the tenure of ward, for the duties of which a minor was considered incompetent, the lands remained with the superior under the casualty of ward while the heir was under age. The casualty of marriage seems to have been designed as a safeguard against a virtual alienation by an unsuitable marriage on the part of the heir. When a vassal was outlawed he could no more perform his feudal duties than if he were dead, yet his heir could not enter in his place; so during his life his lands fell to the superior by liferent escheat. In the tenure of ward the alienation of more than half the fee inferred Recognition, *i.e.* the resumption, of the whole by the superior; for since it was essential in a ward fee that the superior should have a vassal of his own choice in possession of the lands, alienation

amounted to desertion of them (Ersk. ii. 5. 10). Under the other tenures alienation did not infer recognition. Sub-feus, in which the original feuar remained as vassal, were competent to any extent. But the feuar's right was so far regarded as inalienable, that conveyances purporting to alienate the vassal's whole right and substitute another in his place, were inept as regards the superior even after possession had been taken by the disponee (*Wallace*, 1739, Mor. 4195; *Hyslop*, 1863, 1 M. 535). The original vassal remained vassal, and the disponee a mere possessor, till the superior, having received the lands back, granted them to the disponee, which was the method more in accordance with theory (Resignation), or adopted the vassal's disposition as his own deed (Confirmation; see DISPOSITION). On granting the new infeftment the superior was by statute entitled to a fine called composition.

Duties of Superiority.—A superior, by granting a feu, becomes liable, without any stipulation, to warrant it to the feuar and his successors (Ersk. ii. 3. 11). Before the commencement of the Conveyancing Act of 1874, he was also bound to give an entry to those who were entitled, whether as heirs or by singular title, to succeed the feuar as vassals in the lands. Entry is the recognition as his vassal by a superior of lands of the person entitled to the property of the lands. It is now unnecessary and, subject to the exceptions noted below, incompetent for a superior to grant an entry, for every proprietor infeft in lands is to be held to be entered with the nearest superior of them whose estate of superiority would not have been defeasible at the will of the proprietor so infeft under the law as it existed prior to the passing of the Conveyancing Act (37 & 38 Vict. c. 94, s. 4 (1 and 2)). It is as yet unsettled whether a person infeft only in security is thereby entered with the superior (*Campbell*, 1890, 17 R. 661). However this may be settled, a bondholder can in no case be considered a singular successor so as to be entitled to the benefit of a stipulation in favour of singular successors in a feu-right. But the holder of an absolute disposition, though truly in security, is a singular successor (*Campbell, supra*; see ABSOLUTE DISPOSITION).

It is now incompetent for a superior to grant any writs by progress, by which entry used to be granted, except charters of *novodamus*, precepts or writs from Chancery or of *clare constat*, or writs of acknowledgment (37 & 38 Vict. c. 94, s. 4 (1)). By the charter of *novodamus* the vassal's right is not merely renewed, but the respective rights of superior and vassal may be modified. The precept of *clare constat* is a convenient means of making up a title when the superior is willing to acknowledge his vassal's heir without service (Ersk. iii. 8. 71; Menzies, 805; Bell, *Lect.* 1086 and 1096). Writs of *clare constat* were made equivalent to precepts by the Titles to Land Act, 1858. The vassal's title may now be completed by registration of a writ of *clare constat* (21 & 22 Vict. c. 76, s. 11; 31 & 32 Vict. c. 101, s. 101). Precepts and writs from Chancery are similar writs by which titles of heirs in Crown holdings may be completed (Ersk. iii. 8. 79; Menzies, 830; Bell, *Lect.* ii. 1086; 21 & 22 Vict. c. 76, s. 11; 31 & 32 Vict. c. 101, s. 84). The heir or executor, as the case may be, of a creditor in a bond and disposition in security may complete his title thereto by writ of acknowledgment from the debtor registered in the appropriate Register of Sasines (8 & 9 Vict. c. 31, s. 3; 31 & 32 Vict. c. 101, s. 125, Sched. (I.); 37 & 38 Vict. c. 94, s. 63).

Though it is thus still competent to receive an entry from a superior, the rules as to forcing an entry are no longer of more than historical interest; for whenever a superior is unwilling, or, from his title being

incomplete, unable to give the entry asked, the obvious course for the heir is to serve, and so obtain a statutory entry.

Before 1469 only the heir of the investiture was entitled to demand an entry against the superior's will. But appraisers, adjudgers, and purchasers at judicial sales were successively given this privilege by statute (Acts 1469, c. 36; 1672, c. 19; 1681, c. 17). If the superior refused to give an entry, these four classes of persons were entitled to have him ordained to do so by three consecutive precepts from Chancery, and on his persisting in his refusal, to apply for entry to the next superior *supplendo vices* (Stair, iii. 5. 46 *et seq.*; Ersk. iii. 8. 79; Menzies, 819). In 1747 every heir duly served, and every purchaser in right of a procuratory of resignation, was given right to charge the superior on letters of horning to enter him on his tendering the casualties due (20 Geo. II. c. 50, ss. 12, 13). After this enactment superiors could still refuse entry except by resignation. But they were subsequently obliged to grant entry by confirmation to any one requiring them to do so who could show a title capable of being made public by confirmation and offered the proper casualties (10 & 11 Vict. c. 48, s. 6; 31 & 32 Vict. c. 101, s. 97).

Before a superior can effectively give an entry, and so be entitled to call on the vassal to enter (p. 169), his own title must be complete; but though it is incomplete at the time of giving entry, if it be subsequently completed the vassal's title will be validated *accretione* (Ersk. ii. 5. 45; iii. 8. 80; Bell, *Lect.* ii. 741, 1140; Bell, *Prin.* 710). A vassal is not in safety to take an entry from a superior who is unable to instruct a right to the superiority (*Henderson*, 1836, 14 S. 540), nor is he bound to do so (*Melvill, Chalmers*, etc., *infra*). Yet he may not take critical objections to the superior's title; and, on the other hand, it appears that a title taken from a superior who can show an *ex facie* title and an undisputed right is good, though the superior's title be afterwards reduced (*Gibson-Craig*, 1838, 16 S. 1332; affd. 1841, 2 Rob. 446; Menzies, 813; *Innes*, 1844, 7 D. 141). A vassal is not entitled to object to the title of a superior from whom he or his authors have already taken an infeftment (*Breadalbane*, 1880, 8 R. 42; affd. 1881, 8 R. (H. L.) 92; see Bell, *Prin.* 710; Bell, *Lect.* 1142). A liferenter in the superiority by reservation can enter vassals without special power reserved but a liferenter by constitution cannot unless he has special power (Bell, *Lect.* ii. 1141). A vassal is entitled to receive entry jointly from *pro indiviso* superiors and also from heirs-portioners, unless the formal right of superiority has been taken by the eldest (Bell, *Lect. ib.*; Bell, *Prin.* 1083). The entry implied under the Conveyancing Act of 1874 is equally effectual, whether the title of the superior or of any over-superior has been completed or not (37 & 38 Vict. c. 94, s. 4 (2)).

After 1474, if a superior did not complete his title when required, he was liable to be charged, at the instance of an heir duly served, to obtain himself infeft in forty days, and on his failure, to loose the tenant for his lifetime (Act 1474, c. 57; *Rossmore, infra*). The vassal had then to obtain decree of declarator of tinsel of the superiority (*Dickson*, 1802, Mor. 15024), after which he could charge the next superior to give him an entry *supplendo vices*. The superior refusing to complete his title lost only the casualty of non-entry due by the vassal whom he refused (Ersk. iii. 8. 80; *Rossmore's Trs.*, 1877, 5 R. 201). A simpler procedure was introduced by the Transference of Lands Act of 1847 (10 & 11 Vict. c. 48, s. 8), which has been incorporated in the Titles to Land Consolidation Act of 1868. If a superior had not completed his title so as to be able

to give an entry, then, if the annual value of the superiority did not exceed five pounds, any person entitled to demand an entry might, by summary petition in the Bill Chamber, have the superiority declared forfeited, and thereafter apply for entry to the over-superior (31 & 32 Vict. c. 101, s. 104). If the yearly value of the superiority was over five pounds it could not, in similar circumstances, be declared forfeited; but the vassal might on petition obtain warrant to enter with the Crown or any mediate over-superior, the immediate over-superior losing the casualties due on the vassal's entry, and being liable for the expenses of the process and the completion of the vassal's title (ss. 105, 106). A decree of forfeiture, whether under the Act of 1847, or of 1868, in order to be effectual had to be against those personally in right of the superiority (*Rossmore, cit.*). Whatever the value of the superiority, the superior might relinquish his estate to the petitioning vassal by minute in process, whereupon the vassal might proceed to obtain entry with the over-superior (s. 107).

An analogous procedure, still perfectly competent, by which, apart from applications for entry, mid-superiorities may be extinguished, was introduced by the Titles to Land Act of 1858 (21 & 22 Vict. c. 76, s. 23). Under the provisions of that statute as re-enacted by the Consolidation Act (31 & 32 Vict. c. 101), any superior, whether he has made up a title or not, and whatever the annual value of his estate, may relinquish it to his immediate vassal by deed of relinquishment (s. 110, Sched. (CC) No. 1). On this deed being accepted by the vassal (Sched. (CC) No. 2), and with the acceptance and a writ of investiture by the immediate over-superior written on it (Sched. (CC) No. 3) being recorded in the appropriate Register of Sasines, it is declared that the relinquished superiority shall be extinguished, and that the vassal and his successors shall hold the lands of the over-superior by the tenure and for the *reddendo* by and for which the relinquished superiority was held. The over-superior is declared bound on production to him of the deed of relinquishment and acceptance, to receive the vassal by writ of investiture (s. 111). It is not quite clear, in view of the provisions of the Conveyancing Act of 1874, whether the writ of investiture is still necessary, or the registration of the deed of relinquishment and acceptance is sufficient to extinguish the superiority and make the vassal hold of the nearest superior whose estate is indefeasible. The purpose and tendency of the Conveyancing Act favours the latter view; but three propositions may be advanced for the former. (1) What the section in question enacts is that registration of the deed of relinquishment with the acceptance and writ of investiture written thereon, will extinguish the mid-superiority. (2) Recognition of a vassal by an over-superior for the first time is not an ordinary entry, and there seems to be as good ground for excepting it as for excepting entry by charter of *novodamus*. (3) In point of form the writ of investiture does not resemble any charter, precept, or writ by progress. The investiture on relinquishment is as effectual as if the granter of the deed of relinquishment, having completed his title, had conveyed the superiority to his vassal, who, thereupon, had completed his titles and resigned *ad remanentiam* in his own hands (s. 111). In case of the relinquishment of entailed superiorities, provision is made for the application of the price (s. 112). The heir entitled to a superiority, if he relinquishes without making up his title, does not thereby make himself liable for his author's debts, except to the extent of the price which he has received (s. 110). A superior may lose his rights entirely if his vassal holds of another superior on an *ex facie* good title for the prescriptive period (*Buccleugh*, 1890, 18 R. 1; cf. *Roxburghe*, 1890, 18 R. 8).

Rights of Superiority.—The rights of superiority may be conveniently classified, after Erskine's division of the properties of feus, as essential, natural, and accidental (Ersk. ii. 3. 11); though Erskine himself classifies them simply as fixed and casual, evidently regarding the accidental rights not as rights of superiority proper, but as rights by stipulation (Ersk. ii. 5. 1). The essential or fixed rights are two: the radical right of property in the lands, which has already been discussed, and the right to some service or payment as an acknowledgment from the vassal. From the first word in the Latin charter of the clause dealing with it, this acknowledgment got the name of the *reddendo* (Menzies, 551; Bell, *Lect.* 1632). The natural rights are so called because, while they may be renounced at will, they yet, in the absence of stipulation, arise from the nature of the feudal contract. To this class belong the casual rights or casualties, so named from their falling to the superior on uncertain events (Ersk. ii. 5. 5). The accidental rights, under which fall reservations, real burdens, and conditions, depend in each case on the terms of the charter or contract.

Duties and Casualties.—The precise nature of the fixed services or payments and the casualties due to the superior depends, firstly, on tenure, and secondly, on stipulation.

Ward.—In the tenure of ward, the usual *reddendo* was "services used and wont," *i.e.* military service; but it was quite consistent with the holding to stipulate for some special service (Ersk. ii. 4. 2). Of the casualties proper to ward there were three peculiar to that holding—ward, marriage, and recognition—as well as several others which, being common to feu-farm, will be dealt with under that head. By the casualty of ward (Ersk. ii. 5. 5 *et seq.*), which fell when a vassal left an heir in minority, the superior was entitled to the guardianship of the minor's person and the administration of his estate, with the full profits thereof. The reason of this was that the superior being without a vassal able to perform proper duties (Ersk. ii. 5. 9), was entitled to the profits of his estate. Moreover, no minor was allowed to enter to a ward fee (Ersk. ii. 5. 30); so when such a fee fell to a minor, the lands were in *non-entry*, and he was regarded not as vassal but as heir till his majority. Without his own consent or the authority of law the superior's right could not be limited by debts contracted by the vassal or by rights granted by him, such as subaltern grants (except for a short period by statute, Ersk. ii. 5. 7), leases, or servitudes not fortified by prescription. The ward was, however, burdened with an alimony to the heir, and restricted by widow's terce and debts of adjudgers who had been entered by the superior or had competently charged him to enter them before the casualty fell. Further, the superior was bound to exercise his right to the profits of the estate with the same moderation as a liferenter. The casualty came to an end in the case of an heir on his attaining the age of twenty-one, and in that of an heiress or heirs-portioners on the heiress or the eldest heir-portioner attaining the age of fourteen. A ward fee held of a subaltern superior who was likewise a ward vassal was called *black ward*, because the vassal was liable to lose his rents during both his own minority and that of his superior (Ersk. ii. 4. 4). The casualty of ward could be taxed, that is, the superior could compound his rights for an annual payment during his vassal's minority: in which case, on being paid his yearly composition, he had no further concern with the guardianship of the ward or the administration of the estate, and was released from all responsibility for the ward's maintenance (Bell, *Lect.* 562; Ersk. *ib.*). The casualty of *marriage* fell due when the feu came to be in the hands of a minor heir over the age of

puberty. This casualty seems to have been the subject of so much abuse that it is difficult to say what the legal rights of superiors were. The right is said to have arisen from the superior's tutorial power over a minor heir, in pursuance of which he at first arranged a suitable match for his ward, and later came to demand what the heir's position entitled him to expect from his wife as tocher. The payment, called the avail—*i.e.* the value—of the marriage, seems originally to have been demanded only from minors unmarried at the death of their ancestors on their being required by the superior to marry. But it was, through time, extended to all cases where the heir, even when major, was unmarried at the ancestor's death, whether he was requested to marry or not. The superior's consent to the marriage was latterly construed as a renunciation of the casualty; but to accept the wife chosen by the superior did not release the heir from his obligation. On the contrary, if the superior selected a wife "without disparagement" (Stair, ii. 4. 59) who herself freely consented, to refuse her and marry another subjected the heir to a double avail. The avail was originally calculated as the amount of tocher which the heir might be expected to receive in consideration of the value of his whole ward lands; but it was subsequently modified by the Court of Session to two years' rent of his whole lands. It was payable entirely to the "eldest" superior; that is, the Crown, and after it the subject-superior of whom, or of whose ancestors, the heir or his ancestors earliest held land in ward. By Craig's time the double avail amounted simply to a heavy single avail (Ersk. ii. 5. 18 *et seq.*). The casualty of *recognition* was a forfeiture to the superior of the whole feu on the vassal's alienating more than half of it to a stranger, that is, to anyone not *alioqui successurus*. The word *recognition* at first signified any resumption of his original estate by the superior, but came later to have this limited sense. This casualty, like the preceding two, depends on the principle that the superior is entitled to have an efficient vassal in his lands. Its leading rules are that the alienation must be voluntary,—though not necessarily gratuitous, —effective, and without the superior's consent. Thus neither adjudications, nor alienations on which no sasine followed, nor feus even of the whole lands for a feu-duty of more than half the rent, nor infeftments of warrandice before eviction, nor infeftments in security of a sum less than half the value of the lands, nor alienations by vassals under interdict, nor those to the completion of which the superior's confirmation was necessary, could infer recognition. Alienations to which the superior had consented could not be computed with unauthorised alienations, to make up the half. The superior might waive his rights either expressly by confirming an alienation by which the forfeiture had been incurred, or implicitly by granting a charter of confirmation, precept of *clare constat*, or other deed recognising the vassal's right which he was not legally bound to grant (Ersk. ii. 5. 10 *et seq.*). The tenure of ward, with the services and casualties peculiar to it, was abolished in 1747 (20 Geo. II. c. 50, ss. 1 and 9). Ward feus held of the Crown were converted into blench (s. 2), and those held of subject-superiors into feu-farm (s. 4).

Blench.—Blench tenure affords a striking illustration of the formal necessity in a feudal holding of some acknowledgment to the superior. Grants *in libera alba firma* are truly gratuitous, being commonly bestowed as the reward of some past service; yet the vassal is bound to make some yearly payment, however trifling—for example, a pair of spurs, a penny money, or a pound of pepper. If the thing payable is of yearly growth, it is not demandable beyond the year; but if not, it may be demanded any time within the years of prescription, unless the taxative words *si petatur*

tantum, or *si petatur*, are added in the *reddendo* clause, in which case the vassal is free beyond the year, whatever the nature of the subject (Ersk. ii. 4. 7). The vassal is also liable for the same casualties as in feu. The measure of the casualty of relief in this tenure is the blench duty (Ersk. ii. 5. 49; Bell, *Lect.* 624). That of non-entry, in fees originally blench, is the retour duty or new extent. In fees converted from ward it is one per centum of the valued rent, a valuation made for purposes of assessment about the time of Cromwell (Ersk. ii. 5. 30–36; Bell, *Lect.* 623; Duff, *Feudal Conveyancing*, 462).

Mortification.—In the tenure of *mortification*, by which, before the Reformation, land was held by the Church and religious houses, the only return was *preces et lacrymæ*, that is, the ministrations of the Church on behalf of the donor's soul. As the vassal could never die, there were no casualties. The main purpose of this form of grant was declared superstitious at the Reformation (Act 1587, c. 29), and it is now practically obsolete, though still competent for educational and charitable purposes (Ersk. ii. 4. 10 and 11).

Burgage.—*Royal burghs* hold their land of the sovereign by burgage tenure for the service of watching and warding. While each burgher is liable for his share of service, the true vassal is the burgh as a corporation, and consequently there are no casualties under this holding (Ersk. ii. 4. 8; see BURGH).

Feu-farm, now by far the most important tenure, arose from the necessity of maintaining agricultural industry. Its earliest form was soccage, in which the vassal held his feu on condition of agricultural service on his lord's land in place of military service (Ersk. ii. 4. 5). It is doubtful whether this form ever prevailed in Scotland (Ersk. i. 1. 35). The *reddendo* in feu-farm proper is a feu-duty or yearly payment, either in money or in kind; in addition to which various personal services used commonly to be stipulated. It early became the practice in this holding to enumerate the particular services to be rendered in each case, adding the words *pro omni alio onere* to obviate further demands on the part of the superior (Ersk. ii. 4. 5). These services fall into two general classes, the military and the civil. The first comprise hosting and hunting, or following the superior in wars and commotions and at frays and followings, that is, supplying him with a retinue when required, either for public or private wars, or in peace for purposes of display (Ersk. ii. 5. 2). Shortly after the rebellion of 1715 all such services were declared illegal in both feu and ward holdings, pecuniary compensation being provided to superiors (Clan Act, 1 Geo. I. stat. 2, c. 54). The second, which are still competent, consist chiefly of agricultural services, for example, the supply of reapers, but may include others of a more personal nature, so long as they are in no way military (*Munro*, 1763, Mor. 14497, supplying peats for superior's house; *Duke of Argyll*, 1762, Mor. 14495, the maintenance of a boat and crew for the superior's use). So far as agricultural, these services must be demanded year by year or they are lost without compensation (*Young*, 1693, Mor. 13071; *Duke of Hamilton*, 1835, 14 S. 162; *Hope*, 1872, 10 M. 347; on services generally, Menzies, 521, 552; Bell, *Lect.* 573, 633). All services still exigible by a superior may now be commuted under the Conveyancing Act of 1874, as follows: (*a*) Where an annual money payment has in fact been accepted by a superior for five years, in lieu of any services due to him, whether in pursuance of an express agreement or not, the payment is to be taken to be the yearly value of the services in lieu of which it has been made, and the superior is bound to accept it as such. (*b*) Where there has been no such practical commutation, either party may apply to the Sheriff to fix the annual value

of the services, which he is authorised to do summarily and finally, and the sum fixed by him is thereafter to be accepted by the superior in place of the services in question. The annual value, when ascertained in the first method, may be stated in a memorandum, framed after a form provided by the Act (Sched. G), signed by the parties or their respective agents. The money payment is declared, on registration in the appropriate Register of Sasines of such a memorandum, or of an extract of the Sheriff's decree, to acquire all the qualities of feu-duty, and to form an addition to any existing feu-duty. Further, on such registration the superior's right to the services is to be held to be discharged (37 & 38 Vict. c. 34, ss. 20, 21). This commutation is competent notwithstanding any entail (s. 21). Feu-duty now generally consists of a money payment, but may also be stipulated for in kind, subject to the provision of the Conveyancing Act that in all feus granted after its commencement the feu-duty must be of fixed amount or quantity (s. 23). All duties payable in kind are, in the absence of contrary stipulation, demandable in the particular thing stipulated, whether it continues to be produced on the lands or not; but the superior is entitled, if the stipulated payment be in grain, to demand the grain grown on the lands at the time, though superior to that grown at the date of stipulation (Bell, *Prin.* 694). In the case of payment being stipulated in kind or money alternatively, the option is with the vassal unless the terms of the *reddendo* clause demand the opposite (*ib.* 696). Unlike services, payments, whether in money or in kind, fall into arrears (*Young, supra*; *Hope, supra*). The superior has the option of demanding his arrears in kind, or in money according to the market values for the respective years (*Duke of Hamilton, supra*). It has been laid down as a general rule, that arrears of feu-duty do not, in the absence of express stipulation, bear interest until they have been judicially demanded by the superior (*Tweeddale*, 1842, 4 D. 862; Bell, *Prin.* 695). But doubts have been expressed whether this rule is inflexible, and, in particular, whether the demand must be judicial (*Tweeddale's Trs.*, 1880, 7 R. at p. 643). A superior has been found entitled to bank interest from the date of consignation on arrears of feu-duty to which he had been found entitled out of consigned money (*Pollock*, 1862, 24 D. 371). It is not settled whether even where there is a stipulation for interest the vassal is entitled to purge an irritancy which he has incurred, without paying interest (*Maxwell's Trustees*, 1893, 20 R. 958); but the opinions expressed in the case of *Maxwell's Trustees* favour the view that he would be. In modern feu-rights interest is almost invariably stipulated for.

The superior has various means of securing and compelling payment of his feu-duty, depending respectively on his radical right of property in the lands, his real right to the feu-duties, and the personal obligation of the vassal. In virtue of the first he has, in rankings of creditors, a preference to the extent of the full feu-duty over the whole of the lands, however these may be divided (Bell, *Prin.* 697; Bell, *Lect.* i. 634; see Lord Watson in *Sanderson, infra*, 12 R. (H. L.) at p. 70), and his rights are in no way affected by commercial sequestration (19 & 20 Vict. c. 79, s. 102). He also has a hypothec over the crops and stocking in rural subjects, and the *invecta et illata* in urban subjects. This hypothec is similar to the landlord's, but preferable to it (Ersk. ii. 6. 63; Bell, *Com.* ii. 27; Bell, *Prin.* 698; *Vuille*, 1823, 2 S. 155). It is not affected by the Hypothec Abolition Act, 1880 (43 Vict. c. 12, s. 1), or the Bankruptcy Act (19 & 20 Vict. c. 79, s. 119). In practice the alternative remedy of poinding of the ground in virtue of the real right is adopted more generally than sequestration under the hypothec.

Thirdly, feu-duty, for the reason that it is an essential condition of the feudal holding, is a debt secured on the lands or *debitum fundi* independently of the conditions essential to the constitution of ordinary real burdens (Ersk. ii. 5. 2: Stair, ii. 4. 8). In particular, though since conveyances were made registrable it will generally do so, it does not require to appear on record (Bell, *Lect.* 1156). Also, while the duties in feus constituted since 1874 must be of fixed amount or quantity (37 & 38 Vict. c. 97, s. 23), duties of indefinite amount in earlier feus are equally *debita fundi*.

"The general rule as between superior and vassal — and confining myself strictly to feudal principle, which in this matter is still in full force —is," said Ld. Gifford in *Morrison's Trs.* (1878, 5 R. 800 at 809), "that all the reserved rights of the superior — that is, all rights reserved by the charter—everything which he does not expressly give to the vassal—remain effectually secured by the superior's own infeftment, and are therefore real rights — *debita fundi* — available against the subject into whose hands soever the mere vassal's right, called the *dominium utile*, may happen to come. . . . In general, therefore, it is really superfluous for the parties to a feu-contract to stipulate that the superior's rights, or any of them, shall constitute *debita fundi* or real burdens" (cf. Ld. Corehouse in *Tailors of Aberdeen*, 1840, 1 Rob. 296). Accordingly, the superior is "entitled to an action for poinding all the goods on the lands burdened," *i.e.* on the feu, "in order to his payment, even though the original debtor should have been divested of the property in favour of a singular successor" (Ersk. iv. 1. 11). This right to poind in itself gives no preferential right to the goods (Bell, *Prin.* 699). To secure such right the superior must raise an action of *poinding of the ground*, or real poinding, so called because it is directed not against a personal debtor to secure the effects belonging to him, but against the burdened lands to secure the effects brought upon them, without regard to the liability of their proprietor. The calling of this action, by rendering the subjects litigious, secures the superior's preference against all diligence not then complete. The conclusions are that the goods should be poinded and sold in satisfaction of the feu-duty already due and of the future payments as they respectively fall due (Mackay, *Manual of Practice*, 509).

Unless it has been allocated (p. 167, *infra*), the whole feu-duty is a real burden on every part of the lands burdened, and so, if the feu has been divided among various disponees or sub-vassals, the superior can realise his whole feu-duty from the effects brought on to the lands by any of them (*Crs. of Eyemouth*, 1757, 5 Bro. Supp. 856; *Stormount*, 1682, 2 Bro. Supp. 13; see *Sandeman*, 1881, 8 R. 790; *Sandeman*, 1883, 10 R. 614; rev. 1885, 12 R. (H. L.) 67). Tenants are so far protected by statute as to be liable only to the extent of their rents due and unpaid (Act 1469, c. 36; Stair, iv. 23. 10: Ersk. ii. 8. 33; Bell, *Lect.* 1195). But where the tenant has paid a grassum, a question arises as to the true amount of his liability to the superior (Bell, *Prin.* 699).

A former superior, after he has alienated the superiority, cannot poind the ground for arrears though incurred while he was superior, for the reason that he no longer has the real right to the land, which is the foundation of the action (*Scot. Her. Co.*, 1885, 12 R. 550; and see Ld. Rutherfurd Clark in *Maxwell's Tr.*, 1893, 20 R. 958). The superior's right to poind the ground is not affected, like that of heritable creditors, by the bankruptcy statutes (Bell, *Prin.* 699; 42 & 43 Vict. c. 40, s. 3; 49 Vict. c. 23, s. 3 (4); Ld. Deas in *Royal Bank*, 1877, 4 R. 985; 19 & 20 Vict. c. 79, s. 102).

In the fourth place, the vassal, by accepting the feu, subjects himself to personal liability *ex contractu* for payment of the feu-duty (Stair, ii. 4. 7; Ersk. ii. 5. 2; Bell, *Prin.* 700; *Wallace*, 1739, Mor. 4195; *Hunter & Boag*, 1834, 13 S. 205; *Macrae*, 1891, 19 R. 138, Ld. Kinnear, at p. 146; *Aiton*, 1889, 16 R. 625, Ld. Pres. at p. 629). His liability is the same whether the feu be granted under a feu-charter, which contains no express obligation on the vassal's part, or under a feu-contract in ordinary form, which contains an express obligation by the vassal to pay the feu-duty and perform the prestations of the contract and a clause of registration for execution (Ld. Pres. Inglis in *Aiton*, 16 R. at p. 629). Under a feu-contract, payment or implement may be enforced by summary diligence, while under a charter an action is necessary. The ordinary terms of the obligation in a feu-contract are as follows: "For which causes and on the other part, the said B. (the vassal) binds and obliges himself, and his heirs and successors whomsoever in the said subjects, to make payment to the said A. (the superior), and his heirs, successors, or assignees, of the sum of £ sterling yearly in name of feu-duty for the said subjects" (*Jurid. Styles*, i. 36). The rule as to the duration of the liability of a vassal so bound was stated by Ld. Pres. Inglis in the *Police Comrs. of Dundee* (1884, 11 R. 586) as follows: "The feuar is bound so long as he lives and continues as feuar in the whole obligation, and when he dies his heirs and executors are liable only in arrears, while his successor in the feu becomes liable in the whole obligation" (cf. Ld. Pres. Inglis in *Dick Lauder*, 17 R. at p. 327). So long as he lives, the feuar "continues as feuar" until another is entered in his place. He cannot avoid payment of his feu-duty by refuting his feu, that is, by relinquishing it to the superior without the superior's consent. This was attempted in the case of *Hunter* (1834, 13 S. 205), on the ground that feus, being *beneficia*, could be renounced at will. But by the judgment of the whole Court it was found that, whether or not this doctrine applied to real *beneficia*, where the feu was truly onerous the consideration was legally due (see Stair, ii. 3. 34, ii. 4. 48, ii. 11. 6). Again, the vassal could not before 1874 free himself of his obligation merely by alienating his feu to a third party, even though possession was ceded to the disponee.

But, as follows from the above rule, on an entry being granted to the disponee by the superior the former vassal became free as to future payments, and the disponee became liable in his place *ex delegatione* (*Wallace*, 1739, Mor. 4195; *Hyslop*, 1863, 1 M. 535, see p. 551; *Marshall*, 1895, 22 R. 954, Ld. Kinnear, at p. 962, and Ld. Kyllachy, *ib.*). When, by the Conveyancing Act of 1874 (37 & 38 Vict. c. 94, s. 4 (2)), it was enacted that infeftment should imply entry with the superior without his intervention, it was provided that, notwithstanding this, the last-entered vassal should continue liable for the feu-duties and other prestations of the feu till notice of change of ownership was given to the superior, without prejudice to the superior's remedies against his impliedly entered vassal. If the last-entered vassal has to make payment of any feu-duties owing to his successor's neglect to give notice, he may recover them from him, and for this purpose all the superior's remedies for recovery of feu-duty are to be held to be assigned to him, "but that always under reservation of, and without prejudice to, the superior's rights, remedies, and securities for making effectual and recovering all other feu-duties due and to become due to him" (*ib.*). Apart from this enactment, no one paying feu-duties on behalf of another has any right to an assignation of the superior's remedies for his relief (*Guthrie*, 1880, 8 R. 107;

Henshelwood's Trustees, 1877, 8 R. 108, in note). To free a vassal from his liabilities there is now required, *first*, the implied entry of his successor, and, *secondly*, notice of change of ownership. It is illegal to stipulate for any other form of intimation than that provided by the Act (s. 22).

The liability for feu-duties accruing after the death of a vassal is transferred to his successors in the feu, and no responsibility for them attaches to his personal representatives as such. This is illustrated by two recent cases (*Aiton*, 1889, 16 R. 625, and *Macrae*, 1891, 19 R. 138). In the first the vassal bound himself and his heirs, executors, and successors whomsoever "to pay the feu-duty named," and that at the term of Martinmas yearly. He died on 15th April 1887, leaving his whole personal estate to his wife. The heir refused to take up the feu, and in March 1888 the superior raised an action against the executors for the feu-duty due at Martinmas 1887, or, failing their making payment of the feu-duty, for damages in respect of their failure to take up the feu. The executors plead that on a sound construction of the feu-contract they were not liable for feu-duties after the death of the late vassal, and that, not having broken any contract, they were not liable in damages. These contentions were upheld by the Court, on the ground that a vassal's personal obligation for feu-duty was limited to instalments falling due during his possession of the feu; that if the heir refused to enter, the superior had his remedies under the casualty of non-entry, or the Conveyancing Act (s. 4 (4)); and that the executors were neither bound nor entitled to enter to the feu. The second case illustrates the application of the rule to an obligation *ad factum præstandum*. The feuars, trustees for a firm, bound themselves "and the survivors and survivor and the heir of the survivor" by feu-contract under burden of erecting certain houses within two years. After the expiry of the two years the last survivor died in possession of the feu, leaving his whole estates to his widow as sole trustee. The building obligation had not been implemented, and the widow refused to take up the feu. The superior thereupon raised an action against her as trustee, concluding for implement, or failing that, for damages. The Court granted absolvitor, holding that this case was governed by the same rule as *Aiton*, that is to say, that after the feuar's death only his successor in the feu was liable in the prestations of the charter. This distinction is, however, to be observed between the two cases. In *Aiton* the executors could not possibly have been made liable either for feu-duty falling due after the ancestor's death, or for damages on account of the feu having been left in non-entry by the heir. In *Macrae*, on the contrary, while the executrix could not be rendered directly liable for the prestation in question, yet her predecessor had, by his failure to build, incurred a liability transmissible against his personal representatives; and opinions were expressed to the effect that, while it was impossible to grant decree in terms of the summons for an alleged failure by the executrix, the result might have been different if she had been sued as representing her author for damages for his failure (Ld. Kinnear, at p. 147). These rules apply alike to cases of liability implied under feu-charter or expressed in the ordinary terms of a feu-contract. But an express obligation may be so conceived as to extend (*a*) the liability of the feuar and his representatives after alienation of the feu, and (*b*) the liability of his personal estate after his death. Two ways in which this may be done are respectively illustrated by the cases of *King's College of Aberdeen* and *Brown's Trustees* (1852, 14 D. 675; rev. 1854, 17 D (H. of L.) 30, 1 Macq. 526; 1855, 2 Macq. 40), and *Dundee Police Com-*

missioners (1884, 11 R. 586). In the first-mentioned cases the circumstances were practically the same. The obligation for the feu-duty was taken in a separate personal bond, in which the feuar bound himself, his heirs, executors, and successors. Thereafter in each case, on the feuar's successor in the feu, who was also his personal representative, desiring to alienate the feu, the question arose whether he could thus rid himself of his liability for feu-duty. On appeal to the House of Lords it was determined that he could not, because the bond in itself contained a plain obligation on him and his representatives in perpetuity, which it was impossible to limit by reading along with it the documents constituting the feudal relationship. The rule that the liability under contracts of ground-annual depended purely on contract, as opposed to tenure, had already been laid down by the House of Lords in cases which were referred to as precedents in *Brown's* case (*Small*, 1849, 11 D. 495; rev. 1853, 1 Macq. 345; *Royal Bank*, 1851, 13 D. 912; rev. 1853, 1 Macq. 358): but though there is no decision of that House in the case of a feu-charter or a feu-contract in ordinary terms, it seems that such a case would be regarded as depending on the feudal relationship (see L. C. in *Royal Bank*, *supra*, 1 Macq. at p. 360). In the case of the *Dundee Police Commissioners*, the obligation was contained in the feu-contract, but was in the following terms: "The said second party hereby binds and obliges himself and his heirs, executors, and successors whomsoever, *conjunctly and severally*," to pay the feu-duty, and *inter alia* to erect certain buildings. Some years after the time for erecting buildings had expired, a singular successor was entered as vassal, notice of change of ownership having been duly given. No buildings had been erected, and a half-year's feu-duty was overdue. In these circumstances the superior raised an action against the original feuar and the then entered vassal, conjunctly and severally, for implement of the building prestations, or alternatively for damages, and for payment of the arrears of feu-duty, and of a stipulated additional feu-duty on account of the failure to build. The original feuar pled that he had been freed of all his obligations by the entry of his singular successor, but the Court held the contrary. Ld. Pres. Inglis said: "In the case of an ordinary obligation on a vassal, his heirs, executors, and successors, there is no conjunct and several liability. . . . But here they are all to be liable conjunctly and severally, that is to say, they are all liable to pay the same amount, to do the same thing, and each is liable for the performance of the whole. That being so, it seems to follow of necessity that these obligations upon the feuar, his heir, executors, and successors are perpetual. The feuar's heirs are made liable conjunctly and severally with the successor in the feu, but he is not liable for arrears incurred before his time (his estate is, but not himself); therefore, in making the heirs and executors conjunctly and severally liable with the successor, it necessarily follows that they are liable for feu-duties after the successor comes in." No case has yet arisen illustrating the liability of executors along with the heir in possession, but by parity of reasoning it seems that under similar obligation they would be held liable (see Ld. Pres. Inglis, *supra*).

The successor in the feu bears no personal responsibility for arrears. Each vassal, with his personal representatives, is alone liable for arrears which have fallen due during his time. The feu-duty of the year in which a vassal dies is allocated between his successor in the feu and his personal representatives, the latter being liable for the proportion up to the vassal's death (*Aiton*, *supra*, Ld. Kinnear, at p. 626). In the words of Ld. Pres.

Inglis quoted above, the vassal is "not liable for arrears incurred before his time (his estate is, but not himself)." The last words evidently refer to the real liability of the lands feued. A singular successor is not in the general case liable for arrears at all. But when a vassal has allowed the feu-duty payable by him to fall into arrear so as to incur an irritancy it is questionable whether he is not liable to pay the whole feu-duty resting-owing, though partly due before his time, in order to purge the irritancy (*Maxwell's Trs.*, 20 R. 958). An heir, while he is directly liable as vassal for duties accruing after his ancestor's death, is liable for arrears only (*a*) indirectly as representing his ancestor, and (*b*) subsidiarily to the ancestor's executors. (*a*) This point is clearly illustrated by the opinion of Ld. Kinnear in *Macrae* (19 R. 138, at p. 147), to the effect that it is incompetent to sue the personal representative directly for that for which he is truly liable as representing his predecessor. (*b*) Arrears of feu-duty form a moveable debt, for which, therefore, the heir, if he make payment, will have relief against the executor (*Johnston*, 1829, 7 S. 226).

There is this distinction to be observed between the case of payments and that of other prestations: that while only one vassal and his representatives can be liable for termly or casual payments accruing at definite times, in the case of continuing obligations several singular successors in the feu may become liable in the same obligation. This was decided in the case of *Marshall*, 1895, 22 R. 954, the facts of which were, that a vassal, being under liability to his superior in terms of his feu-contract to rebuild certain premises on his feu which had been destroyed by fire, transferred the feu to a second party, who transferred it to a third, before the superior had succeeded in making good his claim by action. The second and third parties were in turn duly entered with the superior in terms of the Conveyancing Act. The superior then brought a supplementary action against all three. The first and second parties pleaded that, since they were no longer vassals, they were entitled to absolvitor. The Court held that all three were liable, on the ground that the obligation had been prestable while each had been vassal, that none had been discharged, and that in case of a continuing obligation there was no inconsistency in a vassal remaining liable for his unimplemented obligation while his successor, by becoming vassal, became also liable.

The superior has a personal action not against his immediate vassal alone, but also against sub-vassals, tenants, and intromitters with the rents (Stair, ii. 4. 7; Ersk. ii. 5. 2; Bell, *Prin.* 700). In the case of *Sandeman* v. *Scottish Provident Investment Society Ltd.* (1881, 8 R. 790), the exact point decided was that a sub-vassal in part of a feu is not personally liable for the whole feu-duty; but in that case the sub-feu duties due and resting-owing were tendered, and from the opinions it would appear that a sub-vassal's liability to his immediate superior is the measure of his personal liability to the over-superior (see also *Hyslop* v. *Shaw*, 1863, 1 M. 535). The *ratio* of this liability is not made very clear in the cases. The Ld. President (*Hyslop*, 1 M. at 551) seems to rely on the superior's radical right and practical convenience; Ld. Shand, in *Sandeman*, 8 R. at 797, on pure equity. It has been suggested that the sub-vassal should be liable for that proportion of the *cumulo* feu-duty which his sub-feu bears to the whole feu, even in cases where the sub-feu duty is less (*M. Tweeddale's Trs.*, 1880, 7 R. 620, at p. 628; *Sandeman*, 8 R. at p. 797). While a superior cannot sue tenants for rent as such (*Prudential Assurance Co.*, 1884, 11 R. 871), he may sue them in respect of overdue feu-duties to the extent of their rents. In the leading case on the subject, their liability is laid on intro-

mission, and there the same *ratio* is applied to sub-vassals (*Prudential Assur. Co., cit.*). A trustee for creditors has been held personally liable to the superior on the same ground (*Abercorn*, 1835, 14 S. 168). It is clear that this liability cannot extend to feu-duties due before the intromission, but in spite of the decision in the case of *Biggar* (*infra*), it is difficult not to agree with the minority of the judges that the liability should continue while the intromitter is accountable, as tenant or otherwise, for money obtained by the intromission (*Biggar*, 1738, Mor. 4191; *Hamilton*, 1712, Mor. 4189; *Rollo*, 1629, Mor. 4185). Besides these remedies, the superior, if his feu-duties are in arrear, has the right to irritate the feu (*infra*).

A vassal may retain the feu-duty if his superior has clearly failed in his undertaking as superior (*Ainslie*, 1839, 2 D. 64: 1842, 4 D. 639; *Arnott's Trs.*, 1881, 9 R. 89), but not merely because he is engaged in some dispute with his superior (*Thom*, 1886, 13 R. 1026: see *Ker*, 1790, Mor. 2692; aff. 1792, 3 Pat. 238; *Cockburn*, 1825, 4 S. 128; rev. 1826, 2 W. & S. 293). The superior's right to feu-duty cannot be lost by the negative prescription, but the separate termly payments prescribe if they are not demanded within forty years from the dates at which they severally become due (Ersk. iii. 7. 12; Bell, *Prin.* 609). Before 1874 the voluntary granting of an entry without reservation was held to imply a discharge of all arrears of both feu-duties and casualties (Stair, ii. 4. 23; Ersk. ii. 5. 46; *Tailors of Glasgow*, 1851, 13 D. 1073; *Lord Advocate*, 1872, 10 M. 1021: but see Ld. Kyllachy in *Marshall*, 22 R. p. 963): but then a superior could refuse entry till he was paid (Ersk. ii. 5. 45; 20 Geo. II. c. 50, ss. 12 and 13). While the Conveyancing Act has made it impossible for a superior to do this, it has safeguarded his right to all feu-duties and arrears, and reserved to him all means for their recovery not inconsistent with its provisions (s. 4 (3)). A discharge of all arrears is also implied by a disposition of the superiority in the vassal's favour (Menzies, 664; *Argyll*, 1676, M. 842).

The effect of an allocation of feu-duty, in case of the division of a feu among several disponees or sub-vassals, is to make each parcel of ground liable only for the proportion allocated on it. The superior is under no obligation to grant an allocation unless he has expressly undertaken to do so in the feu-charter (Bell, *Prin.* 697; Duff's *Feudal Conveyancing*, 80). Before 1874 the only way by which an allocation could be carried out was by a charter of *novodamus* apportioning the feu-duty, but under the Conveyancing Act of 1874 it may be done by memorandum engrossed on a deed conveying the lands on which the allocation is made and signed by the superior or his agent (37 & 38 Vict. c. 94, s. 8, and Sched. D). The rights of heritable creditors on the estate of superiority cannot be affected by an allocation of feu-duty unless they are made parties thereto (*ib.*). The right to the feu-duties may be assigned without the superiority itself being alienated (*Douglas of Kelhead*, 1671, Mor. 9306: Bell, *Prin.* 703).

Casualties.—The casualties now prestable under the tenure of feu-farm are non-entry, relief, liferent escheat, composition, and irritancy. Of these, the last two are peculiar to this tenure, but the first three were common to ward-holding while it existed. There used to be two other casualties common to ward and feu tenures, disclamation and purpresture or purprision, both of which have long been obsolete. Their effect was that the vassal's rights were forfeited, under the first, if he disowned his superior, and, under the second, if he encroached on his superior's lands. The casualty of marriage was sometimes introduced by stipulation into holdings by feu-farm, which were

then called feus *cum maritagio* (Ersk. ii. 5. 23, 28; Bell, *Lect.* i. 573). In feu-holding, as well as in ward-holding, this casualty was a *debitum fundi* (Ersk. *ib.*). It was made incompetent in feus by the Act which abolished ward-holding (20 Geo. II. c. 50, s. 10).

In feus granted after 1st October 1874, no casualties are due by law, and it is not competent to stipulate for casualties properly so called. In lieu of them it is permitted to stipulate for periodical payments over and above the regular feu-duty, of fixed amount, and payable at fixed times depending entirely on stipulation (37 & 38 Vict. c. 94, s. 23). This enactment in no way affects the right to casualties under feus of earlier date, which are still demandable.

Non-entry.—A feu which has no vassal entered in it is said to be in non-entry. Lands might, prior to the passing of the Conveyancing Act of 1874, come to be in non-entry in various ways, *e.g.* if a vassal died and his heir did not enter, or if the heir's service was reduced, or if a vassal died after having alienated his feu and the disponee did not enter, or if the lands had been resigned and not given out again. No lands are now to be deemed to be in non-entry (37 & 38 Vict. c. 94, s. 4 (4)); but prior to the commencement of the Conveyancing Act of 1874, as, on the one hand, a superior was obliged to give entry to those entitled to the property, so, on the other, he was entitled to have a vassal entered in the feu, or to enter into possession of it himself. Originally, the superior could, at his own hand, exclude the heir from possession till he entered (Ersk. ii. 5. 29; Bell, *Prin.* 706); later, his remedy was by action of declarator of non-entry. In the simple action brought against an heir who was entitled to enter and delayed to do so, the conclusions were, for declarator (1) that the lands had been in non-entry since the death of the last-entered vassal; (2) that the bygone non-entry duties, up to the date of citation, belonged to the superior; (3) that the full rents thereafter belonged to the superior; and (4) for warrant to poind the ground for the bygone non-entry duties (*Juríd. Styles*, 2nd ed., iii. 186). The heir was the proper defender though there were no conclusions against him (Ersk. iii. 5. 42). Where there had been resignation *in favorem*, the action took the form of a reduction-improbation, to have it declared that the disposition in favour of the negligent disponee was null and void, followed by the ordinary conclusions as above. In this case the superior might call the person in possession instead of the heir (Bell, *Prin.* 709; *Mags. of Dundee*, 1829, 7 S. 801; *Mackenzie*, 1838, 16 S. 1326; *Governors of Cauvin's Hospital*, 1863, 1 M. 1164), but, except in this case, the defender could insist on the heir being called (*Mags. of Hamilton*, 1854, 16 D. 437), and the heir was always entitled to enter (*Piggot*, 1829, 8 S. 213; Bell, *Prin.* 709). Though, since the passing of the Conveyancing Act of 1874, those infeft in the property become entered by force of statute, superiors are still entitled, under feu-rights granted before the passing of the Act of 1874, to the casualties of relief and composition to which they had right on the entry of heirs and singular successors respectively under the old law; and as they can no longer have the lands declared to be in non-entry, a special remedy, called an action of declarator and for payment of a casualty, is provided by the Act (37 & 38 Vict. c. 94, s. 4 (4)). In this action the conclusions are for declarator (1) that a casualty has become due, and (2) that until payment of said casualty the rents belong to the superior, and (3) for decree for the amount of the casualty of relief or composition. This action lies against the successor in the lands whether infeft or not, implied entry is no defence to it (see *Stuart*, 1889, 2 R. 85), and the effect

of decree therein is that of a declarator of non-entry under the old law until the overdue casualty is paid with expenses (37 & 38 Vict. c. 94, s. 4 (4)). But the non-entry duties proper which formerly fell due before citation cannot now fall (*ib.*), and are no longer recoverable even if they had fallen before the commencement of the Conveyancing Act (*L. A.*, 1890, 17 R. 945). The new action of declarator cannot be raised until a declarator of non-entry would have been competent (37 & 38 Vict. c. 94, s. 4 (3)).

After citation in the action of declarator of non-entry—now of declarator and for payment of a casualty—the superior is strictly entitled to the whole rents (Ersk. ii. 5. 40); yet the rigid enforcement of this claim has always been regarded with so much disfavour that a reasonable excuse will free the vassal from the full penalty, even after citation (*Melvill*, 1677, Mor. 9321; *Maitland*, 1704, Mor. 9325; *Douglas*, 1675, Mor. 9318; *Robin*, 1823, 2 S. 404; *Ferrier's Trs.*, 1877, 4 R. 738). The retour duties to which the superior was entitled from the last vassal's death were, in feu-holdings, the feu-duties to which he would have been entitled in any case (Ersk. ii. 5. 36). Non-entry duties due before citation were *debita fundi*, and might be recovered by poinding of the ground: but those falling due after citation never were, and are not now, for the superior's right is that of a proprietor to his rents, and may be so enforced after his right has been judicially declared (Ersk. ii. 5. 42). Before he can give an entry, and, consequently, before he is entitled to sue an action of declarator of non-entry or for payment of a casualty, the superior's own title must be complete (p. 156). He must also show that he is the superior entitled to the casualty (*Chalmers*, 1745, Mor. 9330, 15091; 1746, 1 Pat. 404). The casualty is excluded by a liferent recognised by the superior, by courtesy, and, to the extent of one-third, by teree (Ersk. ii. 5. 44). Though a liferenter is infeft in the lands and entered by the Conveyancing Act, this is no answer to an action against the fiar for a casualty (*Stuart*, 1889, 17 R. 85).

Relief and Composition.—These payments are due on the entry of a new vassal—relief on that of an heir, composition on that of a singular successor (Ersk. ii. 5. 47, ii. 7. 7; Menzies, 525; Bell, *Lect.* i. 623–4; Bell, *Prin.* 715). When the property is in the hands of *pro indiviso* proprietors, a proportional part of the full casualty is due on the death of each (*Governors of Cowvie's Hospital*, 1863, 1 M. 1164). The questions to which these casualties now give rise are intimately connected, but in origin they are widely different. Relief is an old casualty which was common to ward, blench, and feu holdings. It is payable by the heir of the investiture (*Stirling*, 1842, 4 D. 684) on his recognition by the superior, as an acknowledgment that the lands have returned to the superior and require to be relieved or redeemed (Ersk. ii. 5. 47, 48; Bell, *Lect.* 616). Its amount early came to be that of the retour duty,—*i.e.* in feu-holdings, the feu-duty,—and is so still in the absence of special stipulation. The origin of composition is statutory. By the Statute 1469, c. 36, which requires superiors to enter purchasers in apprisings (p. 156), it is provided that the purchaser shall on his entry pay to the over-lord a year's maill as the land is set for the time. The Act 1672, c. 19, which substituted adjudications for apprisings, declared that the rights of superiors should remain the same; and the Act of 1681, c. 17, instituting judicial sales, gave the purchaser right to demand an entry on paying a year's rent. Before ordinary purchasers were entitled to demand an entry, it had become customary for them, on being voluntarily received by the superior, to pay the same fine (Ersk. ii. 7. 7); and when they obtained right to force an entry, it was made a condition that they should do so (20 Geo. II.

c. 50, ss. 12, 13; 10 & 11 Vict. c. 48, s. 6; 31 & 32 Vict. c. 101, s. 97; *Aitchison*, 1775, 2 Ross, *L. C.* 183; see Ld. Curriehill in *Steuart*, 1882, 19 S. L. R. 649). Owing to the peculiar origin of this payment, considerable doubt has been felt as to whether it should be regarded as a casualty, and consequently a *debitum fundi*, or merely as a personal debt. It will probably suffice for the decision of most points now likely to arise in practice, that in the Conveyancing Act the term "casualty" includes composition (37 & 38 Vict. c. 94, s. 3); yet so lately as 1889 (*Stuart*, 17 R. 85) an opinion was expressed that a renunciation of "casualties" by a superior contained in a feu-charter dated in 1701 did not bar a demand for composition. In the case of *Cockburn Ross* (6 June 1815, F. C.) the question was mooted but not decided. "It appears to me," said Ld. Glenlee, in that case, "that it is just a feudal casualty or not, according as you take the expression in a more extensive or in a more limited sense." In the *Edinburgh Gas Light Co.* (1843, 5 D. 1325) it was held that an express declarator that part of a feu should be burdened with the casualties of the whole included composition. But because the then recent case of *Stirling* (1842, 4 D. 684) was not referred to in it, an opinion has been expressed that this case was decided on specialty (*Morrison's Trs.*, 1878, 5 R. 800, Ld. Ormidale). In *Stirling*, though the point did not require to be decided, a strong opinion was expressed that composition was not a casualty (Ld. Justice-Clerk at p. 715; see also Bell on *Completing Title*, 309; Bell, *Com.* i. 23; Bell, *Prin.* 728). In *Morrison's Trs.* it was held competent to poind the ground for a composition stipulated in a feu-right; but this judgment proceeded on the ground that the deed in question made it a real burden; for on the question whether past-due composition is in the general case a *debitum fundi*, Ld. J.-Cl. Moncreiff indicated his agreement with Ld. Ormidale, who dissented.

As relief and composition alike were the price paid by a new vassal for his entry, the Conveyancing Act, by declaring infeftment in lands equivalent to entry with the superior, would implicitly have abolished these casualties. But as it was not the purpose of the Act to affect the pecuniary rights of superiors, it provided that the implied entry should neither prejudice the superior's right to casualties, feu-duties, or arrears, nor make him entitled to them sooner than he would have been under the old law (37 & 38 Vict. c. 94, s. 4 (3)).

Under the old law the casualty of relief or of composition only became due when the vassal demanded an entry or the superior forced him to take one by raising an action of declarator of non-entry. So long as the vassal was content, and was permitted, to depend on a base title, the superior had only "a claim which must be made effectual by an action" (Ersk. ii. 5. 29). On the principle that the new action of declarator and for payment of a casualty comes exactly in place of the declarator of non-entry, Ld. Curriehill held, in *Leith Heritages Co.* (1876, 13 S. L. R. 731), that a clause of relief binding the seller to relieve the purchaser of all casualties due at its date did not, although the seller had been impliedly entered and had paid no casualty, entitle the purchaser to relief from a composition subsequently demanded, on the ground that the composition was not due at the date of the disposition. That opinion was overruled by the case of *Straiton Estate Co.* (1880, 8 R. 299; *Farquhar*, 6 S. L. T. 453). In this case, as in the former one, an impliedly entered vassal who had paid no casualty granted a disposition of his land binding himself to the disponees in relief of all casualties due prior to the date of entry. In the preceding case of *Sivright* (1879, 5 R. 922) the singular successor had been found liable for the casualty, but in *Straiton* it was held that the casualty became "due and

exigible" on the death of the last vassal who had paid a casualty, and that the singular successor was entitled to relief. Thus the present law, which hardly tallies with the old, seems to be as stated by Ld. Curriehill in *Steuart* (1882, 19 S. L. R. 649, at p. 651): "The casualty becomes a debt due by the new vassal from the moment of his implied entry, or . . . . from the date of the death of the last vassal . . . . where he survived the date of the new vassal's infeftment."

Under the old law a purchaser was entitled, before accepting a disposition, to compel the seller to enter (*Gardiner*, 1799, Mor. 15037). Similarly, since 1874 the purchaser may compel the seller to pay a casualty due by him (*Lawrie*, 1876, 8 R. 305, *in note*). In *Straiton* the judges held that the purchaser does not lose this right by accepting and registering a disposition, at least if it contains a clause of relief. Ld. Shand and Ld. Young expressed the view that the result would have been the same though there had been no clause of relief, but this was not decided. Another question touched on in this case was, whether a purchaser who under the old law had accepted a disposition from an unentered proprietor and then entered, paying a casualty, could demand relief, on the ground that the casualty had been exigible from, if not due by, the seller. Professor Bell seems to have thought that in such circumstances the purchaser would have been entitled to relief, at least if his disposition contained a clause of relief (Bell, *Lect.* 691), but the point must be regarded as open (see Ld. Justice-Clerk, 8 R. p. 306, Ld. Shand, p. 313).

Closely connected with the question of the date when casualties become due is that of the year the rent of which is to be taken as their measure. There are four decisions on this point, in two of which (*Sivright* and *Campbell*, *infra*) the defender was not infeft till after 1874, while in the other two (*Steuart* and *Houston*, *infra*) he was infeft before that date, and became entered by the Conveyancing Act at its commencement. In *Sivright*, 1879, 6 R. 1208, the subject fell into non-entry in 1872; in 1874 the last-entered vassal's trustee became impliedly entered; in 1876 the defenders became infeft, and so entered; in 1877 the superior raised action. It was found that neither the year of the demand nor that of the defenders' infeftment was the proper criterion, but that it was equitable to take as the basis of calculation the average rent of three years preceding Whitsunday 1874, the year in which the subjects ceased to be in non-entry. This case was complicated by the subjects being chiefly minerals, and the grounds of decision are not very clear. The decision in *Campbell* (1874, 22 S. L. R. 292) proceeded on a different rule. There the last-entered vassal died in 1837. His trustees became entered in 1874 by the operation of the Act, and in 1876, without having paid a casualty, conveyed to the defender, who became infeft and entered in that year. The last surviving trustee died in 1876. In 1883 the superior demanded two casualties, both according to the rental of that year: the one for the trustee's entry in 1874, the other in respect of his death in 1876. After the decision in *Mounsey* (*infra*) the claim for the first casualty was withdrawn, so the only question which remained was that of the year's rent to be taken. It seems that the only two years urged in argument were 1883 and 1876, neither of them being the year selected in *Sivright*. Ld. Fraser decided in favour of 1876, on the ground that it was the rent of the year of entry which was taken under the old law, and should be under the new.

Turning to the second pair of cases, in *Steuart* (1882, 19 S. L. R. 649) the circumstances were that the last-entered vassal died in 1873; that the defender was infeft in 1869 and consequently became impliedly

entered in 1874; and that in 1880 the superior raised action for payment of the rent of that year as the casualty due. It was held by Ld. Curriehill, and acquiesced in, that the casualty due was the amount of the rent of 1873; but it must be said that his reasoning mainly points to 1874, the year indicated by the case of *Sivright* (*supra*). The last decision on this subject is that of *Houston* (1892, 19 R. 524). In it the defender became infeft in 1873, at which time the lands were held to be in non-entry, and entered by operation of the Conveyancing Act in 1874. Thus the circumstances were substantially those of *Steuart*; but here the question was directly raised between the year of the defender's implied entry and the previous date at which, under the old law, an action of declarator of non-entry would have become competent. The Court, holding that the effect of the Act on infeftments taken prior to its commencement was the same as if a writ of confirmation had been granted at that date, decided that 1874 was the proper date. A case where the last vassal who paid a casualty did not die till after the implied entry of the defender has not arisen.

Though more than one vassal has been impliedly entered since the death of the last vassal who paid a casualty, the vassal who is entered when the demand for casualty is made is entitled, on paying a casualty, to the full immunities of a vassal entered under the old law (*Mounsey*, 1884, 12 R. 236). In *Mounsey's* case the lands fell into non-entry in 1871. James Miller, who had become infeft in 1867, became impliedly entered at the commencement of the Conveyancing Act, and thereafter sold to the defender Palmer, who became infeft, and so entered so, in 1875. In 1883 the superior demanded and received a casualty "payable . . . on the death of the last-entered vassal in 1871." Miller died in 1883, after the superior had made his first demand. Thereupon the superior demanded another casualty from Palmer; but to this it was found that he had no right, as Palmer, when he paid the casualty first demanded, would have been entitled under the old law to a charter by progress in his own favour. As a superior cannot demand casualties sooner under the Conveyancing Act than formerly (s. 4 (3)), no casualties can fall in respect of implied entries during the life of a vassal who has paid a casualty (Ld. Shand, at p. 246; Ld. Mure, 248; Bell, *Prin.* 723). Further, under the old law, though several transmissions took place while the fee was in non-entry, the superior was entitled to only one casualty, and that from the disponee entered when the demand was made (Bell, *Prin. ib.*); nor could he, at least without express stipulation, demand arrears of casualties payable in respect of bygone entries (*supra*). But now that all disponees infeft are entered vassals, and an exigible casualty becomes a debt due by them as at the date of their implied entry (*supra*), the question might arise whether the superior has a direct claim for payment of a casualty against a person who, having been impliedly infeft after the death of the last vassal who paid a casualty without himself paying a casualty, has alienated the lands before the demand was made. Such a demand is quite distinguishable from that in *Mounsey's* case, but on principle it does not seem likely to be successful (Ld. Mure in *Mounsey*, at p. 248.) Thus the law stands that one casualty is payable by the vassal impliedly entered when a casualty is exigible and demanded (*Sivright, Mounsey, supra*); that a casualty becomes due at the date of death of the last vassal who has paid a casualty by the vassal then impliedly entered; that its measure is the rent of the year of the vassal's implied entry, unless, probably, in cases where the last vassal who paid

a casualty was alive at that date; and that a vassal paying a casualty is entitled to relief against his author from whom a casualty was exigible, at least if he has a clause of relief in his disposition. In this state of the law a difficulty arises in connection with the right of relief, since a later vassal may have to pay a casualty larger than his predecessor would himself have been liable for. It is true that under the old law where an obligation to relieve of any casualty subsequently demanded had been effectively constituted, a similar difficulty might equally well occur. But since it has been held that under the Conveyancing Act a casualty of composition constitutes a fixed debt, this rather points to the conclusion that the rent of the year when the casualty first became demandable should regulate its amount whenever it may be paid (see *Straiton* and *Steuart*, *supra*).

Before the commencement of the Conveyancing Act it was competent, when lands fell in non-entry, for a proprietor infeft in the *dominium utile* on an *a me vel de me* charter,—*i.e.* holding as a sub-vassal,—to put forward the heir of the deceased vassal or mid-superior, if he consented (*Douglas*, 1769, M. 15035), thus incurring the expense only of a relief instead of a composition; and the superior was bound to receive the heir (Bell, *Prin.* 712; *Hill*, 1824, 2 S. 681; *Piggot*, 1829, 8 S. 213). This has been altered by the Conveyancing Act. The disponee is now in the position of a vassal confirmed by the superior, who consequently could not at common law have put forward his author's heir. Also the defeasible mid-superiority to which the heir formerly entered is abolished (37 & 38 Vict. c. 94, s. 4 (2)). Therefore whether his infeftment was prior or posterior to the commencement of the Act, the disponee who is infeft is now liable for a composition though the heir be willing to enter (*Ferrier's Trustees*, 1877, 4 R. 738; *Rossmore's Trs.*, 1877, 5 R. 201; *Sivright*, 1878, 5 R. 922). At common law the fact that trustees held for the heir did not exempt them from payment of composition if they entered (*Grindlay*, 18 Jan. 1810, F. C.; cf. *Neill*, 1882, 19 S. L. R. 827). When trustees could no longer be infeft and yet unentered (*Lamont*, 1879, 6 R. 739; aff. 1880, 7 R. (H. L.) 10) this was felt to be a hardship, to remedy which it has been enacted (1) that where a trust is created under which heritable estate is to be conveyed to the testator's heir immediately, or within twenty-five years, or by virtue of which the heir has the ultimate beneficial interest in the estate, the trustees shall not be liable for more than an heir's casualty because of their entering or of their having entered prior to the Act, by infeftment or otherwise; (2) that the heir, on entering thereafter—*i.e.* after the trustees have entered and paid relief—shall not be liable for any casualty: and (3) that, whether he enters or not, another casualty shall be exigible on his death as if he had been entered (50 & 51 Vict. c. 69, s. 1). The rubric in the case of *Stuart* (17 R. 85), to the effect that this section is not retrospective, is hardly accurate. The terms of the section certainly bear to be retrospective. In *Stuart* the Lord Ordinary (Ld. Kinnear) merely held that the Act had no bearing on that action, because it had been raised before the Act passed, and in the Inner House the point was not referred to.

A trust for special purposes, *e.g.* for payment of debts (*Huntly*, 1887, 14 R. 1091), or to secure a liferent (*Hope*, 1883, 10 R. 1122), is regarded as a mere burden. The radical right remains with the granter, and consequently the trustees, though infeft, are not liable for any casualty during the truster's life, and on his death his heir may enter (*Campbell*, Mor. App. "Adjud." No. 11; *Gilmour*, 1873, 11 M. 853; *M'Millan*, 1831, 9 S. 551: aff.

1834, 7 W. & S. 441; *Lindsay*, 6 D. 771; *Home*, 1887, 15 R. 193; *Huntly*, *supra*; *Hope*, *supra*). Further, any trustee or other disponee may put forward the heir so long as he himself is not infeft (*D. Hamilton*, 1883, 10 R. 1117; *Neill*, 1882, 19 S. L. R. 827; see Ld. Shand in *Rossmore's Trs.*, *supra*).

If the vassal infeft in the lands when a casualty is due and demanded, be the heir *alioqui successurus* of the last vassal who paid a casualty, he is liable only for relief, although he takes the estate under a *mortis causa* disposition from his ancestor, and makes up his title in a form appropriate to a singular successor. The earliest cases on this point arose in connection with entails. When a deed, whether a strict entail (*q.v.*) or not, contains a destination, then, once the destination has been recognised by the superior, the heirs of provision under it, and not the vassal's heirs-at-law, are *heirs* in a question with the superior. The destination was recognised, or, as it is called, enfranchised, by the superior's granting a charter containing or confirming it, as he was bound to do on receiving a casualty of composition from an institute or substitute under the destination (Stair, ii. 3. 43; Ersk. ii. 7. 7; Bell, *Lect.* ii. 1142; *D. Hamilton*, 1827, 6 S. 94; *Stirling*, 1842, 4 D. 684; *Advocate-General*, 1854, 17 D. 21; cf. Ld. Watson in *Johnstone*, *infra*, 19 R. (H. L.) at p. 42; see also *Heriot's Hospital*, 1884, 12 R. 30; *Mags. of Musselburgh*, 1809, Mor. 15038). Since 1874 a destination in a recorded disposition is enfranchised when a vassal pays a casualty in circumstances in which under the old law he would have been entitled to a charter containing that destination (*Lord Advocate*, 1894, 21 R. 553). The casualty properly due is composition, but if the superior chooses to recognise a vassal as holding under a new destination for a smaller casualty, the investiture is nevertheless enfranchised (*ib.*). On the other hand, it has long been law that a vassal in right of lands under a new investiture, and also heir under the recognised investiture, is entitled to enter as heir, leaving unrecognised the new investiture, on which his personal title depends (*Mackenzie*, 1777, Mor. 15053, App. "Sup. and Vas." No. 2; *Marquess of Hastings*, 1859, 21 D. 871). The same rule applies where the singular title under which a vassal *alioqui successurus* has right, is a simple disposition *mortis causa* (*Mackintosh*, 1886, 13 R. 692). On the other hand, if during the life of an entered vassal a new investiture has been constituted in the person of his heir (on these cases see Ld. Watson in *Johnstone*, *supra*, 19 R. (H. L.) at p. 42), then, for the same reason for which the heir could not have been put forward if the new investiture had been in some third party, he can only enter as a singular successor on payment of composition (*Stuart*, 1889, 16 R. 1030; *Ferrier's Trs.*, *supra*).

If the vassal from whom the casualty is demanded being the heir of the last proprietor, is infeft on a disposition from that proprietor's trustees, he is liable as a stranger for composition, although the trustees have paid composition, if his ancestor has not been expressly entered, or paid a casualty (*Johnstone*, 1891, 18 R. 587; aff. 1892, 19 R. (H. L.) 39). But if his ancestor has been expressly entered, or has paid a casualty, his liability depends on whether or not the trust has created a new investiture (*Stuart*, 1889, 17 R. 85). The heir has been held liable in relief only when the trustees have never been infeft (*Hope*, 1883, 10 R. 1122; *Athole*, 1890, 17 R. 724), or when, though they have taken infeftment, the trust is only a burden on the fee of the estate (*Stuart*, *supra*, 17 R. 85; *Hope*, *supra*; *Athole*, 1890, 17 R. 733). The rule was thus stated by the Ld. President in *Stuart* (17 R. p. 96): "It appears to me that if there was, by virtue of that trust-disposition, a disinherison of the defender, he could not now serve as heir in special to his father, although by the operation of the trust and

subsequent events it has come to be a resulting trust in favour of the heir as a beneficiary under the trust. If the heir can now claim the estate only as a beneficiary under the trust, then his character as heir is gone. But if his rights as heir have only been suspended or burdened by the operation of the trust, and all the purposes of the trust have failed, then his radical title of heir has not been extinguished." (See Ld. Watson, in *Johnstone*, *supra*.)

The amount actually payable for an untaxed composition is the rent of the lands subject to certain deductions (Ersk. ii. 7. 7: Bell, *Com.* i. 23; Bell, *Prin.* 720). Various questions have arisen as to what the proper rent of the land is. It has been argued that the casualty should amount only to a ground-rent (*Anderson, infra*); but it is now settled that its measure, when the lands are under lease, is the rent payable, whether the ground be built on or not (*Heriot's Hospital*, 1715, Mor. 7998: *Anderson*, 1824, 3 S. 334; *Aitchison*, 1775, Mor. 15060, 5 Br. Sup. 613). If the lands are in the vassal's own possession, the amount of the casualty is the actual value, *i.e.* the rent which could have been obtained (*Ld. Blantyre* v. *Dunn*, 1858, 20 D. 1188). Prospective alterations in the value are not to be taken into consideration. After a piece of pasture land had been disponed under ground-annual for building, the casualty was taken, for the purpose of redemption, at the agricultural value (*Neilston School Board*, 1887, 15 R. 44). If from their nature the subjects have not a letting value in the market, the Court will take means to ascertain their true value (*Hill*, 1877, 5 R. 386: *M'Laren*, 1886, 13 R. 580). In *Hill's* case there was demanded as composition for part of a line of railway, its value as ascertained for assessment purposes: but the Court held that this was inequitable. The price paid for the land in question, less the additional price paid in respect of compulsory purchase and damages for severance, added to the cost of constructing the part of the railway on that land, was taken as the capital value of the subjects. On this four per cent. was allowed, deductions being made for feu-duty, public burdens, and maintenance from the result so obtained. Opinions have been expressed that the valuation roll may be accepted as evidence of the value of such subjects as a lunatic asylum (*M'Laren, cit.*). If there are minerals in the lands which are let or worked by the vassal, their value is to be computed (*M'Laren, cit.*; *Allan's Trs.*, 1878, 5 R. 510). In the case of *Sinclair* v. *Straighton Estate Co.* (1879, 6 R. 1208), where the vassals were themselves working the minerals, the method followed was to take four per cent. on the capital value of the minerals, calculated by taking ten years' purchase of the average annual value of the minerals for three years, as shown by the valuation roll. It has been suggested from the bench that where minerals are being worked by a tenant it would also in general be equitable for this purpose to ascertain the capital value of the minerals, and take a percentage thereon (*Allan*, *supra*, at p. 522). But it has been found that where minerals let for a fixed rent were being very slightly worked, the fixed rent should be taken as their yearly value (*Sturrock*, 1880, 7 R. 799). In ascertaining the amount of the rent for the purpose of payment of a casualty only those fixtures are considered part of the subjects which would go to the landlord in a question with his tenant. Thus rent effeiring to trade fixtures is not computed (*Marshall*, 1886, 13 R. 1042). The value of shootings must be included not only if they are let, but also if, though unlet, they are of such value that they might bring a rent (*Stewart*, 1881, 8 R. 381). No rule has been formulated for the estimation of their value in the latter case. An average of the rents for the preceding seven years has been accepted as the value of grass lands and salmon fishings which were annually let (*Mags. of Inverness*, 1771, Mor. 9300).

If lands have been sub-feued for a fair return, the composition payable from them is the feu-duty payable by the sub-vassal, or that feu-duty together with interest on any grassum paid to the vassal for the sub-feu. No allowance is made for bygone untaxed entries; but it is undecided what would be the effect of a composition being demanded by the over-superior for the year in which a casualty fell due to the mid-superior (*Ross*, 6 June 1815, F. C.; affd. 1820, 6 Pat. 640; *Campbell*, 1832, 10 S. 734; see *Campbell*, 22 S. L. R. 292; Menzies, 526). Before 1874, if the sub-feu was terminated by consolidation, the vassal became liable for the full rents of the lands, but since the commencement of the Conveyancing Act no consolidation can extend or in any way affect the rights of over-superiors (37 & 38 Vict. c. 94, s. 7). When a tenant under lease purchases the lands in which he is tenant, the lease falls *confusione*, and thereafter the amount payable as composition is not the rent under the lease, but the actual value of the lands (*Ld. Blantyre*, 1858, 20 D. 1188).

The casualties of relief and composition may be taxed. A taxing clause is properly introduced as a qualification of the *reddendo* in the vassal's title, but may be made a burden on the title of the superior (*Learmonth*, *infra*). Under a taxative clause in the form, "doubling the said feu-duty the first year of the entry of each heir or singular successor to the lands as use is of feu-farm," or in words of similar import, the new vassal will only pay, above the current year's feu-duty, the amount of one feu-duty. But he is liable for two extra feu-duties, if the clause be conceived in the form, "doubling the said feu-duty the first year of the entry of each heir or singular successor to the lands, besides paying the feu-duty of the year in which such entry shall take place," or, "paying a duplicand of the said feu-duty over and above the feu-duty of the year on the entry of each heir or singular successor" (Bell, *Lect.* 635; cf. *Cheyne*, 5 S. L. T. No. 38). A taxing clause is construed strictly in the superior's favour, and will not benefit singular successors unless it clearly includes them (Bell, *Prin.* 727; *Innes*, 1822, 1 S. 518). If it bear to be in favour of "assignees," it has been held not to extend to disponees after infeftment (Bell, *Prin.*, *supra*; Bell, *Lect.* 1149; Menzies, 606). A more liberal interpretation prevailed in a recent case, but only on the terms of the deed in question (*D. Montrose*, 1887, 14 R. 378). A taxed entry is generally made payable not only on the death of each entered vassal, but on the entry of each heir or singular successor. If, in conjunction with such a taxing clause, there is a stipulation that heirs and singular successors shall be infeft and entered within a given time after succession or purchase, fenced by an irritancy, the casualty will be demandable from each new vassal though the preceding vassal is alive (*Dick Lauder*, 1890, 17 R. 320). It has not been decided whether the superior could succeed if he had to depend on the obligation to enter, unfortified by an irritant clause (*Dick Lauder*, *supra*; cf. *Morrison*, 5 R. 800, where this point was not raised). A prohibition of subinfeudation, though fenced with an irritant clause, does not make a casualty payable on each transmission, as under the old law a new vassal could not have been compelled to enter till his predecessor's death (*Morris*, 1877, 4 R. 515).

Relief is a *debitum fundi* in any case (Ersk. ii. 5. 50); but it is doubtful whether composition is so, except when it is taxed (*Morrison's Trs.*, 1878, 5 R. 800; *Stewart*, 1880, 8 R. 270). Before 1874 this was not of so great significance, since it was hardly possible for a vassal to be entered without paying his casualty, and no casualty was due from one who remained unentered. But in *Morrison's Trs.* (*supra*), it was

decided that where two vassals had been impliedly entered under the Conveyancing Act without a composition having been paid, the superior was entitled to poind the ground in the hands of the second vassal for two casualties. The feu-contract in question expressly made the taxed casualty a *debitum fundi*, and the judgment proceeded largely on that ground; but the opinions expressed were such as to imply that by means of implied entries under the Act, casualties which are *debita fundi*, and consequently relief duties, may accumulate as real burdens, though the vassal in possession is personally liable for one casualty only (*supra*).

Superiors were never obliged, except under express stipulation, to enter corporations (*Hill*, 17 Jan. 1815, F. C.; *Campbell*, 1843, 5 D. 1273; *Learmonth*, 1854, 16 D. 580), or a body of trustees having perpetual succession (Bell, *Lect.* ii. 1146). If they did so, they lost their right to casualties in perpetuity, even after singular successors became entered under the Conveyancing Act of 1874 (*Heriot's Trust*, 1890, 17 R. 937; *E. Lauderdale*, 1897, 24 R. 914). When a corporation or a body of trustees desired to be entered, some arrangement was usually made for payment of casualties (Menzies, 816; Bell, *Lect.* ii. 1146). As under the Conveyancing Act it is impossible for superiors to prevent the entry of corporations, the following provision has been made by that statute for cases in which there has been no express stipulation on this point (37 & 38 Vict. c. 94, s. 5). (1) Corporations or bodies of trustees are, in cases where a casualty is only due on the death of the last vassal who has paid composition, to pay a composition (*a*) when one would have fallen due if the Act had not been passed; and (*b*) every twenty-fifth year thereafter, so long as the lands are vested in them. (2) Where a taxed composition is stipulated for on each transfer of the property as well as on the death of each vassal, corporations or bodies of trustees are to pay a composition (*a*) on their acquiring the property, and (*b*) every fifteenth year thereafter so long as the lands are vested in them. (3) Where corporations or bodies of trustees cease to be proprietors after having paid composition in terms of the section, (*a*) their successor who is infeft at the end of twenty-five or fifteen years, as the case may be, from the last payment, shall then pay a composition, and (*b*) the casualties shall thereafter be payable as if the corporation or body of trustees had never been infeft in the lands. The same section provides that where a taxed composition is payable on the occasion of each sale or transfer of the property as well as on each death, then in case of two persons having interest as liferenter and fiar respectively, or as successive liferenters, becoming entered under the Act, a composition, or in the case of parties interested *pro indiviso* a rateable proportion thereof, shall be due from each person who takes benefit under the implied entry as he comes to take the benefit competent to him.

The casualties of all feus created prior to the commencement of the Conveyancing Act—*i.e.* all casualties in the proper sense—may be redeemed, (*a*) by agreement, and (*b*) compulsorily at the instance of the proprietor of the feu or estate of mid-superiority in respect of which they are payable (37 & 38 Vict. c. 94, ss. 15–19). In the latter case they are redeemable by the proprietor of the feu in respect of which they are payable on the following terms: (1) where exigible only on the death of a vassal, for the amount of the highest casualty estimated as at the date of redemption, with an addition of fifty per cent.; (2) where exigible on each sale or transfer of the property as well as on the death of the vassal, for two and a half times the amount of the casualty estimated as above: (3) where consisting of a sum calculated as a certain annual sum for each year since

the last entry, for eighteen times the amount of that sum. Redemption applies only to "future and prospective casualties." Before redemption can be effected, except by agreement, any casualty due at the date of redemption, and in the case of annual sums, the amount of these sums since the last payment, must have been paid (s. 15). On payment or tender of the redemption money, the superior must grant a discharge, which on being registered in the Register of Sasines operates a full discharge of the casualties (s. 16 and Sch. F). When, before discharging his casualties, the superior has granted a heritable security over the superiority, it is enacted that no discharge of casualties shall be effectual without the consent of the creditor in the security (s. 16). The fetters of an entail are no bar to redemption (s. 18). In the superior's option the redemption money may be commuted into an annual payment. This transaction must be recorded in a memorandum which requires to be signed by the parties or their agents and registered in the Register of Sasines at the expense of the party redeeming, whereupon the annual sum is to form an addition to the existing feu-duty, with all the legal qualities of feu-duty (s. 17). The consent of heritable creditors on the superiority is not required for commutation. A vassal infeft in the lands is entitled to the benefit of the section, though he has never paid a casualty, so long as one is not exigible (*Morris*, 1877, 4 R. 515). A successor of the vassal in part of a feu may redeem the casualties applicable to his own part, on the basis of the rental of that part (*Edinburgh Roperie Co.*, 1877, 4 R. 1032; affd. 1878, 6 R. (H. L.) 1), but the vassal cannot redeem the casualties applicable to part of an undivided feu (*Leslie's Trs.*, 1898, 35 S. L. R. 855).

Liferent Escheat.—This casualty was common to the tenures of Ward, Blench, and Feu-farm. The term Escheat means a falling or forfeiture, and was originally applied to all forfeitures of the vassal's feu to his superior, whether by recognition, disclamation, purpresture, or other breach of feudal duty (Ersk. ii. 5. 53; Menzies, 511). It is now used only of Single Escheat and Liferent Escheat. The former is a forfeiture in favour of the Crown. By the latter a vassal, on denunciation as rebel in a criminal charge or on escape after receiving sentence of death, except for treason, in which case the fee of the estate falls under the single escheat, forfeits the liferent of his lands during his life to the superior, or respective superiors, if more than one, of whom he holds them (Ersk. ii. 5. 57 and 66; Menzies, 526). Formerly the casualty also fell on denunciation for civil debt, but this has been abolished (20 Geo. II. c. 50, s. 11). The liferent returns to the superior subject to all burdens completed by sasine before the vassal's denunciation (Ersk. ii. 5. 78–9; Menzies, 621).

Irritancy of the Feu.—Any stipulation in a feu-charter may be enforced by a conventional irritancy, or clause to the effect that in the event of a breach the charter shall become null (Ersk. ii. 5. 25). But a legal irritancy is peculiar to the tenure of feu-farm. It was introduced by the Statute 1597, c. 250, by which "all vassals by feu-farm failing to pay their feu-duty for two years, haill and together, are declared to lose their right in the same manner as if an irritant clause had been specially engrossed in their charter" (Ersk. ii. 5. 26). A distinction used to be drawn between the effect of a conventional and that of a legal irritancy, but this difference no longer exists, at least in connection with feus (Ersk. ii. 5. 27; *Tailors of Aberdeen*, 1840, 1 Rob. 296 at p. 316; Bell, *Prin.* 701). All irritancies must be enforced by actions of declarator (Bell, *Prin. ib.*; Bell, *Lect.* 625), and since the passing of the Conveyancing Acts Amendment Act, 1887, may be purged till an extract of the decree has been recorded in the

appropriate Register of Sasines (50 & 51 Vict. c. 69, s. 4). Prior to that Act an irritancy could not be purged after extract (Bell, *Prin.*; *Bellenden*, 1702, Mor. 7252). In order to purge an irritancy a vassal need not pay up arrears of feu-duty accrued before the superior demanding the irritancy became superior, and it is questionable if he need pay arrears due to that superior before he became vassal (*Maxwell's Trs.*, 1893, 20 R. 958). There is no decision of the Court of Session as to whether, when interest on feu-duty is stipulated, it must be paid for this purpose (*Maxwell's Trs., cit.*). Where the feu-duty has fallen two years in arrears, an action of removing is competent in the Sheriff Court if the value of the subjects does not exceed £25 (16 & 17 Vict. c. 80, s. 32) and also, subject to removal by the defender to the Court of Session if the value does not exceed £50 (40 & 41 Vict. c. 50, ss. 8–10). The superior reacquires the feu free of all burdens (Ersk. ii. 5. 79; Bell, *Prin.* 701) and sub-feus (*Cassels*, 1885, 12 R. 722; *Sandeman*, 1883, 10 R. 614; rev. 1885, 12 R. (H. L.) 67); but must renounce all arrears of feu-duty, the *ratio* being that these have not been paid (*M'Vicar*, 1748, Mor. 15095; *Napier*, 1831, 9 S. 655; *Mags. of Edinburgh*, 1834, 12 S. 593). He is, on the contrary, entitled to a composition due before the irritancy (*Mags. of Edinburgh, supra*).

Such are the rights, as modified by modern legislation, which are either essential or natural to the feudal relation and so arise to the superior without any stipulation. But in practice it is almost invariable for the legal position of the parties to be modified by the terms of the feu-right. (1) The superior may reserve to himself the property of part of the estate which would otherwise pass to the vassal. (2) Rights may be created on either side by stipulation. (3) The superior may grant to the vassal part of his estate of superiority.

(1) *Reservations*, as derogations from the granter's own deed, are strictly construed. A clause the terms of which may be satisfied by a lower right will not be held to reserve a right of property (*Reid*, 1891, 18 R. 744). The most common and important reservation is that of minerals. There should be reserved, first, the property of the minerals, and second, a right to work them and carry them away (Bell, *Lect.* i. 609; Duff, 70; *Jurid. Styles*, i. 18). The vassal is properly entitled to everything within his boundaries *a centro ad cælum*; therefore only those subjects are reserved to the superior which are expressly covered by the clause (*Menzies*, 10 June 1818, F. C.; affd. 1822, 1 Sh. App. 225; *Duke of Hamilton*, 1841, 3 D. 1121; *Forth & Clyde Navigation Co.*, 1848, 11 D. 122). The meaning of the general expression "mines and minerals" has been discussed in connection with the Waterworks and Railways Clauses Acts (*Magistrates of Glasgow*, 1887, 14 R. 346; rev. 1888, 15 R. (H. L.) 94; *Ruabon Brick, etc., Co.*, [1893] 1 Ch. 427; see Bell, *Prin.* 740). Though it is a mistake not to reserve the property expressly, a reservation of full power to work will be construed as a reservation of ownership (*Graham*, 1869, 7 M. 976; rev. 1871, 9 M. (H. L.) 98; *Duke of Hamilton*, 1884, 11 R. 963; affd. 1885, 12 R. (H. L.) 65). Similarly, an express reservation of power to work the minerals should always be inserted, though this right would probably follow a reservation of the property (Rankine on *Landownership*, 160).

If a vassal works minerals which have been reserved, the superior is entitled to their market value, less the cost of working, though he could not himself have worked them profitably (*Davidson's Trs.* 1895, 23 R. 45). The superior, if he reserves the minerals, is liable, like all subjacent proprietors, for the support of the surface (see MINES AND MINERALS).

The superior holds the reserved minerals on his superiority title, and may dispone them with the superiority or separately. They do not, however, necessarily pass as a pertinent of a superiority in the absence of a reservation clause: for the Court will consider the context, to discover whether the minerals were meant to be comprehended (*Orr*, 1893, 20 R. H. L. 27).

A personal privilege ordinarily connected with the ownership of land, for example, that of fishing, may also be reserved (*D. Richmond*, 1867, 5 M. 310). A reservation of the deer that may be found on the lands is equally competent, but has been found not to imply a right to stalk them (*Hemming*, 1883, 11 R. 93).

(2) *Conditions.*—Collateral personal agreements, binding on the parties thereto and their representatives, may be introduced into any conveyance of land; but, except in the case aftermentioned, they do not pass to singular successors in the lands unless by special assignation (*Horne*, 1841, 3 D. 435; rev. 1842, 1 Bell's App. 1, 1 Ross' *L. C.* 55). On the other hand, real money burdens and real conditions run with the lands (see REAL BURDEN; BUILDING CONDITION). A real burden in favour of the granter of a deed, whether an original grant or a disposition, gives him a real action against the lands in whosesoever hands they may be (*supra*). A real condition gives to the person in right of it a personal action against the person undertaking it, his personal representatives (see *Macrae*, 1891, 19 R. 138), and his singular successors in the estate in the titles of which it appears (*Tailors of Aberdeen*, *infra*).

The rules as to the constitution of real conditions as between granter and grantee of ordinary conveyances are laid down in the case of the *Tailors of Aberdeen* (1840, 1 Rob. 296). But stipulations which, whether by force of law or by stipulation, enter into and form part of the feudal contract as such, though not made real in the ordinary way, transmit against the singular successors in the superiority or property, as the case may be, of the party undertaking them, and also, without special assignation, to those of the party in right of them. As regards legally inherent conditions, reference may be made to what has been already said. In the case of *Lennox* (1843, 5 D. 1357, 1 Ross' *L. C.* 95) a superior bound himself by feu-charter to warrant the feu from all future augmentations of stipend. In subsequent charters by progress this undertaking was omitted; yet more than forty years after the first omission the superior was found liable in relief to a singular successor in the feu, on the ground that the superior "made the obligation to relieve from augmentations a part of his obligation as superior" (see also *Wilson*, 1831, 9 S. 357; *Clark*, 1850, 12 D. 1047). In contrast to the case of *Lennox* is that of *Sinclair* (1844, 6 D. 378; rev. 1846, 5 Bell, 353, 1 Ross' *L. C.* 70), in which the circumstances were that a Lord Breadalbane had entered into a contract of sale, binding himself to grant a charter containing a clause of relief from augmentations of stipend, and thereafter granted a charter referring to the obligations in the contract. Thereafter, when the superiority had passed to a singular successor, an heir and successor in the property brought an action of relief, not against the superior at the time, but against the personal representatives of the granter of the charter. In these circumstances the question whether the obligation had been imported into the charter so as to bind singular successors in the superiority could not be tried; and it was found that the pursuer's title did not sufficiently connect him with the personal contract which he pleaded. The case of *Lennox* (*cit.*) was followed in similar circumstances in *Stewart* (1860, 22 D. 755; affd. 1863, 4 Macq. 449,

1 M. (H. L.) 25). In that case, which went to the whole Court, the judges forming the majority rested their opinion on the ground that an obligation to warrant teinds free of future augmentations was "a counterpart to the obligation undertaken by the vassal" (22 D. at p. 781), and so, in a question between superior and vassal, did not need special assignation, and this view was indorsed by the House of Lords. Ld. Kinloch pointed out that had the defender—the superior—been liable only as personal representative of the granter of the charter, the pursuer would not have had a title to sue. Finally, a singular successor in the superiority has been found liable under a similar clause of relief to a singular successor in the property, though the obligation had not entered the records, so that the superior had no warning of its existence (*Hope* v. *Hope*, 1864, 2 M. 670; see also *D. of Montrose*, 1887, 14 R. 387). In the case of *Morrison's Trs.* (1878, 5 R. 800), though the point at issue was decided on the terms of the deed in question, the general nature of the superior's rights was discussed. Ld. J.-Cl. Moncreiff said: "If they are part of the *reddendo* of the contract, and are of the substance of the feudal relation constituted by it . . . they did not require to be constituted real burdens in the sense applicable to collateral personal stipulations." But where such obligations are not contained in a feu-right but in an obligation to feu (*Duric's Trs.*, 1889, 16 R. 1104), or in a disposition (*Horne, supra*; *Spottiswoode*, 1853, 15 D. 458: see also 1 Ross' *L. C.* 50 *et seq.*), they do not transmit without assignation. A stipulation in a feu-right, binding as between superior and vassal, confers no right on disponees of other parts of the superior's lands who are not successors in the superiority (*Stevenson*, 1896, 23 R. 1079; see *Morier*, 1895, 23 R. 67).

The rights and obligations undertaken by superior and vassal in a feu-right can only be altered by charter of *novodamus*, or a charter by progress with a clause of *novodamus* (Bell, *Lect.* 739; but see Lds. Medwyn and Murray in *Graham, infra*, 4 D. at p. 491). A reservation not contained in the original right could not be introduced by insertion in the writs by progress, nor could one contained in an original right be abrogated by omission from them for any length of time. When an original charter contained a reservation of minerals, the superior was found entitled, on granting an entry, to reinsert it after it had been omitted from charters by progress for a century (*Hutton*, 1863, 2 M. 79). Again, when the writs by progress had contained a reservation in the superior's favour not in the original grant for almost the same time, this was found to give the superior no title to the subject reserved (*Graham*, 1842, 4 D. 482; *Thriepland*, 1848, 10 D. 1079; cf. *Jamieson*, 1876 (H. L.), 14 S. L. R. 198). In these cases of reservation it was observed that effective possession for the prescriptive period by the person having an *ex facie* good title would have given an indefeasible right. The benefit of a taxing clause in a charter in favour of "heirs and assignees" was found not to be extended to disponees after infeftment, though a subsequent charter of confirmation and *novodamus* was conceived in favour of "heirs and assignees whomsoever excluding assignees before infeftment," because it did not appear that the charters of *novodamus* were intended to change the entry of heirs or singular successors (*Mags. of Inverkeithing*, 1874, 2 R. 48; see also *Rankine*, 1890 (O. H.), 28 S. L. R. 594). Implied entry under the Conveyancing Act of 1874 "shall not be held to confer or confirm any rights more extensive than those contained in the original charter or feu-right of the lands, or in the last charter or other writ by which the vassal was entered therein" (37 & 38 Vict. c. 94, s. 4 (2)). The opinion has been expressed by Ld. Kinnear that under this subsection "the implied entry must . . . be subject to

all the conditions and reservations by which a superior would have been entitled to qualify an express entry by progress" (*Lord Advocate*, 1894, 21 R. 553).

Various conditions in favour of superiors which used to be common, have now come to be of very slight importance, or been made incompetent. Vassals have always had right, in the absence of special agreement, to prevent the superior's interjecting another superior or splitting the superiority, but the superior may reserve power to do so. The vassal's right of objection in either case may also be lost by his acquiescence or by a contrary prescription of forty years. Since 1874 the vassal has little interest to oppose the interjection of a superior; but it would still cause him inconvenience in payment of his feu-duties if the superiority were divided (Bell, *Lect.* ii. 753–4).

Formerly the superior could, by a clause *de non alienando sine consensu superioris*, stipulate that the vassal should not have power to alienate his feu at will, but such clauses are now incompetent and of no force in any feu whenever constituted (20 Geo. II. c. 50, s. 10). It is thought that the superior may still reserve a right of pre-emption (Bell, *Lect.* i. 612; Ersk. ii. 3. 13; Ld. Corehouse in *Tailors of Aberdeen*, 1840, 1 Rob. at 312; *Preston*, 1805, Mor. App. "Personal and Real," No. 2, 3 Ross' *L. C.* 289; *Earl of Mar*, 1838, 1 D. 116; *Christie*, 1898 (O. H.), 6 S. L. T. No. 320, under appeal). Clauses prohibiting subinfeudation are incompetent in feus created since the commencement of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94, s. 22), but still effective in those constituted prior to that date (ss. 22 and 4 (2)). The provisions of the Conveyancing Act as to implied entry will not validate any sub-feu which has been competently prohibited (s. 4 (2)). All conditions to the effect of securing a monopoly or privilege to superior's agents in the preparation of deeds in connection with a feu, whether made before or after the commencement of the Conveyancing Act, are now of no effect (s. 22).

(3) A superior may renounce his casualties in favour of his vassal. The more approved method of doing so is for the superior to dispone the casualty which he has agreed to forego, in favour of his vassal, either in the original charter or in a charter of *novodamus* (Bell, *Lect.* 627; *M'Vicar*, 1749, Mor. 4180, 10251). The superior may also grant a renunciation, which should be recorded (Bell, *Lect.*, *supra*); or the discharge may be made a real burden on the superiority by being so declared in a disposition of the superiority (*Learmonth*, 1854, 16 D. 580). It has been doubted whether a simple discharge of casualties, not made public by registration, would be binding on singular successors in the superiority. This question was raised in the case of *Nasmith* (1748, Mor. 5722), and was answered in the negative, but the case was finally decided in the opposite sense on the ground that the feu-right containing the discharge had been excepted from warrandice in the disposition of the superiority. These rules apply to casualties of positive value. The casualty of irritancy may be discharged by a clause of renunciation (Bell, *Lect.* i. 625).

Disposition of Superiority.—The *plenum dominium* cannot be divided by dispositions separately disponing the *dominium directum* and the *dominium utile*, but only by charter and infeftment constituting a feu (*Norton*, 6 July 1813, F. C., 1 Ross' *L. C.* 31; see *Williams & James*, 1872, 10 M. 362). After separation of the estates the superiority may be alienated in favour either of the vassal or of a third party, but only, in the absence of special agreement, so that it be not divided, nor a new mid-superiority created (Ersk. ii. 5. 4; Menzies, 663, 667; Bell, *Lect.* ii. 753–4). The delivery of a

disposition of the superiority to the vassal implies a discharge of bygone feu-duties (*Earl of Argyll*, 1676, Mor. 842, *supra*). A disposition of superiority differs from a disposition of property in the following particulars: the granter is described as superior instead of heritable proprietor of the lands; the feu or blench duties and casualties are assigned in place of rents; and the feu-rights under which the lands are held are excepted from the warrandice (Bell, *Lect.* ii. 752–3). The better form in which to dispone the superiority of lands, is to dispone the lands themselves and except the feu-rights from warrandice (Ersk. ii. 5. 41; Bell, *Lect.* 755). It was formerly held that one who was not infeft in the lands themselves could not pursue an action of declarator of non-entry (*Park*, 16 May 1816, F. C.), and it was doubted if he could enforce an irritancy or accept a resignation (Ersk. *supra*; Bell, *Lect.* ii. 755; *Hamilton*, *infra*). But it is now settled that an infeftment in the *dominium directum* or right of superiority is practically equivalent to an infeftment in the lands under exception of the feu-rights (*Hamilton*, 23 Feb. 1819, F. C., 1 Ross' *L. C.* 22; *Gardner*, 1841 3 D. 534; *M'Kenzie*, 1822, 2 S. 81; *Hill*, 1828, 6 S. 1133; see *Laird of Lagg*, 1624, M. 13787). A disposition of the superiority, though in form a disposition of the lands, does not necessarily comprehend everything reserved from the property; see DISPOSITION, II.). The superiority may also be burdened by heritable security (Menzies, 667; Bell, *Lect.* 753). Professor A. M. Bell says, on the authority of an old case, that in a security over a superiority the lands should be disponed (Bell, *Lect.* ii. 1160; *Home*, 1794, Mor. 15077): but there is no apparent reason why redeemable dispositions should not be governed by *Hamilton* (*supra*). The consent of heritable creditors is required to the redemption of casualties, and the allocation of feu-duty (*supra*). They can have no higher right than superiors (Bell, *Lect.* 754; *Home*, 1794, M. 15077), and so cannot raise an action of maills and duties (*Prudential Insur. Co.*, 1884, 11 R. 871; *Nelson's Trs.*, 1896, 23 R. 1000), nor demand payment of feu-duties which, as against the superior, the vassal would be entitled to retain (*Arnott's Trs.*, 1881, 9 R. 89). A right of superiority falls under the Courtesy of Lands (Bell, *Lect.* 852), but not under terce (*ib.* 855).

Consolidation.—The superiority may be reunited with the property by consolidation, so that the two estates become one, as if the property had never been feued out (see CONSOLIDATION; DISPOSITION, III.).

Supervision Order.—Reference is made to JOINT STOCK COMPANIES, vol. vii. p. 157–158. A supervision order, pronounced under the Companies Act, 1862, ss. 147 *et seq.*, is specially valuable in Scotland, because, while in England the Court, under the Companies Act, 1862, ss. 133 and 138, restrains action and diligence against a company in voluntary liquidation (*Thurso Gas Co.*, 1889, 42 C. D. 485, and prior cases), the same view has not been taken in Scotland; and in *Sleuard* v. *Gardner*, 1876, 3 R. 577, the Court held that neither these sections alone, nor in combination with secs. 85, 87, and 163, authorised the Court to stay proceedings by creditors against a company in voluntary liquidation. But a supervision order confers that power (s. 151). Accordingly, for that purpose, and in order, under the Companies Act, 1886, s. 3, to equalise diligence begun within sixty days before liquidation, it is necessary for the protection of the general body of creditors to apply for a supervision order, and this is frequently made an instruction to the liquidator in the winding-up resolution. Applications at the instance of the company and liquidator, or of creditors, are granted

almost as a matter of course (*Christie*, 1876, 3 R. 623; *Monkland Co.*, 1886, 14 R. 242; *Lawson Seed Co.*, 1886, 14 R. 154; *Drysdale and Gilmour*, 1890, 18 R. 98; *Aitken*, 1888, 26 S. L. R. 129; *Macquisten*, 1896, 23 R. 910); but this leaves the discretion of the Court under the 87th section unaffected (*Solana Co.*, 1891, 29 S. L. R. 290). In special circumstances orders were refused in *Mitchell*, 1888, 16 R. 117, and granted in *Gardner and Hughes*, 1883, 10 R. 1138.

The supervision order does not alter the date of the commencement of the winding up, which continues to be the date of the extraordinary resolution, or, in the case of a special resolution, the date of the confirmatory resolution (Act 1862, s. 130; *Weston*, 1868, 4 Ch. 20; *West Cumberland Co.*, 1889, 40 C. D. 361). This is the rule also in Scotland, though apparently there is no decision (see *Athole Hydro. Co.*, 1886, 13 R. 818).

Effect of a Supervision Order.—Prior to the Companies Act, 1886, it was only attachments, executions, etc., put in force against the estate of the company *after* the commencement of the winding up that were void (Act 1862, s. 163); hence arrestments, whether on the dependence or in execution, laid on *before* that date, even although within sixty days of it, were sustained (*Benhar Co.*, 1883, 10 R. 558). Now, under the Companies Act, 1886, s. 3, it is provided (1) that a winding up by or under the supervision of the Court shall (like a sequestration) be equivalent to completed diligence, viz. *quoad* moveable estate, arrestment in execution, and decree of forthcoming, or executed poinding; and *quoad* heritage, decree of adjudication, subject to valid preferable rights, and the right to poind the ground as there defined; (2) the *punctum temporis* is fixed, in the case of a winding up by the Court, to be the commencement thereof, *i.e.* the date of the presentation of the petition; and, in the case of a winding up under supervision, the date of the presentation of the petition on which the order is pronounced (sometimes a winding-up petition is amended and a crave for a supervision order inserted); and (3) it is provided that no arrestment or poinding executed on or after the sixtieth day prior to these respective dates shall be effectual.

In construing sec. 163, it has been held that the compearance of a creditor, after the commencement of a winding up, in a poinding executed before it, was not struck at (*Clark*, 1884, 12 R. 347); nor an action of poinding the ground where the summons was served after the winding up began (*Athole Hydro.*, 1886, 13 R. 818)—a decision doubted by Ld. Young in *N. B. Propty. Co.*, 15 R. 885, where it was held that a collector of poor-rates was preferable to a heritable creditor, who had obtained decree in an action of poinding the ground.

The Act of 1886 applies to the equalisation of diligence, but doubt has been expressed in the profession whether the voluntary alienations struck at by the Act 1696, c. 5, may be set aside if liquidation supervenes within sixty days after. A different view, however, was expressed *obiter* by Ld. Shand in the case of *Clark*, 1884, 12 R. 347, who said that he saw no reason to doubt that a company might be made notour bankrupt, "so as to regulate the equalisation of diligences, *and to enable creditors to reduce preferences struck at by the Statute of* 1696" (p. 353). See Bankrupt Act, 1856, ss. 4, 7, 8, and 12: also article DEBENTURE, etc., vol. iv. p. 104.

The Companies Act, 1862, s. 151, defines the effect of a supervision order, and is read along with sec. 87. Accordingly, if by diligence prior to the sixty days preference has been secured, the creditor would be in a favourable position for obtaining the leave of the Court to complete the diligence, and in any case would have his rights reserved (*Benhar Co.*, 1883,

10 R. 558; *Gardner and Hughes*, 1883, 10 R. 1138; *New Glendaffhill Co.*, 1882, 10 R. 372). If an action were in dependence, the Court might in its discretion allow it to proceed for the purpose of constituting a claim, all the more if an effectual arrestment on the dependence had been used. But as in bankruptcy a claim in the sequestration is the recognised mode of constituting a debt, the Court would only allow the action to proceed if it appeared in the circumstances a more expedient course (Companies Act, 1886, s. 4; *Phosphate Sewage Co.*, 1874–76, 1 R. 840, 3 R. (H. L.) 77).

Under these sections, actions by creditors, over whom the Scottish Court had jurisdiction, raised in a foreign country against the company or a trustee for it, were restrained (*Pacific Co.*, 1886, 13 R. 816; *California Redwood Co.*, 1886, 13 R. 1202); but an order was refused where one of the plaintiffs in the foreign action was not subject to the jurisdiction of the Scottish Court (*California Redwood Co.*, 1886, 13 R. 810).

Under sec. 151 the liquidator has a general authority, subject to any restrictions imposed by the Court, to exercise his powers, as in a voluntary winding up. Restrictions are not in practice imposed. But from the terms of the latter part of the section, by which for all purposes a supervision order is to be deemed a winding-up order, the practice is to obtain the sanction of the Court to all important steps in the winding up, *e.g.* settling the List of Contributories, making calls, adjudicating upon and ranking claims, and paying dividends; while secs. 159 and 160 specially require the sanction of the Court to compromises with creditors and contributories. Although sec. 161, under which reconstruction schemes are carried out, applies only to a purely voluntary liquidation, still, in a liquidation under supervision, a sale of the property or undertaking to another or reconstructed company may be carried out under sec. 95, with the sanction of the Court, and by the aid of the Companies Act, 1870, under which a three-fourths majority of creditors may bind the minority.

If the liquidation continues for more than a year, annual meetings should be convened by the liquidator under the Act 1862, s. 139; and as soon as the affairs of the company have been fully wound up, the liquidator must, under sec. 142, make up an account and convene a meeting of the members for the purpose of having the accounts laid before them and hearing any explanation thereanent. The meeting must be convened on a month's inducie. The meeting, if satisfied, will approve of the accounts and authorise the liquidator to apply to the Court for approval thereof, for fixing his remuneration, and for dissolution of the company. Under this application the Court will remit to a professional man to audit the accounts of the liquidator's intromissions, and to the Auditor of the Court to tax the law agent's business accounts, and will fix the liquidator's remuneration after such inquiry by remit or otherwise as is thought expedient. Unclaimed dividends will be directed to be deposited in a bank, and the deposit receipt to be lodged in process and transmitted by the Clerk of Court to the Accountant of Court, to be dealt with in conformity with the Bankruptcy (Scotland) Act, 1856. Thereafter an order will be pronounced discharging the liquidator and dissolving the company, and also, under sec. 155, authorising the liquidator, on the expiry of a year from the dissolution, to destroy the books, accounts, and documents of the company and of the liquidator.

Supplement, Letters of.—Letters of Supplement derive their name from the fact that in certain circumstances "they supply the want of jurisdiction in an inferior judge by the interposition of the Supreme

and Universal Court," the Court of Session (Ersk. *Inst.* i. tit. 6, s. 21). Their use nowadays has, in the majority of instances, been rendered unnecessary by various statutory enactments.

Formerly, when it was desired to cite a person living in Scotland to appear before an inferior Court as party or witness, and the party or witness was domiciled outwith the jurisdiction of the judge of the inferior Court, it was necessary to apply to the Court of Session, whose jurisdiction extended over the whole kingdom, for Letters of Supplement, which were always granted as matter of course. These letters contained a warrant to cite the party or witness before the judge of the territory where the action was brought (Ersk. *Inst.* bk. i. tit. 2, s. 17; Ross's *Lectures*, i. 282, ii. 531).

This procedure, however, while still competent, has been rendered unnecessary by Act 1 & 2 Vict. c. 119, s. 24, which enacts that it shall be competent, in any civil or criminal action in any Sheriff Court, to cite all persons within Scotland as parties, when amenable to the jurisdiction of the Court, or as witnesses, by the warrant of such Sheriff Court, and "all such warrants shall have the same force and effect in any other sheriffdom as in that in which they were originally issued, the same being first indorsed by the sheriff clerk of such other sheriffdom, who is hereby required to make and date such indorsation, and such citation made shall be due and regular citation." In a very limited number of cases the necessity for such indorsation has been abolished by Act 39 & 40 Vict. c. 70, s. 12; namely, where the defender is subjected to the jurisdiction of the Sheriff by secs. 46 and 47 of the Act (cases concerning persons carrying on business within the county, and actions of furthcoming and multiplepoinding). It is thought that the Citation Amendment Act, 1882, which introduced citation by registered letter, does not extend the jurisdiction of the Sheriff to the effect of abolishing the necessity of indorsation (see Dove Wilson, *Sheriff Court Practice*, p. 120, and cases noticed; *Bird* v. *Brown*, 1 White, 495; Mackay, *Manual*, p. 11).

Where a party to a suit was furth of Scotland, he could, when amenable to the Sheriff's jurisdiction, be cited to appear by Letters of Supplement. Such letters contained a warrant to cite the defenders at the office of the Keeper of Edictal Citations in Edinburgh. By Act 39 & 40 Vict. c. 70, s. 9, it is provided that any warrant of citation granted by a Sheriff against any person furth of Scotland may now be executed edictally. There is no means of citing witnesses furth of Scotland to the Sheriff Court, for the provisions of Act 17 & 18 Vict. c. 34 apply only to proceedings in the Supreme Court.

The above-mentioned Acts do not apparently affect the procedure in inferior Courts other than the Sheriff Court (Campbell on *Citation*, p. 133).

Letters of Supplement were formerly sometimes used for intimation and requisition of payment of a heritable bond, but have been superseded by the changes made by Act 10 & 11 Vict. c. 50.

They are still in use for intimating assignations when the debtor or debtors are furth of Scotland.

For Form, see *Jurid. Styles*, vol. iii. p. 379; Bell, *Lectures on Conveyancing*, vol. i. pp. 314, 315; Gloag and Irvine, *Rights in Security*, p. 484).

Letters of Supplement may also be used for intimating a resignation of trustees when the party to whom intimation should be made cannot be found (*Jurid. Styles*, vol. iii. p. 381). It is, however, now provided by the Trusts (Scotland) Act, 1867, 30 & 31 Vict. c. 97, s. 10, that such intimation may be given edictally in usual form.

See CITATION.

Supply, Commissioners of.—See COMMISSIONERS OF SUPPLY.

Support.—The right of support from adjoining soil may be claimed in respect of land in its natural state, or of land subjected to artificial pressure, by the erection thereon of buildings or other structures. Further, a right of support may be claimed for a building from adjoining building or buildings. Many questions have also arisen as to the degree of care to be used in regard to the withdrawal of support, and the liability of a proprietor for such operations on the ground of *culpa*; but these, though intimately connected with the law of neighbourhood, form part of the general law of negligence, and do not fall to be here considered. The general principles which govern the right of support are the same in both English and Scots law (Ld. Chan. Cranworth, *Caledonian Rwy. Co.*, 1856, 2 Macq. 449, at 461; Ld. Chan. Selborne, *Andrew*, 1873, 11 M. (H. L.) 13, at 16); though these systems differ in several particulars. Reference has accordingly been made to English authority, more especially where such is not available with us. The subject is treated under the following heads:—

A. Natural support to land.
B. Support to buildings from adjoining land.
C. Support to buildings by buildings.

As is hereafter stated, there is no valid distinction to be drawn between the right of support from adjacent or from subjacent land. The two cases are therefore considered together in what follows.

A. Natural Support to Land.

1. *Natural Right to Support from Adjacent or Subjacent Soil: an Incident of Ownership.*—The natural right which the owner of lands has to its support by adjacent or subjacent land affords a good example of the principle upon which the right of ownership comes to be limited by the law of neighbourhood: in which the one maxim, *Qui utitur jure suo neminem lædit*, is controlled by the other, *Sic utere tuo ut alienum non lædas*. It is plain that unless some restriction upon the absolute rights of ownership could be thus imposed, there would be no guarantee for the security of property. The withdrawal of all lateral support, for instance, by an adjoining proprietor, would at once, in many cases, cause the unprotected surface of his neighbour to fall in.

Accordingly, in all cases in which the owner of land has not, by the erection of buildings or otherwise, increased the lateral or vertical pressure, it may be stated as a general proposition that such owner has a right to such support for his land from the adjoining soil as shall be sufficient to retain it in its natural state. And this, not by way of servitude, but as a natural incident to his right of property in the land (*Humphries*, 1848, 12 Q. B. 739, 20 L. J. Q. B. 10; *Elliott*, 1863, 10 H. L. Ca. 333, 29 L. J. Ch. 808; *Caledonian Rwy.*, *r.s.*; *Bonomi*, 1861, 9 H. L. Ca. 503; 1859, El. B. & E. 622, 646; Ld. Chan. Selborne and Ld. Blackburn, *Angus*, 1881, 6 App. Ca. 740, at 791, 808; *White*, 1883, 10 R. (H. L.) 45; see *Pountney*, 1883, 11 Q. B. D. 820, 52 L. J. Q. B. 566; *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301, per Collins, J., at 311). This natural right of support has been likened to the right of a riparian owner in a river or stream (Pollock, C. B., *Solomon*, 1859, 4 H. & N. 585, at 598; Willes, J., *Bonomi*, 1859, El. B. & E. 622, at 654). The right of support exists in respect of adjoining soil, subjacent as well as adjacent, so that, where in course of time the surface and the subjacent soil come to be vested in different owners, the owner of the former

is entitled to support at the hands of the latter (*Humphries* and other cases, *supra*). The same holds as between upper and lower mineowners (*Hurlet Alum Co.*, 12 D. 704; affd. 7 Bell's App. 100; *Mundy*, 1882, 23 Ch. D. 81).

2. *Extent of Natural Right and its Effect.*—The right does not imply that the whole or any part of the adjacent or subjacent soil must be left in its natural state; it is simply a right not to have one's land injured by any operations of the adjoining owner *in suo*, however carefully these may be executed. It follows from this, that the obligation to support may in some cases lead to the entire negation of the right to work subjacent minerals. For "the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level" (Campbell, C. J., *Humphries*, *v.s.*, at 745); and so, if the soil be of so friable a character that the subjacent mines cannot be worked without causing the surface to subside, then the mines cannot be worked at all (*Wakefield*, 1866, 4 Eq. 613, 36 L. J. Ch. 763; *Hext*, 1872, 7 Ch. App. 699, 41 L. J. Ch. 761: see *Love*, 1884, 10 Q. B. D. 558, 52 L. J. Q. B. 290, 9 App. Ca. 286, 53 L. J. Q. B. 257). A similar result may follow in the case of underground water (see Ld. Chan. Hatherley, *Grand Junction Canal*, 1871, 6 Ch. App. 483, at 488). Accordingly, no definite limit can be set to the extent of the obligation of support attaching to adjoining lands (Jessel, M. R., *Corpor. of Birmingham*, 1877, 6 Ch. D. 284, at 289). It is in each case a question of circumstances, depending upon the nature of the soil, and so forth (Ld. Chan. Cranworth, *Caledonian Rwy.*, *v.s.*, at 451). The obligation only affects so much of the adjoining land as is necessary to sustain the property in its natural state; and therefore the owner alleging injury cannot obtain damages from the proprietor of non-contiguous lands if it be shown that no damage would have resulted to him from the defender's actings but for the excavation of the intervening land. The burden of support, in short, cannot be increased by the act of the intermediate owner (*Corpor. of Birmingham*, 1877, 6 Ch. D. 284, 46 L. J. Ch. 673; cf. *Solomon*, *v.s.*). The same result follows, upon another principle, if the actings of the complainer himself can be shown to have in any way contributed to the injury (see *infra*, s. 18). The onus is on the complainer to prove that the same effect would have resulted independently of his own operations (see *Durham*, 1871, 9 M. 474).

3. *When Right of Action emerges: Remedies.*—The natural right of support being a right to the ordinary enjoyment of the land (Ld. Cranworth, *Bonomi*, 1861, 9 H. L. Ca. 503, at 512), it also follows that, until that ordinary enjoyment is interfered with, a proprietor has nothing of which to complain. The mere withdrawal of support, as, for example, by excavating the adjacent land, or working out the minerals below the surface, is not *per se* wrongful, nor will it give a cause of action. A cause of action only emerges when the condition of the complainer's land has been in fact appreciably changed or substantially interfered with by the withdrawal of the support, lateral or vertical (Ld. Chan. Westbury and Ld. Cranworth, *Bonomi*, *v.s.*, at 512; Brett, M. R., *Darley Main Colliery Co.*, 1884, 14 Q. B. D. 125, at 130, Bowen and Fry, L. JJ., *ib.*, at 137, 140; but cf. Cockburn, C. J., *Lamb*, 1878, 3 Q. B. D. 389, at 402). Each distinct subsidence, though possibly caused by the same excavation, affords a fresh cause of action (*Darley Main Colliery Co.*, 1886, 11 App. Ca. 127; *Crumbie*, [1891] 1 Q. B. 503). Prescription only begins to run from the time that the injury arising from the withdrawal of support makes itself felt, although the cause may be workings of some years' standing (*Bonomi*, *v.s.*; Pollock, B., *Angus*, 1881, 6 App. Ca.

740, at 745). This does not, of course, mean that the surface owner must in all cases stand by until his land actually subsides. He is entitled to the protective remedy of interdict against the mineral owner or tenant, if the latter is in course of working these in a way which is calculated to produce injury (Ld. Mure, *White*, 1881, 9 R. 375, at 389); or where it can be shown that the operations proposed by the mineowner must necessarily result in letting down the surface (Jessel, M. R., *Corporation of Birmingham*, 1877, 6 Ch. D. 284, at 287). He has two distinct remedies. An action of damages for any injury that may be occasioned by the working; or, as the act itself when done is a wrong rendering the doer liable in damages, and "as prevention in such a case is a better remedy than any damages, the Court would be justified in granting, and probably could be called upon to grant, an interdict" (Ld. Chan. Selborne, *Andrew*, 1873, 11 M. (H. L.) 13, at 16; *Siddons*, 1877, 2 C. P. D. 572; see *Elliott, v.s.*; *Heal*, 1872, 7 Ch. 699).

4. *Necessity for Proof of Actual Damage.*—Upon the question how far proof of actual damage is necessary to support an action, it has been said that "the right of support, though absolute in the sense of not admitting of degrees, is not absolute in the sense of giving rise to a right of action when no appreciable damage has been sustained," because "it is the damage which is done by subsidence that first gives a right of redress" (Rankine, *Landownership*, p. 341). If this means only that there may be cases in which the rule of *de minimis non curat prætor* may prevent a successful application to the Court, no exception can be taken to it; but if it means, as apparently it does, that damage is the basis of the right of redress, and proved damage therefore the condition of success, it is submitted to be unsound in principle and contrary to authority.

It is the fact of subsidence following upon the actings of the defender, not the pecuniary loss accompanying it, which founds the right of action (see cases *supra*, s. 3), and which constitutes the *injuria* upon which action may be brought. This, indeed, follows from the cases to be immediately noticed (*infra*, s. 5), in which, upon proof that the erection of buildings has not contributed to the subsidence, the value of such buildings may be recovered by way of damage consequent upon such *injuria*. For in such cases the fall of the buildings themselves can afford no right of action, there being no obligation to support them. Proof that the unencumbered surface would have subsided establishes the wrong, from which the damage to buildings flows as a consequence; and this although it be not proved that any pecuniary damage whatever would have resulted had the buildings been absent (see Collins, J., *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301, at 312; *Chapman*, 1883, 47 L. T. 705; but see *Smith*, 1866, 1 C. P. 564).

It is, moreover, settled law that the natural right of support is an incident of ownership (*supra*, s. 1); and there seems no reason why invasion upon one natural incident of property, namely, the right in flowing water, which is undoubtedly actionable whenever a sensible alteration has been produced in the flow, and without the necessity of proving actual damage (see *Morris*, 1864, 2 M. 1082, 4 M. (H. L.) 44; *Embrey*, 1851, 6 Ex. 353; and other authorities, RIVER, s. 6), should be attended with different results from the case of invasion upon a similar incident to ownership, namely the right to support. The former view, which seems to be based upon the erroneous view that damage, and not the fact of subsidence, actual or potential and imminent, is the gist of the right of action, is accordingly submitted to be not good law.

5. *Right to Support may Continue, though Ground built upon.*—The natural right to support is not lost by the fact that buildings are erected upon the surface, where the surface sinks, not in consequence of the additional pressure so caused, but owing to the adjoining owner's operations, and would have so sunk had no such buildings existed. The onus of proving this, however, lies upon the owner of the surface. And damage to the buildings may be recovered as a consequence of the wrong done (*Hamilton*, 1867, 5 M. 1086; see Lds. Deas and Ardmillan, pp. 1099, 1100; *Brown*, 1859, 4 H. & N. 186, 28 L. J. Ex. 250; *Stroyan*, 1861, 6 H. & N. 454, 30 L. J. Ex. 102; *Siddons*, 1877, 2 C. P. D. 572, 46 L. J. C. P. 795; *Love*, 1884, 9 App. Ca. 286, 53 L. J. Q. B. 257; cf. *Smith*, 1866, 1 C. P. 564; *infra*, s. 17).

6. *Support from Underground Water.*—It has apparently been decided in England that the surface owner's right to support does not extend to the support which is afforded by the hydrostatic pressure of underground water, or enable him to prevent the owner of the inferior strata from draining his property, the presence of such water being an accidental circumstance on which the surface owner is not entitled to rely, that is, not a circumstance from which any grant of a right of support can properly be implied (*Elliott*, 1863, 10 H. L. Ca. 333, see pp. 359, 365; 29 L. J. Ch. 808, at 812; *Popplewell*, 1869, L. R. 4 Ex. 248, 38 L. J. Ex. 126). An earlier Scots decision in which this point occurred has been thought to run counter to these, and to be of doubtful authority. Here a proprietor feued out lands on which buildings were erected, reserving the minerals. The buildings at the time of the feu stood above coal wastes filled with water, which water did in fact support, and was known to the grantor of the feu-right to support, the surface of the lands feued out by him. The grantor subsequently leased the remanent minerals, and the lessees, by pumping out the water, caused a sit, injuring the surface and the buildings. It was proved that had ordinary precautions been taken, any such injury might have been prevented. In an action by the feuar, both the grantor of the feu and the mineral tenants were found liable for the damage caused (*Bald*, 1854, 16 D. 870). The fallacy of the decision has been said to lie "in applying to a case of severance of the surface and the minerals subsequent to excavation and flooding, the rules applicable to severance prior to the drowning of the mine" (Rankine, *Landownership*, p. 430). This is certainly not so. An application of the latter principles would, in the view of the Court, have infallibly led to absolvitor (see Ld. Pres. M'Neill, *ib.*, p. 875). It would seem, on examining these cases, however, that they are quite reconcilable. In *Popplewell's* case (*v.s.*), C. J. Cockburn said: "Although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if for any reason it becomes necessary or convenient for him to do so. It may be, indeed, that where one grants land to another for some special purpose, for building purposes, for example, then, since according to the old maxim 'a man cannot derogate from his own grant,' the grantor could not do anything whatever with his own land which might have the effect of rendering the land granted less fit for the special purpose in question than it otherwise might have been" (*ib.*, p. 251). The exception here pointed at seems to precisely cover and explain the principle of the judgment in *Bald's* case. In addition to this, it may be observed, the element of neglect of ordinary precautions for the safety of the surface, found in fact by the jury, formed a good ground of liability against the defenders. "The neglect of the precautions which ought to have been taken, was their mutual neglect." It is submitted, therefore, that the supposed antagonism

between the English and Scots law on this point does not exist, and that each decision may be supported in the light of the special facts.

7. *Variation of Natural Right by Contract.*—The natural right to support *primâ facie* subsists in all cases; but the adjoining owner may be relieved from the obligation to afford support, and the natural legal relation between the parties be varied, by contract between them, either on the original severance of ownership or at any subsequent period, or by force of statute (*Rowbotham*, 1860, 8 H. L. Ca. 348). The onus, if such a term be appropriate to what in such cases comes to be really a question of construction, lies upon him who founds upon the surrender of the common law right of support (Ld. Blackburn, *White*, 1883, 10 R. (H. L.) 45, at 47; Ld. Chan. Selborne, *Love*, 1884, 9 App. Ca. 286, at 289). The legality of such a contract was at one time doubted (Ld. Denman, *Hilton*, 1844, 5 Q. B. 701, at 730), but is now quite settled (*Andrew*, 1873, 11 M. (H. L.) 13; *White, Rowbotham, Love, supra*). In order, however, to maintain a grant in derogation of the ordinary and *primâ facie* right to support, the contract must be express, or the implication be necessary (*Smart*, 1855, 5 El. & Bl. 30, 24 L. J. Q. B. 260). "If A. conveys minerals to B. reserving the property of the surface, or if A. conveys the surface to B. reserving the property of the minerals below it, A. in the one case retains, and B. in the other gets, a right to have the surface supported, unless the contrary shall be expressly provided, or shall appear by plain implication from the terms of the conveyance" (Ld. Watson, *White*, *v.s.*, at 50).

8. *Express or Implied Right to let down Surface*, et contra.—Cases in which there is conferred an express right to let down the surface present no difficulty (*Andrew*, *v.s.*); cases in which the right to support has been negatived upon a construction of the contract, on the ground of clear implication, are less numerous (see *Muirhead*, 1854, 16 D. 1106; *Rowbotham*, *v.s.*; *Duke of Buccleuch*, 1869, L. R. 4 H. L. 377; *Aspden*, 1875, 10 Ch. 394, 44 L. J. Ch. 359; *Gill*, 1880, 5 Q. B. D. 159, 49 L. J. Q. B. 262). Thus, in a recent case, lands were disponed, the disponer reserving the minerals with power to work them, but without entering upon the surface. Certain portions of the mineral field lying under existing buildings were excepted from the reservation; the disponee, on the other hand, having a power to purchase additional support for these buildings, if such were found necessary. The Court read the contract as reserving a right to work the coal in the way in which it was being worked at the date of the disposition, although the result of this working might be to let down the surface (*Bank of Scotland*, 1891, 18 R. 957). Here it was known to both parties that the only feasible or profitable way of working the coal—by long wall—involved or might involve the reduction of the surface. There are also cases of mining leases (see MINES AND MINERALS), in which, upon a construction of the contract, the lessee has been held to be released from the obligation to support the superjacent land (*Muirhead*, *v.s.*; *Smith*, 1872, L. R. 7 Q. B. 716; cf. *Eadon*, L. R. 7 Ex. 379); but, even in such leases, there is no presumption against the subsistence of the right to support. The rule of law is the same as between grantor and grantee, or lessor and lessee, except that where the lessor has a royalty a reason is afforded why the lessee should be empowered to let down the surface, and the presumption against the surrender of the right may be perhaps less strong (Ld. Blackburn, *Davis*, 1881, 6 App. Ca. 460, at 466; Jessel, M. R., *Aspden*, *v.s.*, at 399). It has been suggested (Ld. Chan. Hatherley, Ld. Chelmsford, *Duke of Buccleuch*, *v.s.*, at 398, 411; Ld. Chan. Selborne and Ld. Watson, *Love*, *v.s.*, at 296, 298; Mellish, L. J., *Hext*, *v.s.*, at 717) that one reason for holding

the right of support to be surrendered in these and similar cases, was the presence of an absolute and unqualified clause of compensation, so that, whatever the extent of the damage, a full remedy was provided by the contract. This element, however, was not present in the case of the *Bank of Scotland*, *v.s.*

Other cases have all been in favour of the retention of the common law right, even where the contract contains clauses providing for compensation for surface damage (see *Harris*, 1839, 5 M. & W. 60; *Smart*, *v.s.*, s. 7; *Roberts*, 1856, 6 El. & Bl. 643; *Proud*, 1865, 34 L. J. Ch. 406; *Davis*, 1881, 6 App. Ca. 460; *Chapman*, 1883, 47 L. T. 705; *White*, *v.s.*, s. 7; *Love*, *v.s.*, s. 7; *Greenwell*, [1897] 2 Q. B. 165). So where a superior, reserving right to the minerals, bound himself to repair any damage the feuar should sustain through the leading or setting down of mineral shanks, it was held that the feuar's right to support was not discharged by the compensatory clause (*Bain*, 1867, 6 M. 1; cf. *White*, *v.s.*). It may be noted that in such cases it is not incumbent upon the feuar to call the mineral lessees of the superior. He may proceed against the superior alone (*Highgate*, 1896, 23 R. 992).

The result of the authorities shows that it is now "perfectly settled ground that, as of common right, the surface land has a right to be supported by subjacent strata of minerals. Although that is of common right, it may be shown—the burden lying on those who wish to show it—that the person who has got the surface obtained it either upon terms which would give him no right of support, he having accepted it and taken it upon these terms, or that before he got it the person from whom he claims, the owner of the surface, had parted with the right of support from below, in which case, of course, the owner of the surface could be in no better position than the person who sold it to him" (Ld. Blackburn, *Davis*, 1881, 6 App. Ca. 460, at 466). It has been said that the provision of compensation for surface damage is an element in favour of a right to let down (Jessel, M. R., *Aspden*, *v.s.*, s. 7, at 396), but such a provision is primarily intended not to define or to extend the powers conferred, but to express the terms upon which these shall be exercised (see Ld. Watson, *Love*, 1884, 9 App. Ca. 286, at 299; *White*, *v.s.*, s. 8). If the compensation clause can be fairly satisfied as referable to damages arising in the course of the proper exercise of the rights conferred, there is no room for an implication of surrender of the right of support (Ld. Blackburn, *Davis*, *v.s.*, at 468; Ld. Selborne, *Love*, 1884, 9 App. Ca. 286, at 293). "It seems to be assumed that if there is a provision that whatever damage is done by the owner of the minerals is to be compensated by a money payment, that gives him a kind of authority or power to do any amount of damage of any kind. Now, I am not aware of any authority for such a proposition as that. I do not know any case in which the mere provision of damage in case a thing be done has by itself and without any other aid from other portions of a deed, or from the circumstances, been held to infer a right to do the damage" (Ld. President Inglis, *White*, 1881, 9 R. 375, at 385).

9. *Effect of Severance under Statutory Powers.*—No distinction in principle can be made whether the severance follows upon voluntary agreement between the parties, or is the result of the exercise of compulsory powers conferred by statute (*Elliott*, 1863, 10 H. L. Ca. 333, 29 L. J. Ch. 808); unless there be special provisions in the statutes conferring the power, as in cases under the Railway and Canal Acts.

It is impossible here to treat with any detail the numerous cases dealing with the question of support under these and similar statutes, and reference is made to the special treatises dealing with the subject (see

Ferguson, *Railways*, 189 *seq.*; Browne and Theobald, *Railways*, 2nd ed., 281 *seq.*; Hodges, *Railways*, i. 238 *seq.*). Broadly stated, the result is that where lands are compulsorily acquired under the Railway Clauses Consolidation (Scotland) Act of 1845 (8 & 9 Vict. c. 33; see ss. 70–78) the common law rules are displaced. These sections provide that railway companies shall not be entitled to the minerals under the lands purchased, these being deemed excepted from the conveyance unless the contrary is expressed (see *Earl of Hopetoun*, 1893, 20 R. 704; cf. *Nisbet-Hamilton*, 1886, 13 R. 454); notice of working of the minerals must be given by the mineowners (see *Glasgow & S.-W. Rwy. Co.*, 1893, 21 R. 134; *Wm. Dixon Ltd.*, 1879, 7 R. 216, 7 R. (H. L.) 116), the company having the right, if injury is likely to arise therefrom, to veto the working upon paying compensation. Should the company refuse to do so, the mineowners may work out the minerals in the usual and proper way (see RAILWAYS). It has been held, as a result of the cases under the statute, that the policy of the Act is to create a different relation between vendor and purchaser than would result at common law (see Esher, M. R., *in re Lord Gerard*, [1895] 1 Q. B. 459, at 464): the company, on the one hand, having the benefit of being enabled to acquire the surface without compulsory purchase of the minerals; the mineowner, on the other hand, being advantaged by getting his mine free from the obligation of support which the common law would impose upon a seller disponing the surface under reservation of the minerals. Where, accordingly, the company do not purchase the minerals, the mineowner is at liberty to work them, even from the surface, and to the effect of letting down the ground (*G. W. Rwy. Co.* v. *Bennett*, 1867, L. R. 2 E. & I. App. 27, 36 L. J. Q. B. 133; *G. W. Rwy. Co.* v. *Fletcher*, 1859, 5 H. & N. 689, 29 L. J. Ex. 253; *L. & N.-W. Rwy. Co.*, 1862, 31 L. J. Ch. 588; *Ruabon Brick Co.*, [1893] 1 Ch. 427. See for illustrations under Canal Acts, *Lanc. & Yorks. Rwy. Co.*, 14 App. Ca. 248; *Birmingham Canal Co.*, 1879, 11 Ch. D. 421; *Stourbridge Navigation Co.*, 1860, 3 El. & E. 409, 30 L. J. Q. B. 108; *Dudley Canal Co.*, 1830, 1 B. & Ad. 59). It would seem that the same result follows although there has been a severance of the surface and minerals before the railway company comes into the field (*Pountney*, 1883, 11 Q. B. D. 820, 52 L. J. Q. B. 566), in which case also it was held that a purchaser of superfluous lands from a railway company takes no higher right than his vendor, and that the right of support does not revive. On the other hand, where the servient tenement is acquired in virtue of compulsory powers, the rule, in the absence of special provisions in the Act, is that this operates extinction of servitude rights constituted over it (see *Town Council of Oban*, 1892, 19 R. 912; *Macgregor*, 1893, 20 R. 300). The question in each case is whether the provisions of the particular statute indicate an intention that the right *primâ facie* existing in all cases as between the owner of land and the adjoining owner, adjacent or subjacent, is to be affected (see *L. & N.-W. Rwy. Co.*, [1893] 1 Ch. 16, 62 L. J. Ch. 1; *G. W. Rwy. Co.*, [1894] 2 Ch. 157, 63 L. J. Ch. 500). If this view be negatived upon a construction of the statute, the ordinary rules apply (see *Caledonian Rwy. Co.*, 1856, 2 Macq. 449; *Caledonian Rwy. Co.*, 1857, 3 Macq. 56; *Elliott*, 1863, 10 H. L. Ca. 333, which all turned upon the construction of special Acts prior to the Railway Clauses Act of 1845; see also *Aitken's Trs.*, 1894, 22 R. 201, case under Road Act).

10. *Construction of Compensatory Clauses: Surface Damage.*—Where there is a clause providing for compensation for surface damage, it is always a question of construction, looking to the circumstances of the case and the

fair meaning of the stipulation, what is to be held covered by the term. The natural meaning of the term has been said to be such damage as prevents the ordinary agricultural use of the subject (Ld. Pres. Inglis, *Galbraith's Trs.*, 1868, 7 M. 167, at 172). Actual damage to crops and plantations would naturally come within its scope, but not injury to amenity, from smoke or vapour emitted in the process of calcining ironstone (*Galbraith's Trs., v.s.*, Ld. Deas, at 171). Damage arising from subsidence of the ground will more naturally fall under a clause providing for compensation for injuries to buildings (see *Allaway*, 1859, 4 H. & N. 681). On the other hand, the term may have a much wider meaning. So where a mineral lease prohibited the working of minerals under the mansion-house, but gave an unreserved power of working elsewhere, under the condition of paying "all surface damages whatever occasioned by these operations," whether occasioned to the grantor of the lease or to the other proprietors, this clause was held to cover damage caused by underground as well as surface operations, including injuries affecting the stability of the mansion-house offices caused by a sit of the ground (*Oswald*, 1853, 16 D. 70; see Ld. Pres. M'Neill, at 75). Later cases have also construed the term as including generally subsidence of the surface owing to mineral workings (*Governors of Stewart's Hospital*, 1890, 17 R. 1077), and also damage to buildings upon the surface (*Hallpenny*, 1898, 25 R. 889; *Neill's Trs.*, 1880, 7 R. 741). Some cases in which damage to buildings has been recovered as a consequence of injury to the surface have been already noted (see *supra*, s. 5).

The same canons of construction apply whether the contract under consideration be one between grantor and grantee (*Hallpenny, v.s.*), or between lessor and lessee (*Governors of Stewart's Hospital, v.s.*). A mineral lease, it is true, differs but little from an out-and-out sale, inasmuch as it generally contemplates exhaustion of the subject of lease before the ish (Ld. Pres. Inglis, *Hamilton*, 1867, 5 M. 1086, at 1095); but upon principles similar to those upon which it has been thought that a right to let down the surface may be more easily inferred in favour of a tenant than a grantee (*supra*, s. 8), so also a right to compensation for damage may be less readily inferred in questions between landlord and tenant, than as between a mineral lessee and the disponee of the surface (see Rankine, *Landownership*, p. 433).

11. *Obligation to Support: against whom and by whom pleadable.*—The obligation to support adjoining land transmits against a disponee of the adjacent or subjacent proprietor, so as to subject him in liability for any act for which his author, had he committed it, would have been liable. Accordingly, where a mineowner who had granted out the surface, and thereafter worked an upper seam of coal without damaging the surface, subsequently sold the lower seam to a third party, the latter, though he himself had left sufficient support, was held liable for surface damage, the cause of this damage being the withdrawal of the lateral support of the lower seam, which had in turn caused a draw in the upper seam, and thus affected the surface and buildings thereon (*White's Trs.*, 1887, 14 R. 597; see Ld. Rutherfurd Clark, at 603; see *Brown*, 1859, 4 H. & N. 186). But the mere fact of a subsidence happening during his tenure of the subjacent land does not impose liability therefor upon the owner or lessee for the time, if the cause of the subsidence is not the result of any act of commission on his part, but is the result of the wrongous act of a predecessor in title (*Greenwell*, [1897] 2 Q. B. 165).

On the other hand, the obligation to support is only prestable at the instance of the owner of the surface, or those who represent him, and cannot

be founded on by the man in the street, with whom the subjacent owner has no relation, contractual or otherwise. So, where gas-pipes were laid in the surface soil with the consent of the owner, who thereafter disponed the minerals, it was held that the gas company, being mere licensees, had no title to sue the subjacent owner for damage to their pipes, caused by subsidence of the surface through the working of the minerals (*Midcalder Gas Light Company*, 1891, 18 R. 788; cf. *Normanton Gas Co.*, 1883, 52 L. J. Q. B. 629).

B. Support to Buildings from Adjoining Land.

In this connection also, adjoining is used in a sense covering both land which is adjacent and subjacent.

12. *Support to Buildings a Servitude Right: Nature and Effect.*—When once the natural condition of the surface is changed, and the pressure upon it has been artificially increased by the erection of buildings and structures, a different chapter of law is entered. We are no longer in the region of natural rights incident to ownership. The rights of parties must here stand upon contract, that is, upon a servitude constituted by grant, express or implied, or upon something which is, in law, equivalent to grant (Ld. Chan. Selborne, *Angus*, 1881, 6 App. Ca. 740, at 792; Cotton, L. J., *ib.*, 4 Q. B. D. 162, at 184). This distinction has long been recognised and acted upon in England. "Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement for support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of that of his neighbour, unless he has some grant to that effect" (*Partridge*, 1838, 3 M. & W. 220, Alderson B., at 228; see also *Wyatt*, 1832, 3 B. & Ad. 871; *Humphries* and *Bonomi*, *v.s.*, s. 1).

The precise nature of this servitude right has been the subject of much controversy. There is no authority in Scots law upon the point; but in England, in the leading case of *Angus* (*vide infra*, s. 17), opinions were expressed that the servitude of support is to be regarded as of the nature of an affirmative or positive servitude, capable of ripening into a full right by the mere lapse of time, where no interruption of possession occurs (Lindley, J., *Angus*, 1881, 6 App. Ca. 740, at 763; see Bowen, L., at 788). This view was concurred in by Ld. Watson, apparently with special reference to Scots law (*ib.*, at 830, 831), and by Ld. Chan. Selborne, who stated that "it is both scientifically and practically inaccurate to describe the right of support as one of a merely negative kind. . . . In the case alike of vertical and of lateral support, both to land and buildings, the dominant tenement imposes upon the servient a positive and constant burden, the sustenance of which by the servient tenement is necessary for the safety and stability of the dominant tenement. The burden and the sustenance are reciprocal and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight" (*ib.*, at 793). The question, however, can perhaps hardly be taken as definitely settled by this case, for although favoured by such high authority, this view was not that accepted by the majority of the judges.

Whatever be the precise nature of the servitude right, it is clear that, once validly acquired, the right is similar in its character and governed by the same principles which apply to the natural right of support (*Bonomi*, 1859, El. B. & E. 622). "The right of support of land, and the

right of support to buildings, stand upon different footings as to the mode of acquiring them, the former being *primâ facie* a right of property, analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as matter of grant (see *Caledonian Rwy. Co.*, 1856, 2 Macq. 449); whilst the latter must be founded upon prescription or grant, express or implied; but the character of the rights, when acquired, is in each case the same" (Willes, J., *Bonomi*, *v.s.*, at 654; see also Ld. Blackburn, *Angus*, *v.s.*, at 809).

13. *How Acquired: Express Grant.*—The right of support to buildings may, of course, be constituted by express grant. No case, however, has been noted in which an express grant of such a servitude has occurred with us.

14. *Acquired by Implied Grant.*—The right of support to buildings or other structures on the surface may also, like other servitudes, be founded upon implied grant, where both tenements, dominant and servient, have originally been in the possession of the same owner, this being a condition of the application of the doctrine (see Parke, B., *Gayford*, 1854, 9 Ex. 702, at 708; Ld. Blackburn, *Angus*, *v.s.*, at 809). Accordingly, where buildings or other structures are already erected upon the land at the time of the severance (see *Simson*, 1792, 3 Pat. App. 238), by the granting out of the surface, the subjacent land being reserved by the grantor, an implied grant of support to such buildings will be held to be conferred (*Caledonian Rwy. Co.*, 1856, 2 Macq. 449; Ld. Chan. Selborne and Ld. Blackburn, *Angus*, *v.s.*, at 792, 826; cf. *Richards*, 1853, 9 Ex. 218). Or if, the minerals being reserved, the surface is granted out for the purpose of building, expressly mentioned or clearly implied, as where the feuar is taken bound under pain of irritancy to erect houses upon the feu (*Hamilton*, 1867, 5 M. 1086; *Howie*, 1852, 14 D. 377; *Aspden*, 1876, 1 Ex. D. 496, per Bramwell, B., at 506), a servitude of support will, unless the contrary be stipulated (*Andrew*, 1873, 11 M. (H. L.) 13), be held to be implied in the grant (see Ld. Adam, *Neill's Trs.*, 1880, 7 R. 741, at 743; Ld. Cranworth, *Caledonian Rwy. Co.*, *v.s.*, at 451; *Elliott*, 1863, 10 H. L. Ca. 333; *Siddons*, 1877, 2 C. P. D. 572; *Rigby*, 1882, 21 Ch. D. 559). The question, What limit, if any to the power of building is in such cases to be implied? is considered below (*infra*, s. 15). In the case of *Bald* (*supra*, s. 6), both of these elements—the existence of buildings at the date of severance, and the contemplated erection of further buildings—were present. The governing principle, in such cases, is that a grantor cannot derogate from his own grant. For an illustration of this principle in the case of acquisition under statutory powers, see *Corporation of Dudley*, 1881, 8 Q. B. D. 86; *Normanton Gas Co.*, 1883, 52 L. J. Q. B. 629.

In the Scots cases, however, the essential difference between the natural right of support to land and the acquired servitude of support to buildings does not appear to have been distinctly adverted to. In some cases in which the question of implied grant might have been raised (*Hamilton*, 1867, 5 M. 1086; *Bain*, 1867, 6 M. 1; *Neill's Trs.*, 1880, 7 R. 741; see *White's Trs.*, 1887, 14 R. 597; *Aitken's Trs.*, 1894, 22 R. 201), the Court appear to have considered that erections built upon the ground subsequent to severance (in which case alone, of course, any difficulty arises) were entitled to protection on the same footing as the surface (Ld. Ardmillan, *Hamilton*, *v.s.*, at 1100; Ld. Kinloch, *Bain*, *v.s.*, at 3; Ld. Trayner, *Aitken's Trs.*, *v.s.*, at 207); but in none of these was the point as of implied grant decided, inasmuch as the Court, upon principles already stated (*supra*, s. 5), found in fact and proceeded upon the view that

the *surface* had been let down, and that the weight of the buildings had in no way contributed to this result (Ld. Pres. Inglis, Lds. Deas and Ardmillan, *Hamilton*, *v.s.*, at 1095, 1099, 1100; *Neill's Trs.*, *c.s.*; see Ld. Gifford, at 749; *White's Trs.*, *v.s.*). In the case of *Bain*, also, it did not appear that the buildings in question were not anterior in date to the severance of the surface and the minerals. There are dicta, however, in some of the later cases, in which there had been severance by disposition of the surface reserving the minerals, which seem to found a servitude right of support in favour of the surface upon something less than "grant, express or clearly implied"; indeed, to hold such a servitude to be constituted in every case in which the contrary is not expressed. Thus it has been said that where "lands are disponed for no specified purpose, and without limitation as to the uses to which the surface may be applied, it must be held to be in the contemplation of the parties that the land may be put to the uses and purposes to which land is usually and admittedly put. The erection of houses upon land is certainly one of the usual and ordinary purposes to which land is put" (Ld. Adam, *Neill's Trs.*, 1880, 7 R. 741, at 743). So also, a surface owner was held entitled to recover damages for injury to buildings erected by him as against mineral lessees, because, being purchasers of the ground, "there was no restriction placed upon them by the seller as to the extent, character, or weight of the buildings which they should erect thereon. At least no such restriction is averred by the defenders, and restrictions on the use of property by its owner are not to be presumed. . . . The pursuer having built upon his own ground, the defenders are liable for any damage wrongfully inflicted by their operations on the pursuer's property" (Ld. Trayner, *Aitken's Trs.*, 1894, 22 R. 201, at 207; cf. Denman, J., *Chapman*, 1883, 47 L. T. 705, at 708). If these views be sound, it would seem that the criterion of the creation of the servitude is not whether it can be implied in the title, but whether it is expressly excluded from it. In other words, the burden is no longer upon the dominant tenement to prove the constitution of the right, but upon the servient tenement to prove the negative.

15. *Extent of Servitude Right of Support.*—The extent of the servitude right thus constituted, or the limit of the surface owner's power to build, has not been definitely decided. It would seem that this is to be determined by what can be held to have been the intention of the parties at the time of the contract; so that if the buildings be of an unusual or extraordinary character, clearly outwith the contemplation of parties, and be such as to substantially alter the use of the surface had as at the date of the severance, such buildings will not be permitted (Ld. J.-Cl. Moncreiff, *Neill's Trs.*, *v.s.*, at 749; Ld. Pres. Inglis and Ld. Shand, *White*, 1881, 9 R. 375, at 388, 393; Ld. Trayner, *Aitken's Trs.*, *c.s.*, at 207; see also *Dunlop*, 20 June 1809, F. C.).

16. *Servitude of Support by Implied Reservation.*—While this principle is clear in the case of alienation of the surface, the grantor reserving the minerals, it has been settled in England, that where the quasi-servient tenement is severed from the surface, the latter being retained by the grantor, there is no implied reservation of servitude rights in his favour (*Wheeldon*, 1879, 12 Ch. D. 31, overruling *Pyer*, 1857, 1 H. & N. 916, 26 L. J. Ex. 258; cf. *Dugdale*, 1857, 3 Kay & J. 695; *Richards*, 1853, 9 Ex. 218); unless in cases in which the existence of such a servitude right is necessary for the enjoyment of the subject reserved, or is clearly implied in the contract in order to give effect to the intention of the parties (Thesiger, L. J., *Wheeldon*, *v.s.*, at 44), or in exceptional circumstances which may raise the element of bar

or acquiescence (see *Russell*, 1885, 10 App. Ca. 590). In a later case (*Thomas*, 1887, 20 Q. B. D. 225), the rule laid down in *Wheeldon* was treated as being only a presumption which may be rebutted, *e.g.* as where the dominant tenement is at the time of severance in the hands of a third party under lease; but, granting that the mineral tenant's rights cannot in such a case be worsened by the subsequent severance (see Ld. Currichill, *Hamilton*, 1867, 5 M. 1086, at 1096), this distinction does not seem to be sound upon principle (*Barnes*, 1879, 4 Q. B. D. 494; see Gale, *Easements*, pp. 123 *et seq.*, where the whole subject is discussed). The only Scots case in which the question of the constitution of a servitude right of support by virtue of an implied reservation could have been raised (*Dunlop*, 20 June 1809, F. C.) merely determined that the mineowner could not restrain the proprietor of the surface from building, leaving open any questions of liability for damage to such buildings, if erected. Here, however, as in some other cases (see *Aitken's Trs.*, *v.s.*), the compensation clause covered damage to buildings as well as to the surface of the land. It is thought that in such cases a servitude right of support will not be held to have been constituted where the contract is silent (see Ld. Currichill, *Hamilton*, *v.s.*, at 1096; see *Hext*, 1872, 7 Ch. D. 699).

17. *Servitude of Support by Prescriptive Possession.*—A servitude right of support to buildings from adjacent or subjacent land may also be acquired by enjoyment during the prescriptive period, subject to the general conditions which apply to prescriptive possession. This has been long settled law in England (*Hide*, 1846, 2 C. & K. 250; *Rowbotham*, 1860, 8 H. L. Ca. 348; *Humphries*, 1848, 12 Q. B. 739, 20 L. J. Q. B. 10; *Bonomi*, 1861, 9 H. L. Ca. 503; 1859, El. B. & E. 622, 646; *Angus*, *infra*); and the same would seem to be the law of Scotland, and was apparently assumed as a valid basis for the right in a case in which the facts raised the point (see *Neill's Trs.*, 1880, 7 R. 741, per Ld. Gifford, at 747, 749). While the law is clear that prescriptive possession is a good foundation for the right, the principle upon which this is to be held to proceed has given rise to much discussion. It has been stated that prescription operates by way of presumed grant (Rankine, *Landownership*, p. 374); but this seems exceedingly doubtful, and, in the present connection, was expressly repelled by Ld. Blackburn (*Angus*, 1881, 6 App. Ca. 740, at 817 *seq.*). The idea lying at the base of prescription is not the presumption of a *grant*; it is a presumption of a *right* or of lawful origin (see Field, J., *ib.*, at 756; Bowen, J., *ib.*, at 782, 787). Prescription is a matter of positive law (Stair, ii. 12. 9); it is consequently not rebuttable by proving the non-existence of a grant in fact, but only upon special conditions introduced, like the rule of prescription itself, upon grounds of expediency, namely, legal incompetence, the physical impossibility of interruption, and the uncertainty and secrecy of the enjoyment had (see Thesiger, L. J., *Angus*, 1878, 4 Q. B. D. 162, at 175).

The leading case in England, in which all the authorities were reviewed, is *Angus* v. *Dalton* (1878, 3 Q. B. D. 85, 4 Q. B. D. 162; 1881, 6 App. Ca. 740). This was an action to recover damages for injuries sustained by the fall of the plaintiff's building, caused by the excavation of soil upon the adjoining property. Beyond the prescriptive period the plaintiff's predecessor had altered his building so as to increase the lateral pressure. The express assent of the defendants or their authors had not been obtained, but the fact that such alterations were in progress was open and patent to anybody. The defendants pulled down the existing building upon their property without causing damage; but, in excavating for cellarage, the

plaintiff's house, being deprived of the lateral support of the adjoining soil, sank and fell. The House of Lords with seven consulted judges held, after conflicting judgments in the Court of Queen's Bench and Court of Appeal, that the action was good, and awarded damages. In both the Courts below the judges thought it clear that uninterrupted enjoyment during the prescriptive period was sufficient to constitute the right. They differed, however, as to the principle on which this was to be based. The majority of the Court of Queen's Bench held, that, upon the theory of a presumed grant, this presumption being not a *presumptio juris et de jure*, was rebuttable, and could not subsist in the face of proof or admission that no grant or assent was in fact made or given (see Cockburn, C. J., 3 Q. B. D. at 113, 118). On appeal this judgment was reversed by a majority, on the ground that the presumption of a grant, although rebuttable, was of the nature of "an estoppel by conduct, which, while it is not conclusive so as to prevent denial or explanation of the conduct, presents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct." Mere proof of non-assent was therefore insufficient (see Thesiger and Cotton, L. JJ., *ib.*, 4 Q. B. D. at 173, 187). The House of Lords, with seven consulted judges, unanimously affirmed the judgment of the Court of Appeal, but on widely divergent grounds (cf. Pollock, B., 6 App. Ca. at 747, and Lindley, J., at 765). Opinions were stated by others of the judges (see *supra*, s. 12) to the effect that the right was of the nature of a positive servitude, which could stand either upon grant, express or implied, or upon prescription; that it was capable of interruption, so that if not interrupted it would ripen by the mere lapse of time into a full right of support. In the result the House of Lords held, that the enjoyment of a right of support from adjacent or subjacent land had during the prescriptive period, would, if open and of right and not interrupted, either at common law, or on the doctrine of implied grant, or on the ground of prescription, confer the right to have the support continued; that, further, the presumption of a legal right cannot be rebutted merely by evidence that no grant was in point of fact made; and that the progress of buildings is of itself sufficient notice that the servitude right is in process of acquisition, so as to put the servient owner on his enquiry. The earlier view (see Parke, B., *Hide*, 1846, 3 C. & K. 250, at 255) must accordingly be supplemented, and the servitude held to be constituted by prescription where "it was known, *or ought to have been known*" to the defender, that his land supported the plaintiff's house (but see Bramwell, B., *Solomon*, 1859, 4 H. & N. 585, at 602).

It has already been pointed out that where it can be proved that (1) the surface would have sunk, and (2) damage resulted therefrom, owing to the operations of the defender, independently altogether of the presence of buildings upon the complainer's land, action will lie, and that damage to buildings may be recovered as being damage immediately consequent upon the injury to the land (see cases *supra*, s. 5; cf. *Hunt*, 1860, 29 L. J. Ch. 785, Wood, V. C., at 788).

18. *Increase of Burden.*—Once a servitude right of support to buildings has been acquired, the general rule of servitude law applies, that the dominant tenement can do nothing at his own hand whereby the burden upon the servient tenement shall be increased. It follows from this, that every such act must run a prescriptive course of itself. Upon this principle, also, where damage sustained by a building would not have happened but for such operation of the pursuer, the pursuer has no action, although the building might have stood in the absence of excavation of the

adjacent or subjacent land by the servient owner; because the continued existence of the building was only secured by the increased support afforded by the servient tenement, which increase of support it was, *ex hypothesi*, under no obligation to afford (Gale, *Easements*, p. 355). The case of increase of burden by the act of third parties has been already noticed (*supra*, s. 2).

C. Support of Buildings by Buildings.

Cases as to a servitude of support to be afforded by one building in favour of another, adjoining or discontiguous, are infrequent; most of the questions arising in such cases involving other considerations. Thus the law applicable to flatted houses, known as the law of the tenement, though apparently closely allied to the law of servitude rights (Stair, ii. 7. 6; Ld. Chan. Cranworth, *Caledonian Rwy. Co.*, 1856, 2 Macq. 449, at 450), is more properly dealt with under the head of Common Interest. See Common Interest. As between adjoining houses, the law of mutual gable is that most ordinarily involved. See Common Gable.

19. *Servitus oneris ferendi: servitus tigni immittendi.*—There are two servitudes, however, relating to the support of buildings by buildings which have come down to us from the civil law, the *servitus onera vicini sustinendi*, and the *servitus tigni immittendi* (*Inst.* ii. 3. 1; Vinn. *Inst.* 2, *de serv. urb.* 3). Though the distinction was not noted in our earlier law (see Stair, ii. 7. 6; Ersk. ii. 9. 7, 8; Bank. ii. 7. 7), it has been pointed out that the latter cannot be considered as a proper servitude of support, but only as a mere right to immit or thrust a beam or other structural part of the dominant tenement across the boundary of one's own land, the circumstance of the encroaching part being *de facto* supported by the wall of the servient tenement being accidental to the right itself (see Rankine, *Landownership*, p. 573). It is true, that, unlike the servitude *oneris ferendi*, the servitude *tigni immittendi* does not carry with it an obligation upon the servient tenement to repair the supporting structure; but the general law of servitude gives the dominant tenement access to the servient tenement to repair at his own hand when this becomes necessary, and there seems no reason why this servitude should be exceptionally treated (Bell, *Prin.* s. 984; Stair, *v.s.*; Bank. ii. 7. 7, 8; see *Colebeck*, 1897, 1 Q. B. D. 234, 45 L. J. Q. B. 225). If this be so, the right certainly approaches very nearly to a servitude of support. See Oneris ferendi.

20. *Servitude Right of Support from Building: How Acquired.*—It seems clear that a servitude right of support by one building to another might be constituted by express grant (see *Brown*, 1830, 1 C. & J. 20), or by implied grant, where the necessary conditions for the application of that doctrine are present (see Thesiger, L. J., *Angus*, 1878, 4 Q. B. D. 162, at 167; *Wheeldon*, 1879, 12 Ch. D., Thesiger, L. J., at 59; *Dugdale*, 1857, 3 Kay & J. 695). In *Solomon* (1859, 4 H. & N. 585), where, however, the houses were also discontiguous, the element of prior common ownership before severance was not present, and judgment went against the right of support. A temporary easement constituted by express agreement between the lessees of adjoining houses who hold under the same lessor, will not, upon the subsequent purchase from the lessor of the servient tenement, be held converted into a permanent servitude of support upon the principle of an implied reservation (see *Howarth*, 1897, 13 T. L. R. 529).

As regards the prescriptive acquisition of such a servitude (Ersk. ii. 9. 8), the difficulty is to determine under what circumstances the possession had by the dominant tenement can be said to have been open, of right, and not

clandestine. Where one of the buildings has slipped from the perpendicular so as to be obviously leaning upon its neighbour, this might satisfy the condition (but see Bramwell, B., *Solomon*, 1859, 4 H. & N. 585, at 602). Again, it seems to be not easy for the servient owner to resist the acquisition of the servitude, short of pulling down his house during the currency of the prescriptive period, which seems an unreasonable condition (see Fry, L. J., *Angus*, 1881, 6 App. Ca. 740, at 775). If the reasoning upon which the case of *Angus* was decided, however, be capable of being extended to the case under consideration, mere neglect to alter the status, and sufferance of the burden during the prescriptive period, would apparently constitute the right; and this has been so held in England. So, where the eastern wall of the plaintiff's tenement had for the prescriptive period depended on and enjoyed the support of the defendant's western wall, this fact being within the knowledge of the defendant, it was held that an easement had been acquired by prescription, the possession having been open, peaceable, and of right (*Lemaitre*, 1881, 19 Ch. D. 281; see *Tone*, 1883, 24 Ch. D. 739).

Surrogatum.—The doctrine of surrogatum is contained in the maxim, *Surrogatum sapit naturam surrogati* (a thing substituted partakes of the nature of that for which it is substituted). The maxim may be illustrated as follows:—

1. *Husband and Wife.*—In marriages entered into before the Married Women's Property (Scotland) Act, 1881, the wife's moveable estate, but not her heritable estate, belongs to the husband: where, however, her heritable estate is converted into moveable *stante matrimonio*, then the latter forms a surrogatum of the former, and does not pass to the husband unless it appears that there is no intention on the wife's part to reinvest it heritably: in which event it passes, but subject to revocation (Fraser, *H. & W.* ii. 703 *et seq.*; Walton, *H. & W.* 138). Where heritable estate of a wife situated abroad has been converted into moveable, such moveable estate is the surrogatum for the heritable estate, but the rights of the spouses therein are determined by the *lex loci rei sitæ* of the heritage, and not by the *lex loci domicilii* of the parties (*Welch*, 1891, 18 R. (H. L.) 72).

2. *Succession.*—Where a share of estate has been forfeited by one claiming his legal rights, it becomes *pro tanto* the surrogatum of that paid away (*Ross*, 1896, 23 R. 1024; see also ELECTION, vol. iv. 390). Where one bequeaths what is another's, believing it to be his own, the legatee is neither entitled to the legacy nor to a surrogatum out of estate for its value; but where a bequest of what is another's is made knowingly, then, if subject of legacy cannot be acquired for him, the legatee is entitled to a surrogatum (*Traquair*, 1872, 11 M. 22; see also LEGACY, vol. vii. 369).

3. *Trustees, etc.*—The nature and character of property for the purposes of succession is as a general rule determined at date of death. Where, however, trustees, curators, tutors, or other administrators sell the heritable property of one in life, they cannot alter the nature and character of that property; any conversion is held as being merely for administrative purposes, and the proceeds are treated as the surrogatum of the estate sold (*Macfarlane*, 1895, 22 R. 405). But, while this is so, a minor may deal as freely with such surrogatum as if it were moveable: he may dispose of it by will or otherwise (*Brown's Tr.*, 1897, 24 R. 962). Where trustees had to sell a part of the heritable estate in order to pay certain debts, etc., which were primarily payable out of the moveable estate, and where moveable estate was subsequently recovered sufficient for that purpose, held that in equity

a sum equal to that obtained by the sale of heritage fell to be invested in lands as a surrogatum of those sold (*Stainton's Trs.*, 1868, 6 M. 240). Where creditors sell the debtor's heritable estate under a process of judicial sale, any surplus remaining is surrogatum and heritable (*Gardiner*, 1779, Mor. 730, and comments thereon in *Macfarlane*, *ut supra*, where it is distinguished from the case of a compulsory sale). Where a factor immixes the funds of his principal with his own, then, if they are ear-marked, the doctrine of surrogation applies, and such immixed funds will be *in bonis* of principal (*Allison*, 1765, Mor. 15132). Where the price of principal's goods is taken payable to agent, or where the agent takes a bond or bill for the price in his own name, then such price, bond, or bill is still *in bonis* of principal (*Hay*, 1707, Mor. 15128; *Street*, 1669, Mor. 15122; *Baird*, 1744, Mor. 7737; see also Thomson on *Bills of Exchange* (Dove Wilson's ed.), 541 *et seq.*). Where one of two creditors in a bond sold the security-subjects to himself, the other creditor having been called, but died, and his heirs not sisted: held that the part of price effeiring to second creditor belonged to his representatives as surrogatum of lands sold, and that their right was not a mere personal action for repetition (*Cockburn*, 1725, Mor. 15129).

4. *Involuntary Sales.*—(*a*) *Fee-Simple Proprietors.*—Where lands are taken from a fee-simple proprietor by the act of the general law, whether such proprietor is *sui juris* or not, there is no room for the doctrine of surrogatum. Thus where teinds belonging to an insane person were compulsorily acquired by heritors, the proceeds were held to be moveable, and went to the insane's executors (*Graham*, 1798, Mor. 5599; see also *dicta* by Ld. Benholme in *Stuart*, 1855, 17 D. 378). Where lands are acquired by a railway company under statutory powers, the price or the right to demand price, where the transaction has not been completed, is moveable, and cannot be treated as surrogatum of land (*Heron*, 1856, 18 D. 917). Again, where a *pro indiviso* proprietor, in a process of division and sale, sells the subjects, and where the other proprietor, who was abroad at the time, was found to have died at a date subsequent to the sale, held his share of proceeds could not be treated as surrogatum for heritable estate sold, and that it fell to be paid to heirs in moveables (*Macfarlane*, *ut supra*).

(*b*) *Proprietors with Limited Rights.*—Owing to the peculiar character of interests involved, statutory provisions have been made to regulate the rights of such proprietors, and the price of lands compulsorily sold is treated as surrogatum of such lands, and must be reinvested to compensate for what has been taken away (see Lands Clauses Act, 1845, ss. 67 *et seq.*; Entail Amendment Act, 1848, ss. 25 *et seq.*; and Entail Amendment Act, 1853, s. 8). In *Garland*, 1841, 4 D. 1, the proceeds of a compulsory sale were held to be surrogatum for the lands sold, but the character of the proceeds here were regulated by a private Act.

5. For further illustration, see *Murray*, Bro. Syn., *h.t.*, where a widow, who was liferented in a certain house which was taken down, held entitled to liferent of new house as being surrogatum of the former; *Heron's Trs.*, 19 R. 922, where children were entitled one year after the death of their father, and if they survived him, to a certain sum of money secured over lands, and where the father becoming bankrupt, the rights of children were valued: held that price received was to be held by trustees as coming in place of bond, and that neither the capital nor the income fell to be paid to beneficiaries. Where, however, a liferent is valued, the capital value would be paid to liferenter, and not merely the interest.

The cargo of a ship, which is on its immediate return from a port where it had landed contraband of war, is not to be held as surrogatum of the

contraband cargo and liable to forfeiture (*The Frederick Molke*, [illegible] 1 C. Merc. 1011; also *ib.*, p. 990).

[See Morrison, *Dictionary, h.t.*; Kames, *Equity*, 293; Brown, *Supp. h.t.*; Thomson on *Bills of Exchange*, 1st ed., p. 776; MARINE INSURANCE, vol. viii. 239.]

Surveyor.—A surveyor, in the broadest significance of that term, is a person who has or professes to have skill in measuring and valuing land and buildings, in the management and laying out of estates, building or rural road-making, land drainage, and the various other works incident thereto. There is no legislation defining or regulating the business of surveyor in its ordinary sense, and it seems to be a matter of doubt whether such persons require appraisers' licences under 46 Geo. III. c. 43, ss. 4 and 7; 8 & 9 Vict. c. 76, s. 1. In certain cases it is necessary to employ a qualified surveyor to value land or dilapidations, *e.g.* under sec. 63 of the Lands Clauses Act, 1845 (8 & 9 Vict. c. 19). Surveyors have all the privileges and liabilities of persons professing skill. They are entitled to payment for their services either *quantum valeat* or under agreement. They are bound to indemnify their clients in respect of loss sustained through their negligence. The business of surveyor proper has come by custom to be divided into two main branches. *First*, the valuing of property, either land or buildings, of whatever class or denomination. *Second*, what is known as quantity surveying. This latter branch does not admit of a very strict definition, but may generally be characterised as "taking out in detail the measurements and quantities from plans of a building prepared by an architect, for the purpose of enabling builders to calculate the amounts for which they would execute the plans" (per Morris, J., in *Taylor* v. *Hall*, 1870, 4 I. R. C. L. 467, at p. 476). The business of valuing and quantity surveying has in modern times, owing to the great extension of cities and large towns, become one of vital importance to owners of property and the commercial classes generally. There are no statutory regulations fixing the qualifications necessary for the profession, and it is understood that any person, however meagre his experience in the business of valuing and measuring, can practise as a surveyor. The requirements of the business, however, have made it almost universally necessary for persons who wish to practise as surveyors, to undergo a professional training by apprenticeship to a surveyor. In addition to this apprenticeship there is an examination, prescribed by certain authorities in Glasgow and Edinburgh, for persons wishing a special qualification; and admission, in the case of Glasgow, to a special society of measurers, and, in Edinburgh, to the title and dignity of an Ordained Surveyor. In Edinburgh a person wishing the title of Ordained Surveyor presents a petition either to the Sheriff or to the Magistrates and Town Council, setting forth his qualifications and craving to be ordained a surveyor. The applicant is then remitted to two surveyors nominated for the purpose, to examine him in his knowledge of the business. If their report be satisfactory the oath *de fideli* is administered, and he then receives a certificate entitling him to practise as a surveyor, and to use the title of Ordained Surveyor. Outside such persons there is the general body of surveyors. These persons may have very little or no qualification. As a matter of fact they are usually persons who have either served in some capacity in a surveyor's office or had some connection with the building trade, *e.g.* builders' clerks, clerks of works, etc.

A quantity surveyor ought to have a thorough knowledge not only of

architecture but of the building trade, so that he may understand the meaning of the drawings and specifications furnished by the architect, and may be able to calculate therefrom the amount of labour and materials which the particular items of work would require. The architect's drawings and specifications thus become the basis of elaborate calculations. The finished work which the quantity surveyor supplies as the result of his skill and calculations is called a Bill of Quantities, which is in the form of a schedule, giving in detail the quantity of each item of labour and materials required to be done and provided in the execution of a building or other undertaking, with a money column left in blank for the builder to fill in the prices. Quantities are necessary because of the number of works for which a builder is asked to tender, and because of the intricacy of estimates for building work.

The builder is usually required to pay the quantity surveyor's charges, but a memorandum is indorsed on the schedule to the effect that the builder must allow in his estimate for these charges a certain percentage on his total estimate. This percentage ranges from one to two and a half per cent., or even more, according to the nature of the work. The builder must also add a fixed sum for lithography, postage, etc., incurred to the surveyor. These two items are then added by the builder to his estimate.

The quantity surveyor is usually employed by the architect, either with the express authority of the employer or building owner, or, as is more often the case, without any such authority. The architect has an implied authority to employ a quantity surveyor, and the surveyor has, in the event of his charges not being paid otherwise, a right, in the absence of any special circumstances, to demand payment from the building owner (*Black*, 1879, 7 R. 581).

An important duty falling upon the surveyor in connection with the performance of a building contract is to provide certain measurements to enable an architect to certify for payment of extras or deviations from the contract. It has been held (*Beattie*, 1882, 10 R. 226) that there is a custom or usage of the building trade whereby, in works of a certain magnitude, the architect has an implied authority to instruct a quantity surveyor to perform this work, whose charges the employer is liable to pay. Such implied authority, either in the case of the preparation of the original bill of quantities, or in measuring up extras or deviations during the contract or at its completion, can only be negatived by contrary terms expressed in the employment of the architect. It may be that the architect's contract is to undertake the duties of the quantity surveyor himself. In that case he has no authority to employ a quantity surveyor to perform his duties, except at his own expense. Moreover, the architect of the building owner, without any express instructions, sometimes measures up the work himself. Per Inglis, Lord President: "In the present instance the architect employed himself to measure. This is not the common practice, but there is nothing wrong in it so long as the measurer acts honestly" (*Beattie, supra*). In taking out quantities and measuring up himself, the architect is only entitled to charge his employer direct. He cannot, without special authority from the building owner, debit the builder with his charges, as this would place him in the position of certifying for his own payment. This rule is supported by the regulations of the Royal Institute of British Architects, and the breach of it brings the matter within that class of cases where a defrauded principal is entitled to recover secret profits or commissions obtained by an agent or servant.

If the architect employs a quantity surveyor without authority, express

or implied, from the building owner, he will be liable for the surveyor's charges, as in the case of a breach of warranty of authority.

The general liability of the building owner is sometimes modified or altered by express agreement, or by special circumstances arising during the contract. Thus where the builder prevents the performance of the contract, or a condition in the contract upon the happening of which he should receive from the building owner the surveyor's fees, the builder will be liable to the surveyor for such fees. Again, the builder is liable when he directly employs the surveyor, or agrees to pay him out of one of the instalments of the contract price.

If the building owner guarantees the accuracy of the quantities, he will be liable to the builder in respect of material inaccuracies. Further, he will be liable if the quantity surveyor is guilty of fraud or misrepresentation. In this case, however, the builder must show that the owner knew of such fraud or misrepresentation.

A surveyor, like all other professional men, owes a duty to the person who employs him. To enable a building owner to recover for inaccuracies, he must show a contract, express or implied, between him and the surveyor, and the breach of the contract, or negligence or want of skill.

The builder, in the ordinary case, is not entitled to recover for inaccurate quantities as against the surveyor. To enable him to do so he must prove a contract, express or implied, between himself and the surveyor. The English Courts have refused to fix liability arising by custom on the surveyor to the builder for inaccuracies (*Priestley*, 1888, 11 Q. B. D. 503). The architect, however, if he takes out the quantities himself and receives payment from the builder, may be liable to the builder if he cannot show employment by the building owner, express or implied.

In supplying a builder with quantities, the general rule is that there is no warranty of their correctness. Neither is it a fraud or misrepresentation to state that they are correct, if such statement be made in good faith.

The multifarious duties now imposed upon and undertaken by surveyors render a high standard of professional skill and ability necessary for their proper performance. It is somewhat singular that there have not been more judicial decisions explaining or interpreting the rights, duties, and liabilities of surveyors, which to a large extent have been established by usage and custom. As the usage is naturally the growth or outcome of expediency or necessity, it may be taken that it would receive judicial sanction or approval if and when the Courts are asked to adjudicate upon it.

[Hudson on *Building Contracts*; Armour on *Valuations*; Evans on *Principal and Agent*.]

Surveyor of Highways.—Surveyors are appointed, under the Local Government Acts, by County Councils to superintend the making and upkeep of public roads.

Surveyor of Taxes.—Under 43 & 44 Vict. c. 19, s. 17, an officer is appointed by the Treasury to survey the duties of land tax and income tax. Certain duties are assigned to him by the statutes on these subjects. A surveyor of taxes holds his appointment during pleasure. If he commits any misdemeanour or offence involving penalties, he loses his office (43 & 44 Vict. c. 19, s. 18).

Survivance in Common Calamity, Presumption of.—In questions of succession it occasionally may be necessary to determine which of two persons who have perished in a common calamity

(as by shipwreck, fire, or in battle) survived the other. For this purpose certain systems of jurisprudence, notably that of Rome, have elaborated a series of presumptions of an arbitrary kind. None of these presumptions have place in the law of Scotland (Dickson, *Evidence*, s. 130; M'Laren, *Wills and Succession*, i. 67, 68). The ordinary rule of law would, it is thought, hold good in such a case; and the representatives of the person who is alleged to have survived would be required to establish the fact of survivance (M'Laren, *ib.*). [See *Wing*, 30 L. J. Ch. 65.]

Suspension.—"Suspension is that form of law by which the effect of a sentence condemnatory that has not received execution is stayed or put off till the cause be again considered" (Ersk. iv. 3. 8). After decree has been pronounced, a party aggrieved or dissatisfied can, unless excluded by statute, obtain redress or review by appeal,—formerly by advocation,—or by suspension, or by reduction; and the general rule regulating the selection of these different forms of process is that "prior to extract advocation (now appeal) is the proper form of review. When a charge has been given or threatened on an extracted decree, suspension is the form. When these modes of review are impossible, reduction is competent" (*Buchanan*, 1837, 15 S. 958, per Ld. Medwyn). Suspension is said to owe its origin to the right every subject had to appeal for redress to the Chancellor as keeper of the King's conscience (Ross, *Lect.* i. 360); and since its institution the Court of Session has always exercised the right, on cause shown, of stopping or suspending diligence, or the threatened use of diligence; which proceeded either on decrees, or on documents recorded for execution, *i.e.* on the decrees of consent contained in registered writs. In the case of a decree other than a decree of consent, however, the decree must have been extracted—as a decree, strictly speaking, means an extracted decree (*Buchanan, supra*). Accordingly, suspension of a threatened charge under an unextracted decree which can be extracted is incompetent (Ersk. iv. 3. 20; *Turner*, 1824, 3 S. 235; *Alexander*, 1824, 3 S. 243; cf. *Templeton*, 1837, 16 S. 100). Suspension is naturally applicable chiefly to decrees on which a charge can be given; but the Court of Session Act, 1868, s. 24, makes it also competent to suspend decrees on which a charge cannot follow, in certain cases (*infra*, p. 43). The forms of this action are also used even if there is no decree, as in applications for suspension and interdict and suspension and liberation (*q.v.*). As will be seen later, with one exception the Court of Session has exclusive jurisdiction in such matters. Suspension was intended, in the first instance, to prevent diligence being done on decrees in absence, which in early times were obtained sometimes in cases where the defender did not know that he was being sued. It was next used to suspend charges given under the decrees of consent contained in registered writs and protested bills of exchange. Finally, it was used in cases where the decree was pronounced *in foro contradictorio* (Stair, iv. 52. 11–12, and 13). In all these cases, moreover, suspension was competent not only when diligence had been used, but also when it had been threatened. As this action sists diligence, and it could not be assumed that the suspender had any right to do this, in early times, before the action could be begun, an application or petition had to be presented to the Court craving leave to be allowed to expede, serve, and call a summons or Letters of Suspension. If this were granted the action took the form of one at the instance of the suspender or complainer, as he is generally called, against the person who had obtained the decree, and who is called the charger, because in former times a charge of horning in most cases had to precede the other executions

(Stair, iv. 52. 8). The term Respondent is now, however, frequently used instead of charger. In form it was thus the converse of an ordinary action, for under it the original defender becomes the pursuer and the original pursuer becomes the defender. But in substance the suspender is the real defender, as he seeks to avoid being obliged to implement the decree that has been obtained against him; and if he succeeds in the suspension, he obtains, strictly speaking, only a negative remedy. At the same time, the distinction between suspensions and ordinary actions was more marked in former times than it is at present. This was owing no doubt to the fact that in former times suspensions were greatly abused, as the Statute 1581, c. 139, and the very numerous Acts of Sederunt passed to prevent the abuse of this process abundantly prove. Nowadays, owing greatly to the fact that the rules regarding caution and consignation are so well understood, there is little or no abuse of this process, and it has required almost no statutory regulation since the Suspension Act, 1838, was passed.

Suspensions in former times did not pass unless the grounds on which they were based were instantly verified. This rule came to be abused by suspenders obtaining suspensions on forged grounds, and in other ways (cf. A. S., 9th Nov. 1680); and though such abuses were stopped, the rule ceased in practice to be observed.

Suspensions, however, are only sustained on cause shown. Thus "objections against the citation, titles, interests of parties, competency or relevancy of the action, or against the sufficiency of the probation, or the nullities in not observing the necessary formalities (Stair Ap. par. 8), or an allegation that the decree or charge has not proceeded upon a just and lawful debt, or that it has been satisfied in whole or in part, or that the diligence used upon it has been carried on irregularly without observing the forms required by law" (Ersk. iv. 3. 18), are reasons on which a suspension will be obtained. But as the pleas of "competent and omitted," and "proponed and repelled," apply to suspensions, reasons which either were or could have been urged in the original action, if there had been one, cannot be alleged in the suspension. Again, the plea of *res noviter veniens ad notitiam* can only be urged as a reason of suspension if the information has been received after the decree (Stair, iv. 52. 14). Again, a decree that has been implemented cannot be suspended (*Wotherspoon*, 1849, 11 D. 371), nor can a decree in absence, which has been acquiesced in (*Ewing*, 1835, 13 S. 515). Again, caution or consignation is required in all cases unless specially dispensed with. On the other hand, though a suspension can be passed in part and refused in part (A. S., 20th Nov. 1711), it is not competent to amend the decree that is sought to be suspended. Therefore if it be bad the charge following must be suspended (*Lyon*, 1874, 1 R. 512). Finally, suspension, though it is the process used for staying diligence, does not reach all kinds of diligence. Thus diligence for probation before sentence (*i.e.* such as a diligence to recover documents prior to a proof) cannot be suspended; nor can the use of inhibition or arrestments. Though after a suspension has been brought, arrestments used on the decree which has been suspended may be loosed on caution. Again, execution by adjudication cannot be suspended (Stair, iv. 52. 36, 37; *Miller*, 1794, Mor. 15148; *Tod*, 1707, M. 190).

If the Note of Suspension be not passed, the charger may use diligence against both the person or property of the debtor. In modern practice, although imprisonment is still competent in certain cases (see SUSPENSION AND LIBERATION), the usual result of a charge, if it is a charge to pay money, is poinding, in addition to which the debtor is rendered notour

bankrupt: if it is a charge under a decree of removing, the tenant is ejected. It is accordingly to prevent such consequences that suspensions are brought.

Divisions of Suspensions.—Suspensions are divided into: I. Suspensions of decrees pronounced in the Court of Session; II. Suspension of decrees pronounced in inferior Courts; III. Suspensions and interdicts and all other kinds of suspensions. This is the division given in the Suspension Act, 1838 (1 & 2 Vict. c. 86). At the same time, with the exception of suspensions and interdicts, all suspensions are really of decrees or of the diligence or threatened use of diligence proceeding on them; as recording a deed or other document for execution is, strictly speaking, obtaining a decree of consent which the parties to the deed either agree, or are held to agree, may be put in force in certain events. This division, however, is convenient.

I. Suspension of Decrees pronounced in the Court of Session.—(1) *Decrees in foro.*—Decrees of absolvitor never could be suspended (*Findlay*, 1854, 16 D. 939, per Ld. Ivory), but formerly it was thought that all other decrees pronounced in the Court of Session might be suspended; provided the grounds on which suspension was sought had emerged since the decree, or the suspender had been unable by circumstances beyond his control from properly defending the action (*Macpherson*, 1863, 1 M. 973, per Ld. Barcaple). Now, however, it seems settled that no suspension of such a decree can be brought, and parties dissatisfied with such decrees must raise actions of reduction, if they can aver relevant grounds (cf. *Hamilton*, 25 Nov. 1813, F. C.; *Irvine*, 1782, 3 Pat. 287; *Young*, 1862, 24 D. 587). A decree by default is a decree *in foro*, and, therefore, cannot be suspended, even though the default occurred by inadvertence (*Lumsdaine*, 1834, 13 S. 215; *Macpherson*, 1863, 1 M. 973; *Maule*, 1879, 6 R. 44). If, however, a charge be given under a decree *in foro*, the charge or other diligence may be suspended if the suspension does not challenge or affect the decree. Thus it would be, it is thought, competent to suspend a charge for payment under a decree on the ground that the sum contained in it had been paid since the decree was obtained (cf. *Paul*, 1867, 5 M. 1120).

(2) *Decrees in absence.*—A decree in absence is a decree obtained in an action in which the defender lodged no defences (Act 1672, c. 16, s. 19). A decree in absence could always be suspended. Thus Ld. Stair says, "The lords so easily suspend their own decreets in absence" (Stair, iv. 1. 44). Such suspensions are now regulated by 1 & 2 Vict. c. 86, s. 5. The procedure is to lodge a note of suspension in the Bill Chamber, and to consign the expenses decerned for. This being done the note is passed and ordered to be served on the opposite party. After the lapse of fifteen days it may be enrolled before the Lord Ordinary who passed the note; or the Court may transfer the cause to another Lord Ordinary. Thereafter the cause proceeds in common form.

It is to be noted that such suspensions pass only on consignation of the expenses. But if consignation be made they must be passed. The effect of this provision is greatly lessened by the procedure introduced by the Court of Session Act, 1868, ss. 23 and 24. Sec. 23 provides that within ten days of the date of a decree in absence, the defender, if he pursue the procedure there set forth, will be allowed to have the decree recalled, and the action will thereafter proceed as if defences had been timeously lodged. Sec. 24 provides that certain decrees in absence shall have the effect of decrees *in foro*, namely, decrees in absence obtained after personal service of the summons, or after the defender has entered appearance,

shall, after extract and upon the lapse of sixty days after the expiry of a charge not brought under review by suspension, be entitled to the privileges of a decree *in foro*. Similarly decrees on which a charge is not competent obtained in absence after personal service, or after appearance has been entered, shall be final on the lapse of twenty years, unless they have been set aside within that time by suspension or reduction. Suspensions, therefore, will not be brought in the cases to which sec. 23 applies, and in the cases to which sec. 24 applies, the suspension must be brought within sixty days of the expiry of the charge in cases where a charge is competent, and within twenty years in cases where a charge is not competent. In addition, 1 & 2 Vict. c. 86, s. 5, will, of course, apply in all cases where there has not been personal service, or the defender has not entered appearance.

II. Decrees of Inferior Courts.—In all cases, unless excluded by statute or practice, it is competent to suspend decrees pronounced in inferior Courts whether pronounced in absence or *in foro*.

In the following cases suspension is excluded:—(*a*) A decree that has been implemented cannot be suspended (*Tweedel*, 1840, 2 D. 808). (*b*) When appeal is competent, suspension is incompetent, as an appeal stops extract. By the Sheriff Court Act, 1876, s. 32, an appeal may be taken within fourteen days, during which time extract is not given out, and thereafter if the decree be not extracted, an appeal may be taken within six months of the date of the decree. In the other inferior Courts the rule is the same, except that extract is not given out for twenty-one days, during which time the right to appeal is absolute. Therefore during six months after decree, suspension is incompetent, unless the decree has been extracted. After six months it is competent, provided the interlocutor is reviewable. (*c*) No interlocutor pronounced in the Sheriff Court in any cause not exceeding £25 sterling in value can be suspended (Sheriff Court Act, 1853, s. 22). Nor any interlocutor pronounced in any other inferior Court where the value of the cause does not exceed £12 (A. S., 11th Aug. 1787, s. 4). Again, no decree pronounced in the Small Debt Court (Small Debt Act, 1837, s. 30) can be suspended, though irregular proceedings following thereon may be suspended (*Shiell*, 1871, 10 M. 58). Again, no decree pronounced in the Debts Recovery Court is subject to review by suspension (Debts Recovery Act, 1867, s. 17). (*d*) By a long series of decisions suspension of a decree of absolvitor, and of the decree for expenses following thereon, on any ground involving review of the decree of absolvitor, is incompetent. The reason is that no charge can be given on a decree of absolvitor, and, therefore, it cannot be suspended, and as the decree for expenses is the result of the decree of absolvitor it cannot be suspended, because the merits of the decree of absolvitor cannot be inquired into (*Scott*, 1831, 10 S. 67; *Whyte*, 1835, 13 S. 470; *Findlay*, 1854, 16 D. 938; cf. *Scoular*, 1864, 2 M. 955). Where, however, the decree for expenses can be reviewed on grounds not affecting the principal decree, it may be suspended (*Menzies*, 1834, 12 S. 772).

On the other hand, in cases not falling within these exceptions, suspension of decrees of inferior Courts, whether *in foro* or in absence, is competent, and is, moreover, in certain cases the only mode of obtaining review. Thus a decree *ad factum præstandum* which is not an interlocutor that is appealable under the Sheriff Court Act, 1853, s. 24, may be suspended; not, indeed, under sec. 4 of 1 & 2 Vict. c. 86, which chiefly regulates suspensions of Sheriff Court decrees, but under sec. 6 of that Act, which is concerned with all suspensions (*Wilson*, 1860, 22 D. 1410).

Again, a decree *ad factum præstandum* in an inferior Court, other than that of the Sheriff, can be suspended, even though it is not a final interlocutor (*Christie*, 1825, 4 S. 71; *Matheson*, 1829, 7 S. 449).

Again, in actions of removing, suspension is the only mode in which the decree can be reviewed (Judicature Act, 1825, s. 44; cf. *Roy*, 1840, 2 D. 1345). Such suspensions may be before extract (*Graham*, 1843, 5 D. 1207), and without waiting the expiry of the reclaiming days against the Sheriff's judgment (*Ross*, 1833, 12 S. 200). An intended removal can be suspended (*Scott*, 1827, 6 S. 250). Such suspensions are competent after extract, but not after the decree has been executed (*M'Dougal*, 1863, 1 M. 1012; cf. *Macintosh*, 1830, 9 S. 75). Suspensions of decrees of removing formerly required the concurrence of the whole Court in Session and three judges in vacation, but are now passed by the Lord Ordinary alone. See 50 Geo. III. c. 112, s. 42; 6 Geo. IV. c. 120, s. 46, under which last-mentioned section they are now brought.

(*a*) *Decrees* in foro.—Suspensions of decrees pronounced *in foro* in inferior Courts are, for the most part, regulated by sec. 4 of 1 & 2 Vict. c. 86, but when not competent under it they may, in certain cases, be brought under sec. 6.

Sec. 4 deals with two kinds, namely—

(1) Suspensions on caution not being suspensions of decreets of removing.

(2) Suspensions without caution, or on juratory caution, or of decreets of removing.

(1) *Suspensions on Caution.*—It is competent to suspend the decree, and any diligence or proceedings following thereon, in cases which may at present be brought under review by suspension, by lodging a note in the Bill Chamber, setting forth the decree sought to be suspended, and the remedy craved. The presentment of this note operates as an interim sist, and on such caution being found as is by the present practice required—and also for the Court of Session expenses (*infra*)—the note shall be passed. The process is then transmitted to the Court of Session, and as soon as the note has become final and caution found, it may be enrolled in the motion roll of the Lord Ordinary (cf. 31 & 32 Vict. c. 100, s. 90). The point to be noted is that where suspension is competent in this manner, it must be passed if caution be found.

(2) *Suspensions without Caution, or on Juratory Caution, or of Decreets of Removing.*—In such cases an articulate statement of facts on which the suspension is founded, and a note of pleas in law, must be annexed to the note. And it is not, as in the former case, passed as a matter of course; but only if the Lord Ordinary or, on a reclaiming note, the Court think just (cf. A. S., 11th July 1828, ss. 9 and 10).

The following points should be noted:—In all suspensions of decrees *in foro* the inferior Court or the Court of Session can regulate all matters regarding interim possession (1 & 2 Vict. c. 86, s. 4), and in suspensions of final judgments pronounced in inferior Courts, it is competent for the Lord Ordinary on the Bills, or for the Court, to remit with instructions; but no such remit shall be made except in the case of a suspension of a decree in absence, without hearing counsel or receiving a written answer on the part of the respondent (1 & 2 Geo. IV. c. 38, s. 1).

Finally, if suspension cannot be brought under sec. 4 of 1 & 2 Vict. c. 86, it may, in certain cases, be raised under sec. 6, which includes suspensions of all kinds (*infra*, III.; *Wilson, supra*, 1860, 22 D. 1410).

(*b*) *Decrees in absence pronounced in inferior Courts.*—Suspension of

decrees in absence pronounced in the Sheriff Court can be brought under 1 & 2 Vict. c. 86, s. 6, provided the action be for a sum of not less than £25, as the Sheriff Court is final in causes not exceeding that sum (16 & 17 Vict. c. 80, s. 22). Such suspensions, however, will only now be raised in cases in which a defender cannot get reponed in the Sheriff Court. Reponing is much simpler, and is now regulated by 39 & 40 Vict. c. 70, s. 14. Suspension can also be brought of decrees in absence pronounced in other inferior Courts. If, however, the action be for a sum not exceeding £12 the Lord Ordinary refuses the suspension, and, provided the suspender consign the expenses, he remits to the inferior judge, if he be competent, who hears parties (A. S., 11th Aug. 1787). In cases exceeding £12, the Lord Ordinary can pass or refuse the note, or remit it with instructions to the inferior Court, under 1 & 2 Geo. IV. c. 38, s. 1. Suspension of such decrees in absence will be seldom resorted to, as a party against whom a decree in absence has been pronounced can get reponed (A. S., 12th Nov. 1825, ch. 19, s. 6).

III. Suspension and Interdict and all other Suspensions not otherwise provided for under the two preceding heads (s. 6).—Such suspensions will include suspension and interdict (see Interdict); suspension and liberation in cases where imprisonment is still competent; and also suspension, liberation, and interdict when both liberation and interdict are desired; suspensions of charges, or threatened charges under documents which have been recorded for execution, or under the recorded protest of a bill of exchange, a warrant to poind, and many other kinds.

Suspension and interdict, and suspension and liberation, are processes distinct from ordinary suspensions, but which use the procedure applicable to suspensions. Under them either interdict to prevent a legal wrong or liberation is sought; while in all other cases it is the suspension of diligence which, unless suspended, might be used in due course of law, that is desired. For example, in a poinding the proceedings may be suspended at any stage, up to the moment when a warrant for sale has been granted. After the warrant for sale has been granted, the matter passes out of the control of the Court, and accordingly the sale can only be stopped by an interdict (Mackay, *Practice*, vol ii. p. 212). Similarly, all other acts done without the authority of Court, which are said to be illegal, must be stopped by suspension and interdict (see Interdict).

In all suspensions under this section, the note of suspension must have annexed to it an articulate statement of facts and a note of pleas in law. The Court considers the matter, and passes or refuses the note as may seem just. Finally, the practice as to caution and the power to reclaim to the Inner House "shall remain as at present." These points are dealt with under procedure.

Procedure.—As procedure in suspensions is summary, suspensions always commence in the Bill Chamber. Prior to 1838 the procedure was for the suspender to present a short note or petition to the Lord Ordinary on the Bills. The note was considered, and if passed it was a warrant for the suspender to expede Letters of Suspension, which was a writ issuing from the signet, and which, when served, stayed execution of the decree craved to be suspended until the process of suspension was discussed. The Letters of Suspension in form resembled a summons, and, like a summons, it was called in the usual way (Ersk. iv. 3. 18–21).

Now, however, since the passing of the Suspension Act, 1838 (1 & 2 Vict. c. 86), the practice has been changed. Instead of presenting a note or petition craving for leave to expede Letters of Suspension, a suspender

now simply presents a note to the Lord Ordinary on the Bills, signed by his agent, craving for suspension of a decree in absence pronounced in Court of Session under sec. 5 (*supra*); of a decree *in foro* of an inferior Court under sec. 4 (*supra*); or the appropriate crave in all other cases under sec. 6 (*supra*). Forms of these notes are given in the schedule annexed to the A. S., 24th Dec. 1838.

As we have seen, this note must have annexed to it an articulate statement of facts and note of pleas in law in all cases—except in suspensions on consignation of decrees in absence pronounced in the Court of Session, and in suspensions on caution of inferior Court decrees, pronounced *in foro* not being decrees in removings. It is laid before the Lord Ordinary, and a copy handed to the Bill Chamber Clerk (A. S., 24th Dec. 1838, s. 1).

In the case of suspensions of decrees in absence pronounced in the Court of Session, the note must be passed if consignation be made. In the case of suspensions of decrees *in foro* pronounced in the inferior Courts, with the exception of judgments pronounced in actions of removing, the presentment of the note, on being certified by the clerk, operates as an interim sist of diligence; and the note must be passed if caution be found for the implement of the decree, and of the expenses to be incurred in the Court of Session. In all other cases the Lord Ordinary considers the matter. He may refuse the note, but if caution or consignation is offered, the usual course is to order the respondent to answer it within a fixed time, and during that time to sist execution of the diligence used or threatened. If a caveat be lodged, the charger will be heard before a sist is granted.

Sist.—A sist stays "execution of the decree craved to be suspended till the process of suspension be discussed" (Ersk. iv. 3. 18), that is, until the note be passed or refused. A sist begins when it is intimated to the charger. In the exceptional case of the suspender not being bound to find caution or make consignation, it lasts until the note is disposed of. When caution or consignation is necessary, it must be made or found within fourteen days, unless the Lord Ordinary, on special cause shown, prorogates the time. Prorogation of time in practice is asked for on the motion roll, and parties do not require to present a separate note. If caution be found, or consignation be made in due time, the sist continues until the note is disposed of. If caution be not found, nor consignation made within the fourteen days, and no prorogation of time be obtained, the sist expires, and the charger can proceed with his diligence as soon as he has obtained a certificate of no caution or consignation, which he will obtain on application to the Bill Chamber Clerk (A. S., 3rd July 1677; A. S., 1st Nov. 1799). Similarly, if a suspender offer in the note to find caution or make consignation, he may obtain a sist for fourteen days, and within that time he must find caution or make consignation, otherwise the sist expires.

When a sist has been intimated it has the same effect as a passed suspension, and if the charger proceed to do diligence he will be proceeded against for contempt of Court (Stair, iv. 52. 16).

Thus after a sist, a charger cannot execute a poinding (*Stewart*, 1751, Mor. 10535), nor carry out a decree of removing (*Keltie*, 1828, 7 S. 208).

The interlocutor sisting execution also orders answers within a certain number of days. This means after caution is found, if caution is required. If no caution is required, answers are due within the days fixed after intimation has been made.

Caution and Consignation.—The ordinary rule is that consignation must

be made, or caution found, in all cases before a sist can be granted or a note of suspension be passed (Stair, iv. 52. 24; Ersk. iv. 3. 19). As a rule caution is sufficient, but consignation of the sum of money decerned for is required in the following cases, namely:—Charges by ministers for their stipends, by professors of universities, or masters of parish schools for their salaries, or directors of hospitals for their rents (St. 1669, c. 6; 1669, c. 14), or by the collector of the widows' fund of the Church of Scotland against contributors (19 Geo. III. c. 20, s. 55). In addition, as we have seen, consignation of the expense decerned for must be made in suspension of decrees in absence pronounced in the Court of Session under 1 & 2 Vict. c. 86, s. 5. It may also be required in any case on cause shown. A condition in a bond, however, that it is only to be suspended on consignation, does not prevent the Court from suspending on caution (*Gilmour*, 1831, 9 S. 907). On the other hand, caution itself may be dispensed with in all cases, except suspensions of decrees of inferior Courts brought under 1 & 2 Vict. c. 86, s. 4 (*supra*, 209). Formerly this privilege of dispensing with caution could only be granted if the suspension were passed *in presentia*, or by three or two judges in vacation (A. S., 29th Jan. 1650; A. S., 10th Aug. 1776). Now, however, only one judge is required (6 Geo. IV. c. 120, s. 46).

Of course, caution can only be dispensed with on cause shown. What is sufficient is a question of circumstances. For example, where the acceptor of a bill denied that the signature was his (*Keehans*, 1893, 21 R. 75), and where a firm's signature to a bill was appended after dissolution (*Goodwin*, 1890, 18 R. 193), no caution was required (cf. *Simpson*, 1888, 15 R. 716, and *Renwick*, 1891, 19 R. 163, where caution required). Again, caution may not be required if the note refer the matter to the charger's oath (*Larkins*, 1823, 2 S. 114). As a rule, however, a sist is only granted and a note is only passed if caution be found. Caution takes the form of a bond which must be lodged with the Bill Chamber Clerk before the expiry of the sist, or the time allowed for finding caution. Under it the cautioner becomes bound to pay both the sum contained in the charge and also the expenses of the suspension (A. S., 23rd Nov. 1613). The Bill Chamber Clerks are in the first instance responsible for the solvency of the cautioner, who must be habit and repute solvent, sufficient for the sum in the charge, and subject to the jurisdiction of the Court. When, however, the sufficiency of a cautioner is objected to, the Bill Chamber Clerk must see that the bond is attested. Attestation is attesting the sufficiency of cautioner, and is done by an attestor signing the bond, and so becoming cautioner for the cautioner (Ersk. iii. 3. 71; A. S., 27th Dec. 1709). The attestor had formerly the benefit of discussion (Stair, iv. 52. 25; A. S., 27th Nov. 1709), and may still stipulate for it (19 & 20 Vict. c. 60, s. 8). A new cautioner may also be required if the cautioner become bankrupt (A. S., 11th July 1828, s. 118). Again, cautioners are liable under their obligation though the suspender do not enrol the case within the time allowed, and even although the charger obtain and extract protestation for not enrolling and insisting (6 Geo. IV. c. 120, s. 47). Again, under a bond of cautionry in suspensions, each cautioner, when there is more than one, is liable if he sign. In this respect it differs from ordinary cautionry, where none are liable unless all sign (*Simpson*, 1860, 22 D. 679). Finally, the septennial limitation of cautionary obligations does not apply to judicial cautioners (B. *Pr.* 602; *Hope*, 1715, Mor. 11009).

Juratory Caution.—The general rule that suitable or sufficient caution must be found in suspensions has from the earliest times been subject to

the exception that a suspender who is in poor circumstances can offer juratory caution, "*i.e.* such security as the suspender swears is the best he can give" (Ersk. iv. 3. 19). Formerly the suspender in such circumstances had to grant a disposition *omnium bonorum* in favour of the charger, but that is no longer necessary. When such caution is tendered the procedure is for the suspender to lodge an inventory of his effects; swear to the truth of his statements before a commissioner appointed by the Court to take his oath; give up all vouchers of debts due to him; and, if required, dispone his heritage to the charger (Stair, iv. 52. 26; A. S., 14th June 1799; A. S., 28th July 1828, s. 3). Whether juratory caution should be accepted, is in all cases a question of circumstances, but as a rule it will be accepted if the Court consider that injustice might be done if it were refused (*Livingstone*, 1890, 17 R. 702; *Logan*, 1870, 8 M. 1009). It has been accepted in a suspension of a decree of removing (*Marshall*, 1850, 12 D. 946). It was refused in *Marshall*, 1860, 22 D. 926; *McGregor*, 1862, 24 D. 1006.

Passing or Refusing the Note.—If answers are lodged within the time fixed in the interlocutor ordering intimation of the note, or, as all interlocutors in the Bill Chamber are after consideration (*Arthur*, 1866, 4 M. 705), even if no answers are lodged on the expiry of the time allowed for answers, the Lord Ordinary considers the case. If no caution be found when caution has to be found, the note is refused; but if caution be found, the Lord Ordinary considers the matter on the merits, and passes or refuses the note in whole or in part (A. S., 20th Nov. 1711). As to expenses, he may give expenses to the charger, if answers have been given in, but he cannot give expenses to the suspender (A. S., 19th Dec. 1778; *Nairnes*, 1824, 3 S. 228). When notes are refused, the certificate of refusal is not issued until forty-eight hours after entry in the minute book; and when notes are passed, the interlocutor does not take effect for forty-eight hours, except as a continuance of the sist. In cases, again, where caution has to be found after passing the note, the note only takes effect when caution is found. Until then, the note is not out of the Bill Chamber (A. S., 1838, s. 8).

Review.—It is competent to reclaim against the interlocutor passing or refusing a Note of Suspension. When reviewing Bill Chamber interlocutors, however, the Inner House sits as a branch of the Bill Chamber (Mackay, *Practice*, i. 69). The peculiarities of such reclaiming notes are that they must be boxed within fourteen days of the interlocutor passing or refusing the note; that they must be intimated to the agent of the opposite party; and that such reclaiming notes "shall neither prevent the Clerk to the Bills from issuing the passed note, or a certificate of refusal as the case may be, nor hinder the interlocutor submitted to review from being carried into effect by the opposite party, unless the Lord Ordinary on the Bills shall, as heretofore, stay proceedings on special cause shown by a note for the party by prohibiting the delivery of the note, or the issuing of the certificate on such terms and conditions and during such time as he may judge reasonable for enabling the party to obtain a review of the interlocutor" (1 & 2 Vict. c. 86, ss. 4 and 6; A. S., 24th Dec. 1838, s. 5). Passing or refusing a note was always the important step in suspensions, as after a note is passed the case is considered on its merits. Since 1868 this result is attained as soon as the interlocutor passing the note has become final, and caution or consignation has been found or made if either has been ordered. This happens fourteen days after its date or the conditions it contains as to the caution or consignation have been fulfilled. When the interlocutor has become final, the cause becomes for all purposes an action depending on the Court of Session (Court of Session Act, 1868, s. 90).

It may here be noted that Bill Chamber work is done by Bill Chamber officials, and as the extractor is not a Bill Chamber official, interlocutors in the Bill Chamber are not extracted, and instead of extracts the clerks give certified copies (A. S., 24th Dec. 1838). The reclaiming note may be presented to either the First or Second Division in the reclaimer's option; as the rules as to marking a case to a particular Division only apply to Court of Session not to Bill Chamber cases (*Graham*, 1849, 11 D. 1165).

When a reclaiming note has been heard, the Division may either refuse the reclaiming note, or may remit to the Lord Ordinary to pass or refuse the suspension; or if the reclaiming note is against an interlocutor in a suspension of an inferior Court decree, it may remit to the inferior judge with instructions, and any interlocutor of the Division refusing the reclaiming note, or of the Lord Ordinary on a remit from the Court, shall be final (6 Geo. IV. c. 120, s. 46). Under this section the old theory regarding Bill Chamber reclaiming notes was kept in view. The Inner House can refuse a reclaiming note, but it never passes or refuses the note of suspension. It remits to the Lord Ordinary to do the one or the other. Accordingly, the case is always remitted to the Lord Ordinary when his interlocutor is reversed. In addition to this, when expenses are given, and these, as we have seen, can be given against but not to a suspender (A. S., 19th Dec. 1778), the Inner House remits to the Lord Ordinary to refuse with expenses in the case when his interlocutor passing the note of suspension has been recalled. The Inner House must also remit to the Lord Ordinary when it refuses a reclaiming note against an interlocutor refusing to pass a note of suspension, if it intends to give additional expenses. The general form of interlocutor in such cases is to "refuse the reclaiming note, find additional expenses due, and remit to the Lord Ordinary to modify and discern for the same." These rules were sanctioned in the case of *Morison*, 1842, 4 D. 563.

Appeal to the House of Lords.—An appeal is competent to the House of Lords against an interlocutor of the Inner House passing or refusing a note of suspension (*Fleming*, 1839, Macl. & R. 547; Beveridge on *Bill Chamber*, 119).

Second Notes of Suspension.—(*a*) *Under the A. S.*, 1838.—Besides reclaiming notes, second notes of suspension are competent in certain cases. Thus in a case where a note of suspension has been refused in respect that caution has not been offered or found or on any ground other than the merits; or again, in a case where a note has been passed and "a certificate of no caution or consignation" or other condition attached to the passing of the note has been issued, a second note may be presented on payment of previous expenses (*Allan*, 1854, 16 D. 917). To this right, however, there is the following exception: Where a note has been presented without caution or on juratory caution or on consignation, it is competent for the suspender to amend the note, and offer juratory caution or full caution in place of no caution; or full caution or consignation in place of juratory caution; or the note may be again amended under conditions as to paying expenses or finding caution within a certain time, as may be fixed in the interlocutor allowing the amendment. But if the suspender take advantage of these provisions and the note as amended is refused on the ground of no caution or consignation, a second note of suspension cannot be brought (A. S., 24th Dec. 1838, ss. 4 and 7; cf. *Taylor*, 1852, 15 D. 14).

(*b*) *At Common Law.*—As we have seen, the pleas of competent and omitted, proponed and repelled, apply to suspensions (Stair, iv. 52. 14).

Therefore no second note is competent at common law unless circumstances have changed since the first note was refused. At the same time, if the circumstances of parties change, a new note of suspension by the same suspender is not a second note in the sense of the A. S., and is competent, and can be passed even without caution or consignation being found or made (*M'Kenzie*, 1831, 10 S. 24). Thus a suspension and liberation can be brought although a suspension of the charge on which the suspender was incarcerated has been refused (*Barr*, 1850, 13 D. 305). Again, a suspension and interdict to stop a poinding has been held competent although a suspension of the charge on which the creditor afterwards was proceeding to poind had been refused on the ground of no caution (*Stewart*, 1841, 3 D. 668).

Third Notes of Suspension.—In former times third notes were apparently brought and considered by simply offering caution. Such a mode of procedure is not competent under A. S., 1828, s. 15 (*Corsan*, 1830, 8 S. 114). Though not competent under the A. S., such notes, it is thought, may still be brought, if not barred by the pleas of competent and omitted or proponed and repelled, and if circumstances have again changed since the second note was brought.

Turning the Charge into a Libel.—In suspensions of decrees an ancient mode of procedure is thus described: if it shall appear to the Court that the decree suspended is defective as to form, though the debt due to the charger may be just, they frequently *turn the charge into a libel*, the meaning of which is that, though the charge given is to have no longer the effect of a proper charge, yet to save the expense to the creditor of bringing a new action for the debt, it is held as equivalent to a citation given by him to his debtor upon a summons, so that the debtor or suspender must offer his defences against the debt *tanquam in libello* as if he had been cited in a common action (Ersk. iv. 3. 22). This procedure was commonly adopted if the charge was manifestly irregular (*M'Ready*, 1715, Mor. 11984), or even null (*Gordon*, 1822, 1 S. 318), but not if the warrant on which the charge was given were bad (*Fleming*, 1823, 2 S. 446). It was usually asked for by the charger when the Court suspended the charge. It is still competent at least until the record in the passed note has been closed (*Campbell*, 1827, 5 S. 412). This procedure is now, it is believed, never taken advantage of.

Reference to Oath.—It is generally competent in an action to refer the matter in dispute to the oath of the defender. Such procedure is also competent in suspensions. The reference to oath may be made in the note itself, or it may be made by minute subsequent to the presentation of the note (*Macdonald*, 1848, 10 D. 740). If the oath is affirmative of the reference, the note will be passed. If it be negative, the note will be refused. In either case the interlocutor of the Lord Ordinary can be reclaimed against. In addition, if a suspender fail to proceed with the reference and a decree by default is pronounced, it is competent to reclaim in order to be reponed, and it is not necessary to present a second note of suspension, although it would be competent in such circumstances to present a second note of suspension (*Law*, 1853, 15 D. 481).

If circumstances change after a reference to oath has been made, the suspender may retract the reference even though a sist was obtained on account of it. But a suspender can only do so, it is thought, on payment of such expenses as the reference and its retraction have caused the charger. It has been doubted if this statement is correct, but if a reference can be retracted on cause shown only, the suspender's remedy will be to present a second note of suspension, which is clearly competent (*Jameson*,

1853, 15 D. 414; A. S., 1838, s. 7). When the reference to oath is contained in the note itself, caution, as a rule, is not required (*Lauchlan*, 1922, 2 S. 114).

Procedure after the Note of Suspension has been passed.—When answers are lodged by a respondent in any process of suspension, the record shall be made up in the same manner as in an ordinary action (Court of Session Act, 1850, s. 9). This is the leading provision regarding suspensions in the Court of Session. But there are one or two points regulated by statute or A. S. to which reference may be made. Thus the respondent, and not the suspender, has the right to fix the Lord Ordinary and Division to which the case will belong in all cases, except where the note of suspension has been reviewed by either Division before it was passed. When that has happened, the case is marked to that Division. The respondent must, however, exercise this right within twelve days of the date of the interlocutor passing the note, or in the case of a suspension of a decree, within twelve days of the service of the interlocutor passing the note, upon the respondent; otherwise the suspender can fix the Lord Ordinary and Division. During the period of twelve days the Bill Chamber shall retain possession of the process and shall not lend it up to either of the parties (s. 33; and Court of Session Act, 1868, s. 90).

Again, when the suspension is of the decree of an inferior Court in a case where a record has been made up and a proof led, the Lord Ordinary need not himself issue a judgment, but must, on the motion of either of the parties, report the cause to the Inner House. The party who has moved the Lord Ordinary has in the first instance to pay the expense of printing the record, proof, and other papers which are boxed for the Court (s. 32). Again, prior to 1838 the expede letters of suspension, and from 1838 to 1868 the passed note of suspension, were duly called. Calling is now unnecessary, and as soon as the interlocutor has become final and caution or consignation if ordered has been found or made, the case may be enrolled by either party in the motion roll of the Lord Ordinary to whom it is marked (Court of Session Act, 1868, s. 90).

This privilege of enrolling a case enables a charger to force on the discussion of a suspension, as of course the enrolment can be for any purpose, and has therefore practically superseded the right which a charger possessed of putting up a protestation after the expiry of fifteen days after an interlocutor passing a note had taken effect. The right, however, still exists (A. S., 1838, s. 12).

Finally, the process shall be transmitted from the Bill Chamber to the clerk to the process in the Outer House as soon after the interlocutor passing the note has taken effect as the party leading in the process may require (A. S., 1838, s. 13).

In other respects the case is disposed of in the same manner as an ordinary action.

When the charge is finally suspended, the suspender may obtain the Court of Session but not the Bill Chamber expenses. When the decree finally finds that the charge has been orderly proceeded, the charger can of course proceed to use diligence against the suspender to recover payment of the sum mentioned in the charge, or to remove a tenant, or to secure implement of whatever the charge warranted him to demand. To do this he is entitled to do diligence either on the extracted decree in the suspension or on the old charge; but as it does not include the expenses of the suspension, it is necessary to charge on the extracted decree in that process if they have been awarded (Ivory, *Forms of Process*, i. 263).

Jurisdiction in Suspensions.—The Court of Session has exclusive jurisdiction in all cases of suspension except that an action of suspension of a charge under a registered writ for a sum not exceeding twenty-five pounds can be raised in the Sheriff Court. It is to be noted that such jurisdiction only exists when there has been a charge, not when there has only been a threatened charge; and that the Sheriff has no jurisdiction when the charge is under a decree either in absence or *in foro*. When the Sheriff, moreover, has jurisdiction he can only suspend on caution (1 & 2 Vict. c. 119, s. 19).

Suspension and Interdict (see Interdict).

Suspension and Liberation.—In former times a person imprisoned for debt might obtain liberation by means of *cessio bonorum* or by letters of suspension containing a command to the jailer to set him at liberty (Ersk. iv. 3. 15. 26). Owing, however, to changes in the law relating to civil imprisonment and bankruptcy, *cessio bonorum* is not now a means of obtaining liberation, and is simply a method of obtaining sequestration. Letters of suspension, or as the process would now be called, note of suspension and liberation, is now the only method by means of which liberation is obtained when a person has been incarcerated for civil debt. By the ancient law any debtor who failed to pay his debt after a charge on letters of horning could be denounced a rebel, and thereafter letters of caption on which he might be imprisoned were issued. By the Personal Diligence Act, 1838, s. 6, the procedure was changed. Instead of obtaining letters of horning, the charger recorded the charge, and an extract of this with the words *Fiat ut petitur* written on by the Bill Chamber Clerk was the warrant on which imprisonment followed. This Act is still in force, but imprisonment for debt is entirely abolished, except in the following cases and under the following conditions—namely, persons may still be imprisoned (1) for any period not exceeding twelve months for failure to pay taxes, fines, or penalties due to Her Majesty; (2) for any period not exceeding six weeks for failure to pay any rates and assessments; (3) for periods of not more than six weeks at a time at intervals of not less than six months, for failure to pay any sums decerned for as aliment, provided the debtor has possessed or been able to earn the sums decerned for as aliment; for failure to implement decrees and obligations *ad factum præstandum*; or against any debtor as being *in meditatione fugæ*; but as to this last case, see *Kidd*, 1882, 9 R. 803 (Debtors Act, 1880, s. 4; Civil Imprisonment Act, 1882, ss. 4, 5).

It will thus be seen that suspension and liberation will now rarely be required. When it is resorted to, it will be presented under sec. 6 of the Suspension Act, 1838. It will take the form of a note, and will have added to it an articulate statement of facts and note of pleas in law. The reasons on which liberation will be asked will be either that the decree itself has been wrongly obtained, or that the imprisonment has been irregularly carried out, or both reasons may exist. The crave in all cases is to suspend the proceedings, whatever they are, that are complained of, and liberate the suspender (cf. *Wilson*, 1862, 24 D. 271). It may or may not contain an offer to find caution, and caution may or may not be required as a condition of liberation being granted. Naturally an incarcerated debtor is not likely to be able to offer more than juratory caution at the outside. When warrant for liberation is granted, a certificate of the interlocutor is issued at once, and parties do not require to wait the expiry of forty-eight hours, as is required in other cases (A. S., 1838, s. 8).

Suspension and liberation is to obtain liberation when a person has

been imprisoned for a civil debt only. Therefore when a person has been imprisoned for contempt of Court, or in the process of lawburrows, or in criminal proceedings in inferior Courts, or otherwise illegally detained, an application for liberation must be made to the High Court of Justiciary.

Suspension (Criminal); Suspension and Liberation (Criminal).—Suspension and Suspension and Liberation are processes competent in the High Court of Justiciary by means of which a conviction, sentence, whether proceeding on a verdict of a jury or not, warrant, or other determination of a judge obtained in an inferior Court can on certain grounds be set aside. Otherwise stated, suspension is a process of review on account of reasons or grounds appearing on the face of the proceedings. The other modes of review are Advocation, Appeal to the Circuit Court under the Heritable Jurisdictions Act, 1747 (20 Geo. II. c. 43), and Appeal on a case stated against a judge's determination as erroneous in point of law under the Summary Prosecutions Appeals Act, 1875 (38 & 39 Vict. c. 62). These different processes are not mutually exclusive, and a party aggrieved may be able to select the one he chooses. But, as is stated on the following page, if he has appealed under the Act of 1875, he cannot thereafter present a suspension or obtain review otherwise.

In considering whether suspension is competent, the following points should be borne in mind:—

(*a*) Suspension only suspends the proceedings of inferior Courts. Therefore no interlocutor of the High Court, either when sitting in Edinburgh or on Circuit, can be suspended, as the Lords of Justiciary do not review their own sentences by Advocation, Suspension, or Appeal. Nor can criminal sentences pronounced by the Court of Session be suspended, as it is, equally with the High Court, a supreme and independent Court (Hume, ii. 509). With these exceptions, the proceedings of all other criminal Courts can on competent grounds be suspended. When jurisdiction, moreover, is conferred upon inferior judges, it is construed as conferring upon them only the right of judging in the first instance, and does not give them exemption from the general power of review possessed by the High Court (Hume, ii. 31), unless review has been excluded (*infra* (*b*)). (Cf. *Giles*, 1849, J. Shaw, Just. 203.)

(*b*) Review of all kinds may be excluded, or the modes of review that are permitted or the reasons on which it can be entertained may be regulated, by statute. Thus compare the Day Trespass Act, 1832 (2 & 3 Will. IV. c. 68, s. 15), where another Court of Review is appointed, to wit Quarter Sessions; the Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114, s. 6); Excise prosecutions under 24 & 25 Vict. c. 91, or under certain local police Acts, such as the Glasgow Police Act, etc. (*Porter*, 1858, 3 Irv. 57; *Mackenzie*, 1890, 2 W. 589; *Schulze*, 1890, 2 W. 449; cf. *O'Brien*, 1880, 4 Coup. 375). It must at the same time be kept in view that a finality clause in a statute has to be construed, and does not exclude all reasons of suspension (*infra*, *Reasons of Suspension*).

(*c*) Suspension is only competent in criminal cases. At one time it was greatly discussed what was a criminal case. No great difficulty arose in regard to common law crimes, but difficult questions arose in regard to statutory offences. This point is now settled by the Summary Procedure Act, 1864, s. 28, which enacts that a case shall be deemed to be criminal when the Court can pronounce a sentence of imprisonment, or where it is authorised to pronounce a sentence of imprisonment in default of payment

of a fine or disobedience to an order of Court. "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" (*ib.*). In regard to this latter class, review, when competent, must be obtained in the Civil Court.

(*d*) It is a well settled rule that the merits of a conviction cannot be reviewed in a process of Suspension. Thus "if the verdict is challenged on this ground only, that it is not warranted by the evidence in the trial, certainly the Lords can pay no regard to such a plea. To settle the fact is the peculiar province of every assize, in what Court soever the trial be; and in the process of review equally as in receiving a verdict of assize in their own Court, the Lords of Justiciary must in that respect take the face of the verdict for their rule, and hold it to be the truth" (Hume, ii. 514). Again, when a case is tried in an inferior Court without a jury, the same rule applies (*Rattray*, 1891, 3 W. 89). This rule is so well settled that a suspension on the ground that bad law had been laid down by a Sheriff in a charge to a jury was refused as incompetent (*Quarns*, 1866, 5 Irv. 251). There is, in fact, no way of obtaining a review on the merits of the verdict of a jury, but when a case has been tried summarily, without a jury, though suspension is incompetent on the merits, review may be obtained by an Appeal on a case stated against the judge's determination as erroneous in point of law. It is, moreover, very important to decide whether the process of Suspension or Appeal should be resorted to (cf. *Glass*, 1882, 5 Coup. 160, per Ld. Young; *Rattray*, 1891, 3 W. 89); because if an appeal be taken, the other modes of review are excluded (Sum. Jur. Ap. Act, 1875, s. 9; *Walker*, 1895, 1 Ad. 569). This is so, at least, unless the Appeal be withdrawn (*Kay*, 1876, 3 Coup. 305).

(*e*) Suspension is only competent when a sentence, conviction, or other warrant has been obtained. It is not, therefore, the process to obtain redress in a case when a person has been illegally detained, unless this has been done under a decree of Court, nor if a person has been apprehended without a warrant, which in some circumstances is legal (Hume, ii. 75). Redress in such cases, it is thought, would be by an appeal to the *nobile officium* of the Justiciary Court (Moncreiff, *Review in Criminal Cases*, ch. v.). Again, before a suspension can be brought, the warrant must have been executed, as suspension of a threatened or expected warrant is incompetent (*Jupp*, 1863, 4 Irv. 355). (In that case the warrant has not been signed.) Where, however, there is a warrant or other determination of a judge, suspension is competent at the instance of the accused. It may also happen that the warrant, such as warrant to imprison, has been wrongously obtained. In such circumstances the suspender, in addition to obtaining redress in the High Court, may have his remedy in the civil Courts (*Sinclair*, 1890, 2 W. 481; *M'Hattie*, 1892, 3 W. 289; cf. *Leask*, 1893, 21 R. 32).

(*f*) Again, suspension is only applicable to final judgments or determinations—advocation being the appropriate remedy for correcting errors committed during the course of a trial (Hume, ii. 509). After a trial is finished, however, or a conviction has been obtained, the regularity of the proceedings can, of course, be inquired into, in a suspension.

What is sought to be suspended usually is the sentence or the conviction, and in support of the prayer relevant grounds must be averred. But any independent determination or warrant can be suspended. Thus search-warrants can be suspended (*Bell*, 1865, 5 Irv. 57; cf. *Boyd*, 1897, 25 R. (J. C.) 49).

(*g*) Finally, from the nature of the remedy suspension is only competent at the instance of an accused party.

Reasons of Suspension.—Suspension is competent even although the warrant has been executed or the sentence obtempered (*Bell*, 1865, 5 Irv. 57; *Russell*, 1845, 2 Br. p. 572; *Bonthrone*, 1889, 1 W. 279; *Muirhead* 1892, 2 W. 473 (where four and a half years' delay did not exclude)). That the sentence has been acquiesced in may, however, bar suspension (*M'Clure*, 1872, 2 Coup. 177; *Watson*, 1898, 25 R. (J. C.) 53).

It has been already pointed out that the merits of a case cannot be inquired into in a suspension, and that suspension is only competent on account of reasons appearing on the face of the proceedings. It would be impossible here to classify the numerous reasons on account of which review is competent. It is the more unnecessary as very few of them are exclusively applicable to suspension. They are, in fact, all reasons against the judgment or sentence, other than the reason that the inferior judge or jury has wrongly decided the case in point of fact, or that bad law has been laid down, or that the judge's determination is erroneous in point of law (*supra* (*d*)).

Among other reasons, suspension, though it may be refused, is competent on the following averments:—

(1) That the Court has no jurisdiction, or want of competency (*Lamb*, 1892, 19 R. (J. C.) 78).

(2) That the instance is bad (*D. of Bedford*, 1893, 3 W. 493).

(3) That the citation is bad (*Stewart*, 1894, 1 Ad. 493).

(4) Objections to competency of the complaint (*Clark & Bendall*, 1886, 13 R. (J. C.) 86).

(5) Objections to relevancy (*Whyte*, 1891, 3 W. 245; *Clendinnen*, 1875, 3 Coup. 171). But, as a rule, objections to relevancy must be stated in the inferior Court (*Bolton*, 1890, 2 W. 410; *Stewart*, 1891, 2 W. 627).

(6) Rejection of competent, admission of incompetent, evidence; or refusing competent questions (Hume, ii. 515; *Burns*, 1856, 2 Irv. 571; *Stevenson*, 1854, 1 Irv. 603; *Bruce*, 1861, 24 D. 184; cf. *Falconer*, 1893, 1 Ad. 96).

(7) Oppression (cf. *Rodgers*, 1892, 3 W. 151).

(8) That the verdict has been irregularly obtained (Hume, ii. 515; *M'Garth*, 1869, 1 Coup. 260); or that it is ambiguous (*Graham*, 1864, 4 Irv. 504; *Milne*, 1874, 2 Coup. 562).

(9) Objections to the conviction—such as that the charge is alternative and the conviction general (*Reaney*, 1883, 5 Coup. 367).

As has been already stated, review may be excluded by statute. But in addition to the fact that certain grounds, such as want of jurisdiction, must always give a party a right to bring a case under review, it is well established that finality clauses are construed, and except so far as it is excluded, review is competent. Cf. *Simpson*, 1892, 3 W. 167, where the pleas of no jurisdiction, irrelevancy, bad instance, oppression, were considered in a suspension of a conviction under a statute excluding review except on the grounds of corruption or malice (*Young*, 1897, 25 R. (J. C.) 22).

Procedure.—There is no statutory form for a Bill of Suspension or Bill of Suspension and Liberation where a sentence of imprisonment has been passed; but forms, modelled on the forms annexed to A. S., 12th Dec. 1838, are usually used (see *Jurid. Styles*, iii. 896–900). The bill is signed either by counsel or agent (Moncreiff, *Review in Criminal Cases*, 176). Originally the procedure took place under the warrant of a bill passed in the Court of Session, but since 1729 the bill has been always presented to the Court of Justiciary. One judge alone can grant the preliminary deliverances,

including granting interim liberation, but a quorum of the Court is required to dispose of the bill itself (Hume, ii. 514). The preliminary stages are—

The Court of Justiciary always disposes of the suspension by the interlocutor passing or refusing the bill. It thus never allows a proof, but if relevant averments as to the truth of which it considers it should be advised, it may remit to a reporter to make investigations and report (*Wright*, 1874, 2 Coup. 504).

It can also remit to the inferior Court with instructions (Hume, ii. 512; *Paterson*, 1867, 5 Irv. 415; cf. *Blair*, 1864, 4 Irv. 545). Instead of remitting, it can amend, vary, or alter the conviction complained of (Alison, ii. 32).

It can suspend in part and sustain the conviction in part (*Snaddon*, 1862, 4 Irv. 200; *Stewart*, 1891, 2 W. 627). But if the parts of the conviction are not separable, if one be bad the conviction must be suspended (*Ross*, 1869, 1 Coup. 336).

There ought always to be a respondent in a process of suspension, and the proper respondent is the prosecutor. But it may happen there is no prosecutor, as in the case of a suspension of a sentence of imprisonment for contempt of Court. In such cases the Court will consider the bill even if there be no respondent (*Macleod*, 1884, 11 R. (J. C.) 26; cf. *Nicolson*, 1861, 4 Irv. 115).

Finally, if a sentence of imprisonment has been passed in the inferior Court, and the suspender has obtained interim liberation, he must appear personally when the suspension is disposed of. He may also, if the suspension is refused, be imprisoned for the remainder of the sentence. (Summary Procedure Appeals Act, 1875, s. 10; cf. s. 3.)

[Hume, ii. 515 *et seq*; Moncreiff, *Review in Criminal Cases*; Brown, *Summary Prosecutions*.]

Swans.—Domestic swans and swans partially domesticated and furnished with collars or otherwise earmarked are private property (Bell, *Prin.* 1290). Wild swans were at one time classed as *inter regalia* (Stair, ii. 3. 68 and 76; Bankt. i. 3. 166); but this doctrine, which Erskine repudiates (ii. 6. 15), is not now law (see *Athole*, 1862, 24 D. 673). Swans are not included under the Game Acts; but, like other wild birds, they are protected by the Wild Birds Protection Act, 1880, and therefore they may not be killed between 1st March and 1st August. The taking of their eggs may be prohibited in any county by the Secretary for Scotland, on the application of the county council, under the Wild Birds Protection Act, 1894.

Taciturnity.—See Mora (vol. viii. 373).

Tailzie.—See Entail.

Taxation.—*Generally.*—Taxation is the proceeding by which accounts are submitted to a skilled person to examine, consider, and tax (see Auditor). Taxation may always be ordered either between litigants or between the client and his agent, though in either case the party called upon to pay may waive his claim to taxation. Expenses are taxed either as between party and party or as between agent and client. An interlocutor awarding expenses without qualification, implies expenses taxed as between party and party (*Fletcher's Trs.*, 1888, 15 R. 862). The question

of the method of taxation should be settled when expenses are awarded, but if the Court have not dealt with the question then, it does not appear to be incompetent to raise the point as an objection to the Auditor's report (*Davidson's Tr.*, 1896, 23 R. 1117). The preparation and taxation of all accounts for judicial proceedings, whether as between party and party or as between agent and client, are regulated by A. S., 15th July 1876.

Modes of Taxation.—Taxation as between party and party includes only necessary expenses, and these are determined by the practice of the Court and of the Auditor's office. By the second method of taxation, as between agent and client, "the client is liable for all expenses reasonably incurred by the agent for the protection of his client's interest in the suit, even though such expenses cannot be recovered from the opposite party." The expenses allowed to be charged against the opposite party are limited to proper expenses of process, without any allowance for preliminary investigations, subject to the proviso that precognitions may be allowed where eventually an interlocutor is pronounced either approving of issues or allowing a proof (A. S., 15th July 1876; Mackay, *Practice*, vol. ii. p. 585; *Manual*, pp. 667–668). Where the Court has found an unsuccessful party liable in expenses as between agent and client, the principle of taxation is not necessarily the same as where the client has to pay his agent, and the Auditor is entitled to knock off needless and excessive charges which might be allowed as against the client (*Walker*, 1869, 7 M. 751; *Hood*, 1896, 23 R. 675).

In consistorial actions it appears to have been the practice at one time to tax the wife's expenses as between agent and client; but it was found that great hardship was often caused to the husband thereby, and the principle applied nowadays is not as between agent and client, or party and party, but an intermediate principle, by which the expenses allowed to the wife are such only as ought necessarily and properly to be incurred in conducting the action, according to the circumstances of the case (*King*, 1845, 7 D. 536; *Campbell*, 1861, 23 D. 873; Fraser on *Husband and Wife*, p. 1233; but see *Mackellar*, 25 R. 883). Where the co-defender is found liable, the expenses are taxed as between agent and client (Conjugal Rights Act, 1861, 24 & 25 Vict. c. 86, s. 7).

A client is always entitled to have his agent's account taxed (*Henderson*, 1852, 14 D. 1040), and the right can only be foreclosed by express waiver (*M'Laren*, 1857, 20 D. 218). This right of taxation is competent to any person interested in the account (*M'Farlane*, 1897, 24 R. 574; *Macdonald*, 1856, 18 D. 630). The waiver of a client's right to have business accounts taxed must appear in explicit terms before it can be pleaded against him by the agent; and the law is extremely jealous of any settlements of accounts between an agent and his client, as the parties do not meet upon equal terms (*M'Laren*, 1857, 20 D. 218, per Ld. Deas).

By A. S., 6th February 1806, a summary method was introduced by which law agents may obtain decree against their clients for the taxed amount of accounts incurred in conducting proceedings in the Court of Session. By this Act it is competent, either for the agent or the client, to make a summary application to the Court to get the account claimed by the agent remitted to the Auditor for taxation; and the sum ascertained by the Auditor shall alone form a charge against the client. The form of application is by petition (*Cullen*, 1829, 8 S. 197; *Gowans*, 1835, 13 S. 491). It is competent in connection with all accounts incurred in proceedings before the Court of Session (*Jameson*, 1829, 7 S. 379), but is incompetent as to factorial claims by a factor (*Howison*, 1832, 10 S. 630), or where

employment is denied (*Adam*, 1832, 11 S. 196). The agent is entitled to the expense of such a petition (*Sprot*, 1854, 16 D. 1043).

Remit to Auditor.—The taxation of accounts is left entirely in the hands of the Auditor, and it is only in very exceptional circumstances that the Court will interfere with his discretion (*Tough's Trs.*, 1874, 1 R. 879; *Tannett, Walker, & Co.*, 1874, 1 R. 440); he has, however, no power to refuse the expense of proceedings which have been ordered by the Court (*Stott*, 1856, 18 D. 716). The Auditor to the Court of Session was first appointed by A. S., 6th February 1806. To him the Clerk transmits the process, and the agent gives in the account of expenses. Of this account he serves a copy on the opposite agent, along with a warrant for parties to appear on a fixed day for the purpose of having the account taxed. The Auditor may hear the agents for the parties, and may call for vouchers of all the articles stated in the account. If either party intends to object to the Auditor's report, he must "immediately lodge with the Clerk a note of his objections, stating them shortly and without entering into argument; a copy of which note shall be transmitted by him to the agent on the other side; and the Court, or the Lord Ordinary, may either direct the same to be answered in writing or *viva voce* at the bar, as the case may require, the expense of such discussion being always laid upon the objector, in case his objection shall not be sustained" (A. S., 6th February 1806). All objections to the Auditor's report must be lodged within forty-eight hours after the report has been issued, unless special cause is shown (*Stewart & Co.*, 1893, 20 R. 832; *A. B.* v. *C. D.*, 1894, 21 R. 1083).

For procedure in remits to the Auditor, see A. S., 11th July 1828; Mackay, *Practice*, vol. ii. p. 587, and *Manual*, p. 668.

Where, on the taxation of the account of a party who has been found entitled to expenses generally, it appears that there is one branch of the case on which such party has proved unsuccessful, he will not be allowed the expenses of such proceedings (*Bell*, 1868, 7 M. 49; A. S., 19th December 1835). It is the duty of the Auditor to consider whether there is any part of the case in which the successful party has been unsuccessful, and also to consider whether any part of the proceedings has been caused by his own fault, and in either case to disallow the expense (A. S., 15th July 1876; *M'Elroy*, 1879, 6 R. 1119; *Bell, supra*; see also *Rigby*, 1872, 9 S. L. R. 627). The clause in the A. S., 15th July 1876, dealing with this matter is expressed thus: "Notwithstanding that a party shall be entitled to expenses generally, yet if on the taxation of the account it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings." What is signified by the word "fault" in the above clause is open to conjecture; it has been held that it does not mean that the party has stated a plea which he ought not to have stated, so as to entitle the Auditor to determine whether the particular plea ought or ought not to have been stated (*Welsh*, 1894, 21 R. 769). Where the defenders objected to the Auditor's report on the ground that the Auditor should have disallowed the expenses of a proof, the Court held that the objection was stated too late (*Electric Construction Co. Ltd.*, 1897, 24 R. 525). Where the pursuer was found entitled to two-thirds of his expenses, the Court sustained the Auditor, who had not only deducted one-third, but, before doing so, had disallowed all charges which had reference to those parts of the case in which the pursuer had been unsuccessful (*Arthur*, 1895, 22 R. 904). It is the duty of the Auditor, where the Court has awarded expenses

subject to modification, to tax as if the finding had been general, and to leave it to the Court to fix the modification subsequently (*M'Elroy*, 1879, 6 R. 1119; *Strang*, 1882, 19 S. L. R. 890).

The unsuccessful party, as a general rule, pays the expense of taxation, but if the amount struck off is excessive, the expense may be laid on the party entitled to the account (Dove Wilson, *S. C. Practice*, 4th ed., 199), or the expense may be divided between the parties (*Cameron*, 1835, 14 S. 24; *Hogg*, 1835, 13 S. 451). The general practice has been to allow the expense of taxation unless one-fifth or more has been taxed off (*M'Dowall*, 1850, 13 D. 303; *Liddle*, 1897, 5 S. L. T. 13).

After taxation it is necessary for the successful litigant to move the Court for the approval of the Auditor's report. The successful party is entitled to the expense of this motion, unless the unsuccessful litigant makes a proper tender of the whole amount of the taxed expenses (*Bannatyne*, 1884, 11 R. 681; *Maitland*, 1882, 20 S. L. R. 35; *Magistrates of Leith*, 1882, 19 S. L. R. 399; *Allan*, 1851, 13 D. 1270). The tender must be received prior to the enrolment for approval (*Campbell*, 1843, 5 D. 753). If objections to the Auditor's report be lodged, the expenses of the discussion are awarded against the objector if he be unsuccessful (A. S., 6 Feb. 1806; *Matthew*, 1844, 6 D. 1135); but where the Auditor himself reports a point for the consideration of the Court, no expenses are, as a rule, allowed to either party (*Nisbet*, 1853, 15 D. 778; *Dempster*, 1831, 12 S. 844). When the motion for approval is enrolled, the enrolment should state whether there are objections to it, or reservations by the Auditor, or whether the expenses fall to be modified (*Broadwood*, 1856, 18 D. 791; *Rattray*, 1855, 17 D. 484); all objections should be stated at one time (*King*, 1845, 7 D. 536). Where the Lord Ordinary deals with the Auditor's report, it is competent to reclaim against his Lordship's interlocutor (*Clough*, 1841, 3 D. 884).

Taxation in Sheriff Court.—Taxation in the Sheriff Court is regulated by A. S., 10th July 1839, and A. S., 4th Dec. 1878. In the ordinary Sheriff Court there are two scales of taxation—*first*, for causes where the amount concluded for does not exceed £25; *second*, for causes of higher amount. Whether an account is to be taxed according to the higher or the lower scale is a matter for the Court to decide, and not for the Auditor (*Murray*, 1897, 24 R. 1026). In the ordinary case the scale of taxation is regulated by the amount concluded for, but it is always competent for the Sheriff to direct that the expenses shall be taxed in accordance with the scale applicable to the amount decerned for. The lower scale was held to be applicable where the sum concluded for was £24, 19s., even though the sum awarded—£24, 19s. with interest from the date of citation—exceeded the £25 required by A. S. (*Dempster*, 1894, 2 S. L. T. 413). Objections to the Auditor's report in the Sheriff Court must be lodged within forty-eight hours of the account being taxed. These objections should be stated specifically. Where an action is raised in the Court of Session, which should have been raised in the Sheriff Court, it is competent for the Lord Ordinary to order the expenses of the successful party to be taxed on the Sheriff Court scale (*Murray*, 1885, 12 R. 945; *M'Farlane*, 1858, 21 D. 107; *Wilkie*, 1884, 12 R. 219, per Ld. Young). The expenses of trial by Sheriff and jury under the Lands Clauses Act, 1845, fall to be taxed by the Auditor of the Sheriff Court (Deas on *Railways*, Ferg. edit., 283).

[Mackay, *Practice*, ii. 685 *et seq.*; *Manual*, 665 *et seq.*; Monteith Smith on *Expenses*, 292 *et seq.*; Henderson Begg on *Law Agents*, 158, 171.]

See EXPENSES; AUDITOR.

Taxes Management Act.—See Income Tax.

Teacher.—The rights and legal position of school board teachers are dealt with under the head of Education. No speciality attaches to the rights or position of teachers not under a school board. It has been alleged that in the case of tutors and governesses there is a presumption in favour of yearly hiring: but from the opinions expressed in *Moffat* (1839, 1 D. 468) it appears that, in the absence of special agreement or of circumstances showing that the parties contemplated an engagement for a period of some duration, the hiring of a tutor or governess will be held to be during pleasure, subject to reasonable notice on either side. The teacher of a school not under a school board is in the same position, unless in virtue of special provisions in the school's deed of constitution (Fraser, *Master and Servant*, 1882, pp. 54, 56). But the rights of teachers in all State-aided schools in the matter of retiring allowances have been affected, since the article on Education in vol. iv. was written, by the passing of the Elementary School Teachers (Superannuation) Act, 1898 (61 & 62 Vict. c. 57). By the provisions of that Act (which applies to teachers in all schools "in receipt of annual parliamentary grants," and therefore includes teachers in "voluntary" as well as in school board schools), teachers are divided into two classes: I. Those who become certificated after 1st April 1899, and, II. Those who have been certificated before that date.

I. The Education Department must be satisfied of the physical capacity of a teacher certificated after 1st April 1899. His certificate shall expire on his reaching the age of sixty-five, unless specially continued by the Department.

A teacher while in service is to contribute, if a man, £3, if a woman, £2, to the deferred annuity fund established under the Act, or at such increased rate as may be fixed by the Treasury. On reaching sixty-five, he will be entitled, out of the deferred annuity fund, to such annuity in respect of his contributions as may be fixed by tables constructed by the Treasury, and so framed as to secure the fund against loss (ss. 1, 4). The Treasury may also, if he has contributed to the deferred annuity fund in accordance with the Act, and if he has been in service as a teacher for not less than half the time that has elapsed since he became certificated, grant him an annual superannuation allowance out of moneys provided by Parliament at the rate of ten shillings for each year of service (s. 1).

If a teacher has served not less than ten years, and not less than half the years which have elapsed since he became certificated, and has become permanently incapable owing to infirmity of mind or body, the Treasury may, subject to disqualifications which may be prescribed by them, grant him an annual "disablement allowance" not exceeding, if a man, £20 for ten years of service, with an additional pound for each complete additional year of service, and if a woman, £15 for ten years of service, with the addition of thirteen shillings and fourpence for each complete additional year of service. Such disablement allowance must not in any case exceed the total annual sum which the teacher might obtain from an annuity and from a superannuation allowance under the Act by continuing to serve until the age of sixty-five (s. 2). There are therefore three kinds of allowances to teachers under the Act: (1) an annuity secured by the teacher's own contributions, (2) a superannuation allowance granted by Government, and (3) a disablement allowance granted during incapacity.

II. Teachers certificated before 1st April 1899 may, within not more than one year after that date, "accept" the Act. If not accepted, it shall

not apply to such teachers. If accepted, it applies, with the following modifications. The rate of ten shillings upon which the superannuation allowance is calculated may be augmented, in the case of a man, by threepence, and in the case of a woman by twopence for each year of service before 1st April 1899. If the teacher has, when he accepts the Act, attained the age of sixty-five or more, the date of such acceptance shall be substituted for the date at which he attained the age of sixty-five. No teacher already in receipt of a pension from Government is entitled to an allowance under the Act.

The Treasury and the Education Department are to make rules for carrying the Act into effect. A teacher, though not in service, may continue his contributions to the deferred annuity fund during any period not exceeding six months. A teacher appointed previous to 1872 is not affected by the Act, unless he has "accepted" it. A school board is not entitled to grant a retiring allowance under the Education (Scotland) Act, 1872, to a teacher certificated after 1st April 1899, or to a teacher certificated before that date, who has "accepted" the present Act.

Teind Court—This Court was originally constituted, under the Act of the Scottish Parliament 1707, c. 9 (10 of Thomson's edition), to conduct the business formerly delegated by the Parliament of Scotland to Commissioners. Under that Act the whole judges of the Court of Session were constituted Lords Commissioners for the Plantation of Kirks and Valuation of Teinds. The judges of the Inner House and the second Junior Lord Ordinary are the present Lords Commissioners for Teinds (2 & 3 Vict. c. 36, s. 8); and the Court of Session Act, 1868, s. 9, provided that any five judges, being Lords Commissioners for Teinds (of whom, except in case of indisposition or absence from other necessary cause, the Lord Ordinary in Teind Causes shall be one), shall constitute a quorum of the Court of Commissioners for Teinds. By the same section the Court is appointed to meet once a fortnight on Monday during the sitting of the Court of Session, at such hours as shall be convenient. The Court now meets fortnightly on Fridays at ten o'clock, although the new causes continue to be called fortnightly on Mondays preceding. The Lord Ordinary usually calls his roll on Fridays. (See TEINDS; see also Introduction to Elliot's *Erection of Parishes quoad sacra and the Feuing of Glebes* for statement as to changes on the Court from 1707 to 1868.)

The functions of the Teind Court include the following:—

I. Ministerial and discretionary actions, to be dealt with by the Teind Court, viz.: 1. Augmentation modification and locality of stipend. 2. Approbation of a sub-valuation, *i.e.* of a report by Sub-commissioners. 3. Division of *cumulo* valuation of teinds. 4. Disjunction of lands from one parish and annexation to another. 5. Disjunction and erection of a parish *quoad omnia*. 6. Uniting parishes. 7. Transportation of churches and manses.

II. Judicial actions, which may be dealt with by the Court of Session in one of its Divisions, who are held a quorum of the Lords Commissioners for these actions (6 Geo. IV. c. 120, s. 54), viz.: 1. Valuation of teinds. 2. Sale of teinds. 3. Valuation and sale. 4. Reduction (1) of a locality, or (2) of a valuation. 5. Declarator connected with teinds—all these are raised before the Lord Ordinary on Teinds in the first instance. 6. Proving the tenor (see TEINDS); but if of a sub-valuation, it is necessary, after the tenor is held proven, that the approbation come from the

Teind Court, and not the Court of Session, which has no authority under the above section to deal with approbations.

III. Actions dealt with by Teind Court under New Parishes Act, 1844 (7 & 8 Vict. c. 44), viz: 1. Disjunction and erection of parishes *quoad sacra* with districts attached. 2. Disjunction and erection of Gaelic churches without a district. 3. Disjunction and erection of parliamentary churches. The last of these, Plockton and Shieldaig, were erected 19th February 1897. 4. Disjunction of lands from one parish and annexation to *quoad sacra* parish. Case of *Kelvinhaugh*, 14th July 1893. 5. Transportation of churches and manses of *quoad sacra* parishes; and 6. Changing securities when found necessary in cases under this Act.

IV. Actions dealt with under the Glebe Lands (Scotland) Act, 1866. This Act authorises the letting on lease, feuing, or selling glebe lands in Scotland. Under this Act one hundred and six glebes have been operated upon (see GLEBE).

V. Applications under Small Stipend Acts, 50 Geo. III. c. 84, and 5 Geo. IV. c. 72 (see STIPENDS (SMALL)).

Under the Local Government (Scotland) Act, 1889, various changes have been made by the Boundary Commissioners and the Secretary for Scotland, chiefly on the boundaries of parishes (see PARISH). The Act expressly provided, however, sec. 96, that such alteration should not affect teinds or any ecclesiastical arrangements or jurisdictions. This provision is extended by the Local Government (Scotland) Act, 1894, s. 46. The only exception that has been made is that conveyances of teinds fall to be recorded in the register of the county in which the lands are now situated (see Registration of Certain Writs (Scotland) Act, 1891, s. 1, subs. 3).

For forms of summons and other initial writs, see *Jurid. Styles*, 3rd ed., iii. 217 *et seq.* and 863 *et seq.*; Elliot's *Teind Court Procedure*, pp. 38 *et seq.*).

There is a right of appeal to the House of Lords against judgments of this Court (*Scott*, 1714, Macqueen's *Appellate Jurisdiction*, p. 293).

Teinds, as tithes have long been designated in Scotland, were originally the tenths of certain produce which were uplifted from the fields, and from usage certain other articles came to be included. As we shall have occasion to notice, teinds have been much affected and altered in complexion: (1) through the grants made about the period of the Reformation to landowners and others, called titulars (see BENEFICE), which conferred heritable rights to teinds; and (2) through the valuations and sales of teinds—the latter also conferring heritable rights—which were commenced in the reign of King Charles I. Under the valuation proceedings teinds have been gradually fixed on the basis of rental. And even where teinds are still unvalued, they are taken for most purposes at a fifth of the current rent, thus superseding the necessity for drawing the teinds in kind, called teinding (see DRAWN TEIND).

There appears to be no evidence that the claim to tithes was made by the Christian ministry before the fourth century. The earliest claims which have been ascertained are stated to have been made by St. Ambrose and St. Augustine (Selden, ed. 1618, p. 53). These instances have been verified by the Earl of Selborne, who had gone fully into the subject (*Ancient Facts and Fictions concerning Churches and Tithes*, p. 46). The civil power did not interpose till 778–779, when Charlemagne, whose extensive dominions on the Continent gave wide range to his authority,

made an ordinance in a general assembly of his Estates, spiritual and temporal, to this effect:—

"Concerning tithes, it is ordained that every man give his tithe, and that they be dispensed according to the bishops' commandment" (*ib.*, p. 50).

In England tithes appear to have been paid to bishops as early as 747 (see Earl of Selborne's *Defence of the Church*, p. 129). The loss of early records has probably deprived us of authentic information as to the earliest payment of tithes in Scotland. The oldest writ in the shape of a charter connected with Scotland is dated about 1094 (Innes, *Lectures*, p. 29). The first payments were no doubt of the class called parsonage teinds (see DECIMÆ RECTORIÆ); the later class, vicarage teinds (see DECIMÆ VICARIÆ), denoting that vicars were being employed to do work in certain parishes.

While there is reason for supposing that Christianity had been introduced into Scotland at an earlier period, the earliest date of which there is any certainty is about the year 397 (see CHURCH; see also Dr. Forbes' Introduction, p. xxvi, *Life of St. Ninian: Historians of Scotland*, vol. v.). This was during the Roman occupation of Great Britain, which did not terminate till about the year 426. For several centuries little progress was made in settling the Church; and while there can be no doubt that the clergy received their maintenance from the people, we have little information as to the manner in which it was rendered.

The building of churches has claimed attention as a means of showing that the Church was being gradually settled. The limited number of churches at first gave the parish a wide district. Thus, in England, whenever the word *parochia* is used, it is for a diocese, not a parish (Selborne, *Ancient Facts, etc.*, p. 127). In Ireland, also, the word used for a diocese is *parochia* (Dr. Reeves in *St. Columba's Life: Scottish Historians*, vi. p. 257). Likewise, in Scotland, the parish was at first appropriated to the diocese of a bishop, and in 1179 it is used as synonymous with diocesis, and even the word shire is often equivalent to parish (see Mr. Cosmo Innes' Introduction to *Origines Parochiales*, p. xx). The larger districts were in the course of time split up by the bishops into smaller parishes (see examples noted by Dr. Rankine, *History of the Church of Scotland*, edited by Dr. Story, ii. p. 275). Thus churches came to be served by vicars or stipendiaries.

The parish of Ednam is generally accounted the oldest parish in Scotland, taking its rise from a grant by a patron, which, though undated, appears to have been made in the reign of King Edgar, 1098–1107 (Connell, i. 33). The granter had built a church, and he gave it, with certain property, to the Priory of Coldingham, which had been founded by that king in 1098 (see Gordon's *Monasticon*, p. 363). This charter affords an example of how a parish became associated with a religious house and the subsequent employment of stipendiaries. The words parson and vicar had not been observed in any charter, according to Sir James Dalrymple, before the time of David I. (see Connell, i. 24). The reign of King David I., 1124–1153, contributed largely to the settlement of religious houses, with appropriations of churches (Connell, i. 35), with their teinds, parsonage, and vicarage. Some early examples are furnished of writs issued in name of King William the Lion (1165–1214) to enforce payment of teinds (Thomson's ed. *Acts of Parliament of Scotland*, i. 90). Numerous canons were promulgated by the Provincial Councils regulating the payment and appropriation of teinds before the Reformation. The teinds were made the subject of taxation, along with other Church revenues, by the Pope in 1274 (see Dr. Joseph Robertson's *Concilia Scotiæ*, and also Preface to that

work, p. lxv, in regard to the celebrated Boiamunds Roll made up in 1275).

The latest case which has come under the writer's notice of the erection of a parish and its endowment with teinds, with manse and garden, before the Reformation, is that of the parish and parish church of Deskford, by charter of erection by William, Bishop of Aberdeen, dated 15th October 1543. The charter narrates that Alexander Ogilvy of that Ilk rebuilt the chapel of Deskford, had it adorned with ornaments and priestly vestments, and procured its dedication and consecration into a church. Thereupon he applied to the bishop, by petition, to have the chapel erected into a parish church, on the ground that the parish church of Fordyce was too remote for many of the parishioners for their attendance on Lord's days and festival days, especially in inclement weather, and the inhabitants were too numerous for one pastor, while the residents in the barony of Deskford had to travel to the said church by desert ways. The charter bears that, after sixty days' notice of the petition having been given to all parties having interest by public edict, the bishop, with consent of his chapter, erected the chapel into a parish church, with all the privileges and immunities belonging of right or custom thereto, with bell-tower and bells, baptismal font, cemetery and right of sepulture, and of ministering and bestowing all other sacraments of the Church on the parishioners within the bounds of the barony of Deskford, to be called in all time coming the Parish Church of St. John of Deskford. It further bears that the dean and chapter were to present a fit man to be ordained as priest, and were to provide out of the teinds of the church of Deskford a yearly stipend of £8 Scots. It is also stated that said Alexander Ogilvy had granted a garden and manse suitable thereto in perpetual alms. To which proceedings, by notarial instrument, Sir John Robertson, perpetual vicar of the church of Fordyce, for himself and his successors, gave his consent. Thus we have not only a parish erected, but what was at that time considered a suitable provision made for it out of teinds, in addition to a manse and garden. (See Sir William Fraser's Report on the MSS. of Countess Dowager of Seafield, *Historical MSS. Commission*, 1894, pp. 232, 233.)

The character of the parish also had a distinct bearing upon the teinds. At the period of the Reformation there were 940 parochial benefices, of which 262 were designed *patronate*, the incumbent being appointed by the patron, and 678 as *patrimonial*, because they were parts of greater benefices belonging to bishops or appropriated to abbeys and other religious houses. In the patronate the incumbent was styled rector or parson, and had right to the whole teinds. He sometimes granted a tack to the patron or other powerful heritor for a limited tack duty. An example of this is found in the Annandale Papers. Mr. James Livingstone, parson of Moffat, granted a tack, on 17th January 1544, to John Johnstone of that Ilk, his heirs and assignees, of his whole parsonage and vicarage of his kirk of Moffat for three years following Whitsunday next, "with all and sundry teynd schavis, teynd lambis, teynd woll, stirkis, geise, grise, hay, afferandis, emolumentis, fruitis, and rechtuis pertinents," for payment of a rent of £100 Scots (see Sir William Fraser's Report, 1897, *Historical MSS. Commission*, p. 19). In the patrimonial parishes the teinds belonged to the bishop, abbey, or religious house, and the benefice was served by a vicar, stipendiary, or a member of the corporation, who received his stipend out of the teinds, sometimes only a very small part of the vicarage teinds. Where the bishop had right to the teinds, the church was called a mensal church, as the revenue was destined to the supply of the bishop's table. The other churches were

called common churches, because the revenues were assigned to the readers of the chapter and certain others in common. There were many chapels of ease which had not been erected into parish churches at the Reformation.

Although the rector and vicar and other authorities of the Church of Rome were swept away at the Reformation, as pointed out by Mr. Cosmo Innes (*Scotch Legal Antiquities*, p. 200), yet the old possessors were allowed to retain two-thirds of the rentals of benefices, and the reformed clergy only obtained a small portion of the remaining third (see ASSUMPTION OF THIRDS; see also BENEFICE). The Commission of Platt dealt with stipends till the year 1606, when bishops were restored. Under the Act of 1617, c. 3, a Commission was appointed for a limited period to augment stipends out of teinds (see AUGMENTATION). Soon after the accession of King Charles I. in 1625, he took measures for receiving surrenders of Church lands and teinds which had been improperly alienated in previous reigns. The primary object, so far as teinds were concerned, was to secure a revenue therefrom (see ANNUITY). Four different submissions to His Majesty were executed in 1628 and 1629 by those who had benefited by grants of teinds or were interested in teinds, namely: (1) by Lords of Erection, titulars, etc.; (2) by archbishops, bishops, and clergy; (3) by burghs, and (4) by certain tacksmen. The king pronounced his decreets-arbitral thereon in 1629, by which provision was made for the annuity. Teinds belonging to titulars were appointed to be valued at "the fifth part of the constant rent which each land payeth in stock and teind where the same are valued jointly," and where they were valued apart, it was left to the Commissioners and Sub-commissioners to declare the value. Sometimes there arose a difficulty on account of contracts with titulars for the conversion of teinds, in order to avoid teinding, and under which they agreed to pay fixed annual sums of money, or to deliver certain rental bolls, as they were called, and these annual payments were frequently much higher than the actual value of the teind. The decision in some cases was to take a fourth of the stock, but in others, including the latest case, the Court of Teinds added the stock and teind together and took a fifth of the whole for teind (*Crieff*, 9th Dec. 1812, *Teind Records*).

The teinds were to be sold by titulars to heritors at nine years' purchase (Act 1633, c. 17), under deduction of one-fifth for king's ease; but they were only to be purchased so far as not devoted to stipend or pious uses, and heritors were to relieve titulars from payment of the annuity. Teinds destined for pious uses are still unsaleable (*Duke of Buccleuch*, 14th June 1867, *Teind Records*). Where the teinds belonged to titulars *qua* patrons, they must be sold at six years' purchase (Act 1690, c. 23), under the same deductions as in the cases of ordinary titulars. Bishop's teinds were only to be valued under certain conditions, and were not to be sold or diminished in amount. They ultimately fell to the Crown on the abolition of Episcopacy, and were not allowed to be sold (Act 1693, c. 23). They can, however, now be purchased from the Commissioners of Her Majesty's Woods and Forests, in virtue of recent Acts of Parliament, at such prices as may be arranged.

A large amount of work was accomplished by the Commissioners and Sub-commissioners under the different Commissions appointed by the Scottish Parliament in 1633, 1641, 1644, and 1647. During the Commonwealth and after the Restoration little teind business appears to have been transacted, although there were several Commissions prior to the Union in 1707, when the business was transferred to the Court of Session (see TEIND COURT).

Augmentations of stipend out of teinds were contemplated by the Act of 1633, c. 19, after "the closing and allowance of the valuations." Numerous stipends were settled by the Commissioners, and in some cases there is evidence that the king specially authorised them to deal with the stipend. The above provision was not inserted in the Act of 1661, c. 61, nor subsequently (see *Duke of Roxburgh*, 12th Dec. 1744, Kilkerran Teinds, No. 3; see Connell, i. 344–345).

Various questions have arisen as to the rights to teinds acquired about the period of the Reformation (see BENEFICE); and sometimes the mistake was made not to have them valued, in the belief that a good *decimæ inclusæ* right was held, which has since turned out insufficient (*Fotheringham*, 1870, 9 M. 172, 43 Jur. 90; see CUM DECIMIS INCLUSIS).

The removal of the whole records of Scotland by order of Cromwell about 1650 or 1651, and the loss of the greater portion of them by shipwreck in the course of being returned in 1660, and the further destruction of the Teind Records by a fire in the Parliament Close in 1700, all contributed to place the valuation of teinds and other proceedings in an unsatisfactory position. By the Act of 1707, c. 9, the Teind Court was authorised to make up a register to supply the lost registers, by recording authentic extracts that might be brought in, and "upon such evidence and adminicles as they shall see cause, to make up the tenor of such decreets in manner above mentioned whereof extracts are amissing and the registers lost in the said fire." Five volumes have been made up of such extracts to supply lost registers, and in numerous instances the tenor has been proved of others that were lost. The Court have allowed the tenor to be proved of writs lost by the shipwreck as well as by the fire (see *Earl of Wemyss*, 1883, 10 R. 1084).

Where reports of Sub-commissioners were not approved of before 1707, it has been held competent for the Court of Teinds to do so (*Murray*, 1746, M. 15746; see TEIND COURT).

The effect of the various dealings affecting teinds has been that heritors now have very generally heritable rights to such surplus teinds of their lands as are left after providing a suitable stipend to the minister of the parish; and where it is otherwise, these surplus teinds belong to the Crown or other titulars. These surplus teinds, generally called free teinds, can only be encroached upon by future augmentations of stipend through the Teind Court (*q.v.*). In 523 out of 880 parishes the teinds have been exhausted, both parsonage and vicarage. Indeed, most of the vicarage teinds have been lost. When the clergy were restricted to limited stipends, they had no right to recover more. And unless vicarage teinds were included in a decree of locality or a valuation of teinds, they were lost by desuetude. In former times it was not unusual for a titular to award teinds as stipend from another parish than that in which the lands from which the teinds were drawn were situated, it being of no consequence to him from what part of his teinds the provision was made. Several examples of this are found in Forfarshire, where the teinds had belonged to the Abbey of Arbroath. The rule *decimæ debentur parocho* (*q.v.*), however, is now strictly applied, and teinds may be recovered from another parish when it has surplus teinds of its own. It has been proposed that stipends should now be converted into money, on an average of a certain number of years' fiars prices, and when that has been done, that the fiars prices should be superseded. This proposal would greatly simplify all teind questions, and enable a permanent teind roll to be made up.

[See Forbes on *Tithes*, 1705; Connell on *Tithes*, 2nd ed., 1830; Buchanan

on *Teinds*, 1862; and Elliot's *Teind Court Procedure*, 1893; see the last as to Second Teinds and Bishop's Quarter Teinds.]

Teinds, Valuation of—This is an action raised before the Lord Ordinary on Teinds where the teinds of lands have not been already valued by the Commissioners under the Teinds Commissions commencing in the reign of King Charles I., or by the Teind Court subsequent to 1707 (see TEINDS). For form of summons, see *Jurid. Styles*, 3rd ed., iii. p. 222. The pursuer is the titular or proprietor of the lands with a completed title, but the action may be insisted in by the minister of the parish. The defenders are the minister of the parish and the titular, but in case of a vacancy the Moderator of the Presbytery is called. The pursuer's title and the leases, if any are founded on, must be produced (see Act of Sederunt, 12th November 1825, ss. 4–11). When deductions are claimed in the summons, the accounts and vouchers for the deductions are lodged in process, and the pursuer adduces oral evidence in support of the conclusions of the libel. After allowing such deductions as are admissible, one-fifth of the clear rent is taken as the teinds, parsonage and vicarage. As to the deductions and procedure generally, see Elliot's *Teind Court Procedure*, pp. 89 *et seq.* The Lord Ordinary's judgment may be reclaimed against to one of the Divisions of the Court of Session, who are held a quorum of the Lords Commissioners for Plantation of Kirks and Valuation of Teinds, for certain actions (6 Geo. IV. c. 120, s. 54).

Teind Clerk.—See CLERK OF TEINDS.

Telegraph; Telephone.—See POST OFFICE.

Tenant.—The term "tenant" in Scotland is applied only to the lessee under a contract of lease. In England the word has a much wider signification, and denotes anyone who holds or possesses lands or tenements by any kind of title, in fee, for life, for years, or at will (Stephen, *Com.* i. 338; Williams' *Real Property*; Blackstone, ii. 196). As to the capacity of a pupil, minor, married woman, lunatic, trustee, or corporation to be a tenant, and as to the meaning and nature of joint tenancy, see under LEASE.

A sitting tenant can only be dispossessed by process of removing or ejection. Neither interdict nor suspension and interdict is an appropriate remedy. Hence in the case of bankruptcy of tenants, it is not competent to interdict them and their trustees from occupying the subjects (*Rankin*, 1864, 3 M. 128; *Borrows*, 1852, 14 D. 791; rev. 1 Macq. 691; *Johnston*, 1877, 4 R. 868). Where, however, after being ejected, a tenant returns or threatens to return to the subject, interdict is the appropriate remedy (*Boswell's Trs.*, 1886, 24 S. L. R. 32).

Removing: Ordinary, Extraordinary.—Removing may be either ordinary or extraordinary. The former refers to the removal of tenants at the termination of their contract of lease: the latter to their removal pending the currency of the lease, on their having incurred an irritancy, legal or conventional. For a consideration of the circumstances under which irritancies occur, and for the regulations as to removal of tenants thereupon, see under IRRITANCIES, and Rankine, *Leases* (2nd ed.), 470–494. In the present article it is not proposed to give more than a brief outline of the regulations under which ordinary removings are conducted.

Title to Sue a Removing.—If the party suing is the lessor himself, he is

entitled to sue, no matter how defective his title may be (St. ii. 9. 41; iv. 26. 8; Ersk. ii. 6. 51; *York Buildings Co.*, 1764, M. 4054; *Hamilton*, 1583, M. 13784, 14023). This rule applies where the lessor is principal tenant (*Dunlop & Co.*, 1876, 4 R. 11; see *King*, 1858, 20 D. 960 (bankrupt lessor left in possession)). It is, however, competent for the tenant to show that the lessor's title to sue has been lost by a divestiture of the subjects (*Traill*, 1873, 1 R. 61: *Wilson*, 1859, 21 D. 309 (right not lost by a mere assignation of the rents); see *Sinclair*, 1887, 14 R. 792). Where the landlord suing the removing is not the lessor, he must be infeft as stated in Erskine (ii. 6. 51). "If a proprietor is to insist against tenants or possessors who derive their right from others, sasine is, by our customs, a necessary title in removing" (*Scott*, 1832, 10 S. 284). To this rule there are two exceptions. *First*, where the pursuer derives his title by judicial sale (*Ld. Adv.*, 1773, 5 B. S. 571); and, *second*, where the conclusion for removing is subordinate to a declarator (*Tennant*, 1836, 14 S. 976). An original defect in title is cured by infeftment before the case is called (*Campbell*, 1808, M. Appx. "Removing," No. 5), and probably during the course of the action (*Scott*, 1832, 10 S. 284; see St. ii. 9. 41; Ersk. ii. 6. 51; iii. 8. 58; *Calderwood*, 1626, M. 13272; *Mackenzie*, 1853, 16 D. 158 (as to heir's title)).

Special rules apply where the landlord's title is restricted by concurrent right. Thus where there are several joint owners, all must concur, no matter how small the interest of any may be (Ersk. ii. 6. 53; *Stewart*, 1842, 4 D. 622; *Grozier*, 1871, 9 M. 826; see *Murdoch*, 1679, 3 B. S. 297 (implied mandate in one of several joint owners)). Trustees, however, may proceed by a majority (24 & 25 Vict. c. 84, s. 1; M'Laren, *Wills*, ii. 185); so too any co-adjudger may proceed if he is ready with a more solvent tenant (*A. v. B.*, 1680, M. 2448). Fiar and liferenter must concur in a removing if the lease be granted by them or their common author (*Buchanan*, 1831, 9 S. 843, 11 S. 682). As to the necessity of a widow kenning to her terce before concurring in a removing, see Fraser, *H. & W.* 1108. For the power to remove of a *tutor*, see Fraser, *P. & Ch.* 258; of a *judicial factor*, *Thomson*, 1757, M. 4070; of a *Minor*, Ersk. i. 7. 16; of an *Adjudger*, St. ii. 9. 41; iii. 11. 24; iv. 26. 8; 31 & 32 Vict. c. 101, s. 60; 37 & 38 Vict. c. 94, s. 4; of *lessee* removing sub-tenant, *M'Ilreavin*, 1810, Hume, 851; *Winans*, 1883, 10 R. 941. For a discussion of the cases illustrating title to sue, see Rankine, *Leases* (2nd ed.), 461–7.

Defenders.—Where a lease is held jointly or *pro indiviso* by two or more tenants, all have to be called who are to be removed, but certain of the *pro indiviso* tenants may be removed while the others are allowed to remain in possession (St. ii. 9. 43; iv. 26. 10; *Macdonald*, 1843, 5 D. 1253). Where an assignee's right has been intimated, or a sub-lessee has been recognised by the landlord, he is the proper party to be brought as defender (Ross, *Removing*, 98; *Ly. Lauriston*, 1632, M. 13810). If the landlord has not got intimation of an assignation, or has not recognised a sub-tenant, decree against the principal tenant is effectual against the sub-tenant (A. S., 1756, s. 3; *Wilson*, 1839, 2 D. 232).

Procedure in Removings: Act 1555, *c.* 39.—Under this statute the procedure to be adopted with reference to removings from "lands, mills, fishings, and possessions whatsoever" was regulated. The provisions of the statute, which are now obsolete, required that warning should be given to the tenant by precept from the landlord, executed against the tenant personally or at his dwelling-house, and also on the ground of the lands and at the parish church, forty days before Whitsunday of the year in which the lease was to expire (St. ii. 9. 38. 40; Ersk. ii. 6. 45; Bell, *Prin.* 1267;

Rankine on *Leases*, 502 *seq.*; Ross on *Removing*, 34, 61; *Duchess of Buccleugh*, 1715, M. 13836; *E. of March*, 1754, M. 13843; *Campbell*, 1793, M. 13849). Following upon the warning, action of removing was raised either in the Sheriff Court or in Court of Session; and the decree was carried into immediate effect by precept of ejection in the former case, and in the latter by charge (*Stainhill*, 1675, M. 13894; *Pringle*, 1739, M. 13894).

Act of Sederunt, 14*th December* 1756.—Procedure in removings was considerably simplified by this Act of Sederunt. By the first section thereof, where the tenant is under obligation to remove without warning, the landlord might obtain letters of horning, and charge the tenant thereon forty days before Whitsunday of the last year of the lease to remove. Such a charge constituted a good warrant, on the production of which the Sheriff was bound within six days after the term of removal to eject the tenant (St. iv. 26. 14; Bell, *Prin.* 1268; 2 Hunter, *L. & T.* 25 *seq.*; Rankine on *Leases*, 498 *seq.*, and cases there cited). An obligation to remove may be contained in the lease itself, in a separate writing, or may be proved by the oath of the debtor. When contained in the lease itself, as is invariably the case in formal leases, the clause runs: "And the tenants bind and oblige themselves and their foresaids to flit and remove, themselves, their wives, bairns, families, servants, goods, and gear furth of and from the subjects hereby let at the expiry of this lease, and that without any previous warning or process of removing to be used against them to that effect." An addendum to the effect that the tenant is to pay an increased rent for occupation beyond the prescribed term is read in the landlord's favour, and not as conferring a licence upon the tenant (*Campbell*, 1814, Hume, 864; *Gold*, 1870, 8 M. 1006).

By the second section of the Act of Sederunt it was provided, in the case of tenants who had not bound themselves to remove without lawful warning, that the landlord should either adopt the procedure of the Act of 1555, or, alternatively raise an action of removing before the Judge Ordinary of the county in which the lands lie. Such action being called in Court forty days before the term of Whitsunday, was held equivalent to a warning executed in terms of the Act 1555. The Sheriff then proceeded to decern in the removing, his decree being followed up with a precept of ejection within forty-eight hours (*Carruthers*, 1764, M. 13868; *Stevenson*, 1821, 1 S. 88).

Sheriff Courts Act, 1853 (16 & 17 Vict. c. 80).—By the 29th section of this statute it is provided, as regards actions of removing in the Sheriff Court, that it shall be competent to raise such actions at any time provided a period of at least forty days elapse between the date of the execution of the summons and the term of removal, or the first ish where there is a separate ish as for lands and houses or otherwise. By the 30th section of the same statute, where "lands or heritages are held under a probative lease, specifying a term of endurance, such lease, or an extract thereof from the books of any Court of record, shall have the same force and effect in every respect as any extract decree of removing obtained in any ordinary action of removing at the instance of the party, granter of such lease or in the right of the granter of such lease, against the party in possession under such lease, whether such party be the lessee named in such lease or not." A lease such as is there contemplated, or an extract thereof, is, along with a written authority signed by the landlord, his agent or factor, to be sufficient warrant to a sheriff-officer or messenger-at-arms within the county in which the lands are situated to eject the party in possession

from the lands on elapse of the specified term. Notice to remove in the form prescribed in Schedule I of the Act must be given through a sheriff-officer, at least forty days before the termination of the lease, to the tenant personally, at his dwelling-house or through the post; and a certificate in terms of Schedule J is written on the lease. Removal or ejection following upon the provisions of the above section must take place within six weeks after the expiry of the term of endurance of the lease. Sec. 31 of the Act gives the same force and effect *mutatis mutandis* to a letter of removal.

For the form of an action of removing which, except under the Act 1555, must be brought in the Sheriff Court (Bell, *Prin.* 1268), see Lees, *Sheriff Court Styles.* Decree in the action may be extracted within forty-eight hours (A. S., 10th January 1839, s. 113); and the extract orders the tenant to remove on a charge of forty-eight hours (A. S., 27th January 1830). Failing his removal within the period of charge, the decree grants warrant to officers of law to eject the tenant (see under EJECTION). Sec. 34 of A. S., 11th July 1839, provides, "in actions of removing and in summary applications for ejection the defender shall come prepared with a cautioner for violent profits at giving in his defences or answers, unless he instantly verify a defence excluding the action" (see under article on VIOLENT PROFITS). The judgment of a Sheriff in an action of removing cannot be brought under review of the Court of Session by an ordinary appeal, but only by a suspension (6 Geo. IV. c. 120, s. 44; *Clark*, 1890, 17 R. 1064).

Agricultural Holdings Act, 1883.—The provisions of the 28th section of this Act affect procedure in removings under leases to which the Act applies. It is there provided that notice of the intention of either party to bring the tenancy to an end must, in leases for three years or upwards, be given not less than one and not more than two years before the expiry of the lease; and in yearly leases or leases of less than three years' duration, not less than six months before said date (Rankine, *Leases*, 501; *L. Macdonald*, 1884, 12 R. 228). For cases to which the provisions of this Act do not apply, see article on Agricultural Holdings Act.

Removing from Urban Tenements.—Removal from urban tenements is regulated by custom (Ersk. ii. 6. 47). The ordinary practice in burghs was that a burgh officer, in presence of one witness, chalks the most patent door of the building forty days before the term of removing, which is usually Whitsunday. The proper evidence of the warning is the execution sent in by the officer, which should be in writing or print, or partly in both (Ross on *Removing*, 119; *Robb*, 1859, 21 D. 277). Chalking is probably sufficient without other intimation to the tenant. Warning made in the shop to the tenant of a house and shop is good as to both subjects (*Scott*, 1886, 24 S. L. R. 34. For the nature of intimation see *Glowey*, 1865, 4 M. 1; *Morris*, 1839, 1 D. 667). At common law an acknowledgment by the tenant that intimation had been made to him timeously is equivalent to chalking. And now, under sec. 6 of the Removal Terms (Scotland) Act, 1886 (49 & 50 Vict. c. 50), notice of removal "from a house, other than a dwelling-house or building let along with land for agricultural purposes, may hereafter be given by registered letter, signed by the person entitled to give such notice or by the law agent or factor of such person, posted at any post office within the United Kingdom in time to admit of its being delivered at the address thereon on or prior to the last date upon which by law such notice of removal must be given, addressed to the person entitled to receive such notice, and bearing the particular address of such person at the time,

if the same be known, or, if the same be not known, then the last known address of such person."

The customary period of warning is forty days. By sec. 5 of the above Act it is provided: "Where a house (other than a dwelling-house or building let along with land for agricultural purposes) is let for any period not exceeding four calendar months, notice of removal therefrom shall, in the absence of express stipulation, be given as many days before the date of ish as shall be equivalent to at least one-third of the full period of duration of the lease."

The terms for entry and removal from houses are fixed as the 28th May and 28th November, but, notwithstanding the date of these terms, it is necessary, where warning has to be given forty days before a term of Whitsunday or Martinmas, that such warning should be given forty days before 15th May and 11th November respectively (49 & 50 Vict. c. 50, s. 4).

Removing from Small Holdings.—By 1 & 2 Vict. c. 119, s. 8, it is provided that "where houses or other heritable subjects in Scotland are let for any shorter period than a year, at a rent of which the rate shall not exceed thirty pounds *per annum*, it shall be competent for any person authorised by law to pursue a removing therefrom, to present a summary complaint to the Sheriff of the territory, who shall order it to be served and the defender to appear on such day as he may in each case think proper, in the form or to the effect of Schedule (A) annexed to this Act." The citation and further procedure is the same as is provided for small debt causes (s. 11; Lees, *Small Debt Handbook*, pp. 129 *seq.*). Decree pronounced in a removing under this statute is final; and not subject to review, either in the Circuit Court of Justiciary or in the Court of Session. Provision is also made for reponing (s. 9); adjournment (s. 12); and the giving in of written answers by the defender upon finding caution (s. 13).

Removing where Defender no Legal Title.—Where anyone possesses without legal title, an application may be made by the proprietor of the subjects to have such person summarily removed without any notice or warning being given (*Macdonald*, 1860, 22 D. 1075; *Hally*, 1867, 5 M. 951; *Macdonald*, 1883, 10 R. 1079; Rankine, *Landownership*, pp. 9 *seq.*). The heir of a liferent tenant is not entitled to remain after the death of his author; and may be summarily removed as a vitious possessor (St. ii. 9. 38; *Tennent*, 1760, M. 13845; *Gordon*, 1794 (heir of minister who held lease during his incumbency)). In such cases the heir is entitled to the crop sown by his author, in accordance with the maxim *Messis sementem sequitur* (*Stewart*, 1796, M. 13853; *M. Tweeddale*, 1846, 8 D. 411; rev. 6 B. App. 125).

Tenants, Kindly; Rentallers of Lochmaben.—

A rental was a species of tack set to rentallers or kindly tenants, who were the successors of the ancient possessors of the land (*nativi*), or to those whom the proprietor desired to favour as such. This tenure was anciently frequent and widespread, but is now generally obsolete, except in the Four Towns of Lochmaben in Dumfriesshire, where it still almost universally prevails, but in a peculiar form. It was analogous to what became known as copyhold in England. Under kindly tenancy were preserved those ancient customary rights to the soil which it was found difficult to adapt to the feudal system (Ersk. ii. 6. 37; Stair, ii. 9. 15; Ross, *Lect.* ii. 479; Hunter, *Landlord & Tenant*, i. 423, ii. 122; Rankine on *Leases*, pp. 145–47).

It is uncertain whether the tenant's right was originally a temporary

possession, or a heritable right (Craig, i. 11. 24); but on a tenant's death the right came to be generally renewed to his heir (usually on payment of a grassum), especially on the lands of the Crown, the Church, and the great lords (Bell on *Leases*, i. 89, note). Rentallers had no charters or other feudal right, but they were enrolled in the rental books of the tenantry. Their rents required to be certain or ascertainable: but these were usually light, and included agricultural services until their abolition in 1747. From the nature of the right, residence was necessary. Rental rights were constituted by writ, which might be either a formal lease (which was alone good against singular successors (Bell on *Leases*, i. p. 89)), or the entry in the landlord's rental book (*Aiton*, Mor. 7191). Mere allegiance and payment of rent for a period of years were not enough (*Cassilis*, Mor. 15183). Such rights being granted from favour to the tenants, assignation and subletting were prohibited (Stair, ii. 9. 21). Any breach of this implied condition was void, including an excambion between rentallers (*Galloway*, Mor. 7193; *Maxwell*, Mor. 7197); and an assignation or sublease of the whole or more than half of the subject made the whole rental right void (*Craigie Wallace*, Mor. 7191).

Just before the Reformation, these rights, especially on Church lands, were so generally transformed into feus, sold, or alienated in anticipation of the coming storm, that the Legislature had to pass an Act for the temporary relief of kindly tenants of Church lands (1563, c. 77), by which feuars or holders of long tacks were forbidden to remove kindly tenants of Church lands for the next three years without the consent of the Crown. Rentals, as a rule, contained no definite ish, and the Courts of the Reformation at first sustained them only for a year; but they afterwards came to be recognised as enduring for a lifetime, if without mention of heirs, and for the life of the rentaller and the first heir, if heirs were mentioned (Ross, *Lect.* ii. 480–81; Stair, ii. 9. 19; *Galloway*, Mor. 7194; *Ahanay*, Mor. 15191). In 1587 a statute was passed (11 James VI. c. 69) by which it was declared that all Crown rentals should have the effect only of "naked liferents," and this meaning was in time applied to other than Crown rentals, where there was no mention of heirs.

Lochmaben.—The successors of the king's kindly tenants of the Four Towns of Lochmaben (Smalholm, Hitae, Heck, and Greenhill) still hold their lands by a tenure differing in several points from other kindly tenancies. These tenants were originally the vassals on the lands of Robert the Bruce's Royal Castle of Lochmaben, and subsequently royal warrants were issued by later sovereigns for their protection, viz. in 1592, 1602, and 1664. The House of Lords accordingly held that though they possessed neither on charter nor sasine, they had such a right of property in the lands that they could not be removed, and might assign their tacks to strangers (*Tenants of Lochmaben*, Mor. 15195; affd. 1 Pat. 77). The Statute of 1587, therefore, did not apply to Lochmaben. Though the subjects may be burdened and transmitted without infeftment, they are capable of being feudalised, and a bondholder infeft on the sasine in a bond over such a rental was preferred to a creditor who arrested the price on a sale (*Irving and Jopp*, Mor. 10316) It has also been held that a rental right may be pledged by writ with delivery of earth and stone on the lands, without recording or intimation to the landlord, or entry in his books (*Mounsey*, 30 November 1808, F. C.). The Lochmaben rentallers are liable for teind duty for minister's stipend, the *dominium utile* of their lands being legally and validly dissolved from the Crown (*Queensberry*, 16 S. 439). It was observed in that case, "The defenders are thus proprietors of the subjects occupied by them according

to every criterion by which property can be ascertained. It is presumed that the prescription applicable to these holdings would be the long prescription of forty years.

Tender.—A party in a litigation who desires to do so, may make a tender either extrajudicially or judicially. A judicial offer is called a tender. A tender is accordingly a judicial offer by a party to pay a part of the sum asked for by his adversary after the action is raised (*Ramsay*, 1864, 2 M. 891). It must be unconditional (*Bilsborough*, 1861, 24 D. 109; *Gunn*, 1849, 11 D. 1046), and must include an offer of expenses up to its date (*Gunn*, 1886, 13 R. 573), though these may be fixed in the tender (*Aitchison*, 1864, 3 M. 81; *Shaw*, 1863, 2 M. 142). Expenses may include a fee to counsel for advising acceptance of the tender (*Phillip*, 1852, 15 S. 228), the date of extract (*Scott*, 1860, 22 D. 922); but not the expense of diligence used on the dependence, as this is not allowed against a defender in any case (*Black*, 1887, 14 R. 678).

The object of a tender is to entitle the party making it to ask for expenses of the litigation from its date; and these he is entitled to, provided the opposite party does not recover more than the sum contained in the tender (*Gunn*, 1886, 13 R. 573). On the other hand, a tender for less than the amount recovered is of no avail (*Webster*, 1859, 21 D. 1214). But this rule is not absolute, as the giving or refusing expenses is always within the discretion of the Court (*Lawson*, 1866, 38 Sc. Jur. 528; cf. *Aitchison*, 1864, 3 M. 81). Strictly speaking, tenders are of two kinds. A defender may, on the one hand, come into Court admitting that a part of the sum sued for is due, or he may, on the other hand, while disputing liability, tender a sum for the sake of peace. In the former case the ordinary course is to make the offer on record by inserting it in the defences. In the latter case it was formerly unusual to adopt that course, the usual course in such cases being to make the tender in a minute lodged in process (*Ramsay*, 1864, 3 M. 81). In practice, however, this distinction does not seem to be much attended to now, and tenders of all kinds are made indifferently either on record or by minute. As a rule, a tender by minute is to be preferred, as it is less likely to attract notice. There is no special form of tender. It must include expenses up to its date, and it must also meet the demand. If it be by minute, it will take the usual form of a minute. Thus, "A., for defender, hereby tenders the sum of . . ." This will be signed by counsel. But in order to meet the demand, it must in defamation cases include an apology and the fullest retractation. The reason of this is that in such cases an offer to pay a sum of money is not one a pursuer is bound to accept. He is entitled to have his character cleared; but if the calumny be retracted, the question is reduced to one of money damages, and in such a question a tender comes to be important (*Faulks*, 1854, 17 D. 247). Whether an apology is necessary is a question of circumstances; but as in the ordinary case a nominal verdict in a case of defamation may carry expenses, a tender ought to include an apology (cf. *Anderson*, 1835, 14 S. 54; *M'Intosh*, 1851, 14 D. 133).

It would appear that in such an action as an action for breach of promise of marriage, which may or may not be raised for the vindication of character, it is a question of circumstances whether expenses are given to a defender when the verdict is for less than the sum tendered (*Lawson*, 1866, 38 Sc. Jur. 528).

When a tender is made, it must be accepted timeously (*Macrae*, 1885, 23 S. L. R. 185; *Bennet*, 1868, 40 Sc. Jur. 334). Again, a tender may be

amended and a subsequent one put in (*Shaw*, 1863, 2 M. 142). There can be no doubt that a tender can be withdrawn. Finally, when a verdict is returned for a sum less than the tender, and the defender is awarded expenses from its date, the Court may supersede extract of the sum contained in the verdict until the defender has obtained decree for expenses (*Fry*, 1882, 10 R. 290).

Akin to tenders are extrajudicial offers to settle. The rules regarding them appear to be these:—

An extrajudicial offer to settle not repeated on record, if it exceeds the sum ultimately found due, only entitles the defender to a finding of no expenses. It does not entitle him to expenses. If, however, it be repeated on record, though it does not become a tender unless accompanied by an offer of expenses up to date (*A. B.*, 1836, 15 S. 306), yet nevertheless it may entitle the maker of it to expenses. It thus closely resembles a tender (*Critchley*, 1884, 11 R. 475; *Gunn*, 1886, 13 R. 573; *Mavor & Coulson*, 1892, 19 R. 868). A tender does not affect the subsequent course of a litigation, and ought not to be considered until after the case has been decided. Thus a judge ought not to look at it until he has decided the case, and in no case ought a jury ever to know that a tender has been put in. A new trial, in particular, will not be granted on account of a statement by a jury who have given a verdict for a sum less than a tender, that if they had known of the tender they would have given a verdict for a larger sum (*Fullarton*, 1882, 10 R. 70). What would happen if a jury were told that a tender of a certain amount had been made, there has not yet been occasion to decide (Mackay, *Manual*, 638).

Lands Clauses Consolidation Act, 1845.—This statute contains special rules as to offers by "promoters" to pay compensation, which more or less resemble tenders. Thus in cases submitted to arbitration the promoters shall bear the expenses of the arbitration unless they have offered a sum at least equal to the sum awarded, in which case each party shall bear his own expenses (s. 32). In cases tried before a jury, which must contain an offer of the sum the promoters consider just (s. 37), they have to pay the expenses of the trial unless the sum contained in the verdict is not greater than that contained in their offer, in which case one-half of the promoters' expenses shall be defrayed by the party obtaining it (s. 50).

Tender of Amends. — When a party has committed any irregularity, trespass, or other wrongful proceeding in the execution "of this or the special Act," and makes "a tender of sufficient amends" by paying a sum of money into Court before any action is brought in respect thereof, or with leave of the Court after it is brought, but before the record is closed, "such proceedings shall be had as in other cases where defenders are allowed to pay money into Court." When a tender of this kind is made, the money must be paid into Court and not merely tendered. But if it be, and less is recovered in the action than the amount paid in, the party so paying will receive expenses as in other cases of tender (s. 129). The rule is taken from the law of England (cf. Archbold, *Practice*, 350; *Ruckton*, 1879, 4 Ex. D. 174).

Tender (Legal).—See Money.

Tenor.—See Proving of the Tenor.

Tenures.—See Superiority; Burgage; Feu Charter; Feudal System; Booking (Tenure of).

Terce is one of the legal liferents recognised in the law of Scotland. Analogous in its form to a real burden, it is in effect a legal provision of a liferent in favour of a widow of one-third of any estate in which a husband has died infeft as of fee. It is said to be founded on "the obligation incumbent on a landed proprietor to make reasonable provision for his widow suitable to his circumstances and condition in life" (M'Laren, *Wills and Succession*, vol. i. 89; Craig, ii. 22, 25. For the origin and history of the right, cf. Fraser, *H. & W.* 1079, etc.).

Who are entitled to Terce?—Generally speaking, it is a condition of a widow being entitled to terce that her husband shall have died infeft in a right of fee in heritable property which is from its nature subject to terce as hereinafter explained. At common law, where the marriage was dissolved within a year and a day from its date without a living child having been born, terce was not exigible by the widow. By the Moveable Succession Act, 1855 (18 Vict. c. 23), it is provided (s. 7) that "where a marriage shall be dissolved before the lapse of a year and day from its date, by the death of one of the spouses, the whole rights of the survivor and of the representatives of the predeceaser shall be the same as if the marriage had subsisted for the period aforesaid"; and although doubts have been expressed whether, regard being had to the scope of the Act, this provision applies to terce (Bell, *Lect.* vol. ii. 847), the weight of authority is in favour of the view that it does (Fraser, *H. & W.* 1083). Under the Scots Act 1573, c. 55, upon divorce for desertion the innocent party is to enjoy his or her provisions as if the marriage had been terminated by death of the guilty party, and the principle has been extended to divorces on the ground of adultery (Stair, i. 4. 20; *Johnstone-Beattie*, 1867, 5 M. 340, 6 M. 333; *Haney*, 1870, 9 M. 971; 1872, 10 M. (H. L.) 26). Proper legal provisions become exigible, just as do conventional provisions, upon decree being pronounced (*Thom*, 14 D. 861; M'Laren, *W. & S.* 89). Formerly too, widows who were Aliens were excluded from terce as from other real rights; but by the Aliens Act (7 & 8 Vict. c. 66, s. 16) it is provided that "any woman married or who shall be married to a natural born subject or person naturalised, shall be taken to be herself naturalised, and shall have all the rights and privileges of a natural born subject." A widow otherwise entitled to terce, will be debarred therefrom provided she has, in full and fair knowledge of her rights, accepted a conventional provision in lieu of and without reservation of her right to terce (Act 1681, c. 10; Fraser, *H. & W.* 1112–3). And of course, as with other legal rights, the widow may be put to her election between accepting provisions under a settlement and her claim to terce. A plea of bar founded on such acceptance or election may be competently considered by the Sheriff in an inquest on a brieve (*Clark*, 1891, 9 R. 339, per Ld. M'Laren, 343). (See ELECTION.)

The conditions of an entail (or even, probably, of an ordinary fee-simple title not flowing from the husband himself) may exclude terce, and such exclusion will be effectual (Bell, *Prin.* 1597; *Newton*, 1866, 5 M. 1056, 1870, 8 M. (H. L.) 66).

Effect of State of Husband's Title on Right to Terce.—While it is necessary that the husband should be infeft as of fee in order that the widow may be entitled to terce, an equitable relaxation of the rule has been recognised entitling her, in a question with his heirs, to claim terce although his infeftment may have been invalid upon some ground which could have been cured by himself in his lifetime (Fraser, *H. & W.* 1090, and cases there cited). And in one case a widow was even held entitled to maintain

a personal claim against her husband's father in respect of terce from lands in which the father had in her marriage contract become bound to infeft his son, but in which no infeftment had been taken before the son's death (Stair, ii. 6. 16; Ersk. ii. 9. 46; Fraser, *H. & W.* 1094). It may be doubted, however, whether this decision did not go too far (*Carruthers*, 1706, Mor. 15846, and Fraser, *loc. cit.*). Where trustees are infeft in the estate for behoof of the husband, a distinction falls to be drawn between the case where their title is derived from a stranger and that in which they hold upon a conveyance granted by the husband himself, as a proprietor already infeft. In the latter case they are regarded as holding in his right, and terce is due; whereas in the former case it is otherwise (M'Laren, *W. & S.* 91–92). Where a proprietor has granted a trust deed, qualified by a back-bond under which he has the substantial right to the fee, terce is also due (*Bartlett*, 21 Feb. 1811, F. C.; M'Laren, *W. & S.* 91). A similar distinction to that just noticed also obtains where the proprietor is merely infeft in the liferent, with a power of disposal, terce being due where he himself is the granter of the conveyance under which he has the liferent (*Cumming*, 1756, Mor. 15854; 2 Br. Sup. 843), but not otherwise (*Morris*, H. of L., 27 Jur. 546, and other cases cited, M'Laren, *W. & S.* 91). But in any case, where a party holds lands on an infeftment to himself in liferent and his children *nascituri* in fee (or other similar destination importing a fee in the nominal liferenter), terce is of course due. So too where a proprietor has divested himself of his estates *intuitu mortis*, with a reserved power to revoke or alter (M'Laren, *loc. cit.* 91). One of the most singular results of the application of the rule as to infeftment is that where the deceased husband has sold the lands, and has granted a conveyance under which the purchaser has not taken infeftment at the date of the seller's death, the widow of the latter is entitled to her terce out of the lands sold (Fraser, *H. & W.* 1095). On principle, it would seem that where such a transaction has been carried through and the price has been paid, and so forms a part of the husband's moveable estate, the widow, if her *jus relictæ* has not been effectually excluded, should be entitled to a third of the price, in which case, of course, she would be barred from taking terce in addition. The old case of *Campbell* (1776, 5 Br. Sup. 627) is, however, an authority to the contrary effect; and though very meagrely reported, it has recently been approved in *Rossborough's Trs.* (1888, 16 R. 167). In the latter case a bondholder having before his death sold the security subjects to a purchaser who proved unable to carry through the purchase, the widow was held not to be entitled to one-third of the capital, but only to terce out of the sum secured.

Where a husband has made a conveyance deliberately in defraud of terce, or has unduly delayed in taking infeftment, while terce will be defeated in a question with third parties, it appears that the wife may, as a personal right, be entitled to redress or relief (Bell, *Prin.* 1600, and cases there cited; but cf. *contra*, Fraser, *H. & W.* 1094, where the question is discussed).

Estate from which Terce is due.—Subject to what has already been said, terce is due from the heritable estate of the husband, whether acquired by him by succession or singular title—in this differing from courtesy. At Common Law, terce was not exigible from lands held in Burgage tenure. The Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86, s. 12), provided that "the widow of any person who shall, after the passing of this Act, die infeft in property held by burgage tenure shall be entitled to terce therefrom; and the like proceedings as to service and kenning before the Sheriff shall

be competent in such a case as are competent with reference to property in respect of which terce might have been claimed prior to the passing of the Act." This section has indeed been repealed by the Statute Law Revision Act of 1892; but in view of the provisions of the Conveyancing Act of 1874, which practically abolish all distinction between burgage and feudal tenure, this repeal seems to be merely formal: so that terce is now due from all lands, whether formerly held burgage or not (Conveyancing (Scotland) Act, 1874, s. 25). Unlike courtesy, terce is not due from superiorities, either in respect of the regular duties or of casualties, nor is it due from mere rights of servitude. It appears not to be properly due from real burdens by reservation (Bell, *Prin.* 1598), and it seems far from clear that there is any distinction to be drawn in the case where such burdens are by constitution (Fraser, *H. & W.* 1088; Bell, *Lect.* 848). A widow is entitled to terce out of heritable securities constituted by infeftment; and if these are paid up, she seems entitled, as a condition of her consent to the discharge, to have one-third of the proceeds invested for herself in liferent and the husband's heirs in fee (cf. *Rossborough's Trs., supra*, as to her rights if the loans have been called up prior to the husband's death). Where the security is by way of absolute disposition qualified by a back-bond, the terce is limited to one-third of the amount secured. Conversely, where lands which are the subject of terce are burdened with heritable securities, the widow's terce suffers a rateable reduction. This seems to be the case even where the security is by way of absolute conveyance and back-bond, the claim extending to a liferent of one-third of the reversion (M'Laren, *W. & S.* vol. i. *loc. cit.*). Rights of reversion are not, however, in general subject to terce; nor are leases, heritable estate held on a personal title, teinds,—unless feudalised in the husband's person,—patronage, nor minerals. Where minerals have been worked in the portion of the estate allocated to the widow, she seems entitled to continue the working for her own supply. A mansion-house is not, in general, taken into account in estimating terce; but where there is more than one, the widow is entitled to a liferent of the second one. Residential properties which are let, yield terce (Fraser, *H. & W.* pt. iv. ch. vii.).

Estates held under entail are liable to terce unless the right is specially excluded by the terms of the entail. Where not excluded, a bond of annuity may be granted for an amount within the terce. In practice, however, the widow's rights are generally provided for by the terms of the entail (Fraser, *loc. cit.*).

Completion of the Right to Terce.—The right to terce, though effectual by mere survivance, does not give any active right to occupation of the lands until a title thereto has been made up by the widow. Until this is done she may indeed receive payment of the rents to the extent of her terce, and her receipt will be a good discharge therefor; but she cannot sue tenants; and it has been held—although the decision has been doubted—that if she dies without service, she does not transmit to the executors the right to recover arrears of rents not ingathered by her (see Bell, *Prin.* 1602, and cases cited).

The appropriate method of completing title formally is by (*first*) Service followed by (*second*) Kenning to the Terce. Service proceeds on a brieve from Chancery directed to the Sheriff within whose jurisdiction the lands lie, or to the Sheriff of Edinburgh if the lands are in different counties (or sometimes to a special individual nominated as Sheriff for the purpose). The inquest is by a jury, who are directed to inquire (1) Whether the claimant was the lawful wife of the deceased—this being presumed if she

was habit and repute his wife; and (2) Whether the husband died infeft in the lands—this being proved by production of his sasines or recorded titles. The brieve is not retourable, the jury merely arriving at a verdict, to which the Sheriff interpones authority and decerns. Appeal to the Court of Session is competent at any stage at which advocation would formerly have been competent (*Craik*, 1891, 19 R. 339, per Ld. Pres. Robertson, p. 341). It is improper, however, for the Sheriff to sist process merely on an assertion of intention to have objections, which if established would be fatal to terce, tried elsewhere. The widow's right to be served is peremptory, and can only be barred by objections instantly verifiable (*Craik, ib.*). The Sheriff may, however, competently consider a plea of exclusion of right by acceptance of a conventional provision (*ib.*, per Ld. M'Laren, p. 343). By service the widow is vested with a right of possession of the subjects *pro indiviso*, with all benefits of the landlord's hypothec, and she may demand a third of the rents and interests on heritable debts. By the secondary process of kenning, pursued before the Sheriff (for procedure in which, see KENNING), she obtains a proper liferent infeftment in one-third of the estate. (Stair, iv. 3. 11; Ersk. ii. 9. 50; Fraser, *H. & W.* 1101.)

In practice, however, both service and kenning are superseded—the widow's rights being commonly settled by agreement or by submission, in which the arbiter assigns to her a portion of the estate or a fixed sum out of the rents—either being properly secured against creditors of the heir (*Boyd*, 1805, Mor. 15874: Bell, *Prin.* 1601). (For details of procedure, reference is made to Fraser, *H. & W.* pt. iv. ch. vii. 1101, etc.)

Security against Waste by Tercer.—This is provided for by the Scots Acts, 1491, c. 25, and 1535, c. 15. In the case of *Bell* (1827, 6 S. 221) the procedure under the Acts was applied, opinions being expressed that a complainer must adopt the remedies provided by the Acts. The grounds of action must be such, however, as would at common law warrant interdict, *i.e.* injury already done and apprehension of further injury (Fraser, *H. & W.* 1109–1110).

Lesser Terce.—The fact of an existing right of terce in favour of a widow does not exclude the widow of a succeeding proprietor from all claim to terce. She is entitled to one-third of the balance of the rents remaining after satisfaction of the existing right. This is called lesser terce. Upon the pre-existing right being terminated, the second widow takes one-third of the full rents (Fraser, *loc. cit.*).

Term.—See CIRCUMDUCTION.

Terms.—The "term," in the ordinary sense of the word, is the day on which rent is payable. The *legal* terms are *Whitsunday*, 15th May, and *Martinmas*, 11th November. The Removal Terms (Scotland) Act, 1886, 49 & 50 Vict. c. 50 (which repealed the Removal Terms Act, 1881), enacts (s. 4) that—

"Where under any lease entered into after the passing of this Act, the term for a tenant's entry to, or removal from, a house shall be one or other of the terms of Whitsunday or Martinmas, the tenant shall, in the absence of express stipulation to the contrary, enter to, or remove from, the said house (any custom or usage to the contrary notwithstanding) at noon on the twenty-eighth day of May, if the term be Whitsunday, or at noon on the twenty-eighth day of November, if the term be Martinmas, or on the following day at the same hour, where the said terms fall on a Sunday. Notwithstanding anything in this Act contained, in all cases in which warning is required forty days before a Whitsunday or Martinmas term of removal, such warning shall be given forty

days before the fifteenth day of May and the eleventh day of November respectively. Sec. 5. Where a house, other than a dwelling house or building let along with land for agricultural purposes, is let for any period not exceeding four calendar months, notice of removal therefrom shall, in the absence of express stipulation, be given not less than days before the date of ish as shall be equivalent to at least one-third of the full period of duration of the lease."

By sec. 3, "house" means a dwelling-house, shop, or other building and their appurtenances, and includes a dwelling-house or building let along with land for agricultural or other purposes: "burgh" means royal burgh, parliamentary burgh, or any populous place, the boundaries whereof have been fixed and ascertained under the General Police and Improvement (Scotland) Act, 1862, and subsequent Acts: "lease" includes tack and set, and applies to any lease, tack, or set, whether constituted by writing or verbally, or by tacit relocation, and of whatever duration: "tenant" means a tenant under any lease as defined by this Act.

As to Conventional terms, see RENT.

Testament.—See WILL.

Testament in Roman Law.—See SUCCESSION IN ROMAN LAW.

Testing Clause.—See DEEDS (EXECUTION OF) (vol. iv. 137).

Theft.—See HABIT AND REPUTE; HOUSEBREAKING; LOCKFAST PLACES; PLAGIUM; RESET; ROBBERY.

Theft is the felonious taking away and appropriation of the property of another without his consent.

There can be no theft of anything unless it be a subject either of public or of private property. Accordingly, there cannot be theft of any portion of the water of the sea, or of the atmosphere, or of any wild animal, or of any human being above the age of puberty. As regards wild animals, there may be theft of them, if by slaughter, or capture, or enclosure they have been made subjects of private property (*Wilson*, 1872, 2 Coup. 183, Hume, i. 81–2, Alison, i. 279–80). Thus a libel for theft of fish was sustained where an accused had cut away from a fisherman's boat a net in which a quantity of herring were enclosed (*Huie*, 1842, 1 Broun, 383). By statute, the taking of oysters or mussels from beds which are private property, and sufficiently marked out to be capable of identification, is theft (3 & 4 Vict. c. 74; 10 & 11 Vict. c. 92; *Thompson*, 1842, 1 Broun, 475; *Goudie*, 1866, 5 Irv. 259; *Chisholm*, 1871, 2 Coup. 49). It is held by some that a similar provision in regard to game would be the best solution of all questions under the game laws.

Whilst the thing taken must be property, it does not matter whether it is public or private property, whether it belongs to an individual or to a community, or whether the owner be known or not (Hume, i. 77, 78; Alison i. 277). Felonious abstraction of lost property is theft. The statement by Hume (i. 62) that it is not theft if a landowner appropriates an animal which has been found straying on his lands, or if the finder of a pocket-book with the owner's name upon it on the highway appropriates it to his own use, is certainly not now law. It does not matter in whose possession the article appropriated may be at the time at which it is abstracted (Hume, i. 78; Alison, i. 273). Even if the goods be in the hands of someone whose possession is wrongful, it is theft to take them

for the purpose of appropriating them feloniously (*Wood*, 1842, Bell, *Notes*, 23; *Begs*, 1846, Ark. 215; *Smith*, 1833, 2 Swin. 28). It seems to be doubtful whether it is theft if a man dishonestly recovers possession of his own property, with the possession of which he has parted under a contract such as pledge. In such a case a charge of fraud is probably more appropriate.

The question was at one time very keenly argued as to what constituted theft as distinct from a mere breach of trust. This question has lost its practical importance owing to the provision of sec. 59 of the Criminal Procedure Act, 1897, under which a verdict for either of these offences may be returned under an indictment which charges the other. The decisions are not altogether consistent; and the law has advanced a good deal since Baron Hume laid it down that for a person to appropriate an article he was carrying out of a burning house, or for a cabman to appropriate a parcel left in his cab, was not theft (Hume, i. 62).

On a review of the authorities, the present state of the law appears to be as follows. It is theft to appropriate any article, even though it be in the custody of the party appropriating it, unless he had some such title or colourable title of property in it as exonerated him from an unqualified obligation to return the article in *forma specifica*. Thus it is theft to appropriate an article borrowed or hired, or left for repair. But it is not theft to appropriate an article possession of which has been acquired under a *bonâ fide* contract of sale or return.

The abstraction of a dead body, though a criminal offence (Hume, i. 85), appears not to be theft (see Dead Body). But the wrongous appropriation of a skeleton or any other part of a body forming a medical specimen, or a curiosity such as a mummy, would undoubtedly be theft.

Theft is complete if the thief takes possession of the article, even although he fails to remove it from the premises or the person in whose custody it is. Thus it is theft to remove goods in a shop from the shelves, although the thief is interrupted and leaves them on the counter; and it is theft to snatch a watch out of the pocket of the wearer, although the chain holds and the thief fails to detach it or the watch from the person (Hume, i. 70–3). But it is not theft merely to lay the hands upon a thing, if the act be interrupted before the article is actually removed from its position.

To constitute the crime of theft there must be felonious intention in the appropriation. It is not theft to take unauthorised use of another man's horse, or bicycle, or farm implement, provided that there is throughout an intention of returning it. There is an onus, no doubt, upon the wrong-doer to show that there was no intention dishonestly to appropriate, which may be greater or less according to the circumstances of the case. If the article be one ordinarily let for hire, it may be fraud to take a surreptitious use of it, although it does not amount to theft. Hume treats of the case of a landowner driving his neighbour's cattle on to his own land for the purpose of impounding them, and then fraudulently claiming payment for releasing them. In the learned author's opinion this is not theft (Hume, i. 73), but the contrary would now probably be held.

Although the abstraction must be felonious, it is not necessary that there should be any element of cupidity. It is theft although the article is removed from motives of malice or revenge, and is forthwith destroyed, or hidden, or cast adrift. It is necessary, however, that the article should be removed by the offender. It is not theft to destroy it where it is found (Hume, i. 75), or to unloose it and let it wander away, as a cow; or fly away, as a bird; or drift away, as a boat.

Art and Part.—The accessory in theft is equally guilty with the principal, and accession may be inferred even though the alleged accessory may not know all that is done. Thus, for example, if two people agree to pick a person's pocket, both are guilty although only one actually abstracts the article, and the other does not know what he has got. The same would probably be held if two persons, acting in concert, mingled with a crowd for the purpose of pocket-picking, though here the proof might be difficult. It has even been suggested that when a gang of thieves are at work in concert in a town, all are guilty of every theft committed by any one of the gang. Certainly, whoever assists or abets in any way, as by watching, or secreting, or rushing off with the stolen property immediately it is seized, is guilty of theft. Where a child steals, a person sending it out for the purpose is guilty of theft. It appears to be necessary, however, in every case that there should be guilty knowledge prior to the commission of the deed; accession after the fact not being sufficient to constitute the crime of theft (Macdonald, 45, 46).

Aggravations.—*Plagium* or child-stealing, theft by housebreaking, theft by opening lockfast places, theft by a habit and repute thief (all which subjects are dealt with under separate heads), theft by a police officer on duty (*Ferrie*, 1831, Bell, *Notes*, 34), theft of animals, theft of young children's clothes, theft from churches (see SACRILEGE), theft from bleachfields (18 Geo. II. c. 27, and 51 Geo. III. c. 41), are all regarded as aggravated forms of the crime.

Evidence of Theft.—The possession of stolen articles within a short period after the theft, without being able satisfactorily to account for the circumstance, is evidence of theft, and *warrants* the jury in convicting of theft without any further evidence. It does not, however, raise such a legal presumption of guilt as to *require* the jury to convict of theft rather than of reset (Dickson on *Evidence*, 157; Hume, i. 111).

Attempt to Steal.—As in the case of other offences, so in the case of theft an accused may be convicted of the attempt under an indictment or complaint which charges the full offence (Criminal Procedure Act, 1887, s. 61). Where attempt is charged, the accused may be convicted although the full crime is proved by the evidence (*ib.*). It is no answer to a charge of attempt that there was nothing to steal, as, for example, where the accused has rifled the pockets of some person who had nothing in his pockets. In a recent case on Circuit it was held by Ld. Low that, under secs. 59 and 61 of the 1887 Act, under an indictment for robbery an accused might be convicted of attempt to steal.

Interchangeability of Crimes of Dishonesty.—The section of the Criminal Procedure Act, 1897, which makes it competent to convict of one form of dishonesty under an indictment which charges another form, provides as follows:—

"59. Under an indictment for robbery, or for theft, or for breach of trust or embezzlement, or for falsehood, fraud, and wilful imposition, a person may be convicted of reset; under an indictment for robbery, or for breach of trust and embezzlement, or for falsehood, fraud, and wilful imposition, a person accused may be convicted of theft; under an indictment for theft a person accused may be convicted of breach of trust and embezzlement, or of falsehood, fraud, and wilful imposition, or may be convicted of theft although the circumstances proved may in law amount to robbery.

It will be observed that to the interchangeability of these offences there is this exception, that a person cannot be convicted of robbery except under an indictment which charges that crime.

Punishment.—Theft was never a capital offence in Scotland in the sense that a single act of theft necessarily implied a capital sentence. Trivial thefts were not so punished. But a death-sentence might be inflicted even for a single act when the theft was of a serious character (*furtum grave*), and in particular when horses, cattle, or sheep had been stolen. Aggravations, such as housebreaking or previous convictions, might render the offence capital. Apart from these special cases, there does not appear to have been any very sharp dividing line between thefts which were capital and others which inferred only an arbitrary punishment, and the result of a careful examination of precedents by Baron Hume is rather inconclusive (Hume, i. 86–92). No form of theft is now capital (1887 Act, s. 56), and the punishment may be fine, imprisonment, or penal servitude. In the case of theft of oysters or mussels from the seashore, the punishment is limited to twelve months for the completed act and three months for the attempt (3 & 4 Vict. c. 74, and 10 & 11 Vict. c. 92).

Thellusson Act.—The Thellusson Act (39 & 40 Geo. III. c. 98) enacts as follows: "Whereas it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained . . . be it enacted . . . that no person or persons shall after the passing of this Act by any deed or deeds . . . settle or dispose of any real or personal property so and in such manner that the rents issues or profits thereof shall be wholly or partially accumulated for any longer term than the life or lives of such grantor or grantors settler or settlers or the term of twenty-one years from the death of such grantor settler devisor or testator . . . and in every case where when any accumulation shall be directed otherwise than as aforesaid such direction shall be null and void and the rents issues profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

The Act applies where the direction to accumulate is made in terms and also where accumulation is the necessary consequence of the direction given (*Lord* v. *Colvin*, 1840, 23 D. 111; *Logan's Trs.*, 1896, 23 R. 848). For example, where there is a failure of the trust purposes to which income is directed to be paid (*Lord* v. *Colvin*, *supra*), or where annuities directed to be paid do not exhaust the revenue of the estate (*Logan's Trs.*, *supra*), there is held to be an implied direction to accumulate which is struck at by the Act.

In no event (save by the interposition of a liferent) will those entitled to the beneficial enjoyment of the trust estate be deprived of that benefit for a longer period than twenty-one years from the date of the testator's death by any direction to accumulate. So, where a truster directed his trustees to pay the liferent of his estates to his wife and on her death to accumulate for a specified time, and the widow survived for thirty-two years, the trustees were held bound to pay over the income to the persons entitled to receive it on the death of the liferentrix (*Campbell's Trs.*, 1891, 18 R. 992).

The Act has, however, no effect in accelerating vesting of a beneficial interest: "If the fund directed to be accumulated is not the subject of a present gift the right of the eventual beneficiary will not be accelerated or arise at the term of twenty-one years, but the heir-at-law *in mobilibus* will take it as intestate succession. But if there be a present gift of the fund itself, and the direction to accumulate be only a burden on the gift, then

the burden will terminate at the end of twenty-one years, and the gift will become absolute in the person of the donee" (per Ld. J.-Cl. Monc[illegible] in *Maxwell's Trs.*, 1877, 5 R. p. 250).

The question of where the rents go between the points of time when accumulation stops and payment of the fee is made, is clearly explained by Ld. Kincairney in *Campbell's* case. His Lordship says: "On this question there have been two distinct classes of decisions,—in the one class, where it has been held that there was a good gift of the estate, the revenue of which was directed to be accumulated, the direction to accumulate has been held to be a burden on the gift of the estate and the person to whom the estate was destined has been held entitled to it unaffected by the direction to accumulate so far as in excess of the period allowed; and in the other, where there has been no prior gift of the estate, the revenue directed to be accumulated has, so far as affected by the Act, been regarded as undisposed of and as falling to the testator's heir in heritage or moveables. To the former class of cases belong *Ogilvie's Trs.*, 1846, 8 D. 1229; *Mackenzie*, 1877, 4 R. 962; *Maxwell's Trs.*, 1877, 5 R. 248. To the latter, *Keith's Trs.*, 1857, 19 D. 1040; *Lord*, 1860, 23 D. 111; *Cathcart's Trs.*, 10 R. 1205."

Thirlage.—Thirlage is the name given to the obligation under which the occupiers of specified lands were astricted to a specified mill, *i.e.* bound to have their grain ground at the mill of the thirl. The subject is mainly of historical interest, as the commutation of thirlage rights under 39 Geo. III. c. 55 has been almost universal (see below). It is dealt with in Scots law as a prædial servitude (*Stobbs*, 1873, 11 M. 530).

Nature of the Right and History.—While for practical purposes thirlage is to be considered a servitude, its real nature is essentially different. It really was a trade monopoly of the same character as the exclusive rights of trading within burghs. As the power to grant exclusive trading rights was in the Crown, but was sometimes delegated to subject-superiors (Ersk. *Inst.* i. 7. 64, note 260), so the power of astricting to a mill was inherent in the Crown as regards Crown lands, and could be conveyed by feudal investiture on a barony title, or on a title containing the clause *cum molendinis et multuris*. Similarly, at one time the right to erect the smithy—and apparently the power to astrict to a smithy—depended on the charter containing the clause *cum fabrilibus* (Craig, II. *Dieg.* 8, s. 25: cf. *Yeaman*, 1770, Mor. 14537). While, however, this is true of the origin of the right, in later times the right to erect mills was regarded as inherent in the right of ownership, and therefore capable of being exercised by any heritor whose lands were not already astricted. The modern view in favour of freedom is illustrated by the case of *Skene*, 1775, Mor. 16062, Hailes, 675, in which the Court refused to recognise astriction to the kiln attached to a mill, as being a servitude unknown to the law.

The origin of this species of local monopoly is clear enough. At the time of the introduction of water-mills, expenditure on a mill would be undertaken only if there was a certainty that it would be used so extensively as to ensure an adequate return. Accordingly, when a land-owner erected a mill, he required all his tenants to bring their grain to it to be ground, and prohibited the use of hand-mills (querns). The area thus astricted to the mill was called the thirl or the sucken (*q.v.*), and the possessors of the lands astricted were the suckeners. The price of grinding was exacted in kind, and was called Multures (*q.v.*): that paid by the suckeners being known as insucken or in-town multures, while the smaller payments by strangers who resorted voluntarily to the mill were known as

outsucken or out-town multures. (For history, see *E. of Hopetoun*, 1753, Mor. 16029.)

If lands were effectually astricted to a mill, they could be released only by consent of the proprietor of the mill. As mills in many cases became separate tenements (see MILL), and were often disponed separately from other parts of the same estate, thirlage became a burden which entered titles and was of importance in conveyancing. But, as Stair points out, (iv. 15. 2), the obligation affects only the possessors of the ground, to whom the crop belongs, and is rather a burden upon the fruits than upon the ground. It is really nothing more than a personal obligation of the possessor of the ground prestable in virtue of his occupancy. The relation is prædial; the obligation is personal. The rights emerging resemble those of a mutual contract. If the suckener abstracts his grain (takes it elsewhere to grind), he is liable in damages or to a decree *ad factum præstandum*. If the mill fails, the mill-owner loses his multures.

It is thus obvious that thirlage is not properly a servitude. There are indeed what may be called dominant and servient tenements. But, on the side of the servient, there is something more than a mere derogation from the complete rights of ownership or possession, something more than the mere disability characteristic of servitudes. There is a compulsitor on the suckener to do something positive; and thus thirlage, being more than a mere burden *patiendi*, sins against the brocard *servitus in faciendo consistere nequit* (Bell, *Prin.* s. 1016; Rankine, *Landownership*, 3rd ed., 363–4). Accordingly, it is sometimes called a pseudo-servitude.

CONSTITUTION AND PROOF OF THIRLAGE.—It is important to distinguish between the constitution of thirlage and the proof of constitution—matters which are frequently confused with each other in the reported cases.

(1) *Constitution.*—Lands can be astricted only by the act of the proprietor (*E. of Murray*, 1621, Mor. 10851; *Dundas*, 1706, Mor. 35, and 15994). Whatever obligations of thirlage a tenant may undertake, they remain personal and do not permanently burden the lands, unless the landlord's consent is obtained. It seems clear that writ was not in every case necessary to constitute the obligation. It was not necessary in the thirlage of king's lands to a king's mill (*Steuart*, 1662, Mor. 10854 and 15974), of kirk lands to a kirk mill (*Maxwell*, 1740, Mor. 16017, 5 B. S. 687; *Miller*, 1809, Hume, 742), or of barony lands to the mill of the barony (*E. of Hopetoun, supra*; *Walker*, 1755, 5 B. S. 839; cf. *Nicolson*, 1662, Mor. 10856). Various explanations of this are given, but the true one seems to be that given by Ld. Deas (*Harris*, 1863, 1 M. 833, at p. 845), that in old days, before writing was common, thirlage "was constituted by a mere verbal order of the baron, followed by usage." It was a simple act, requiring no solemnity, for a heritor to thirl his own lands to his own mill. But in all other cases thirlage required writing for its constitution. Mere resort to a mill, no matter how long continued, will not *constitute* thirlage. *Nunquam præscribit jus astrictionis* (*Ogilvie*, 1541, Mor. 10849; *Menzies*, 1635, Mor. 1815; *Buntin*, 1682, Mor. 10872 and 15986; *Coltart*, 1774, 2 Pat. App. 332). Among writings constituting thirlage may be instanced the titles of the dominant property or the titles of the servient, or a bond of thirlage.

(2) *Proof of Constitution.*—In the case of king's lands, kirk lands, and barony lands, astricted respectively to the mills of these lands, the only proof required was proof of resort, and of payment of insucken multures for the prescriptive period, in the absence of any proof of contrary intention or right (*Dog*, 1635, Mor. 10853, and cases above cited). So in lands thus

astricted, a new tenant is subject to the thirlage though his lease is silent on the point (*Walker*, 1755, 5 B. S. 839). Even in other cases written proof might not be required; proof of payment of dry multure (*i.e.* paid whether the grain be ground or not) for forty years is held conclusive that the obligation of thirlage has been duly constituted, because no one would make such a payment unless he was under legal obligation to do so (*Kinnaird*, 1675, Mor. 10862; see also *Brown*, 1740, Mor. 16018; *Murray*, 1745, Elch. "Thirlage," No. 2). There is conclusive written proof of thirlage where the astriction is found in the titles of the lands thirled (as where it is constituted by reservation in the disposition, or by an express provision of thirlage). In such a case no proof of possession is required, for vassals cannot prescribe an immunity contrary to the terms of their charters (*M'Leod*, 1727, Mor. 10772; *Simpson*, 1774, Mor. 10746, Hailes, 553). Again, a probative bond of thirlage is conclusive against the parties thirled and their heirs (*Magistrates of Cupar*, 1771, Mor. 16061, and App. "Thirlage," No. 1). Also a decree declaring thirlage, which stood unquestioned for forty years and was not "taken off" by prescription of liberty, was held sufficient proof of thirlage (*Pittarro*, 1676, Mor. 10863). In other cases, however, the written title must be fortified by proof of possession. So a probative bond of thirlage followed by possession (not necessarily for the prescriptive period) is good against singular successors in the land, if "the creditor of the bond acquired possession conform, before the singular successor's right" (*Pittarro*, 1673, Mor. 14503; *Peter*, 1686, Mor. 14515; *Blair*, 1712, Mor. 14505). Where the written title is infeftment in a mill with the multures of specified lands, possession must also be proved in order to establish thirlage (*Halkerston*, 1708, Mor. 15997). Infeftment in a mill with a general clause *cum multuris*, etc., followed by possession of insucken multures for the prescriptive period, is adequate proof of thirlage (*Macalester*, 1831, 9 S. 763). But the nature of the possession necessary to be proved varied in different circumstances. Where the title to the mill was derived from one who had no power to astrict the lands, rigorous proof of uninterrupted possession was required (*Henderson*, 1677, Mor. 10867; *Sinclair*, 1694, 4 B. S. 210). A less complete proof would be required where the lands and the mill had belonged to one proprietor at the time of the astriction. Again, an act of the Baron's Court thirling the lands, followed by possession for the prescriptive period, proves astriction (*Mill*, 1614, Mor. 10850; *Forrest*, 1671, 2 B. S. 542; *Balmerino*, 1678, Mor. 10870). The case of *Balmerino* is instructive, because in it thirlage was held to be established in this manner even against feuars who had a right freeing them from the servitude of older date than the act of Court. A decree for abstracted multures followed by forty years' possession was sufficient to instruct thirlage (*Montgomery*, 1665, Mor. 10857; *M'Pherson*, 1681, Mor. 15985). A Crown charter to a burgh, of which the *tenendas* specified mills, multures, etc., was held a sufficient title for prescribing thirlage on forty years' possession (*Magistrates of Cupar*, 1771, Mor. 16062, and App. "Thirlage," No. 1). A charter to a royal burgh with the clause *una cum molendinis*, etc., was found to constitute a thirlage, but the town was required to prove possession, in order to exclude the negative prescription (*Magistrates of Edinburgh*, 1710, Mor. 8899).

What is not Proof of Astriction.—Mere habit to resort to the mill even for payment of insucken multures does not prove thirlage (*Hamilton*, 1686, Mor. 15988, 3 B. S. 655; ——, 2 July 1742, 5 B. S. 723; and cases cited *supra* under CONSTITUTION). It is not legitimate to attribute to compulsion what may have been merely voluntary and a matter of convenience. Again,

a mere personal contract to come to the mill will not astrict the lands (*Adair*, 1680, Mor. 15983; *Scott*, 1776, 5 B. S. 627). Where a heritor disponed the mill *cum multuris*, etc., and subsequently disponed lands which were in his own possession at the time of disponing the mill, the latter were held not to be thirled, on the principle *res sua nemini servit* (*Kincarrachy*, 1686, Mor. 15987). Again, if a heritor feus lands without astricting them, and subsequently dispones the mill with the multures of these lands, thirlage is not constituted, since the astriction is *a non habente potestatem* (*Hoppringle*, 1566, Mor. 15959; *Bardiner*, 1672, 1 B. S. 663; *Buntin*, 1682, Mor. 10872; *Dundas*, 1706, Mor. 35 and 15994; *Stuart*, 1739, 5 B. S. 672; *Harrowers*, 1750, Mor. 16026; *Coltart*, 1768, Mor. 16058, Hailes, 262; 1774, 2 Pat. App. 332).

How Thirlage is Extinguished (for Commutation, *vide infra*).—Thirlage, like other written obligations, can be extinguished by written discharge or release. Lands astricted are liberated if they are disponed with a clause *cum molendinis*, etc. (even in the *tenendas* if from a subject-superior, only when in the dispositive clause if from the Crown), provided that the disponer is, at the time of disponing, in right of the mill (*Stuart*, 1662, Mor. 10854: *Abbot of Kinross*, 1676, 2 B. S. 5; *M'Pherson*, 1681, Mor. 15985; *Graham*, 1705, Mor. 15992; *Halkerston*, 1708, Mor. 15997; *Russel*, 1723, Mor. 16014; *Wedderburn*, 1741, Mor. 16020; *D. of Roxburgh*, 1785, Mor. 16070, Hailes, 977). A clause in the disposition of land conferring power to build a mill also infers immunity to the extent of freeing the vassal "from the thirle of such corns as can be grinded at his own mill," but no further (*Newmains*, 1797, Mor. 10726). Immunity may be prescribed, as by the absence of proof of use of a barony mill during the prescriptive period (*Macdowal's Trs.*, 1783, Mor. 16068), or by proof of open and persistent disregard of a thirlage constituted *scripto* (*Feuars of Gaitmilk*, 1688, Mor. 10770). But where a thirled tenement had different mailings, some of which had never resorted to the mill, the latter could not prescribe immunity so long as any part of the tenement came to the mill (*Bruce*, 1741, Elch. "Multures," No. 7).

Immunity is not inferred by mere disjunction of lands from a barony (*Chiesly*, 1697, Mor. 15989), nor is thirlage necessarily extinguished by the temporary union of the mill and the thirled lands in one proprietor (*Smyth*, 1789, Mor. 16072). And where lands already thirled to the disponer's mill are feued for a *reddendo pro omni alio onere*, but without a clause *cum molendinis*, etc., there is no liberation from the astriction (*Newliston*, 1629, Mor. 10852 and 15968, as explained in Stair, ii. 7. 17; *Oliphant*, 1631, Mor. 15969; *Monteith*, 1716, Mor. 16009; *Stewart*, 1731, Mor. 16016; *E. of Hopetoun, supra*; *Bruce*, 1769, Mor. 16061, Hailes, 288).

Extent and Nature.—"There are three kinds of thirlage known to the law. In the first place, a thirlage of *grana crescentia*; secondly, a thirlage of grindable corn; and thirdly, a thirlage of *invecta et illata* . . . But these three terms are not *voces signatæ*, and the relative extent and nature of each of them may be extended or limited by usage" (per Ld. Deas in *Harris*, 1863, 1 M. 833). The first of these imported a thirlage of all corns growing on the lands; the second was limited to such corns as the tenants actually ground or required to grind, and the third to corns in-brought. In doubtful cases (as in servitudes) the lightest is presumed, but proof of usage is the unfailing test (*e.g. Simson*, 1824, 3 S. 225). Such proof may even increase the burden, as where a thirlage of grindable corns is proved by usage to mean a thirlage of *omnia grana crescentia* (*vide infra*). But usage is not admitted to diminish the burden, because custom to pay

only a part of the stipulated multures could not take away the obligation to pay the whole (*Waughton*, 1635, Mor. 11230). The meaning of an astriction used and wont is to be ascertained by proof as to a competent number of years, not necessarily forty years (*Kincarrachy*, 1686, Mor. 15987). But proof for the prescriptive period is required when usage is pled to the effect of increasing the burden (*Greig*, 1781, Mor. 16068). Usage was admitted to prove that the astriction did not include wheat (*M. of Abercorn*, 1798, Mor. 16074; *Dalgleish*, 1812, Hume, 743).

Whatever was the extent of the thirlage, it never operated as a restraint on the mode of cultivation. The possessor of thirled lands was not compelled to grow corn: he might crop them as he pleased, so long as he did not act *in fraudem*. He might lay them down wholly in grass, thus escaping payment of multures (*M'Fadzen*, 1731, Mor. 16016; *Grant*, 1755, Mor. 16034; but see *Stewart*, 1704, 4 B. S. 582). So absolute was the possessor's discretion in this respect, that even the proprietor of mill and thirled lands, who had let the mill on tack and subsequently resumed possession of part of the thirled lands, was held not barred from laying these down in grass, though he thus injured his own mill-tenant (*Slowan*, 1765, Mor. 16052; *Chalmers*, 1769, Mor. 16060). An occupier who put his lands into grass might freely buy meal for his use, but if he bought corn to be ground for his use he had to pay insucken multures for it (*Town of Musselburgh*, 1743, Mor. 16021, Elch. "Multures," No. 11). Tenants, however, cannot sell corn and import meal, free of multures (*ib.*).

The peculiarities of the three kinds of thirlage are as follows:—

(1) The thirlage of *omnia grana crescentia* means a thirlage of all the corns growing on the lands thirled except seed and horse-corn, which are exempted because without them the cultivation of the land could not be carried on (*L. Macleod*, 1788, Mor. 16070, Hailes, 1025 and 1047). Thirlage of "lands" means astriction of *omnia grana crescentia* (*Kilkerran*, 1755, 5 B. S. 830; *Yeaman*, 1759, Mor. 16044), because, as explained in *Waughton*, *supra*, astriction of "*terras suas*" means thirlage of "*segetes crescentes super terris suis*." Thirlage of all grindable corns was interpreted by usage to mean *omnia grana crescentia* in *Greig*, 1781, Mor. 16068; *Milne*, 1787, Hume, 728; *Beattie*, 1787, Hume, 729; and *Stobbs*, 1873, 11 M. 530. The same interpretation was given to multures "used and wont" in *Maxwell*, 1766, Mor. 16057, Hailes, 106. When the feu-duty or rent (ferm) was payable in victual not converted, and the landlord was owner also of the mill, multures were not due on the ferm-victual (*Feuars of Gaitmilk*, 1688, Mor. 10770; *Gairden*, 1697, Mor. 15990). So the amount of a grain-rent due to the Crown, for which money was accepted, was held free of multures (*L. Macleod*, *supra*). But multures were clearly due where the rent was payable in meal (*ib.*), or where the grain-rent was payable to another than the heritor of the mill (*Pittarro*, 1676, Mor. 10863). There was no deduction from multures in respect of hind-bolls (*M'Dowal*, 1684, Mor. 15987) or in respect of public burdens (*Nicolson*, 1662, Mor. 15974 and 10856). When "the right of the teind was not in the heritor's person," multures on teind were not due (*Gairden*, 1697, Mor. 15990), and, indeed, teinds were held to be free of multures *de sua natura* (*Innerwick*, 1635, Mor. 15972; *Pittarro*, *supra*). But teinds might be expressly astricted (*Newmains*, 1797, Mor. 10726), or there might be proof of prescriptive payment on teinds (*Grierson*, 1681, Mor. 10871). And if the teind is paid in money or meal (even though exigible in grain), multures must be paid on it (*Nicolson*, *supra*; *Grierson*, *supra*; *Duff*, 1682, Mor. 15986: *Maxwell*,

1766, Mor. 16057, Hailes, 106). On the question of deductions, see *Halkerston*, 1708, Mor. 15997, at pp. 15999 *et seq.*

(2) The thirlage of grindable corn (*grana molibilia*) meant astriction of so much of the corns growing on the lands as was used or needed for consumption within the thirl. Any surplus might be freely exported (*Feuars of Dundaff*, 1709, Mor. 16006; *Law*, 1742, Mor. 16021, Elch. "Multures," No. 9). It included all corns which the possessors happened to grind for any purpose whatever (*Lockhart*, 1736, Mor. 16016, Elch. "Multures," No. 2), *e.g.* when the rent was paid in meal (*Lockhart*, 1731, Mor. 16015; *Miller*, 1740, Mor. 16019, Elch. "Multures," No. 6). The occupier could not evade this thirlage by selling his corn and buying meal (*Town of Musselburgh*, *supra*). If he had no corn growing, he might buy meal free of multures; but if he bought corn to be ground for consumption, he must have it ground at the mill of the thirl (*Cockburn*, 1686, Mor. 15988).

(3) The thirlage of *invecta et illata* was specially applicable to towns, applying as it did to corns brought into the thirl. Its nature varied according to the terms of the astriction, and also according to the custom of the thirl. A general astriction of a barony, including a burgh of barony, to the barony mill, ordinarily imported thirlage of *grana crescentia* in the landward part, and of *invecta et illata* in the burgh (*Richardson*, 1588, Mor. 15960; *E. of Wigton*, 1736, Elch. "Multures," No. 3; *E. of Hopetoun*, 1753, Mor. 16029). The question arose whether in such a case corns grown in the landward part which had paid a multure of *grana crescentia*, and were afterwards imported into the burgh, were there liable for the multure on *invecta et illata*. It was decided that they were not liable in the double multure by the case of *Steedman*, 1722, Mor. 16013, reversing *Ramsay*, 1678, Mor. 15981, 3 B. S. 612. A thirlage of houses with kail-yards was held to include astriction of *invecta et illata*, in so far as brought in and consumed within the thirl (*Hamilton*, 1717, Mor. 16012). Thirlage of the feuars of a town was held to mean astriction of malt in-brought and consumed—probably on proof of usage (*Mackie*, 1746, Mor. 16024, and see Elch. *Notes*, p. 486, "Thirlage," No. 1). In the interpretation of an astriction, "tholing fire and water" means only "kilning and cobling," not brewing and baking (*E. of Cassilis*, 1682, Mor. 15984). Where there is a thirlage of *invecta et illata*, the extent of it depends, apart from special stipulation, on usage. It covers, ordinarily, all corn brought into the thirl and ground and consumed there (*E. of Wigton*, *supra*). It also applies to corn brought in, then ground elsewhere than at the mill of the thirl, and afterwards re-imported (*Gray & Clark*, 1749, Mor. 16024; *Bakers of Perth*, 1749, Mor. 16025); and to corn bought outside the thirl by inhabitants of the thirl, ground by them outside the thirl and then imported (*E. of Fife*, 1807, Mor. App. "Thirlage," No. 3). In these cases there was clearly an attempt at evasion. On proof of usage it was held to cover thirlage of malt brewed in the thirl, though not malted there (*Ramsay*, 1680, Mor. 15984; *Brewhouse*, 1741, Mor. 16020, Elch. "Multures," No. 8); and of corn kilned and cobled within the thirl, and re-exported as malt unground (*Cuthbert*, 1637, Mor. 15973; *Forbes*, 1663, Mor. 15974). But apart from proof of such usage, this thirlage subjects only in multures of what is ground within the thirl (*Keith*, 1621, Mor. 15963), and does not strike at corn imported to be made into malt and resold unground (*M'Kenzie*, 1624, Mor. 15965). Astriction for *invecta et illata* does not affect malt or flour imported in its ground state (*Heriot's Hospital*, 1707, Mor. 15994; *M. of Abercorn*, 1798, Mor. 16074; and cases of *M'Kenzie*, *E. of Wigton*, and *Bakers of Perth*,

supra), nor does it affect ale brewed outside and imported into the thirl (*Arnot*, 1757, Mor. 16035), or bread which has been manufactured outside the thirl out of corn bought by inhabitants of the thirl (*Bakers of Dundee*, 23 Feb. 1813, 17 F. C. 218). Such a thirlage does not cover corn only stacked within the thirl (*Blackburn*, 1628, Mor. 15966). In calculating the amount of thirlage on malt a deduction was allowed for the malt duties (*Magistrates of Forfar*, 1808, Mor. App. "Thirlage," No. 3; *Meikleiohn*, 1815, 18 F. C. 185).

Liabilities of the Thirl.—The suckeners were liable in Multures, Sequels, and Services.

(1) *Multures.*—The payment for grinding consisted originally of a fixed proportion of the corns ground, known as Multures (*molitura*). They were fixed at two rates. (*a*) The competition value of the services rendered was the outsucken or out-town multure, which was paid by those who used the mill without being under any obligation to do so. Reports mention the 24th corn or the 32nd corn as common amounts. (*b*) Those who were astricted to the mill, being debarred from going elsewhere, were as a rule charged a larger amount, known as insucken or in-town multure—"the monopoly price of 'grinding'" (Bell, *Prin.* s. 1018). A common rate was a peck in the boll, *i.e.* one-sixteenth (cf. *Bruce*, 1741, Elch. "Multures," No. 7). One peck of multure *for* five firlots meant one peck out of five firlots, *i.e.* one-twentieth, not one twenty-first (*Lockhart*, 1736, Elch. *Notes*, p. 294, "Multures," No. 2). There might be thirlage for multures at the outsucken rate (*Halkerston, supra*). In some cases a fixed quantity was paid annually, for which the suckener was free of the astriction; this was known as dry multure (*Caskiben*, 1612, Mor. 15963). It should represent the difference between the insucken rate and the outsucken rate. In *Dog*, 1617, Mor. 15963, it was held that forty years' "use" to pay a dry multure for bear freed from the obligation to bring bear to the mill. On the other hand, forty years' payment of dry multure proves the constitution of thirlage (*supra, Constitution*). See Multures; Insucken Multures; Outsucken Multures.

(2) *Sequels* were payments due to the servants engaged in the work of the mill. The statute of William (xxxv. Thoms. *Acts*, i. 59) required every mill to have a master and two servants. The payment to the first was called Knaveship; the payments to the servants were Bannock, and Lock or Gowpen. These payments were held to be necessarily implied in the obligation of thirlage (*Malcolm*, 1697, Mor. 15990), and they were due in addition to the stipulated multure (*Campbell*, 1672, Mor. 15978). Also they were due whether the corns were ground or abstracted, because they were payments for servants whom the mill-tenant was obliged to keep for the use of the mill (*Adamson*, 1628, Mor. 15965, 1 B. S. 221). On the other hand, one who is freed from thirlage by infeftment *cum molendinis*, etc., cannot subsequently be astricted by his superior to pay sequels (*Caskiben*, 1612, Mor. 15963). But there might be an astriction for knaveship and bannock only (*E. of Cassilis*, 1667, Mor. 15977). The amount depended on usage (*Ramsay*, 1738, Mor. 16017). See Sequels; Knaveship; Bannock; Lock; Gowpen.

(3) *Services.*—The suckeners were also liable in certain personal services, viz. bringing home mill-stones, cleaning and repairing the dams and mill-lead, carrying material for repairing the mill-house, and furnishing thatch for it. These services were naturally implied in thirlage (*Newliston*, 1629, Mor. 10852); so that where there was astriction by writ, liability for these services followed by the very nature of the right, and they could be

demanded immediately after the constitution of the thirlage (*Maitland*, 1668, Mor. 15978; *Lockhart*, 1736, Elch. "Multures," No. 2; *Miller*, 1740 and *Bruce Stuart*, 1741, Mor. 16019). If services were due, the whole of them were due: it was irrelevant to plead that only some had been in use to be given. In the matter of the *quantum* of services, the brocard *tantum præscriptum quantum possessum* had no application (*Mercer*, 1725, Mor. 16015; *Crawford*, 1732, Mor. 16016). Liability for services followed on even the lightest astriction by writ, *e.g.* a bond of thirlage for *molibilia* (*Dow*, 1696, Mor. 15989). If, however, the nature of the thirlage was ascertained by proof of usage, it might be held that there was "a thirlage of multures without services, but not of services without multures" (*Robertson*, 1744, 5 B. S. 740). It seems to follow, logically, that immunity from liability for services might be prescribed (*Maitland*, *supra*, and *Lockhart*, *supra*).

Remedies available to the Dominant Tenement.—If the existence of the obligation was denied, the remedy of the heritor of the mill was found in an action of declarator of astriction brought in the Court of Session, and directed against the proprietor of the lands said to be thirled as well as against the tenants, the proprietor being the proper contradictor (*L. Wardis*, 1628, Mor. 2201). A declarator of astriction, it was held, "stopped the septennial prescription even *quoad* a singular successor as to a possessory judgment in mill-multures" (*Stuart*, 1698, Mor. 15991). See Astriction.

If the existence of the obligation was not disputed, but the occupiers of the thirled lands failed to bring their grain to be ground at the mill of the thirl, the remedy was an action of Abstracted Multures (*q.v.*), competent either in the Sheriff Court or in the Court of Session. At one time when a suckener was taken in the act of abstracting, the lord (*dominus*) took the horse, and the miller the sack and corn, but in 1635 this was declared to be in desuetude (*Menzies*, Mor. 1815). The action of Abstracted Multures was competent to the proprietor or the tenant of the mill. If the thirlage was already constituted, it was not necessary to call the heritor of the thirled lands, unless for his interest (*Balmerino*, 1678, Mor. 10870, reversing ——, 1628, 1 B. S. 221). But action was sustained against a heritor who ordered his tenants to abstract (*Murray*, 1697, 4 B. S. 359; contrast *E. of Cassilis*, 1667, Mor. 15977). For the averments required in the action, see *N. v. Cassie*, 1627, 1 B. S. 142; *Adamson*, 1628, Mor. 15965; ——, 1621, 1 B. S. 156; *Heritor of Glenassen*, 1681, Mor. 15985; *Stobbs*, 1873, 11 M. 530; *Jurid. Styles*, vol. iii., 2nd ed., p. 83). Sequels may be sued for in the same action (*Adamson*, *supra*). In *Bryson*, 1828, 7 S. 88, doubts were expressed whether the action was competently brought before the Judge Ordinary of the defender's domicile, who was not also Judge Ordinary of the thirl. It is thought no such doubts would now be entertained; they probably arose from the old practice of holding Multure Courts (see *Rankin*, 1743, 5 B. S. 730). After five years, proof was limited to the defender's writ or oath (1696, c. 14).

As already stated (*supra*, *Extent* and *Nature*), astriction did not warrant interference with the tenant's modes of cultivation, and accordingly the heritor of the mill might lose his multures entirely through the thirl being laid down in grass. But as he had the exclusive right of grinding within the thirl, he could prevent the erection of other mills within that area (*Feuars of Falkirk*, 1744, Elch. "Thirlage," No 1; *E. of Hopetoun*, 1753, Mor. 16029).

The proprietor of thirled lands cannot build a mill or use hand-mills or querns within the thirl (*Crawford*, 1695, Mor. 8898). This disability holds even though he has a clause *cum molendinis*, etc., in his *tenendas*, and though he avers that the mill is for the use of lands not thirled and for

outsucken multures; and if he has erected a mill, an order of demolition will be granted (*M'Dougal*, 1684, Mor. 8897; *Urquhart*, 1752, Mor. 16028, Elch. "Mill," No. 1). Even though caution be offered not to infringe the astriction, there will be an order either to demolish the mill or to make it unfit for grinding the grains thirled (*Urquhart, supra*; *Magistrates of Glasgow*, 11 Feb. 1813, F. C.). But a mill might be erected for grinding other grains than those thirled (*e.g.* making French barley, or sheeling lint bows) on caution being found not to grind the grains thirled (*M'Leod*, 1757, Mor. 16037; *Lockhart*, 1757, Mor. 16039). If the mill was adapted for grinding both the thirled grains and others, it must be either demolished or rendered incapable of grinding the thirled grains (*Miller*, 1760, Mor. 16048). The right to have the mill removed might be barred by acquiescence and *mora* (*M. of Abercorn*, 20 May 1820, F. C.).

Remedies available to the Servient Tenement.—The suckeners were not left without remedy in the event of the mill-owner being unable to afford the necessary facilities for grinding. (*a*) If the mill was insufficient (*e.g.* from want of water), the rule was established that the suckeners, after giving forty-eight hours' notice, might have the corn required for their families ground elsewhere without being liable for abstracted multures (*Lockhart*, 1736, Elch. "Multures," 2; *E. of Wigton*, 1736, Elch. "Multures," 3; *Landal*, 1745, Mor. 16023). But they are not entitled to carry their grain elsewhere without notice simply on the averment that the mill is insufficient for the whole needs of the thirl (*Clark's Tr.*, 1828, 6 S. 659). Suckeners were not required to bring their wheat to a mill which was not properly constructed for grinding wheat (*Wright*, 1768, Mor. 16057, Hailes, 261). (*b*) If the mill be ruinous, the obligation is suspended. The suckeners cannot be compelled to resort to another mill owned by the same proprietor, for the astriction is to the mill, not to its owner (*Ballardie*, 1781, Mor. 16063). But when the ruinous mill is rebuilt, the obligation revives, unless it has been extinguished by negative prescription (*Kinloch*, 1830, 9 S. 244). So necessary is it that the mill must exist in order to justify a demand for multures, that, where an annual sum had been fixed by arbitration as payable by the suckeners in lieu of multures, sequels, and mill-services, it was held that when the mill was destroyed, this annual payment was no longer exigible (*Forbes' Trs.*, 1892, 19 R. 1022).

The suckeners were entitled to require the miller to send such number of horses for the corn as was used to be kept at the mill, with servants to lead them, but the suckeners had to load the horses (*Low*, 1746, Elch. "Multures," 5).

Commutation.—The Act 39 Geo. III. c. 55, on the narrative that "the servitude of thirlage and right of mill-services incident thereto . . . are very unfavourable to the general improvement of the country," provides for thirlage being commuted for an annual payment in grain fixed by a jury of nine heritors under a petition to the Sheriff. A verdict fixing a certain payment in "meal" (though the statute says "grain") was sustained (*Orr*, 1822, 2 S. 19). The verdict is directed to be recorded in the Register of Sasines within sixty days, and is protected against challenge after the lapse of three years from recording. But failure to record within sixty days does not render the verdict null, and the protection against challenge enures three years after the recording, at whatever time the recording is effected (*Duchess of Sutherland*, 1881, 8 R. 514). Provision was made for a thirlage of *invecta et illata* being purchased outright by the inhabitants of places subject thereto (s. 11; see *Bakers of Dundee*, 1804, Mor. 16076).

Tholed an Assize.—The plea of "tholed an assize" is a plea in bar of trial. It is a plea of *res judicata*,—that the accused has already undergone trial on the same charge,—and the result of its substantiation is that he is entitled to be discharged from the bar (*Watt*, 1824, Shaw, 113; *Hosie and Others*, 1837, 1 Swin. 507; *Anderson* and *Fraser*, 1852, 1 Irv. 66; *Dorward*, 1870, 1 Coup. 392). The meaning of the plea is that a jury has already taken cognisance of the charge which the accused has been called upon to answer. The point of time at which the assize begins to be tholed is when the jury is sworn.

The following points must be kept in view in testing the validity of this plea:—

1. The former trial must have been for exactly the same crime, proved by the same evidence, and it must have been regularly conducted. If the second trial is for what is really another crime, though it appears to be connected with the offence originally charged, the plea of "tholed an assize" is invalid (*Galloway*, 1863, 4 Irv. 444; *Glen*, 1865, 5 Irv. 203). The prosecutor, however, cannot evade the plea by merely describing the same facts by a different name.

2. If new events supervene after the first trial which change the nature of the offence, the plea of "tholed an assize" is invalid. Thus a man previously tried for assault, may, on the death of his victim from the effects of the assault, be tried for culpable homicide or murder (*M'Neill*, 1826, Shaw, 162; *Cobb*, 1836, 1 Swin. 176, 227, and 324; *Stevens*, 1850, J. Shaw, 287; *Stewart*, 1866, 5 Irv. 310; *O'Connor*, 1882, 5 Coup. 206).

3. If the former trial was stopped by circumstances for which the prosecutor was not responsible, such as the illness of the judge, or of the accused (*Macintyre*, 1829, Bell, *Notes*, 300; *Chambers* and *Henderson*, 1849, J. Shaw, 252), or of a juryman (*Elder* or *Smith*, 1827, Syme, 71 and 76; *Pringle*, 1830, Shaw, 235; *Grant and Others*, 1838, 2 Swin. 165; *Leckie*, 1841, Bell, *Notes*, 295; *Ross*, 1842, 1 Broun, 434; *M'Namara*, 1848, Ark. 521; *Loman* or *Wilson*, 1852, 1 Irv. 144; *Jackson*, 1854, 1 Irv. 347; *Smith*, 1853, 1 Irv. 378), the plea of "tholed an assize" will not be sustained. In the cases of *Ross*, *M'Namara*, and *Loman* (*supra*) a single juryman was balloted to fill the place of the juryman who was taken ill. Further, the plea will not be sustained where the former trial has been nullified in consequence of some defect for which the prosecutor was not responsible, such as the personation of a juryman or the like (*Sharp*, 1820, Shaw, 19. See also 6 Geo. IV. c. 22, s. 16; and *Glennan* and *Bradly*, 1839, 2 S. J. 382).

[Hume, ii. 465; Alison, ii. 615; Macdonald, 432; Anderson, *Crim. Law*, 234.] See RES JUDICATA.

Threats.—1. *Verbal and Written.*—It is criminal to threaten, either verbally or by letter, to do serious injury to person or property. It is also a criminal offence to threaten to accuse a person of crimes or immoral offences. The person who utters threats against another usually does so with the object of extorting money from the person threatened. It is enough, however, that the purpose of the threat is to alarm the person threatened (*Miller*, 1862, 4 Irv. 238). The usual mode by which the threat is communicated is by threatening letters, signed or unsigned (*Ledingham*, 1842, 1 Broun, 254; *Ross*, 1844, 2 Broun, 271; *Smith*, 1846, Ark. 4). The crime is complete when the letter is despatched, though it never reach the person for whom it was intended (*Hunter*, 1838, Bell, *Notes*, 111).

2. *Blackmailing.*—If the object of the threat is to blackmail or concuss, it is no defence to urge that money demanded was justly due (*Crawford*,

1850, J. Shaw, 309; *Macdonald* and *Laird*, 1879, 4 Coup. 262). It is immaterial that the threats made have produced no effect on the person threatened (*M'Daniel*, 1876, 3 Coup. 271). In the case of a letter threatening to accuse of crime, it is no defence to offer to prove the truth of the contents of the letter The prosecutor, accordingly, is not bound to disprove accusations made by the accused (*Crawford, supra*), and it is incompetent for the accused to prove the *veritas convicii* either in justification or extenuation of his crime (*M'Ewan*, 1854, 1 Irv. 520). It has not been decided whether it would be criminal to threaten with exposure a person who was living an immoral life, with the object of extorting money from him, or whether in such a case it is competent to prove *veritas*. (See Ld. Justice-Clerk Hope's opinion in *Crawford, supra*, and Ld. Deas' opinion in *Macdonald* and *Laird, supra*.)

3. *Aggravations.*—The crime of uttering threats is aggravated if the object is to prevent the giving of true evidence (*M'Daniel, supra*), or in revenge for information given to the authorities (*Ross, supra*), or to intimidate electors (see 17 & 18 Vict, c. 102, s. 5) or masters or workmen (see 9 Geo. IV. c. 129; 22 Vict. c. 34; and 38 & 39 Vict. c. 86). It is also a grave offence to threaten judges or magistrates in reference to their official duties (1540, c. 104; *Porteous*, 1832, Bell, *Notes*, 106; *Carr*, 1854, 1 Irv. 464).

[Hume, i. 135; Alison, i. 443; More, ii. 404; Macdonald, 176; Anderson, *Crim. Law*, 83.]

Ticket of Leave.—See Penal Servitude.

Tigni immittendi was an urban servitude, recognised by Roman law and also by Scots law, whereby the owner of the dominant tenement has a right to let a beam or joist into the wall of the servient tenement and to keep it there. The beam might be renewed when necessary. The servitude might be constituted either with reference to existing beams or future constructions (*Dig.* 8. 5. 14 pr.). The dominant owner could not compel the servient owner to maintain the wall in repair (*Dig.* 8. 5. 8. 2). As to how far the servitude is recognised in Scots law, see Stair, ii. 7. 6; Ersk. ii. 9. 7; Bell's *Prin.* 1003. See Oneris ferendi; Support.

Timber.—Woods and trees are regarded as *partes soli, i.e.* pertinents or parts of the lands on which they grow (B. *P.* s. 741). Hence "trees planted in one's ground, though not by the proprietor, are deemed an accessory of the ground in which they were planted, after they have taken root in and drawn nourishment from it; and so belong, as an accessory of the ground, to the owner of it" (Ersk. ii. 1. 15; see also ii. 6. 14; B. *P.* 1473; *Paul*, 1840, 2 D. 1286).

Difficult questions as to rights in timber arise principally between the following parties: (1) Fiar and Liferenter, (2) Heir of Entail in Possession and next Substitute, and (3) Landlord and Tenant.

Fiar and Liferenter.—As a general rule, a liferenter is bound to preserve the trees upon an estate, even though they have been planted by himself; and he has no right in them except to ingather their produce, *i.e.* shed leaves, mast, and fallen branches (St. ii. 3. 74; Ersk. ii. 9. 58; B. *P.* 1046, 1058; Rankine, *Landownership*, 3rd ed., 637; *Mousewell's Crs.*, 1683, M. 8253; *Gray*, 1789, M. 8250). To the general rule there are several exceptions: *First*, in the case of *silvæ cæduæ*, or coppice-wood, the simplest case being "where the wood is laid out in portions (haggs) or lots for

annual cutting, and regarded as part of the crop of the land" (*Lang*, 1752, Elch. *Notes*, "Liferent," 6; *Mousewell*, *supra*; *Dss. of Hamilton*, 1722, Robertson's Ap. 443; *M'Alister's Trs.*, 1851, 13 D. 1239). In several cases the right of a liferenter by reservation was recognised as being more extensive than the right of a liferenter by constitution—the former, but not the latter, being entitled to cut coppice-wood though not laid out in haggs, so long as he conformed to local usage (*Ferguson*, 1737, M. 8254; *Gray* and *Lang*, *supra*). This distinction has disappeared, and the right of the latter is now as extensive as that of the former (*Dickson*, 1823, 2 S. 152 (N. E. 138); *M'Alister's Trs.*, *supra*). If a liferenter sells his right to cut coppice-wood, the right expires with the liferenter's life, and the fiar may stop the purchaser cutting after that date (B. *P.* 1058). *Secondly*, underwood or brushwood and ordinary windfalls go to the liferenter (Ersk. ii. 9. 58). On the other hand, windfalls caused by an extraordinary storm belong to the fiar (*M'Alister's Trs.*, *supra*). *Thirdly*, mature wood and extraordinary windfalls may be claimed by the liferenter as far as necessary to maintain the houses, etc., in tenantable condition (*Stanfield*, 1680, M. 8244; *E. Dunfermline*, 1683, M. 8244; *Dickson* and *M'Alister's Trs.*, *supra*). Before exercising this right the liferenter must give notice to the fiar (*Dickson*, *supra*; *Tait*, 1825, 4 S. 247 (N. E. 253); *Dingwall*, 1833, 1834, 12 S. 216, 541).

Heir of Entail in Possession and Next Substitute.—An heir of entail, being a fiar, though with limited rights, is in a much more favourable position than a liferenter as regards cutting timber. As put by Ld. Ardmillan in *Boyd*, 1870, 8 M. 637, at 642, "The heir in possession is entitled to cut wood, and to do so to a very considerable extent. Indeed, if he cuts ripe wood, such as a proprietor in fee-simple might fairly be expected to cut, and does not anticipate the proper time for cutting and dispose of wood before it is ready, so as unfairly to benefit himself at the expense of his successors in the entailed estate, I think that his right and power to cut wood is very wide, and that this Court cannot in the general case interfere to restrict it" (see too Ersk. iii. 8. 29; 1 B. C. 51; B. *P.* 1754; *Hamilton*, 1757, M. 15408). But an heir of entail will be interdicted from cutting down such trees as are "required for the reasonable enjoyment of the mansion-house by persons in the rank of life which the inmates of such a house may be supposed to hold" (Ld. Deas in *Boyd*, *supra*, at p. 644; *Mackenzie*, 1824, 2 S. 775 (N. E. 643); *Bontine*, 1827, 5 S. 811 (N. E. 750), and 6 S. 74; *Gordon*, 24 Jan. 1811, F. C.; *M. of Huntly's Trs.*, 1880, 8 R. 50). Properly constituted prohibitions in an entail as to the cutting of timber receive effect so far as possible (*Moir*, 1826, 4 S. 730 (N. E. 737)). The cutting of unripe timber is not an act of ordinary administration, and therefore not such an act as an heir of entail is entitled to do (see *Boyd*, *supra*; *Cathcart*, 1755, M. 15403, 5 B. S. 818; affd. 1 Pat. 618; *Bontine*, 1827, 6 S. 74). An heir in possession has absolute right only to the wood which is severed from the soil during his lifetime; and if he assigns his right and dies during the execution of the contract, his assignee can only claim the value of the wood which has actually been cut down during the lifetime of the heir (*Cathcart*, *supra*; *Stewart*, 1761, M. 5436; *Ld. Elibank*, 1833, 11 S. 238; *Veitch and Pringle*, note to 1 B. C. 53). A trustee for creditors may exercise the powers of an heir in possession (*Ker*, 1827, 6 S. 73); and probably individual creditors may adjudge the faculty of cutting timber (1 B. C. 53; Rankine, *Landownership*, 3rd ed., 627).

Landlord and Tenant.—Under an ordinary agricultural lease woods are "reserved to the landlord, the tenant being entitled to the yearly fruits,

thinnings for repairs, willow twigs while young for basket-work, etc." (B. *P.* 1226; More, *Notes*, 255; Ersk. i. 6. 22; *Ld. Touch*, 1664, M. 15252; *Reps.*, 1806, M. "Planting," Appx. 2). Where woods are let as an accessory to a farm, the tenant is not entitled to cut for alienation, but only for erecting or repairing the necessary farm buildings (*Ld. Touch*, *supra*). A tenant under a ninety-nine years' building lease granted by an heir of entail in virtue of powers conferred by the Montgomery Act, is entitled to cut timber growing on the land leased to him (*Gordon*, 1883, 11 R. 67). A number of old statutes were passed imposing pains and penalties upon those destroying woods, and providing for indemnifying the owners of woods in case of their destruction (*inter alia* 1685, c. 39; 1698, c. 16; see these statutes referred to in Rankine on *Leases*, 2nd ed., 202).

Property in trees was formerly transferred only by actual removal and delivery (Brodie's *Stair*, 897; B. *P.* 1303; *Elder*, 1833, 11 S. 902; *Anderson*, 1844, 6 D. 1315; see now under Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, ss. 17, 18. See also Bell on *Leases*, i. 82, 348; ii. 10, 299, 430; Hunter on *Landlord and Tenant*; and article on LEASES).

Time, Computation of.—The mode of computing time is of the greatest importance. Questions as to the *terminus a quo* and the *terminus ad quem* constantly arise. It is impossible, however, to lay down any fixed rules. "Time must always be computed in a rational way, having regard to the particular purpose for which, in the case in question, the computation has been made" (*in re North*, 1895, 11 T. L. R. 417). Where no time is given, a reasonable time, varying with the nature of the case, must be allowed. When a party is obliged to do a piece of work, he must have as much time as the case requires (Stair, i. 17. 18).

There are two methods of computing time: *Naturalis computatio* and *Civilis computatio*.

I. NATURALIS COMPUTATIO.

This mode is reckoned *de momento in momentum*. Where the period is expressed in hours, it would seem natural to compute by this rule. Thus the 24 hours after which, in postal service, the *inducie* are to run, are calculated from the exact moment of citation. Where time runs from an unknown period between two hours, or on a given day, month, or year, then the hour, day, month, or year must be treated as indivisible, and computation will be reckoned from the last moment of said hour, day, month, or year (*Ogilvie*, 1630, M. 6541; Ersk. ii. 7. 30). In diligences, competitions of rights, prescriptions, or where good sense or the intention of parties demands it, this mode is resorted to (Bell, *Prin.* ss. 46, note *h* and 622). Thus diligence on the same day, but earlier, is preferred. In cases, however, between Crown and subject, the Crown is always preferred in a competition of rights arising on same day (*Rex*, 9 Ex. 32). Where days, months, or years are the given periods of time, then, as a rule, computation is *de die in diem*. If the *naturalis computatio* is adopted, then difficulties will arise. Thus take a case of prescription, where it is laid down that this is the method of computation (Stair, ii. 12. 14; Ersk. iii. 7. 30; Bell, *Prin.* s. 622). If a deed is recorded at 11 a.m. on 5th March 1860, when does the 20 years expire? Calculating strictly *de momento in momentum*, twenty periods of 365 days 6 hours would require to elapse. It is submitted, however, that the proper method of calculating is to take the same hour of the day of the month having the same numerical denomination, *i.e.* 11 a.m. on 5th March

1880 (*Lady Bangour*, 1681, M. 248). In the case of *Simpson* (1899, 6 S. L. T. 433), Ld. Stormonth Darling adopts another method, and reckons the time from twelve o'clock midnight of the day of recording; but this is properly computation *de die in diem* (see Ld. Pres. Campbell's dicta in case of *Ogilvie*, 3 Pat. at p. 377). Another example of *naturalis computatio* is the case of a minor attaining majority: the same difficulty would arise here (*Drummond*, 1624, M. 3465).

II. Civilis computatio.

This mode is reckoned *de die in diem*. This is the ordinary mode of calculation. "Date does not mean the hour or the minute, but the day of delivery, and in law there is no fraction of a day" (Ld. Mansfield in *re Pugh*, 2 Cowp. 714). An indefinite period of time will not be treated as a unit. Thus where proceedings had to be taken within 4 months from the time when cause arose, and where matter was libelled as taking place between certain dates, the earlier of which were without the period: held proceedings bad (*Farquharson*, 1894, 21 R. (J. C.) 52). The expression "time" has the same meaning as "day" (*Frew*, 1897, 34 S. L. R. 527).

When does Time begin to run.—Here there will be the difficulty as to whether Greenwich mean time or local is to be the criterion. In Acts of Parliament, deeds, and other legal instruments, the commencement of a day will be according to Greenwich time (Statutes Definition of Time Act, 1880). Outside of this statutory definition, the local time will be taken. Thus the time for lighting lamps is to be reckoned by local time (*Gordon*, 1899, 80 L. T. R. 20). In the case of *Curtis* (1858, 28 L. J. R. (Q. B.) 36) the question is fully discussed.

The date from which time is to be computed is sometimes not expressly stated, but in some cases statute or the Courts have determined it. Thus by 33 Geo. III. c. 13, the date of the Royal Assent is the date of the commencement of all Acts, unless otherwise provided for; by sec. 3 of Citation Amendment Act, 1882, the day of posting is fixed as the date of citation. The times from which the various prescriptive periods run are also determined by statute. The commencement of an action is the date of execution, not the date of signeting (*Alston*, 1887, 15 R. 78). Where impossible to throw salmon nets out of fishing order at six on Saturday, then they must be thrown out of order before that time.

Is the Day from which the Time runs to be included or excluded? The tendency is to exclude such day. Thus when something is to be done "from" or after a certain day, this day is excluded in the computation, and time begins to run from the midnight following. *Illustrations*:—A Provisional Order coming into operation *from and after* a certain day does not begin to operate till the day after (*Mayor of Sheffield*, 1898, 77 L. T. 616). Twelve calendar months from 24th Nov. 1887 excludes that day (*South Staffordshire Tramways Co.*, [1891] 1 Q. B. 402). A bill payable at a fixed period after date, the time of payment is determined by excluding the day from which the time is to begin (Bills of Exchange Act, 1882, s. 14, subs. 2). Days of grace are reckoned exclusive of day bill falls due (Thomson on *Bills*, 2nd ed., 379). Periods of time under the Bankruptcy Act of 1856 are to be reckoned exclusive of day from which such period is directed to run (s. 5). As to the application of this section to sec. 108, see *Stiven*, 1891, 18 R. 422; and as to the computation of time under secs. 125 and 127, see *Lepman*, 1893, 20 R. 818. Insurance from a certain date means from expiry of that date (*Sickness and Accident Assurance Assoc. Ltd.*, 1892, 19 R. 977). Where a complaint is to be made or an action brought within

a certain time, the day on which the offence was committed is excluded (*Frew, ut supra*; *Radcliffe*, 1892, 1 Q. B. 161; *Ashley*, 1873, 11 M. 703). In calculating the 60 days within which preferences are granted under the Act 1696, c. 5, the day of bankruptcy is to be excluded (*Blair*, 21 January 1809, F. C.; *Anderson*, 2 March 1813, F. C.; *Scott*, 1839, 2 D. 206). Similarly, under the Act 1696, c. 4, in reductions *ex capite lecti* the day of death is excluded (*Oglivie*, 1793, M. 3336 and 3 Pat. 434; *Mitchell*, 1801, M. App. No. 4). Where seisin was taken on 16th October between 11 and 12 a.m. and recorded on 15th December between 3 and 4 p.m., it was held validly recorded. Time computed from midnight to midnight, and excluding day on which seisin taken (*Lindsay*, 1844, 6 D. 771).

Where the expression used is "clear days," "days at least," "not earlier than," or the like, then the first day is excluded, Thus the words "being not earlier than six days," in sec. 67 of Bankruptcy Act, 1856, has been held to mean that six clear days must elapse (*Wilson*, 1891, 19 R. 219). The interval of "not less than" 14 days between the meetings passing and confirming a special resolution, is an interval of 14 clear days exclusive of both days of meeting (*in re Sleepers Supply Co.*, 1885, 29 Ch. D. 205).

There are cases where the first day is included. Where a charter-party bore that the hire was for the space of one or four weeks and commencing from the 8th Sept., *at* which date, etc.: held that this meant earliest moment of 8th (*M'Kenzie*, 1883, 10 R. 705). Where a consignee who had so many days to unload, chose to start unloading at 12 noon: held that that day must be included as one whole day (*Hough*, 1879, 6 R. 961). It would appear that the first day is included where the party begins to have the benefit on that day. Thus where a return ticket is valid for so many days, the day of issue would be computed. By sec. 36 (2) of Interpretation Act, 1889, where an Act, passed after this Act or any Order in Council, order, warrant, scheme, letters-patent, rules, regulations, bye-laws, made, granted, or issued under a power conferred by any such Act, is expressed to come into operation ON a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day (compare *Mayor of Sheffield, ut supra*). In removings under Act 1555, c. 39, the day upon which warnings are executed is held to be one of the 40 required by law (*Buccleugh*, 1715, M. 13836). The wording of sec. 29 of the Act 16 & 17 Vict. c. 80 is different: there the words are "an interval of *at least* 40 days," and it would seem that under this Act 40 clear days' notice would have to be given.

DOES TIME RUN ON CONTINUOUSLY.—Time, once running, does not as a rule stop. But he who is losing a right ought to be legally capable of asserting it. And so, under most prescriptions, time does not run during the time of minority. A creditor will not lose his right if he has not been able to assert it owing to the action of the debtor (*Fannin*, 7 Q. B. 811). Sundays are reckoned, as a rule, except a Sunday which is the last day (*Hutton*, 1883, 10 R. (J. C.) 60). But if mere notice be required, then it must be given on Sunday or before, unless there is some co-operation on the part of the receiver necessary to make notice effectual (*M'Vean*, 1896, 23 R. (J. C.) 25). Under Bills of Exchange Act, 1882, s. 92, where the time limited for doing any act is less than 3 days, in reckoning time non-business days are excluded. These are Sunday, Good Friday, Christmas Day, Bank holiday, Public fast or Thanksgiving day.

WHEN DOES TIME STOP?—On the expiry of a month, a calendar month is meant (Interpretation Act, 1889; see also *Campbell's Trs.*, 1880, 8 R. 21, and dicta of Ld. Young there). The period of one month, therefore, never runs

into the third month. One month from 28th, 29th, 30th, and 31st March would be the 28th of February. Running days are not periods of 24 hours, but calendar days ("*Katey*," 1895, 71 L. T. 709; see also *Allen*, 19 R. 364, as to Ld. M'Laren's dicta on this point).

1. *Last Day included.*—Where the first day has been excluded, then, as a rule, the last day is included. But the computation of this last day receives different meanings.

(*a*) In some cases the maxim *Dies inceptus pro completo habetur* applies; and although the last day is included in calculation, it is held as completed at the first moment of the day. In the acquisition of rights, the dawn of last day is regarded as completing time (*Dig.* 44. 7. 6; Bell's *Prin.* s. 46, Guthrie's Note L.). Where a party has presumption in his favour, *i.e.*, *in favoribilibus*, then the maxim applies (*Thomson*, 1878, 5 R. 561). Illustrations of the rule: Under Act of Grace 1696, c. 32, for the liberation of debtors after 10 days. An imprisoned debtor was freed at commencement of the day when the 10 days did not expire till 6.40 p.m. (*Thomson, ut supra*; *Blair*, 1704, M. 3468; *Hood*, 14 Dec. 1813, F. C.; *Gibb*, 1833, 2 S. 28; but see *Migotti*, 1879, 4 C. P. D. 233, where same result arrived at by including first day in calculation). The 60 days under Acts 1696, c. 4, and 1696, c. 5, are complete on the morning of the sixtieth day, so that any deed executed on sixtieth day would be valid (*Ogilvie*, *Mitchell*, *Blaikie*, *Anderson*, and *Scott*, *ut supra*). Sec. 12 of the Bankruptcy Act of 1856 provides as to the equalisation of diligences "within" 60 days prior to bankruptcy. According to the ratio of the above decision, those using diligence on the sixtieth day would make good their preferences. Goudy on *Bankruptcy*, p. 83, says that such diligences executed on the sixtieth day are not preferred. Sec. 108 of Bankruptcy Act cuts down diligences "on" or "after" the sixtieth day prior to sequestration. The expression "on" makes it plain that diligences executed on the sixtieth day before sequestration can be cut down. Where two persons domiciled in England arrived in Scotland about 4 a.m. of 1st July. They remained there until 21st following, and on that day, between 11 and 12 a.m., contracted marriage. It was held that they had not lived in Scotland 21 days (*Lawford*, 1878, 4 P. D. 61). The actual time they stayed was about 20 days 7 hours, calculating *de momento in momentum*. Had they stayed in Scotland for 20 days 20 hours, the marriage would have been legal. For the first day of 20 hours is excluded, and at 12 midnight on the 21st, 20 days would have been complete. Immediately thereafter they would have acquired the 21 days' residence according to the maxim *Dies inceptus pro completo habetur*.

(*b*) *Certain Periods expire before the Conclusion of the Last Day.*—Up to what time can a valid delivery be made? "Where a thing is to be done anywhere, a tender at a convenient time before midnight is sufficient; where the thing is to be done at a particular place, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight and at a convenient time before sunset" (Benjamin on *Sale*, 687 *et seq.*). Defences are lodged timeously on a certain day, if lodged at any time during that Court day (*M'Kenzie*, 1894, 22 R. 45).

(*c*) *Time expires at Midnight on the Last Day.*—This is *primâ facie* the method of calculating a day inclusive. Where rights are to be lost, then rights are not to be extinguished until the conclusion of last day (*Dig.* 44. 7. 6; see also *Thomson, ut supra*). Day on which act is to be done, or until which some act is prohibited or protection afforded, is *included* in calculation (*Backhouse*, 28 L. J. Ex. 141). An act "within one month from 10th May," is good at any time on 10th June (*Watson*, 1809, 2 Camp. 294; see also *South Stafford-*

shire Tramways, ut supra). Where insurance was for six months from 14th February, it was held that the first day was excluded, and that insurance extended over the whole of 14th August (*Isaacs*, 1870, L. R. 5 Ex. 296). Prescription may be interrupted at any time on the last day (Ersk. iii. 7. 30).

But it is not sufficient, where notice has to be given on a certain day, if it is posted but could not possibly reach its destination on that day (*Neilson*, 1891, 19 R. 301; but see *Charleson*, 1881, 8 R. (J. C.) 34, and *M'Vean, ut supra*). As to case where it was possible for notice to have reached destination on due date, but did not—*Neilson, ut supra*; Interpretation Act, 1889, s. 26.

2. *Last Day excluded.*—Where so many clear days are given to do something, both the first day and last are excluded. Thus if 8 clear days are given from 1st January to do a certain thing, it might be done at any time on 10th. See also *Wilson* and *in re Sleepers Supply Company, ut supra*. Under sec. 119 of Titles to Land Consolidation (Scotland) Act, 1868, the sale cannot take place till full 6 weeks, or 42 days, have elapsed (*Ferguson*, 1895, 22 R. 643). Where, however, something is prohibited after 8 free days, then the fair meaning would be that it could not be done after the end of the ninth day.

Under this head the cases where not only the last day but many days may be excluded from the computation may be discussed. These cases are all based on special circumstances. A few illustrations will best explain the rule. Where money has not been timeously lodged owing to circumstances for which the debtor is not responsible, the time will be extended (*Niddrie*, 1895, 22 R. 413). The Sheriff Court Act, 1876, s. 16, requires defender to lodge notice of appearance before expiration of *inducia*. Where it was impossible to enter appearance at the expiry of *inducia* owing to local holiday, appearance was timeously entered on the next day (*M'Kenzie, ut supra*, and *Husband*, 1874, 2 R. 82). Where annual close time expires during time of weekly close time, then there is excluded from the calculation of the 168 days the period still to run of the weekly close time (*Custar*, 1878, 5 R. (J. C.) 36). Time expired on 23rd of month, on which day Court was closed and remained closed till 28th: held that good delivery on 28th (*M'Kibbin*, 1894, 2 Ir. 654). For the most part, extensions of time in Court procedure are provided for by statute and Acts of Sederunt (see Court of Session Act, 1868, ss. 22 and 93, etc.).

See DAY; MONTH; PRESCRIPTION; BILLS OF EXCHANGE; Bell's *Prin.* s. 146; Lindley, *Introduction to Study of Jurisprudence*.

Tinsel of Superiority is the forfeiture, either permanently or temporarily, of all, or some, of the rights of superiority. It was introduced by 1474, c. 57, to enable vassals who were unable to obtain an entry with their superior owing to his title being incomplete, to force an entry.

Under the provisions of that statute a vassal might charge an unentered superior to complete his title within forty days, under certification that if he failed to do so he would "tyne his superiority." On expiry of the charge the vassal required to raise a declarator of tinsel of the feu, and on getting decree, might obtain an entry from the next over-superior. The recalcitrant superior lost his right to any casualties which might accrue during the lifetime of the vassal, but his right to the annual feu-duty remained unaffected (Stair, ii. 328; Ersk. ii. 7. 9; *Dickson*, 1802, Mor. 15024; *Spalding*, 1709, Mor. 15033; *Christie*, 1776, 5 B. Sup. 608; *Rossmore*, 1877, 5 R. 201).

A simpler and more effective method of procedure was introduced by

the Lands Transference Act, 1847, and the Titles to Land Act, 1858, consolidated by 31 & 32 Vict. c. 101, ss. 104–112. Provision was made for the permanent, or temporary, forfeiture of the superiority, according as the *reddendo* did or did not exceed £5, in the event of the superior failing to complete his title; but it is unnecessary to enter into detail, since a vassal can now obtain a complete title even though the superior's title is incomplete (37 & 38 Vict. c. 94, s. 4 (2)).

[Menzies, *Lectures on Conveyancing*, 820; Bell, *Lectures on Conveyancing*, 789.]

Tinsel of the Feu.—Tinsel, or loss of the feu, is a penalty which may be incurred by a vassal in the event of his failing to perform an essential condition of his grant. The penalty is imposed by law (1597, c. 250) in the event of a vassal failing to pay his feu-duty for two years whole and together, and in accordance with the principles of contract, if a vassal fails to implement a real condition of the grant, fenced by an irritant clause. See IRRITANCIES, LEGAL AND CONVENTIONAL, secs. 1 and 5.

Title to Exclude; Exclusive Title.—A title to exclude is a defence competent in actions of reduction and reduction improbation, which excludes the pursuer's title to sue. Prior to the Judicature Act it had to be stated, and perhaps, strictly speaking, it still ought to be stated, as a dilatory or preliminary defence to satisfying the production. When so stated and sustained, the action is dismissed. When so stated and repelled, the production must be satisfied. These interlocutors can be reclaimed against; but in the latter case the defender must give notice of his intention to reclaim, in order that the expenses of the preliminary discussion may be disposed of by the Lord Ordinary. In cases, on the other hand, where the pursuer's title, though objectionable, yet does not entitle the defender to refuse to satisfy the production, it may now, on cause shown and under reservation of its effect as a dilatory plea, be stated as a defence on the merits. This latter course is quite competent in most cases, and is now the one that is usually followed; but if it cause expense which would have been saved if the action had been thrown out on the dilatory defence of an exclusive title, the defender may be found liable in the expense so caused (Court of Session Act, 1850, s. 7; A. S., 11th July 1828, s. 36; 6 Geo. IV. c. 120, s. 5; *United College of St. Andrews*, 1864, 2 M. 810; *Macintosh*, 1868, 6 M. (H. L.) 141).

In itself a title to exclude is a title preferable to that of the pursuer, and one which stands even though the one the pursuer seeks to reduce is bad. In other words, it is one founded upon rights in the person of the defender standing upon independent title (per Ld. Justice-Clerk in *E. Perth*, *infra*; E. iv. 1. 23).

Thus under the former law an heir who had been excluded from the succession by an irrevocable deed executed while the granter was *in liege poustie*, was barred from reducing any subsequent deed of such granter even though granted on deathbed, because he was excluded from the succession at least by the prior deed (E. iii. 8. 98). The following cases also illustrate the rule: *Robertson*, 1822, 1 S. 364; *Strathmore*, 1830, 8 S. 530; affd. 5 W. & S. 170; *Ker*, 1830, 8 S. 694; affd. 5 W. & S. 718. Again, a decree in favour of a party forms, unless it be itself reduced, either a title to exclude, or, as affording a plea of *res judicata* excludes the action (*Maule*, 1827, 5 S. 256). On the other hand, the deeds themselves brought under reduction cannot form a title to exclude (*Clark*, 1856, 18 D. 499); but the

defender in such an action may be able to have it sisted, to enable him to reduce the pursuer's title (*M'Kenzie*, 1823, 2 S. 181).

Again, in many cases it is a question of circumstances whether the defence is good. Thus a discharge of all claims under a deed may or may not, according to circumstances, give a title to exclude an action of reduction of that deed (*Crichton*, 1874, 1 R. 688; *Fraser*, 1882, 9 R. 1036).

Finally, when pleaded, the exclusive title must be exhibited (cf. *E. Perth*, 1869, 7 M. 642; affd. 9 M. (H. L.) 83; Mackay, *Manual*, 415–6).

Title to Sue and Defend.

I. Title to Sue.

A principle of universal application in the law of Scotland is that no man is bound to justify his actions or possessions to one who has no right or interest to question them (*Paterson*, 8 D. 752). In other words, every pursuer in an action must have both a title to sue, *i.e.* a formal right recognised in law, and also an interest to sue, *i.e.* a direct benefit (pecuniary or otherwise), to himself or, if he sues in a representative capacity, to those whom he represents, dependent on the success of the suit. Both interest and title are usually treated of under the head of title to sue.

The cases in which a pursuer with a good title to sue fails for want of sufficient interest are so few that they may be dismissed in a sentence or two at the outset. "We are not indeed bound to adjudicate *de lana caprina*; but if there be a pecuniary or patrimonial interest, however small, depending on the determination of the question, the parties have a right to invoke the aid of a Court of law to decide their difference" (per Ld. J.-Cl. Inglis in *Strang*, 2 M. at p. 1029). From this it is evident that a person with a title will not be barred from suing an action of strict law on the ground that his interest is too small. But he may not in such circumstances be entitled to the equitable remedies of the Court according to the maxim *De minimis non curat prætor* (Trayner's *Latin Maxims, sub voce* "*De minimis*," etc.). If a pursuer with a good title would by success in the action expose himself to claims by the defenders in the action for an amount as great as, or greater than, the sum sued for, he will be prevented from suing by want of interest, according to the maxim *Frustra petis quod mox es restituturus;* as, for example, cases in which the pursuer who made out his title to certain lands would take them under an obligation to convey them at once to the defenders (*Liquidators of City of Glasgow Bank*, 9 R. 535, per Ld. Pres. Inglis, at p. 586; *Burke & Carmichael*, 3 M. 799; *Smith*, 8 S. 553; *Steele*, 2 S. 146; *Robertson*, 1 S. 364; Shand's *Practice*, p. 139). The principle embodied in this maxim is illustrated in the plea of compensation or set-off (Trayner's *Latin Maxims*). As compensation can only be pleaded where there is a true *concursus debiti et crediti*, so, it is submitted, the maxim *Frustra petis quod mox es restituturus* only applies where the defender himself would be the claimant in the event of the pursuer succeeding. The maxim, therefore, has no application to riding claims in a multiplepoinding, and such cases as *Ker's Trs.* (5 M. 4) are erroneously referred to this maxim.

The cases in which the pursuer has sufficient interest but no title to sue are more numerous, and will be referred to in dealing with title. But probably the best illustration of this is the *Edinburgh United Breweries Ltd.*, 21 R. (H. L.) 10. The facts, shortly stated, are as follows:—A. sold a brewery to B. for £20,500; B. sold it to C. for £28,500. After about a year it was discovered that a clerk in A.'s employment had falsified the books for his own ends and outwith A.'s knowledge, to make the profits

appear greater than was the fact. C. and B. jointly sued A. for reduction of the contract of sale. No fraud on the part of A. was alleged. It was held that C., being no party to the contract between A. and B., had no title to sue for its reduction, however great an interest he might have; that B. having sold the subject at a profit, had no interest to have the contract reduced, unless the contract between C. and B. were reduced upon legal grounds; and that the two suing together had no better title than either separately. (See the opinion of Ld. Watson.)

The question of title is much more complex than the question of interest, and the solution varies so much with the circumstances and the nature of the action that it is impossible to lay down a rule applicable to all cases. Objections to title (apart from interest) may be divided into two great classes: (1) objections personal to the pursuer, and (2) objections arising out of the cause of action.

(1) Objections to the Title of Pursuer Personally.—(*a*) *Absolute Incapacity.*—Two classes known in the law of Scotland are not entitled to sue any action whatever, either directly or by another, viz. alien enemies and outlaws.

By "alien enemies" are meant the citizens of a foreign State at war with Great Britain. When an action was raised by such a pursuer, the Court were in use to sist procedure until a peace (*Carron*, 28 November 1809, F. C.; *Wright*, 17 January 1810, F. C. (footnote to *Carron*)). The rights of an alien to recover debts due to him before the war are only suspended, not forfeited, so the right revives with a peace (Bell's *Pr.* s. 2135). The assignee of an alien enemy has no better title to sue than his author (*Johnston & Wight*, 15 February 1809, F. C.). But the sovereign may grant a special licence to an alien to sue (*Carron*, 28 November 1809, F. C.).

As an alien, although friendly, is not capable of holding any public or political office, or of exercising the political franchise, or of owning a British vessel (Bell's *Pr.* 2135), he has no title to sue in reference to these matters. But while the States are at peace, he may now sue in all other respects as freely as a native. Aliens were formerly disqualified from holding heritage in Scotland, but as that disqualification is now removed, no more need be said on this subject (see 33 & 34 Vict. c. 14, repealing 7 & 8 Vict. c. 66). On the subject generally, see Alien; Shipping; and Franchise.

When a person who is accused of crime cannot be found, and will not voluntarily yield himself up to justice, sentence of outlawry may be pronounced against him (*Monson*, 21 R. (Just.) 5). Such an one having declined to submit to the jurisdiction of the Court, has of course no title to invoke the aid of the Court for any purpose. He has therefore no title to sue or defend, and counsel will not even be heard on his behalf (*Cheyne & Mackersy*, 6 S. 1061; *Marshall*, 13 S. 179; in *Cheyne & Mackersy* it was stated that decree in absence would be given against the outlaw; but in the earlier case of *Crombie*, M. 10162, the Court, while refusing to hear counsel on behalf of an outlaw who was being sued civilly, made the pursuer prove her case before giving judgment in her favour). When an outlaw obtains relaxation of the sentence of outlawry by submitting to the Court, his title to sue revives (Stair, iv. 47. 11; *Black*, 4 S. 124).

Convicts under sentence of death are sometimes mentioned as a class who are personally disqualified from suing. But as this disqualification only extends to actions relating to property which has been escheat to the Crown, the more correct view appears to be that this is an example of want of interest (see Mackay's *Manual of Practice*, p. 142).

Obviously a party whose whole existence is in violation of the law may

not sue in its Courts. Thus a company formed for gain and consisting of more than twenty members (or of more than ten if the company's business be banking) requires by law to be registered under the Companies Act, 1862 (25 & 26 Vict. c. 89, s. 4). Such a company, not registered, would not be entitled to sue until the law was complied with (*Findlay*, 13 R. (J. C.) 53, per Ld. J.-Cl. Moncreiff).

A pupil with a guardian or tutor has no capacity to sue any action, except against such guardian or tutor (Bell's *Prin.* s. 2067; Erskine, i. 7 14; Shand's *Practice*, 140; *Keiths*, 15 S. 116). Where the pupil has either no guardian or the guardian has an adverse interest, the action is raised in name of the pupil, and when it comes into Court a tutor *ad litem* will be appointed (*Ross*, 5 R. 182; *Boyie*, 3 D. 309; *Macneil*, M. 16384). See further, PUPIL, where this subject is fully and ably treated.

Fatuous and Insane Persons are in much the same position as pupils. They are unable to sue in their own names, and the action is either raised in name of the tutor-at-law or *curator bonis*, or else a *curator bonis* is appointed (Bell's *Prin.* 2103 *et seq.*; *Reid*, 1 D. 400; *Wallace*, 9 S. 40). A charge given in the name of the ward directing the debtor to pay to the *curator bonis* of the insane creditor was sustained (*Yule*, 19 R. 167). See INSANE; JUDICIAL FACTOR; TUTOR-AT-LAW.

(*b*) *Persons who are Incapable of Suing without Consent.*—These are principally of two classes, wives under coverture and minors. A wife cannot sue at common law without the consent of her husband as her administrator-at-law (*Wilkinson*, 8 R. 72; *Laird*, 12 S. 54). But where the husband is unable or unwilling to concur, the Court may appoint a curator *ad litem* (Ersk. i. 6. 21). Where the husband's *jus mariti* and right of administration both remain, the wife has no title to sue without her husband's concurrence, but the husband may sue alone and against the wishes of his wife (*Ferguson*, 4 R. 393; *MacDougal*, 20 D. 658). But before the *jus mariti* could attach, the property had to vest in the wife, and therefore a husband without consent of his wife could not sue a reduction of her father's will (*Aitkins*, 1802, M. 16140). By the Conjugal Rights Act, 1861 (24 & 25 Vict. c. 86, s. 16), the husband is declared not entitled to claim property falling to the wife by succession or donation, "except on the condition of making therefrom a reasonable provision for the support and maintenance of the wife, if a claim therefor be made on her behalf" before the husband has obtained complete possession.

Where the *jus mariti* but not the right of administration is excluded, the wife cannot sue without the husband's consent (*Wight*, 5 S. 549; *Borthwick*, 5 S. 242). But if his consent be unreasonably refused, the Court may appoint a curator *ad litem* (*Cullen*, 9 S. 31; affd. 6 W. & S. 566; *Blair*, 8 S. 264). When the husband was undergoing penal servitude, the same course was followed (*Bain*, 11 S. 688).

The wife's heritage was a subject over which the *jus mariti* never extended. But the rents of the heritage fell under the *jus mariti*; and accordingly, while the husband was entitled to sue for the rents of property vested in his wife, he could not sue or compel her to sue for the fee of the heritage (*Aitkins*, 1802, M. 16140). See MARRIED WOMAN and ADMINISTRATION, HUSBAND'S RIGHT OF.

These things have been altered by the Married Women's Property (Scotland) Act, 1881 (44 & 45 Vict. c. 21). That Act provides that in the case of marriages taking place after the date of the passing of the Act, *jus mariti* shall be excluded from the wife's moveables, and from the rents of her heritage; and in the case of marriages which were existing at the date

of the Act, the husband's *jus mariti* was excluded from property acquired by the wife subsequent to the passing of the Act. See MARRIED WOMEN'S PROPERTY ACT, 1881; CONJUGAL RIGHTS (SCOTLAND) AMENDMENT ACT, 1861; MARRIED WOMAN.

When the husband of a married woman had gone abroad and not been heard of for several years, the Court has recognised the wife's title to sue alone for aliment of an illegitimate child (*M'Quillan*, 19 R. 375). This case, however, seems in direct conflict with the case of *Wilkinson* (8 R. 72) above quoted, and on principle, if not expediency, the earlier case seems the sounder. Until the subject is again before the Inner House, no hard and fast rule can be laid down (cf. *Skinner*, 7 S. L. R. 397). Where a married woman, with the consent of her husband, sued for damages for the death of their son, it was held that the wife had no title to sue until her husband had renounced his primary claim (*Whitehead*, 20 R. 1045). Similarly, a joint action by husband and wife for reparation for the death of their child is incompetent (*Bell*, 4 S. L. T. 252).

A wife can sue alone in regard to all property from which the husband's right of administration and *jus mariti* have both been excluded (*Primrose*, 12 D. 917; *Waddell*, 16 S. 79; *Graham*, 9 S. 543). A wife can also sue alone in cases where the husband's interest is adverse, as in cases of divorce, separation, or implement of marriage-contract provisions (*M'Farlane*, 9 D. 793; *Paterson*, 11 D. 421; *M'Naughton*, 12 D. 703; *A. B.*, 15 D. 431; *Wishart*, 7 D. 125; *Smith*, 4 M. 279). After a divorce or judicial separation, or a protection order under the after-mentioned Act, a wife may sue without the consent of her husband (Conjugal Rights (Scotland) Amendment Act, 1861 (*q.v.*) (24 & 25 Vict. c. 86, ss. 5 and 6)).

Minors may not sue without the consent of their curators; and if the curators refuse to consent, or if the action be against them, or if the minor have no curator, the summons will be raised in the name of the minor, and a *curator ad litem* appointed when the case comes into Court (Shand's *Practice*, p. 141; *M'Conochie*, 9 D. 791). But the effect of a minor suing without curators is not to render the whole proceedings null, but merely to render the decree liable to reduction on the ground of lesion within the *quadriennium utile*. "A minor may do a great many things without his curator, and a minor who has no curator may do a great many things subject only to this condition, that the minor is entitled to have what he has done set aside within the *quadriennium utile* on the ground of lesion; and I do not doubt that judicial proceedings, like other actings by a minor, may be set aside *ex capite lesionis* within the *quadriennium utile*" (Ld. Pres. Inglis in *Cunningham*, 7 R. 424). It thus appears that the appointment of a *curator ad litem* to a minor is rather in the interest of his opponent than in his own (Shand's *Practice*, p. 142; *Hay*, Mor. 8973). See further on this subject *sub voce* MINOR.

(*e*) *Persons under Trust.*—By the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79, s. 73), the trustee on a sequestrated estate may sue all actions relating to the property of the bankrupt exactly as the bankrupt himself might have done prior to his sequestration. The general rule, therefore, is that the bankrupt has no title to sue any action which the trustee is willing to sue; and this was also the case under the former Bankruptcy Statutes (Goudy on *Bankruptcy*, p. 378; Bell's *Com.*, 5th ed., ii. 414). But where a trustee refuses to prosecute a claim, the bankrupt, on finding caution for expenses (*Cooper*, 20 R. 920, per Ld. M'Laren, p. 922; *Dunsmac's Trs.*, 19 R. 4; *Horn*, 10 M. 295), may sue in his own name, provided always that there is such a prospect of a reversion going to the

bankrupt as to give him a title and interest to sue (*Whyte*, 17 R. 895). As the bankrupt has no title to sue on behalf of the creditors (per Ld. Shand in *Whyte*, 17 R. at p. 902), his only right to sue must be derived from his reversionary interest. The trustee's right to recover the estate of the bankrupt extends even to recovering damages for personal injuries sustained by the bankrupt (*Thom*, 19 D. 721). But of course in all cases in which the direct interest is not pecuniary, the trustee has no title to sue. Thus the bankrupt's right to sue a divorce, or to concur in an action as administrator of his wife where his own *jus mariti* is excluded (*Horn*, 10 M. 295), and, in a word, to sue any action in which his creditors have no interest or only a secondary interest, remains unaltered. This leaves it in the discretion of a bankrupt whether he will sue for divorce, or even whether, if a woman, she will raise an action of damages for breach of promise, though in both these instances the creditors might indirectly have an interest in the result of the suit. So also the bankrupt alone can sue for damages for defamation (per Ld. J.-Cl. Hope in *Thom*, 19 D. 721), though the damages, if awarded, would go to the creditors (*Jackson*, 3 R. 130). After a bankrupt has obtained his discharge, his right to sue without finding caution revives fully (*Cooper*, 20 R. 920), and this right revives without the necessity for retrocession (per Ld. Watson in *Whyte*, 18 R. (H. L.) 37). Any creditor of a bankrupt is entitled to reduce an illegal preference granted in violation of the Act 1696, c. 5, but he is not entitled to recover the subject either for himself or for the other creditors (*M'Laren's Tr.*, 24 R. 920; *Cook*, 23 R. 925; *Brown & Co.*, 18 R. 311; *Smith & Co.*, 16 R. 392). But a trustee under a voluntary trust deed for creditors has no title to reduce (*M'Laren's Tr., supra*). The trustee in a sequestration, or his equivalent in a foreign sequestration, may reduce a discharge of legitim granted in fraud of creditors (*Obers*, 24 R. 719). See *supra*, SEQUESTRATION.

A trustee in a *cessio bonorum* may sue generally such actions as a trustee in a sequestration may sue (*Henderson*, 16 R. 341). But see CESSIO. And the liquidator of a limited company is in the same position. See JOINT STOCK COMPANY.

A creditor of the bankrupt has no title to sue the bankrupt's debtors, that right being exclusively in the trustee or assignee of the bankrupt (*Henderson*, 16 R. 341; *Gill's Trustees*, 16 R. 403).

A company formed for the purpose of realising the assets of a banking company in liquidation was held to have a good title to sue for reduction of a discharge granted to a contributory on a compromise, although such claim was not expressly assigned (*Assets Co. Ltd.*, 24 R. 418).

Similarly, the title to recover debts due to a person deceased is not in his general legatees, but in his executors. "By our law, if a man in this country executes a testament and leaves general legacies, his general legatees have no action against the debtors of the deceased, for they are not debtors to the legatees, but to the executors of the deceased, and it is against the executors that the general legatees must bring their action. Where a special legacy is left, the legatee is in a different situation. He may bring his action directly against the holder of the subject specially bequeathed, provided he makes the executor a party to the action" (per Ld. Corehouse in *Young*, 16 S. 572; *Peock*, 2 S. 769; and *Hinton*, 10 R. 1110, where it was held that a general *residuary* legatee, who has taken no steps to vest the debt in himself, has no title to sue a debtor of the testator). A decree obtained by one who, though possessing the character of apparent heir, sued solely as executor of the deceased, was reduced on the ground that he had produced no nomination as executor,

or decree-dative or similar title. Ld. J.-Cl. Inglis said that though in practice an executor-nominate may sue before obtaining confirmation, if he expede confirmation before extracting the decree, he knew of no authority and could see no principle for holding that a party can sue as executor before obtaining any title as such (*Malcolm*, 5 M. 18). The distinction is that an existing title may be formally completed in the course of the action, but a title non-existent at the commencement of the action (see SUMMONS) cannot be supplied during its course (see Ld. Adam in *Symington*, 21 R. 434). Persons nominated as trustees of a charitable bequest have no title to present a petition for approval of a scheme before accepting office as trustees (*Watt*, 23 R. 33).

It will be noticed that these cases are examples of persons having an *interest* but no *title* to sue. There is neither title nor interest in a member of a class from which the beneficiary is to be selected by the executors. Thus where a bursary is to be given to such member of a defined class as may be selected by the trustees or by examination, a rejected candidate has no title to sue for reduction of the award, or for damages, even on the ground that the successful candidate did not belong to the favoured class (*M'Donald*, 17 R. 951; *Martin*, 13 R. 274; *Ramsay*, 22 D. 1328; affd. 23 D. (H. L.) 8). An apparent exception is to be found in the case of *Ross*, 5 D. 589, in which the Court of Session found that a boy, admittedly eligible for Heriot's Hospital, who had been rejected by the governors, had a title to sue them (see per Ld. Cuninghame at p. 609). But in that case the averments were that there were more vacancies than candidates eligible at the time pursuer was rejected; and as the *ratio* of the other cases is the uncertainty of the pursuer's election, these averments may reconcile the decisions. The case of *Ross* was subsequently reversed on another point (5 Bell's Appeals, 37). Again, several old women of a class from which annuitants were to be selected under a will, were held to have no title to sue for reduction of a subsequent will revoking the first. The ground of the decision was that they were not the representatives of the testator (*Addison*, 8 M. 909). Contrast with this case *Duncan* (20 R. 200), in which a beneficiary *nominatim* was held entitled to reduce a subsequent will. The whole or a majority of the trustees under a former will might of course sue a reduction of a subsequent will (*Duncan*, *supra*; *Gilchrist*, 18 R. 599).

An executor can in general sue any action which the deceased himself could have sued. The exceptions are principally questions of *status* and cases to which the maxim *Actio personalis moritur cum persona* applies. Thus an executor cannot sue a declarator of marriage, or carry on such an action raised by the deceased, though he may prosecute an alternative conclusion for damages for breach of promise of marriage (*Green or Borthwick*, 24 R. 211). But a surviving party may sue for declarator of marriage, calling as defenders the representatives of the deceased (*Scealcs*, 4 M. 300; but see *infra*, p. 276). The executor of a deceased person cannot sue for damages for personal injuries sustained by the deceased (*Bern's Executor*, 20 R. 859). But he may follow out an action which the deceased has commenced (*Neilson*, 16 D. 325; *Darling*, 19 R. (H. L.) 31). *Auld*, 2 R. 191, was a case in which an executrix was held entitled to sue, but, as pointed out by Ld. M'Laren in *Bern's Executor*, *supra*, there were averments of patrimonial loss there which make the case in some degree special. A landlord in possession is the proper person to sue for rent falling due during his possession, though he may have to account for it to the executor of his predecessor (*Lennox*, 21 R. 77).

Members of the Public.—In questions affecting the public generally, any

member of the public has a title to sue. Thus any member of the public may sue for removal of a nuisance (*Ogston*, 24 R. (H. L.) 8; *Potts*, 8 M. 1064); for declarator of right to use a public market (*Mags. of Edinburgh*, 13 R. (H. L.) 78); and for declarator of public right of way (*Jenkins*, 7 M. 739). A limited company formed for the purpose of vindicating public rights of way has a title to sue such actions (*Macfie*, 11 R. 1094). Ld. Low, Ordinary, held that a railway company had no title to sue for declarator of a public right of way, that being no part of its business (*Parkyard Co. Ltd.*, 24 R. 1148). But this seems doubtful, and in the Inner House approval was expressly withheld (see p. 1156). A member of the public has been held entitled to complain of a breach of a local Tramway Act, without averring special damage (*Adamson*, 10 M. 533). A ratepayer in a burgh has a title under the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55, s. 67), to petition the Sheriff for correction of a faulty method of keeping the burgh accounts, without averring personal hardship (*Heddle*, 25 R. 801). Ratepayers are entitled to reduce the return of an election of members of the School Board (*Duncan*, 19 R. 594); and a publican may sue for declarator of the meaning of a local Act said to affect his licence (*Tennent*, 21 R. 735); and public bodies have frequently statutory power to sue in particular actions, *e.g.* the Act 32 & 33 Vict. c. 6, s. 18, gives a power to the Ferguson Bequest Fund (incorporated by that Act) to apply to the Court for directions in cases of difficulty ("*The Ferguson Bequest Fund*" case, 6 R. 486; *ib.*, 36 S. L. R. 157). The Roads and Bridges (Scotland) Act, 1878 (41 & 42 Vict. c. 51, s. 124), enacts that all penalties under the Act may be recovered "at the instance of the procurator-fiscal, or of the clerk of the trustees, or of the clerk of the burgh local authority, as the case may be." And the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50, s. 94), enacts that any offence against the Act may be prosecuted, and any fine or penalty recovered, at the instance of the procurator-fiscal of Court, or of the county clerk. At common law it was held in 1886 that county road trustees, incorporated under a local Act, had a good title to sue for removal of a barbed wire fence near a public road, "upon the general rule of law that trustees always have a good title to defend the subject of their trust" (*Elgin County Road Trustees*, 14 R. 48, per Ld. Pres. Inglis at p. 51). This rule of law covers the case of all public or municipal bodies charged with the performance of a duty where the remedy or the mode of enforcing it is not otherwise specially declared in the Act creating the duty (*N. B. Railway Co.*, 13 R. (H. L.) 37; *Tay District Fishery Board*, 15 R. 40). A few miscellaneous cases which lay down no general rule are noted: *Kelso District Committee*, 3 White, 94; *Forrest's Trs.*, 11 R. 719; *Mags. of Kilmarnock*, 7 M. 548; *Chisholm*, 1 R. 389; *Mags. of Aberdeen*, 4 R. (H. L.) 48.

(2) Objections to Title to Sue arising from the Cause of Action.—(*a*) *Contract.*—The general rule is that no person has a title to sue on a contract to which he is not a party, or the proper representative of a party (*Tayport Land Co.*, 23 R. 287; *Edinburgh United Breweries Ltd.*, 21 R. (H. L.) 10). A passenger on a railway having been accidentally killed, his sisters sued the company for reparation, founding on the railway company's contract with the deceased to carry him safely, and alleging that the deceased was their sole supporter. *Held*, that as collaterals they had no title to sue (*Eisten*, 8 M. 980). Thus the beneficiaries under a trust have no title to sue the law agents employed by the trustees for damages resulting from bad advice given by them, as there is no privity of contract between the beneficiaries and the law agents (*Rees*, 16 R.

(H. L.) 31); nor can the beneficiaries under any testamentary deed sue the law agent of the testator for failure to carry out any provision (*Williamson*, 14 R. 720). Where a person during his lifetime purchased a house, directing the title to be taken in his nephew's name, and employed a law agent to revise the disposition in the nephew's interest, the nephew had no title to sue that agent for failure to discharge the duty properly (*Tully*, 19 R. 65). On the same principle it was held by a majority of the Second Division, that the trustees of a chapel of ease had no title to sue for a contribution to the endowment fund promised to the minister in a private letter on which they founded. Ld. Young dissented from this ground of judgment (*Cambuslang West Church Committee*, 25 R. 322). Again, an employer contracted with A. to build certain mason work, and with B. to erect the necessary scaffolding. The scaffolding gave way, and some of A.'s workmen were injured. A., having paid compensation to the injured workmen, sued B. for relief. Held by Ld. Kyllachy (Ordinary) and Ld. M'Laren that A., not having contracted with B., had no title to sue him (*Gardiner*, 22 R. 100; *Campbell*, 19 R. 282). A purchaser of an unfinished ship from the builders has no title to recover damages for delay from the engineer with whom the builders had contracted to supply the engines by a certain date (*Blumer & Co.*, 1 R. 379). The purchasers of a company business undertook "to pay and discharge all the present and future liabilities of the vendors in connection with the business." Founding on this clause, a person who averred that he had been defamed by the vendors sued the purchasers for damages. Held that the pursuer was not a party to the agreement, and had no *jus quæsitum* under it, and therefore had no title to sue (*Henderson*, 22 R. 51).

This brings us to consider the qualification of the strict rule that no one except parties to the contract may sue under it, in favour of third parties who have a *jus quæsitum*. A person may on this principle sue under a contract to which he was not a party, if such contract was made on his behalf or directly for his benefit, and this whether he is named in the deed or not. Thus an association of underwriters required, on the admission of new members, a guarantee for underwriting obligations to be undertaken by them. The guarantee was addressed to the secretary of the association. Held that a person insured by such new member subsequently had a *jus quæsitum* under the guarantee and might sue the guarantor under it (*Rose, Murison, & Thomson*, 16 R. 1132, per Ld. Kyllachy, O. H.). It is a well-established rule in marine insurance that if the same person insure the same subject against the same risk with two or more offices, and recover from one of the offices the whole damage, the office paying may sue the other insurers for a rateable contribution (*Newby*, 1 Wm. Blackstone, 416, per Mansfield, C. J.; *Lucas*, 6 Cow. 635; Parson's *Marine Insur.* ii. 468). This principle of contribution, which practically is the same as *jus quæsitum*, was applied to fire insurance in certain *obiter dicta* in *North British & Mercantile Insur. Co.* (5 Ch. D. 569, see particularly Mellish, L. J., at p. 583). This case was followed by Ld. Low, and the title of one insurance company to sue another sustained, in *Sickness & Accident Insur. Assn. Ltd.* (19 R. 977). But it is otherwise where the insurer, having paid the loss, seeks to recover what he has paid from the person whose fault caused the loss. "I know of no foundation for the right of underwriters except the well-known principle of law that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for

the loss. It is on this principle that the underwriter . . can assert any right which the owner of the ship might have asserted against the wrong-doer for damage for the act which has caused the loss. But this right of action they must assert not in their own name but in the name of the person insured" (per Ld. Chan. Cairns in *Simpson & Co*, 5 R. (H. L.) 40). Accordingly, when a collision occurs between two ships belonging to the same owner, the insurers cannot claim on the fund appointed to pay damages (*ib.*). But a person whose property is injured through another's fault is not deprived of his right to sue because his property is fully insured (*Port Glasgow & Newark Sailcloth Co.*, 19 R. 608).

In marriage contracts a destination in favour of the issue of the marriage may confer on such issue a *jus quæsitum* which will entitle them to sue under the contract. The existence of this right is to be gathered from the terms of the deed (*M'Donald*, 20 R. (H. L.) 88; *Hughes*, 19 R. (H. L.) 33; *Gillon's Trs.*, 17 R. 435; *Allan*, 8 M. 34; *Earl of Glasgow's Trustee*, 11 M. 218).

It is customary to insert in building feus clauses restricting the character of the buildings to be erected and the uses to which they may be put. These restrictions may be made enforceable not only by the superior but also by the adjoining feuars; that is to say, a *jus quæsitum* may be conferred on the adjoining feuars. This may be done in one of two ways, either (1) where the superior feus out his land in separate lots for the erection of houses in streets or squares upon a uniform plan which is referred to in each of the feu-charters; or (2) where the superior feus out a considerable area with a view to its being subdivided and built upon, without prescribing any definite plan, but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions to be granted by him (per Ld. Watson in *Hislop*, 8 R. (H. L.) 95, at p. 103). In both these cases the feuar is presumed to consent to the restrictions being enforced against him by his neighbours in return for the right to enforce the restrictions against them. *M'Gibbon*, 9 M. 423, is an example of the first category, and *Robertson*, 1 R. 1213, is an example of the second. Other cases which may be referred to are: *Johnston*, 24 R. 1061; *Dalrymple*, 5 R. 847; *Ewing*, 5 R. 439; *Beattie*, 3 R. 634; *Alexander*, 9 M. 599; *Guthrie*, 9 M. 544; *M'Neill*, 8 M. 520; *Gould*, 8 M. 165; *Glasgow Jute Co.*, 8 M. 93. See JUS QUÆSITUM TERTIO and JUS TERTII.

Somewhat resembling the case of *jus quæsitum* is the right of a principal to sue for fulfilment of a contract made for him by his agent. The rules in reference to this are concisely stated by Ld. M'Laren in *Bennett*, 18 R. 975: "Supposing the parties were within the jurisdiction, I apprehend there can be no doubt that a seller to the agent of an undisclosed principal, when he comes to know the name of the principal, may elect to sue the principal for the price. But if he takes advantage of this right, he is disabled from maintaining any plea that would alter the relations of the principal and the agent to the disadvantage of the principal. . . .

"A corresponding rule exists that a principal, if he has occasion to sue for fulfilment of a contract, may come forward and disclose himself, and may sue the other party in his own name. But he also, if he elects to sue in his own name, will be affected by any counter claims that might have been pleaded against his agent. . . .

"If the seller knew who the principal was from the beginning, the election is held to be made at the time of making the contract, because the seller is bound to elect whom he is to take as his debtor as soon as he comes to know who is the principal to whom the goods are sold."

Ld. M'Laren goes on to say that where the principal is a foreign trader,

the presumption is that the commission merchant buys on his own account, but such presumption may be rebutted by evidence that he was truly an agent.

The selection having been made, the creditor may not sue the agent after having sued the principal, or *vice versâ*; and, similarly, the agent may not sue after his principal has sued, or *vice versâ* (*Thomson*, 2 Smith's *Leading Cases*, 368).

Where there is a disclosed principal, the agent in the ordinary case has no title to sue on the contract, the principal being the only person entitled to sue. But if the contract contains a clause expressly in favour of the agent, the agent has a title to sue for implement of that clause (*Levy & Co.*, 10 R. 1134; *Bonar*, 3 D. 830; *Fisher & Hepburn*, 6 S. 216).

There cannot be an agent for a non-existent company, and therefore a company has no title to sue on a contract made by an agent before it had come into existence (*Tinnevelly Sugar Refining Co. Ltd.*, 21 R. 1009). See 1 Bell's *Com.* 490 *et seq.*; *De Laurier*, 17 R. 167; *Millar*, 22 D. 833; *Paterson*, 2 Smith's *Leading Cases*, 355; *Addison*, 2 Smith's *L. C.* 361.

But an agent having made a contract for a principal containing a clause requiring the principal to sign a confirmation slip, and the principal having failed to sign such confirmation slip, it was held that the principal had no title to sue under the contract (*Ransohoff & Wissler*, 25 R. 284).

The rules of a provident society contained a clause referring to the decision of a committee of the society any dispute between a member, or a person claiming through a member, and the society. This clause was held not to oust the jurisdiction of the Court where the society disputed that pursuer was the representative of a deceased member. The pursuer's title to sue in the Court of Session was accordingly sustained (*Symington's Executor*, 21 R. 371). Compare with this the case of *Law*, 21 R. 1027, in which a contract, constituted by advertisement, was, to pay £100 "to the person whom the proprietors of *Tit-Bits* may decide to be the next of kin of anyone killed in a railway accident" if a copy of the paper was found on deceased. The decision of the proprietors was held to be a condition precedent, and accordingly one suing as next of kin was held to have no title to sue without producing a decision of the proprietors in his favour.

A shipmaster has a title to sue on a contract as representing the owners in a foreign country (*Larsen*, 20 R. 228).

(*b*) *Reparation.*—The question of title to sue in cases of reparation has been fully treated in the article on Reparation, which see.

(*c*) *Consistorial Actions, viz.* declarators of marriage, declarators of nullity of marriage, divorce, and separation and aliment. The general rule is that any such actions may only be raised or carried on during the subsistence of the marriage, and the title to sue is solely in the injured spouse (Stair, i. 4. 7; Ersk. i. 6. 43; Bell, *Prin.* 1524 and 1534; *A.* v. *B.*, 1 Spink, 12; *Ritchie*, 1 R. 826). A declarator of marriage, when not founded on promise *cum subsequente copula*, may be raised by the surviving spouse after the death of the predeceaser (Fraser on *Husband & Wife*, p. 1241; *Steuart*, 2 R. (H. L.) 80; *Scales*, 4 M. 300), and the marriage may be proved incidentally in an action where a third party has an interest in proving it, because such third party cannot raise a declarator (Fraser, *H. & W.* p. 1242; *Piric*, Hume, 248; *Dournie*, Hume, 251; *Rudland*, 16 Scot. Jur. 97). In *Borthwick*, 24 R. 211, conflicting opinions were expressed as to the right of an executor of a deceased woman to carry on an action of declarator of marriage instituted by the deceased during her life. As it was not necessary for the decision of the case, these *dicta* are *obiter*. But they are sufficient to show that the law cannot be regarded as settled.

Declarators of nullity of marriage on grounds other than incapacity of conjugal duties may be sued not only by the alleged spouses, but by others having an interest (Fraser, *H. & W.* p. 1244, and pp. 80–104; Bell, *Prin.* 1524).

An action for divorce is competent only to the injured spouse, and though instituted by him or her during life, many not be carried to a conclusion by his or her executors (Bell, *Prin.* 1534). But it is no exception to this, that the executors of a deceased pursuer may sist themselves to defend in a reclaiming note a decree obtained by the deceased in the Outer House (*Ritchie*, 1 R. 826) (*infra, Title to Defend*). It has been decided that the curator of an insane spouse has no title to sue an action of separation (*Thomson*, 14 R. 634); *à fortiori* he would have no title to raise an action of divorce (per Ld. Young, p. 636). From the opinions expressed and the grounds of the judgment, it would apparently make no difference though the lunatic had been cognosced.

As these actions are only competent to spouses, of course the title to sue depends on the subsistence of that relationship. It follows that a declarator of nullity of marriage is good defence to an action of divorce, as obviously a bond cannot be dissolved which never existed (*C. B.* v. *A. B.*, 12 R. (H. L.) 36). It also follows that a spouse who has been divorced cannot, after that decree has become final, raise an action for divorce against the pursuer in the former action. But until the decree has become final, the defender may raise a counter action, or reclaim in the first action though he has not lodged defences (*Ross*, 24 R. 1029).

As above stated, the curator of an insane wife cannot sue for separation (*Thomson*, 14 R. 634). Further, a decree of separation which has become final cannot be recalled at the instance of one spouse (*Strain*, 17 R. 297).

Another action may be mentioned among the consistorial actions—declarator of putting to silence. This may be resorted to when a person continually declares in public that he (or she) is the spouse or child of the pursuer. The reported cases are few, and none of them refer to title to sue. But it is obvious that all who are subjected to the annoyance of having such statements made about them must have a title to sue, and no others.

(*d*) *Company Actions.*—The general rule is that the title to sue is in the company, and the company alone, and that a majority of the shareholders are entitled to determine what actions shall be raised. This has been well settled in England (*Macdougall*, L. R. 1 Ch. D. 13; *Mozley*, 1 Ph. 790; *Lord*, 2 Ph. 740; *Foss*, 2 Hare, 461), and is now recognised in Scots law (*Lee*, 17 R. 1094). An equally well settled exception is that where a contract or other act of the company amounts to a fraud by a majority of the shareholders on the minority, a single shareholder who has been thus defrauded has a sufficient title to sue (*Rixon*, 16 R. 653; *ib.*, 18 R. 264, see per Ld. Kincairney, p. 271; affd. without opinions, 20 R. (H. L.) 53; *Hannay*, per Ld. Low, 36 S. L. R. 228). A single shareholder may also challenge an act of the company on the ground that it is not only *ultra vires* of the directors, but of the company as such, *e.g.* if a railway company start a line of steamers without having power under their Act to do so (per Ld. Kinnear in *Rixon*, 16 R. at p. 655; per Ld. Low in *Smith*, 4 S. L. T. 451). But a rival shipowner has no title to sue even on that ground (per Ld. Low in *Clyde Steam Packet Co.*, 4 S. L. T. 450). It has not been authoritatively decided whether a private shareholder may sue on the ground that he has been induced to take shares in a company by the fraudulent statements of the promoter, though a debenture-holder or other person who has lent money to the company on these representations may sue (*Dunnett*, 12 R. 400; *ib.*, 15 R. 131). But in the leading case of *Tulloch*, 3 Macqueen, 783, it was

decided that a single shareholder had a good title to sue the representatives of a deceased director of a company whose false and fraudulent representations had induced the pursuer to take shares in the company.

The cases quoted so far chiefly relate to what has been called the internal affairs of the company. As regards actions against other persons, the rule is rigid that only the company has a title to sue.

The liquidator of a company cannot sue in his own name, but must use the company's name (per Ld. Kincairney in *Munro*, 3 S. L. T. 413).

(*e*) *Partnership Actions.*—A firm being recognised in Scotland as a distinct *persona* in law, has a title to sue as such, it being unnecessary to give the names of the partners (*Forsyth*, 13 S. 42, and *Douglas, Heron, & Co.*, 16 June 1792, quoted by Ld. Medwyn at p. 49). And an action instituted by one member of a firm in the name of the firm may be proceeded with in spite of a disclaimer lodged by another partner (per Ld. M'Laren in *Kinnes*, 9 R. 698). It is otherwise where the name of the firm is descriptive; such a firm cannot sue without the partners, or at least three of the partners, being named (*Culcreugh Cotton Co.*, 2 S. 41). But the mandate implied in partnership enables the name of an absent or unwilling partner to be used without specific authority (*Antermony Coal Co.*, 4 M. 1017). Where a partnership is dissolved by death, the surviving partners have a good title to sue in their own names; and the same is the case when a partnership is dissolved by mutual agreement, and one partner dies before the affairs are wound up (*Nicoll*, 5 R. 137). Where a firm would have had a title to sue an action of removing, as possessing the radical right to the subjects, though they had granted a disposition *ex facie* absolute but really in security, it was held that the sole surviving partner, who described himself as trustee for the now dissolved firm, had no title to sue (*Traill*, 1 R. 61). A minority of joint adventurers were held entitled to sue another, who had acted as treasurer, for count, reckoning, and payment (*Pyper*, 6 R. 143). One of several owners of a ship may call on the ship's-husband to account for rebates on commissions paid by him, though the other owners object (*Manners*, 11 R. 899). When a contract of copartnery gave an option to the executors of a deceased partner to become members of the firm in his place, held that one executor had no title to sue for implement of this condition without the consent of the other executors (*Neilson*, 12 R. 499; reversed on another point, 13 R. (H. L.) 50). A business was carried on by the trustees of a deceased partner, who owned three-fourths of the business, and the surviving partner. Held that the trustees collectively constituted one partner, and could not sue in the name of the company without consent of the other partner (*Beveridge*, 10 M. (H. L.) 1).

Two out of three joint proprietors *pro indiviso* have no title to sue a removing without the authority of the third (*Grozier*, 9 M. 826). But one of several *pro indiviso* proprietors has a title to sue to prevent encroachment on the subjects (*Laird*, 9 M. 699). Individual lair-holders in a cemetery have a title to sue for vindication of their individual rights, but not for the rights of others (*Cunningham*, 9 M. 869).

(*f*) *Assignations.*—An assignee has no better title to sue than his author had (*Johnston & Wight*, 15 February 1809, F. C.; *Scot. Widows' Fund*, 3 R. 1078; *Simpson & Co.*, 5 R. (H. L.) 40; *Edinburgh United Breweries Ltd.*, 20 R. 581). The extent of his title is determined by the terms of the assignation, subject to the powers of the cedent (*Glen*, 5 S. 11; *Mackenzie*, 3 S. 190; *Rose*, 15 R. 336; compare *Assets Co. Ltd.*, 24 R. 418). The purchaser of a ship sued for damages sustained by the ship before the date of the purchase; after the summons had been served he obtained an

assignation from the seller of his (the seller's) right: *Held* that on purchaser he had no title to sue; and his title being utterly bad at the date of the commencement of the action, could not be cured by an assignation since that date. The case was distinguished from that of a person who has a substantial right, technically incomplete at the date of the action, which may be corrected at any time before extract (*Symington*, 21 R. 1141). Compare *Dist. Com. of the Middle Ward of Lanark*, 24 R. 139, where opinions were expressed that one of two joint tenants, being the person with the substantial right, was entitled to found on an assignation granted by the other *pendente processu* in order to complete the pursuer's formal title to sue (*Donald*, 5 M. 146, per Ld. Ardmillan, p. 152; *Welsh*, 19 D. 1041). Where parties entitled to assign the rights under a patent for any period not exceeding five years, assigned them absolutely, it was held not to be a good objection to the assignee's title to sue, *within* five years from the date of the assignation (*Mrs. Siddons*, 3 S. 576).

It is competent for an assignee to carry on an action already raised by the cedent (*Fraser*, 16 S. 1130), or to raise an action either in his own name or in that of the cedent (*ib.*); but an absolute assignation takes away the cedent's own right to sue. An assignation in security leaves the radical right in the cedent, but it is proper that he should have the consent of the assignee to sue (*Manson*, 12 D. 775).

(*g*) *Land Rights.*—A landowner is entitled to sue any action required for the protection of his property or the vindication of his rights. But it has been questioned how far this enables one *pro indiviso* proprietor of a subject which has been let, to sue for the rent without the concurrence of the other proprietor (*Schaw*, 16 R. 336). A heritable creditor who has entered into possession of the subjects by the usual process of a decree of maills and duties, has a good title to sequestrate for rent the goods of any one subsequently occupying as tenant, although he was not called in the action of maills and duties (*Robertson's Trs.*, 16 R. 705). The assignee of a tenant at will has no title to sue an action of removing against the tenant (*Sinclair*, 14 R. 792; cf. *Dunlop & Co.*, 4 R. 11). A party to a lease admittedly in existence has always a good title to sue for declaration of its validity, though the lease eventually turn out to be bad (*Abbot*, 8 M. 268). The tenant of a mill was held to have a title to sue an action in the Sheriff Court for abstracted multures though it involved a question as to the extent of the thirl (*Stobbs*, 11 M. 530). A proprietor has a title to sue for interdict against a nuisance which is injuring either the amenity or the value of his property (*Shotts Iron Co.*, 9 R. (H. L.) 78; *Moncrieff*, 13 R. 921). To stop the pollution of a river, several proprietors may in one action sue several defenders (*Cowan & Sons*, 4 R. (H. L.) 14). Where the payment of rent is postponed to a period subsequent to the possession, the landlord in possession at the date when it becomes payable is the proper person to sue for the rent, though he may have to account for it, when recovered, to the executor of his predecessor (*Lennox*, 21 R. 77).

A superior has no title to sue an action of maills and duties for recovery of his feu-duty (*Prudential Assurance Co.*, 11 R. 871); nor has a person who has divested himself of a superiority any title to sue an action of poinding of the ground for recovery of arrears of feu-duties due to him while he was superior (*Scottish Heritages Co.*, 12 R. 550). Where a superior had resumed possession of the *dominium utile* under a decree of irritancy *ob non solutum canonem*, he had no title to insist in a statutory claim for compensation from a railway company for damage done while the vassal was still in possession (*Caledonian Railway Co.*, 2 R. 917). Where a vassal has no right to enforce

restrictions against his co-feuars, the concurrence of the superior will not give him a title (*Hislop*, 8 R. (H. L.) 95; cf. *Martin*, 21 R. 759, where a party concurring with the pursuer was held not entitled to reclaim).

(*h*) *Cases in which Concurrence of Crown or Procurator-Fiscal required.*—To enable a private party to sue for the infliction of penalties, not merely the recovery of damages, the concurrence of the Lord Advocate is necessary (*Paterson*, 11 M. 76; *Usher & Cunningham*, 1 D. 639; *D. of Northumberland*, 10 S. 366). Prosecutions and complaints under the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 703, re-enacting M. S. Act, 1854, s. 531), may be brought before a Sheriff or two Justices of the Peace at the instance of the person aggrieved, with concurrence of procurator-fiscal; such concurrence must be given before service (*Lundie*, 21 R. (J. C.) 33).

In ordinary cases the concurrence of the Lord Advocate is given as a matter of course; but in petitions for the reduction of letters-patent, he must consider the case before giving his consent (*Gillespie*, 23 D. 1357).

In actions for contravention of lawburrows, the Lord Advocate must be a joint pursuer, as one-half of the penalty goes to the Crown (*Robertson*, 11 M. 910, per. Ld. Pres. Inglis).

In proceedings for fraudulent bankruptcy, the Lord Advocate's concurrence is necessary, as the consequences are penal (*Darby*, M. 7907). But the Court can punish incidentally any perjury or prevarication committed in the course of a process depending before them, these crimes being of the nature of contempt of Court (*ib.*). See SEQUESTRATION.

In all actions for or against the Crown, the Lord Advocate has the title to sue or defend.

(*i*) *Miscellaneous.*—Two persons raised an action on a letter in which the defender undertook to pay to them equally the profit made by him on certain contracts. After the action was raised, one of the pursuers became bankrupt, but it was held that the other pursuer had a good title to insist in the action, restricting the conclusions to one-half of the profit made (*Shaw*, 20 R. 718).

A person who is merely a consenter to an action has no title to reclaim against an interlocutor pronounced in the case (*Martin*, 21 R. 759).

A female pauper has a title to sue for the aliment of an illegitimate child, though the parochial board is the true *dominus litis* (*Hepburn*, 1 R. 875).

II. TITLE TO DEFEND.

Whoever is called as a defender is entitled to defend the action (*Pollock*, 5 S. 195; *Drummond*, 3 S. 315, per Ld. Pres. Hope). But when a person called as defender is mentally weak, the trustees in whom his property is vested have no title to lodge defences, not being themselves called (*Lindsay*, 5 D. 1194). When a defender died *pendente processu*, persons alleging that they had been appointed his trustees under a will which had gone amissing, were held not entitled to be sisted as defenders in his place until they proved the existence of the missing document in an action of proving the tenor (*Geikie*, 10 D. 354).

In general, parties who can only sue through another, or with the aid of another, as pupils, minors, wives under coverture, etc. (see *supra*), must be called in the same way. But the person who sues through his tutors is usually called as defender, and also his tutors by name if they are known, but if not, by the general designation of his "tutors and curators if he any have." It is incompetent to call a factor or curator for a fatuous person without calling the fatuous person himself as principal defender (*Govan*, 20 Dec. 1814, F. C.).

In actions against a married woman, her husband must be called either "as her curator and administrator-in-law" or "for his interest" (*Spence*, M. 6080; *Clark*, 1 S. Jur. 302). But if the wife be judicially separated, has a protection under the Conjugal Rights (Scotland) Act, 1861 (24 & 25 Vict. c. 86), or carries on a separate business to which the action relates, it is not necessary to call the husband. The same principle would appear to make it unnecessary to call the husband in actions relating to property from which his *jus mariti* is excluded, as the wife may sue such actions without the husband's consent (see *supra*); but in practice it is safer to call him.

If a woman who is defender in an action marry *pendente processu*, her husband must be sisted as a defender (Fraser on *Husband and Wife*, i. 583; Ersk. i. 6. 21).

Where a wife has an interest to defend a suit independently of her husband, and her husband refuses to appear, the Court will appoint a *curator ad litem* to her (Fraser, *H. & W.* p. 582, quoting *M'Kenzie*, 9 S. 31, which relates to title to *sue*).

A heritable creditor has both title and interest to defend an action of poinding of the ground (*Scottish Heritages Co. Ltd.*, 12 R. 550, per Ld. Adam, Ordinary, and Ld. Shand).

Where a patentee brought a suspension and interdict for infringement of the patent, and no appearance was made for the parties called as respondents, it was held that a third party could not sist himself as defender on the allegation that the machine really belonged to him and was not an infringement. Ld. Shand dissented, holding that the minuter had the real interest in the case (*Laing's Sewing Machine Co.*, 5 R. 29). The principle that the person having the real interest to defend is entitled to be sisted, was given effect to in *Glasgow Shipowners' Association*, 12 R. 695.

Magistrates are entitled to defend the rights of the public to the foreshore (*Keiller*, 14 R. 191).

A neighbouring proprietor has a right to be sisted as a respondent to a petition in the Dean of Guild Court for authority to erect new buildings, although his property was not contiguous to the petitioner's (*Laurie*, 18 R. 1154; cf. *Scott*, 19 R. 895).

A bondholder has no title to defend an action for reduction of an agreement by the borrower, to which the bondholder was not a party, and by which she was not bound (*Heron*, 20 R. 1001).

A debtor has neither title nor interest to defend an action of maills and duties on the ground that the pursuer's title was an assignation by the debtor, which the debtor now alleged was insufficient to warrant the action (*Schaw*, 16 R. 336).

The debtor under an obligation to pay an annuity was sued by the person who by adjudication had acquired the right to receive the annuity. The debtor objected, on the ground that the debt in respect of which the annuities had been adjudged was long ago extinguished. Held he had no title to maintain that plea (*Macleod's Trustees*, 18 R. 831).

Town Clerk.—The town clerk is, as the designation practically implies, the clerk to the corporate body of the town or burgh for which he is appointed.

Royal Burghs.—*Qualifications.*—The qualifications necessary for the office are not authoritatively laid down either by the common law or statute, but as in former times he had the duty laid upon him of acting as Notary in all infeftments granted of burgage property within the burgh, it was necessary at least that he should be a Notary Public. Though this

practice has been swept away by legislation, the town clerk has still very important duties to the community, and even to the State, to discharge, and it is therefore necessary that he should be a Notary Public, as he may have protests to take, record, and extend, and by preference he should be a duly qualified Law Agent.

Disqualifications.—The town clerk cannot at common law hold office as such, and at the same time also as a magistrate and councillor (*Munro* v. *Forbes*, 21st July 1784; affd. 3rd May 1785, 3 Pat. 23). In *Drumlanrig*, 15th January 1624, M. 13089 and 2509, a charge given to the town clerk along with the magistrates to implement the town's obligations was suspended as against the clerk but sustained as against the magistrates. By sec. 28 of 3 & 4 Will. IV. c. 76 it is enacted that no councillor nor the partner in business of any councillor shall be capable of holding the office of town clerk in any such burgh, and no town clerk shall, during the period he shall hold that office, interfere directly or indirectly in the election of the magistrates or town council of any such burgh. By sec. 36 of 2 & 3 Will. IV. c. 65, town clerks and town clerks-depute are disqualified from exercising the franchise in burgh elections.

Neither the clerk of a Burgh Court nor any of his deputes can act directly or indirectly as procurators in that Court; and if they do, the proceedings will be invalid even though the opposite party consent to waive the objection, as private consent cannot make lawful what the public law has declared to be unlawful (A. S., 12th Nov. 1823, part 11, c. 6, s. 2; see also *A.* v. *B.*, 14th February 1740, Broun's Sup. p. 693; A. S., 10th July 1839, s. 160; *Cellon* v. *Duff*, 11th February 1809, 15 J. C. 101; *Smith* v. *Robertson*, 27th June 1827, 5 S. 848). Nor can the clerk be pursuer in the Court of which he is clerk (*Campbell* v. *M'Cowan*, 10th July 1824, 3 S. 173; *Macfarlane*, v. *A. B.* (*Campbell*), 6th March 1827, 5 S. 537 (N. E. 504); affd. 8th April 1830, 4 W. & S. 123), nor act as clerk of Court in any lawsuits in which he is personally interested (*Manson* v. *Smith*, 8th February 1871, 9 M. 492; *MacBeth* v. *Jarvis*, 8th February 1873, 11 M. 404).

Appointment.—The appointment of the town clerk has by immemorial usage rested with the magistrates and council. No special mode of election is prescribed, and the Act 3 & 4 Will. IV. c. 76 does not make any provision as to this. The election of a town clerk, therefore, must be made in the same manner as the election of any other officer of the corporation. He must be appointed at a duly called and constituted meeting of the magistrates and council. Where there is a competition for the office, he must be elected by a majority of the members present. If there be only two candidates, the majority will be easily ascertained; but if there be three or more, "the proper form of taking the vote is to strike off the candidate who has the fewest votes, and to follow out this course until no more than two remain, the vote between whom will be decisive" (Ld. Rutherfurd Clark, quoted Campbell Irons, *Police Law*, p. 74). If there be a motion for adjournment, this must not be met with a motion to elect one candidate, but by a direct negative to proceed (*Gibson* v. *Kerr*, 20th December 1856, 19 D. 261). In this case Ld. Ivory said: "You must so manage that each individual councillor may give his vote for the one candidate or the other as he pleases; and, further, you are not to mix up the voting for an election with the voting for an adjournment." A vote by ballot seems to be illegal (*Watson* v. *Glasgow Police Commissioners*, 10th March 1832, 10 S. 481, 7 F. 370).

Tenure.—The town clerk, being duly elected, holds his office by legal title *ad vitam aut culpam*, and is not removeable therefrom, except on just cause, even though the terms of his appointment bear to be "during the pleasure of the

council" (*Simpson* v. *Todd*, 17th June 1824, 3 S. 150, N. E. 102) or for a period of years, though the term stated may have expired (*Farish* v. *Mags. of Annan*, 22nd November 1836, 15 S. 107, 12 T. 115; affd. 14th July 1837, 2 S. & M'L. 930). The magistrates and council cannot annex any conditions to the appointment which are illegal or *ultra vires*. The town clerk, not being the mere servant of the town council, but a public officer, whatever be the terms of his appointment, is not liable to be arbitrarily removed nor summarily dismissed from his office without proper process of law (*Simpson* v. *Todd*; *Farish* v. *Mags. of Annan*, *supra*).

Where the office of town clerk is held by one or more persons who are able and willing to perform the duties, the town council is not entitled, without the consent of the holder or holders, to appoint an additional town clerk. Even where the office is held by two persons under an appointment "to be conjunct common clerks in terms of law," and one has died but the other is able and willing to perform the duties, the town council do not appear to be entitled to appoint a second town clerk without the consent of the survivor (*Mags. of Forfar* v. *Adam*, 14th May 1822, 1 S. 400; 7th March 1823, 2 S. 281 (N. E. 248)).

It is very doubtful whether the town council can competently appoint an interim clerk, even for the purpose of officiating in matters in which the town clerk cannot act, or grant authority to any other person to perform such duties. When it becomes necessary to appoint an interim clerk or other person to perform duties which the town clerk cannot lawfully perform (*Duff* v. *Mags. of Elgin*, 16th January 1823, 2 S. 117 (N. E. 109); *Tait*, 20th June 1848, 10 D. 1365), or during the incapacity of a town clerk (*Mags. of Newburgh*, 29th November 1864, 3 M. 127), or if a vacancy in the office occur whereby a town council is unable to elect a town clerk permanently, the proper course is to apply to the Court of Session, which will make the necessary appointment on just cause being shown. Where proceedings are actually in dependence, however, with reference to the office, as possessed and exercised by a person elected and holding a *primâ facie* title to it, the Court will not interfere with the person in possession (*Mags. of Annan* v. *Farish*, 5th December 1835, 14 S. 111, 2 S. & M'L. 930).

The town clerk is the legal and proper custodier of the records of the council of the burgh, as well as of charters, writs, and other documents relating to the burgh. If, therefore, the magistrates and council, or any of them, take or retain possession of these documents and records, they will not only be ordained to deliver such to the town clerk, but will be found personally liable for the expenses to which he may be put in vindicating his rights (*Spence* v. *Cunningham* and *Cunningham* v. *Magistrates and Council of Linlithgow*, 6th July 1830, 8 S. 1013; *Boyd* v. *Cunningham*, 20th November 1832, 11 S. 58; *Finnie* v. *M'Intosh*, 15th July 1858, 6 M. 1066). The town clerk is bound to furnish extracts from the records to persons showing a proper interest; and if he refuse or fail to do so, he is liable personally in expenses, even though his failure arise from the refusal of the magistrates and council to give him possession of the records; but in that case he is entitled to relief against those who have illegally retained them (*Tod* v. *Connolly*, 17th June 1824, 3 S. 153 (N. E. 103); *Fotheringham* v. *Williamson*, 9th March 1838, 16 S. 904; *Spence* v. *Cunningham*, 6th July 1830, 8 S. 1015). The extracts must be complete excerpts from the record of proceedings of the town council relating to the specific matter, and not merely such parts or portions as the town clerk may think proper. If the object of requiring extracts be avowedly for a private purpose, and to aid one of the parties in a lawsuit, the clerk may be justified in declining to give

them (*Fotheringham* v. *Williamson, supra*). A town clerk is not bound at the instance of a litigant to produce the Burgh Court books in process, as parties having right, who wish to examine these, are bound and entitled to inspect them at the burgh chambers, and obtain the necessary extracts. Generally, however, unless the town clerk has good reason to apprehend that the public interest would suffer by giving access to the records and furnishing extracts, it is the prudent and proper course for him to afford such access, and give whatever extracts may be required. He is entitled to be paid for such extracts, and reasonable remuneration for searching the minutes therefor.

If the town clerk has been provided with apartments or chambers in the town house of the burgh for the performance of his official duties, it is incompetent for the magistrates to proceed, by way of summary removing before the Sheriff, to deprive him of the apartments he is occupying (*Mags. of Dundee* v. *Kerr*, 6th December 1833, 12 S. 1739, F. 124). Even where a town hall was erected, partly by public subscription and partly by funds contributed by the town council, on a site provided by the council, with a view to accommodation being made for all the purposes of the burgh, and the plans referred to "two rooms for town clerk's offices," it was held that the town clerk was entitled, free of rent, to such accommodation as could reasonably be afforded him consistently with other public requirements (*Downie* v. *Mags. of Annan*, 7th January 1879, 6 R. 457).

Duties.—The town clerk is the clerk of the corporation, and, generally speaking, must do what the corporate body orders him to do, but not extra professional duties which any other person equally with the town clerk might perform. He is bound to attend all the meetings of the town council in its corporate capacity, and to write out the minutes and keep the records of the town council; and, in the same manner, he must attend, as clerk to the Burgh Court, when the bailies are performing their judicial functions as judges of that Court, and must write out their judgments. It does not seem to be part of the duty that he can insist on performing, or be compelled to perform, to act as assessor. When he is called on in the administration of the affairs of the burgh to act as notary or agent, a duty which any other professional man might perform, that is out of the official department, and he then becomes the agent for the burgh, and is entitled to be remunerated as such (*Forbes* v. *Mags. of Banff*, 23rd February and 8th July 1856, 18 D. 645, 1210).

The town clerk has, besides, other and onerous duties to perform, imposed upon him both by the common law and statute, too numerous to specify.

Removal from Office.—The appointment being *ad vitam aut culpam*, the town clerk cannot be removed except for *culpa* or incapacity. In *Sir William Thomson* v. *The Town of Edinburgh*, 14th February 1665, M. 13090, the town clerk sought to have the act of deposition reduced, on the ground that the punishment was incommensurate with the fault, and that no real damage had resulted. The Court repelled the reasons of reduction, and found the sentence not to be unjust, the fault being of "knowledge and importance," but found that if it could be proved that the fault "was not of knowledge but of mere omission incident to any person of the greatest diligence, they would not find that a sufficient ground to depose him." It is not clear that a town clerk can be removed from his office on the ground of incapacity. In *Wright* v. *Lockerbie*, 1st July 1876, not reported (Campbell Irons, *Police Law*, p. 797), Ld. Rutherfurd Clark indicates an opinion that the town clerk of a royal burgh cannot hold his office when he becomes incapacitated; but all the length the Court has yet gone in such a case was to appoint an interim town clerk during the incapacity of the town clerk on the petition of the

magistrates (*Mags. of Newburgh*, 29th November 1861, 3 M. 177). In several of the larger burghs the office of town clerk is regulated by statute applicable to the burgh.

Parliamentary Burghs.—Town clerks of parliamentary burghs are in much the same position as these of royal burghs, with the exception of the tenure of office. With regard to this, sec. 26 of 3 & 4 Will. IV. c. 77 provides that the magistrates and council may elect a town clerk for the period of one year, without prejudice to his re-election, and also without prejudice to the right of any existing town clerk in any such burgh to hold his office of town clerk or clerk to the magistrates and council *ad vitam aut culpam*. With the exception, therefore, of clerks who may have been appointed *ad vitam aut culpam* prior to the passing of this Act, all other town clerks of parliamentary burghs can only be appointed for one year. Indeed, the magistrates and council have no lawful power to elect for any other period (*Dykes* v. *The Mags. of Port Glasgow*, 2nd July 1849, 2 D. 1274, 13 Y. 1388; *Morrison* v. *The Mags. of Greenock*, 27th May 1806, referred to by Ld. Moncreiff in *Dykes* case; *Anderson* v. *Hunay*, 11th March 1837, 15 S. 875, 12 J. 783).

Burghs of Regality and Barony.—The clerk to a burgh of barony or regality holds his office during the pleasure of the magistrates only, and has no right to hold it *ad vitam aut culpam* (*Morrison* v. *The Mags. of Greenock*, 27th May 1806, *supra*), and it does not alter the condition of his tenure though the burgh may have become a parliamentary burgh (*Dykes* v. *Mags. of Port Glasgow*, 2nd July 1840, 2812, Y. 4, 15, 1388).

Trade, Board of.—The Board of Trade was originally, and is still in theory, a committee of the Privy Council. But the Harbours and Passing Tolls, etc., Act, 1861 (24 & 25 Vict. c. 47, s. 65), enacts that "The Lords of the Committee of Privy Council appointed for the consideration of matters relating to trade and foreign plantations may be described in all Acts of Parliament, deeds, contracts, and other instruments by the official title of the Board of Trade, without expressing their names; and all Acts of Parliament, contracts, deeds, and other instruments wherein they are so described, shall be as valid as if the said Lords, or any of them, had been named therein." The Board of Trade really consists of a president (who is usually a member of the Cabinet), a parliamentary secretary (appointed in virtue of 30 & 31 Vict. c. 72), and a permanent secretary and staff, but the president is still in theory the president of a committee of the Privy Council for Trade, and on accepting office takes the oath in that capacity, though any such committee has long ago ceased to exist for any practical purpose. The section of the Act quoted above shows that the Board of Trade was originally a committee "appointed for the consideration of matters relating to trade and foreign plantations," and its duties were confined to collecting and tabulating information on commercial subjects, to advising the Foreign Office as to commercial treaties with foreign States, and generally to assisting all the departments of State in matters relating to trade and commerce, both by the collection of information and by consulting and advising thereon. One of its most important duties was estimating the food supply of the country and regulating accordingly the export and import of corn. But since 1840, the duties of the Board have been executive and administrative rather than consultative. Owing to the institution of railways and steamships, there arose a necessity for some State department charged especially with the supervision of the safety of the public travelling by land or sea and of

railway servants and sailors. This important work naturally fell to the Board of Trade, and their duties under various Acts of Parliament have increased to such an extent as to necessitate division amongst seven different departments, which are distinct from each other, but for all of which the president and parliamentary secretary are responsible. These are—

I. The Statistical and Commercial Department.
II. The Railway Department.
III. The Marine Department.
IV. The Harbour Department.
V. The Finance Department.
VI. The Fisheries Department.
VII. The Bankruptcy Department.

I. The following Acts affect the powers and duties of the Statistical and Commercial Department:—

The Cotton Statistics Act, 1868 (31 & 32 Vict. c. 33). This Act provides for the collection and publication of cotton statistics by the Board of Trade.

The Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78). Sec. 9 of this Act provides that every railway company shall annually prepare returns of their capital, traffic, and working expenditure for the year, and forward the same to the Board of Trade.

The Conciliation Act, 1896 (59 & 60 Vict. c. 30). This Act makes provision for the institution of Boards of Conciliation and for the assistance of the Board of Trade in endeavouring to prevent and settle disputes between employers and workmen.

The Statistical and Commercial Department also prepare annual statistics of shipping and navigation, and as to railways, labour, emigration, trade unions, etc., and collect information on any subject required by the Government or by Parliament.

II. The following Acts affect the powers and duties of the Railway Department:—

The Railway Regulation Act, 1840 (3 & 4 Vict. c. 97).

The Abandonment of Railways Act, 1850 (13 & 14 Vict. c. 85).

"An Act to repeal the Act for constituting Commissioners of Railways, 1851" (14 & 15 Vict. c. 64).

The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31).

An Act to amend the law relating to cheap trains, etc., 1858 (21 & 22 Vict. c. 75).

The Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59).

The Companies Act, 1862, "an Act for the incorporation, regulation, and winding up of companies" (25 & 26 Vict. c. 89).

The Revenue Act, 1863 (26 & 27 Vict. c. 33), s. 14.

The Railway Clauses Act, 1863 (26 & 27 Vict. c. 92).

The Companies Clauses Act, 1863 (26 & 27 Vict. c. 118).

The Railway Companies Powers Act, 1864 (27 & 28 Vict. c. 120).

The Railway Construction Facilities Act, 1864 (27 & 28 Vict. c. 121).

The Railway Companies Securities Act, 1866 (29 & 30 Vict. c. 108).

The Railway Companies (Scotland) Act, 1867 (30 & 31 Vict. c. 126).

The Companies Act, 1867 (30 & 31 Vict. c. 131).

The Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119).

The Railways (Powers and Construction) Acts, 1864, Amendment Act, 1870 (33 & 34 Vict. c. 19).

The Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70).

The Tramways Act, 1870 (33 & 34 Vict. c. 78).

The Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41).

The Regulation of Railways Act, 1871 (34 & 35 Vict. c. 78).

The Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48).

The Railway Regulation (Signals, etc.) Act, 1873 (36 & 37 Vict. c. 76).
The Board of Trade Arbitrations Act, 1874 (37 & 38 Vict. c. 40).
The Companies Act, 1877 (40 & 41 Vict. c. 26).
The Railways Returns (Continuous Brakes) Act, 1878 (41 & 42 Vict. c. 20).
The Companies Act, 1879 (42 & 43 Vict. c. 76).
The Tramways Orders Confirmation Act, 1879 (42 & 43 Vict. c. 193).
The Electric Lighting Act, 1882 (45 & 46 Vict. c. 56).
The Cheap Trains Act, 1883 (46 & 47 Vict. c. 34).
The Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57).
Ditto, Amendment Act, 1885 (48 & 49 Vict. c. 63).
The Patents Act, 1886 (49 & 50 Vict. c. 37).
The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28).
The Electric Lighting Act, 1888 (51 & 52 Vict. c. 12).
The Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25).
The Patents, Designs, and Trade Marks Amendment Act, 1888 (51 & 52 Vict. c. 50).
The Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57).
The Electric Lighting (Scotland) Act, 1890 (53 & 54 Vict. c. 13).
The Railway and Canal Traffic Amendment Act, 1891 (54 & 55 Vict. c. 12).
The Merchandise Marks Act, 1891 (54 & 55 Vict. c. 15).
The Railway and Canal Traffic Amendment Act, 1892 (55 & 56 Vict. c. 44).
The Railways Regulation Act, 1893 (56 & 57 Vict. c. 29).
The Merchandise Marks (Prosecutions) Act, 1894 (57 & 58 Vict. c. 19).
The Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54).
The Light Railways Act, 1896 (59 & 60 Vict. c. 48).
The West Highland Railway Guarantee Act, 1896 (59 & 60 Vict. c. 58).

The titles of the above Acts indicate the varied powers and duties of this department of the Board of Trade. They have powers and duties connected with various matters besides railways, though the general supervision of railways constitutes the most important part of their work. Upon them rests the duty of inspecting new railways, in order to secure the safety of the travelling public. They also inquire into and report on railway accidents. They report to Parliament on the rates and charges proposed in railway Bills, and approve of bye-laws for railway companies, tramways, etc. They also may prepare and submit to Parliament for approval Provisional Orders relating to new tramways, gas, water, and electric lighting.

The Patents, Designs, and Trade Marks Act, 1883 (ss. 82–83), provides for the establishment of a Patent Office, and for the appointment of a Comptroller-General of patents, designs, and trade marks, who is under the superintendence and direction of the Board of Trade. The control of the Patent Office is under this department of the Board of Trade. The Registrars of companies registered under the Companies Acts, and their assistants, are appointed by the Board of Trade. A Registrar must be appointed for each of the three parts of the United Kingdom.

III. The following Acts affect the powers and duties of the Marine Department:—

The Merchant Shipping Repeal Act, 1854 (17 & 18 Vict. c. 120).
The Chain Cable and Anchor Acts, 1864 (27 & 28 Vict. c. 27), 1871 (34 & 35 Vict. c. 101), and 1874 (37 & 38 Vict. c. 51).
The Merchant Seamen (Wages and Rating) Act, 1880 (43 & 44 Vict. c. 16).
The Merchant Shipping (Fees and Expenses) Act, 1880 (43 & 44 Vict. c. 22).
The Boiler Explosions Acts, 1882 (45 & 46 Vict. c. 22), and 1890 (53 & 54 Vict. c. 35).
The Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22).

The Merchant Shipping (Fishing Boats) Acts, 1883 (46 & 47 Vict. c. 41), and 1887 (50 & 51 Vict. c. 4).

The Mail Ships Act, 1891 (54 & 55 Vict. c. 31).

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

The Derelict Vessels (Report) Act, 1896 (59 & 60 Vict. c. 12).

This department has charge, among other matters, of the examination of masters, mates, and engineers in the merchant service, and of the issue of certificates of competency to them, which may be suspended or cancelled; of the whole matters relating to the health or discipline of merchant ships at home or abroad; of tonnage measurement; of the survey of passenger and emigrant ships, and the detention of unseaworthy or overloaded ships; of the rule of the road at sea, ships' lights, and fog-signals, etc.; inquiries into wrecks; and, generally, all questions relating to ships and seamen at home or abroad. This department also co-operate with the Admiralty in the management of the Royal Naval Reserve.

IV. The following Acts affect the powers and duties of the Harbour Department:—

The Preliminary Enquiries Act, 1851 (14 & 15 Vict. c. 49).

The Merchant Shipping Law Amendment Act, 1853 (16 & 17 Vict. c. 131).

The Pilotage Amendment Act, 1853 (16 & 17 Vict. c. 129).

The General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45), and ditto Amendment Act, 1862 (25 & 26 Vict. c. 19).

The Harbours and Passing Tolls Act, 1861 (24 & 25 Vict. c. 47).

The Harbours and Transfer Act, 1862 (25 & 26 Vict. c. 69).

The Railway Clauses Act, 1863 (26 & 27 Vict. c. 92).

The Telegraph Act, 1863 (26 & 27 Vict. c. 112).

The Harbours Transfer Act, 1865 (28 & 29 Vict. c. 100).

The Harbour Loans Act, 1866 (29 & 30 Vict. c. 30).

The Crown Lands Act, 1866 (29 & 30 Vict. c. 62), and 1885 (48 & 49 Vict. c. 79).

The Shipping Dues Exemption Act, 1867 (30 & 31 Vict. c. 15).

The Coinage Act, 1870 (33 & 34 Vict. c. 10), and 1891 (54 & 55 Vict. c. 72).

The Petroleum Act, 1871 (34 & 35 Vict. c. 105), and 1879 (42 & 43 Vict. c. 47).

The Board of Trade Arbitrations Act, 1874 (37 & 38 Vict. c. 40).

The Explosives Act, 1875 (38 & 39 Vict. c. 17).

The Weights and Measures Act, 1878 (41 & 42 Vict. c. 49), and 1889 (52 & 53 Vict. c. 21), and 1892 (55 & 56 Vict. c. 18), and 1893 (56 & 57 Vict. c. 19).

The Public Works Loans Act, 1881 (44 & 45 Vict. c. 38).

The Artillery Rifle Ranges Act, 1885 (48 & 49 Vict. c. 36).

The Submarine Telegraph Act, 1885 (48 & 49 Vict. c. 49).

The Western Highlands and Islands Works Act, 1891 (54 & 55 Vict. c. 58).

The Electric Lighting and Telegraph Act, 1892 (55 & 56 Vict. c. 59).

In addition to the above Acts, there are various local harbour Acts which confer powers and duties upon this department. It has charge, among other matters, of the foreshores belonging to the Crown, and, generally, of harbours at home and abroad; of colonial lighthouses; of registry of British ships, wrecks, and salvage; and of examination of private Bills affecting navigation or the title of the Crown in the foreshore or bed of the sea.

V. The following Acts affect the work of the Finance Department:—

The Seamen's Fund Winding-up Act, 1851 (14 & 15 Vict. c. 102).

The Merchant Shipping Law Amendment Act, 1853 (16 & 17 Vict. c. 131).

The Greenwich Hospital Act, 1869 (32 & 33 Vict. c. 44), and 1872 (35 & 36 Vict. c. 67).

The Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), and 1871 (34 & 35 Vict. c. 58).

This Department presents to the Exchequer the accounts of the Board of Trade, and of other bodies under its control. It also administers the Merchant Seamen's Fund, the wages of deceased seamen, seamen's savings banks, etc. It receives and presents to Parliament the accounts of life assurance companies.

VI. The Fisheries Department administer the Salmon and Sea-fishery Acts for England; but in Scotland the corresponding powers and duties fall to the Fishery Board (see under FISHINGS) in virtue of the Fishery Board (Scot.) Act, 1882 (45 & 46 Vict. c. 78), and the Sea Fisheries (Scot.) Amendment Act, 1885 (48 & 49 Vict. c. 70).

VII. The Bankruptcy Department of the Board of Trade was instituted by the Bankruptcy Act, 1883. The head of this department is the Inspector-General in Bankruptcy. Under this Act the Board of Trade appoint "official receivers" of debtors' estates, and such receivers act under the general authority and direction of the Board of Trade. But the provisions of the said Act do not apply to Scotland.

Trade Disputes: Conciliation Act.—This Act, 59 & 60 Vict. c. 30, which is cited as the Conciliation Act, 1896, was passed for the purpose of making better provision for the prevention and settlement of trade disputes. It repeals earlier enactments of a similar nature, viz. The Masters and Workmen's Arbitration Act, 1824; the Councils of Conciliation Act, 1867; and the Arbitration (Masters and Workmen) Act, 1872 (s. 7).

The first section of the Act makes provision for application for registration to the Board of Trade by any Conciliation Board, which means any Board established either before or after the passing of this Act (7th August 1896), which is constituted for the purpose of settling disputes between employers and workmen by conciliation or arbitration, or by any association or body authorised by an agreement in writing made between employers and workmen to deal with such disputes. The application must be accompanied by copies of the constitution, bye-laws, and regulations, and any other information reasonably required.

The Board of Trade keep a register of such Conciliation Boards, any one of which may, however, at any time have its name removed. The Board of Trade may remove a name if satisfied the Board no longer exists.

The second section confers certain powers on the Board of Trade in the event of a difference arising or being apprehended between employers and workmen. These are—

(1) To inquire into the causes and circumstances.

(2) To take certain steps to enable the parties to meet together with a view to an amicable settlement.

(3) On application of employers or workmen interested, to appoint a person or persons to act as conciliator or as a Board of Conciliation.

(4) On the application of both parties, to appoint an arbitrator.

A report of the proceedings by a person acting as conciliator is sent to the Board of Trade, and if the difference is settled by conciliation or arbitration, a memorandum of the terms of settlement is made and signed, and a copy sent to the Board of Trade.

The Arbitration Act, 1889, does not apply to the settlement by arbitra-

tion of disputes under this Act; but such arbitration proceedings are to be conducted in accordance with such of the provisions of the Act of 1889, or such regulations of any Conciliation Board, or such other regulations as may be agreed upon by the parties (s. 3). Under sec. 4 the Board of Trade may take means to aid in establishing Boards of Conciliation in districts deemed to be requiring such.

The Board of Trade has from time to time to make a report to Parliament of their proceedings (s. 5), and the expenses incurred under this Act are to be defrayed out of moneys provided by Parliament (s. 6).

Trade Mark.—The custom of a manufacturer of goods adopting a distinctive mark to be affixed to his products is said to be of very ancient origin in this country; and the common law, from early times, has recognised and protected his right to the exclusive use of such trade mark (*Dixon*, 1867, 5 M. 326; *Orr-Ewing*, 7 App. Ca. 219). This legal protection is in the interest both of the manufacturer and of the public. Provision for the registration of trade marks was first made by the Trade Marks Registration Act, 1875. The matter is now regulated by the Patents, Designs, and Trade Marks Acts, 1883 to 1888 (46 & 47 Vict. c. 57; 48 & 49 Vict. c. 63; 49 & 50 Vict. c. 37; and 51 & 52 Vict. c. 50). See also MERCHANDISE MARKS ACT.

Definition.—The present statutory definition of a trade mark is contained in sec. 64 of the Patents Act, 1888: "(1) For the purposes of this Act, a trade mark must consist of, or contain at least one of, the following essential particulars:—

"(*a*) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

"(*b*) a written signature or copy of a written signature of the individual or firm applying for registration thereof as a trade mark; or

"(*c*) a distinctive device, mark, brand, heading, label, or ticket; or

"(*d*) an invented word or invented words; or

"(*e*) a word or words having no reference to the character or quality of the goods, and not being a geographical name.

"(2) There may be added to any one or more of the essential particulars mentioned in this section, any letters, words, or figures, or combination of letters, words, or figures, or any of them; but the applicant for registration of any such additional matter must state in his application the essential particulars of the trade mark, and must disclaim in his application any right to the exclusive use of the added matter, and a copy of the statement and disclaimer shall be entered on the register." But a person need not, under the above section, disclaim his own name or the foreign equivalent thereof, or his place of business; but no entry of any such name shall affect the right of any owner of the same name to use that name or its foreign equivalent (s. 64 (3) (1)). There is a saving for old words, letters, and figure marks which were used as a trade mark before 13th August 1875.

Registration.—Application for registration of a trade mark must be made to the Comptroller, Patent Office (Trade Marks Branch), Southampton Buildings, London. The requisite forms for making application are on sale at all the chief post-offices in the United Kingdom (see Trade Mark Rules, 1890, framed by Board of Trade). The application is advertised in the official *Trade Marks Journal* (published weekly). Notice of opposition ought to be given within one month from the date of the *Journal* containing the advertisement of the application—but, on good cause

shown, the Comptroller may extend this time for a period of not more than three months.

Period of Protection.—The period of protection of a registered trade mark is fourteen years. At the expiration of that period, the registration may be kept in force for another period of fourteen years by payment of the prescribed fee for renewal; and it may be thus renewed at the expiration of each period of fourteen years (Act 1883, s. 79; Act 1888, s. 19 (1) (2)). The date of application is held to be the date of registration; and application for registration is declared to be equivalent to public use of the trade mark (Act 1888, s. 75). Registration is *primâ facie* evidence of a person's right to the exclusive use of the trade mark; and after the expiration of five years from the date of registration, is conclusive evidence of his right to the exclusive use of the trade mark, subject to the provisions of the Acts (Act 1883, s. 76). This provision, however, does not mean that "the mark, as registered, shall be deemed to be a trade mark," but only that the person who has registered it is entitled to it (per Jessel, M. R., in *re Palmer*, 21 Ch. D. 53). A trade mark may be expunged from the register on cause shown (and even after the expiry of five years (*Herbert*, 1897, 24 R. 561)), or the entry in the register may be varied or amended (Act 1888, s. 24, Act 1883, s. 92).

Transfer.—Trade marks can be assigned and transferred only in connection with the goodwill of the business in which they have been used—the owner must at the same time transfer to the assignee of the trade mark the business, or so much of it as relates to the goods for which the mark has been registered (*Edwards*, 30 Ch. D. 454, per Fry, L. J.). If a business be sold without mention of the trade mark, the mark is held to be transferred by implication to the purchaser (*Shipwright*, 19 W. R. 599).

In Scotland a petition for rectification of the register may be presented in the Outer House (*Herbert*, 1897, 24 R. 596). A petition under sec. 90 of the Act of 1883 cannot competently be presented to the Scottish Courts, the proper procedure is by summons (*Dewar*, 1898, 6 S. L. T. No. 120).

Even where there is no "trade mark" in the statutory sense, if the goods manufactured by a person have come to be associated in the minds of the public with his name, or the name of the place of manufacture, at common law he will be protected against any use of that name by another in such a way as to mislead the public (*Singer Co.*, 1873, 11 M. 267; 3 App. Ca. 376, 8 App. Ca. 15; *Lochgelly Co.*, 1879, 6 R. 482; *Charleson*, 1876, 4 R. 149; *Crawford's Trs.*, 1896, 23 R. 747; *Cellular Clothing Co.*, 1898, 35 S. L. R. 869; *Thomson & Co.*, 1888, 15 R. 880; *Bayer*, 1898, 35 S. L. R. 913, per Ld. President).

[Sebastian on *Trade Marks*; Fulton on *Patents, Trade Marks, etc.*; Bell's *Prin.* (Guthrie) s. 1361.]

Trade Unions.—*Introductory.*—The objects of trade unions are in general of a twofold character.

(1) Those of an ordinary, friendly, or benefit society, such as to afford relief to members when incapacitated by sickness, accident, or old age.

(2) Those of a trade society proper, viz. to watch over and promote the interests of the working classes in the several trades, and especially to protect them against the undue advantage which the command of large capital is supposed by them to give to the employers of labour.

The first was probably their original and primary condition of existence, but it was natural that in the sequence of events they should devote some attention to the relations of their members with their employers. So far

as regards their first and primary objects, these associations could not be said to be illegal. It was only when they endeavoured to interfere with and regulate such matters as rates of wages, etc., that they overstepped the limits of legality. For a combination of persons concerned in a trade is not of itself illegal. The illegality arises from its purpose. So, during the Middle Ages, there existed under the name of "gilds" many combinations of persons, interested in one trade or craft, which were perfectly legal. But it was ever a well-established principle of common law that "restraint of trade" was unlawful. Apart from this common law doctrine there was much legislation from early times to prevent and punish combinations or conspiracies in restraint of trade. Owing to these statutory enactments there are not many reported cases founding on the common law, but reference may be made to *Hilton*, 1856, 6 E. & B. 47; *Hornby*, 1867, 10 Cox C. C. 393; and *Farrar*, 1869, L. R. 4 Q. B. 602, as three English leading cases illustrating the illegality of such combinations and the consequent impossibility of having their agreements enforced by a Court of law.

Prior, then, to 1824, under these statutes known as the Combination Acts, and at common law, all concerted proceedings on the part of workmen for the purpose of raising wages were punishable; and any association formed for the ordinary purposes of a trade union was illegal and not entitled to any protection from law.

In that year, by 5 Geo. IV. c. 95, the Combination Acts were repealed, and members of such combinations were only subject to punishment where their acts were attended with violence.

In the following year, by 6 Geo. IV. c. 129, the common law in regard to conspiracy was restored, and summary penalties were imposed for violence, threats, intimidation, and molestation. The Act made certain exceptions and exempted from punishment meetings for discussing the rate of wages and hours of work. This Act did not, however, affect the illegality at common law of a society where its rules were in "restraint of trade."

A Royal Commission considered the whole subject from 1867 to 1869, and following on its report there were passed the Trade Union Act, 1871 (34 & 35 Vict. c. 31), and the Criminal Law Amendment Act, 1871 (34 & 35 Vict. c. 32). A second Royal Commission on the labour laws was appointed in 1874, and on its report were passed the Employers and Workmen's Act, 1875 (38 & 39 Vict. c. 90), the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), and the Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22). The statutory law in regard to trade unions is therefore comprised in these Acts.

I. Constitution and Status of Trade Unions.

Effect of 1871 *Act.*—This Act is intended as a remedial measure to improve the status of such associations by removing the taint of illegality attached to them, and their position is clearly set forth in the 2nd, 3rd, and 4th sections quoted below. Facilities are also given for registration, and regulations provided for such registered unions. Generally speaking, the object of the Act was "to give relief to trade unions in certain clearly defined directions, to enable them to sue certain actions and enforce certain rights which they could not sue and enforce before, and to save them from certain criminal liabilities to which they were previously exposed" (per Ld. Pres. Inglis in *Shanks* v. *United Operative Masons' Association*, 1874, 1 R. 823 at 825).

A "trade union" to which the Act applies is defined as "any combination, whether temporary or permanent, for regulating the relations between

workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade (39 & 40 Vict. c. 22, s. 15, partly repealing 34 & 35 Vict. c. 31, s. 23). The unrepealed part of the latter section excludes from the definition—

(1) any agreement between partners as to their own business;
(2) any agreement between an employer and those employed by him as to such employment;
(3) any agreement in consideration of the sale of the goodwill of a business, or of instruction in any profession, trade, or handicraft.

By the 2nd and 3rd sections it is declared that the purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful—

(*a*) so as to render any member liable to criminal prosecution for conspiracy or otherwise;
(*b*) so as to render void or voidable any agreement or trust.

But "no change was introduced into the constitution of these societies. They remain voluntary associations of which the law can take no special cognisance as collective bodies."

Jurisdiction of Courts of Law.—The common law disabilities attaching to trade union contracts are carefully preserved by the 4th section, which, while declaring that such are not unlawful, provides that nothing in the Act is to enable any Court to entertain any legal proceeding instituted in order directly to enforce or recover damages for breach of—

(1) an agreement between the members of a trade union as such concerning the conditions on which they shall or shall not sell their goods, transact business, employ or be employed;
(2) an agreement for the payment by any person of a subscription or penalty to a trade union;
(3) an agreement for the application of the funds—
    (*a*) to provide benefits to members;
    (*b*) to furnish contributions to non-members in consideration of their acting in conformity with the rules or resolutions of such trade unions;
    (*c*) to discharge a fine imposed by any Court of justice;
(4) an agreement between two or more trade unions;
(5) any bond to secure the performance of any of the before-mentioned agreements.

The effect of this section is that the question whether such agreements can be enforced in a Court of law is to be determined by the common law apart from the statute (*Amalgamated Society of Railway Servants for Scotland*, 1880, 7 R. 867, per Ld. Young, p. 873). The important decisions in *M'Kernan*, 1874, 1 R. 453; *Shanks*, 1874, 1 R. 823; and *Aitken*, 1885, 12 R. 1206, are not contrary to this view, for they established that, as the combined result of the common law and the Trade Unions Act, 1871, no Court could entertain any action to directly enforce or recover damages for the breach of any agreement for the application of the funds of a trade union to provide benefits to members.

It cannot, however, be said with certainty to what extent the Courts will interfere to indirectly enforce, *inter se*, the rights of trade union members. Thus it has been held that an application at the instance of the general trustees of a trade union for interdict against the trustees of a branch

applying funds in their hands for purposes alleged to be other than those specified in the rules, is not a proceeding struck at by the provisions of the 4th section (*Amalgamated Society of Railway Servants for Scotland, supra.* See *Wolfe*, 21 Ch. 194; *Stroek*, 1887, 36 Ch. D. 558; *Duke*, 1888, 49 L. J. Ch. 802).

Where the primary objects of a society are legal, the fact that some of its rules are illegal as being in restraint of trade does not constitute the society an illegal society, and a member will be entitled to claim benefit money under a rule which, being in accordance with the fundamental objects of the society, is legal and not affected by other rules which are illegal (*Swaine*, 1889, 24 Q. B. D. 252). Rules made for the *bonâ fide* purpose of protecting the funds of such a society from claims which can be avoided by reasonable care and management are not illegal because they are incidentally to some extent in restraint of trade, provided that their provisions go no further than is reasonable and necessary for that purpose (*ib.*).

Relation to Friendly Societies.—The Friendly Societies Act, 1896, the Industrial and Provident Societies Acts, and the Companies Acts do not apply to trade unions, and the registration of any trade union under any of these Acts is void (1871 Act, s. 5). But an exception to this rule was introduced by the Act 1876, s. 2, in the case of a trade union, whether registered or unregistered, which insures or pays money on the death of a child under ten years of age. These are to be treated as industrial assurance companies, and therefore subject to secs. 62–67 and 84 of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), and secs. 1 and 13 of the Collecting Societies Act, 1896 (59 & 60 Vict. c. 26).

Registered trade unions and branches thereof which contribute to medical societies are within the provisions of sec. 22 of the Friendly Societies Act, 1896.

II. Registered Trade Unions.

The 1871 Act, besides making an important change in the status of associations of the nature of trade unions, also makes provision for such being registered with the Registrar of Friendly Societies, provided that none of its purposes are unlawful (ss. 6 and 17). Mere restraint of trade is not now an unlawful purpose (ss. 2 and 3).

(*a*) Register.—The provisions in regard to registry are contained in secs. 6 and 13 of the 1871 Act. The regulations are similar to those for Friendly Societies, and deal with the form of application, the production of the rules, the registered name, the issue of a certificate of registry, and the power of one of H.M. Principal Secretaries of State to make regulations as to registry. Under sec. 15 the society must, under pain of a penalty, have a registered office; and sec. 16 provides for an annual return being sent to the registrar, under a penalty for failure or false entries. The cancellation or withdrawal of the certificate of registry is regulated by sec. 13 and sec. 8 of the 1876 Act. Provisions for change of name, amalgamation, and dissolution, on giving proper notice, are made in secs. 14–15 of 1876 Act.

(*b*) Rules.—In the first schedule of the 1871 Act are enumerated the matters requiring to be dealt with in the rules of registered trade unions.

A copy of the rules must be delivered to every person demanding them, at a cost not exceeding one shilling (s. 14 of 1871 Act). The circulation of false copies is an offence (s. 18).

(*c*) The Trustees.—(1) *Vesting and Transfer of Property.*—Land not exceeding one acre may be purchased, sold, or leased for any trade union by

the trustees, and their receipt shall be a sufficient discharge (s. 7). The property of a registered trade union or branch is vested in the trustees for the time being, whether of the union or the branch, according to the rules, and no conveyance or deed is necessary to vest the same in succeeding trustees (s. 8 and s. 3 of 1876 Act). Provision is made for transfer of stock, on the absence, removal, bankruptcy, incapacity, or death of a trustee in whose name it stands (1876 Act, s. 4).

(2) *Title to Sue and be Sued.*—In all legal proceedings concerning the property, right, or claim to any property of the union, the trustees or any other officer specially authorised by the rules shall sue or defend on behalf of the union, the title of their office being a sufficient description. The action is not affected by the death or removal of a trustee. The summons to a trustee or officer is sufficiently served by leaving it at the registered office of the trade union (s. 9 of 1871 Act).

(3) *Liability of Trustees.*—They are not liable for any deficiency in the funds, but only for money actually received by them on behalf of the union (s. 10).

The treasurer and other officials have to make an accounting in accordance with the rules (s. 11).

The wilful withholding, or application, fraudulent or contrary to the rules, of any of the effects of the union is an offence dealt with under sec. 12. See also sec. 5 of the 1876 Act.

(*d*) Prosecutions and Complaints.—The jurisdiction is in Scotland confined to the Sheriff Court. Prosecutions are at the instance of the procurator-fiscal under the provisions of the Summary Procedure Act, 1864. Summary orders under the Act may be made and enforced on complaint in the Sheriff Court (s. 19).

The 21st section allows an appeal against any order or conviction to the Justiciary Court.

(*e*) Members.—(1) The membership is open to all over sixteen years of age unless the rules otherwise provide (1876 Act, s. 9). Their position in regard to the union is an anomalous one. For they enter into a contract declared not to be unlawful (it would be more correct to say "contrary to the law") and yet they are excluded from enforcing the agreement. In other words, they have apparently no legal remedy for payment of the benefits for which they have paid their contributions. On the other hand, the union has no means of enforcing payment of their contributions by the members.

(2) *Nomination and Payment on Death.*—A member of a registered trade union may nominate certain persons to receive any sum payable on his death, not exceeding £100 (1876 Act, s. 10, and 46 & 47 Vict. c. 47, s. 3). The union, on satisfactory proof of death of the nominator, pays over the money to the nominee. Where a member dies intestate or without making a nomination, and the fund does not exceed £100, payment may be made without confirmation to the person considered by the majority of the trustees entitled to the same. If the deceased member be a bastard, the union may make payment to the persons who would have been entitled if he had been legitimate, or if there is no such person, must deal with the money as the Treasury may direct (Provident, Nomination, and Small Intestacies Act, 1883, 46 & 47 Vict. c. 47, ss. 7 and 8). A trade union cannot be sued by a nominee for payment of the sum to which, under the rules, he became entitled, there being nothing in the provisions of the 1876 Act which would repeal the provisions of the 4th section of the 1871 Act in this respect (*Crozier*, 1902, 1 Q. B. 702).

No estate or succession duty is payable on such sum of £100, nor any

legacy duty where the sum does not exceed £80 (57 & 58 Vict. c. 30, s. 8 (1); 46 & 47 Vict. c. 47, s. 10).

(*f*) Exemption from Income Tax.—Under the Trade Union (Provident Funds) Act, 1893 (56 Vict. c. 2), the interest and dividends of a registered trade union applicable and applied solely for the purpose of provident benefits are exempted from income tax, provided the rules do not permit a member to be assured for a larger sum than £200 or an annuity exceeding £30 a year.

The mode of claiming exemption is the same as that prescribed for income for charities (s. 2), and the term "provident benefits" is defined under sec. 3.

III. Combining against Third Parties.

Hitherto we have been considering mainly the position of trade unions and their members *inter se*. We have now to consider the position of these in relation to third parties, and to treat the law as it affects Strikes, Picketing, Unlawful Combination, and Conspiracy of workmen against their masters or fellow-workmen.

(*a*) *Civil Liability.*—In England of late years this important question has been much discussed. There has been some difference of opinion, but by recent decisions, including the *Mogul* case and *Allen* v. *Flood*, the principles of common law which apply to such questions have been fairly well settled.

In the *Mogul Steamship Co.*, [1892] A. C. 25, certain shipowners formed an association in order to secure a certain carrying trade exclusively to themselves, by the inducement of cheaper rates of freight, and the prohibition, on pain of dismissal, of agents of members acting in the interests of competing shipowners. Their action seriously prejudiced the trade of other shipowners; but as there was no question of misrepresentation or compulsion used in attaining their object, it was held that though the agreement itself may not be enforceable as between the parties, as being in restraint of trade, yet neither the end contemplated by the agreement, nor the means used for its attainment, was contrary to law, and that they were not liable for loss sustained by third parties.

The case of *Allen* v. *Flood* ([1898] A. C., reversing [1895] 2 Q. B. 21), while it does not define the rights of trade unions, is a case of high authority and importance, and lays down certain legal principles that help to determine the liability of such associations and their members in their actings towards third parties. The case decides that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act, so as to make the doer of the act liable to a civil action. The act complained of in this case was that the delegate of the trade union of ironworkers employed on the repair of a ship had informed the employers that unless certain shipwrights were discharged from the work, the ironworkers would all leave. The delegate had previously been sent for by the ironworkers, who told him this was their intention. In consequence of the representation made to the employers, the shipwrights were dismissed, and two of them raised an action of damages against the delegate of the union. It was decisively settled in this case that the delegate had not used unlawful means in procuring the shipwrights' dismissal, and that he had done no unlawful act, and that in order to give a cause of action against him, malice did not suffice, but that something more, such as violation of duty or breach of contract, or what would tend to such a breach, must be averred and proved. The next question is whether such an act, being lawful in itself,

would become actionable when done by two or more persons in concert, and this question has been decided in *Huttley* v. *Simmons*, [1898] 1 Q. B. 181. In that case Darling, J., on the authority of recent English dicta and the important Irish decision of *Kearney* v. *Lloyd*, 26 L. R. Ir. 266, held that there is no ground of action unless the "acts agreed to be done, and in fact done, would, had they been done without preconcert, have involved a civil injury" to the pursuer.

The dicta in these cases do not, of course, exclude liability where there has been some specific wrong, such as assault, slander, procuring wrongful dismissal, etc. The principles laid down in these English cases were recently approved and followed by Ld. Kincairney in the Scottish case of *The Scottish Co-operative Wholesale Society Ltd.*, 1898, 5 S. L. T., No. 336. The facts more nearly resembled the *Mogul* case than *Allen* v. *Flood*, a co-operative society being held to have no ground for damages against the Glasgow butchers for forming an agreement for the purpose of inducing the cattle salesmen not to accept the bids of the former at auction sales of cattle. In the course of his judgment his Lordship said: "It cannot, I think, be doubted that if A. informs B. that he will not deal with him unless he ceases to deal with C., and C. thereby loses the custom of B., C. has no action against A., although he may in fact have suffered through his interference; and if it should appear or be admitted that A. made his request or demand for no other reason than because he disliked C. and wished to injure him, that, according to the doctrine of *Allen* v. *Flood*, would make no difference."

(*b*) *Criminal Liability.*—There are not any penal provisions in the statutes affecting trade unions as societies, and they are therefore not subject to prosecutions as such. Certain statutory offences for which the officers and others may be punished have already been mentioned, and the mode of appeal stated.

The question as to how far trade unions and their members are criminally liable for concerted operations against third parties, as by *Strikes* and *Picketing*, comes under the law of *Conspiracy*.

Prior to 1871, Strikes and Picketing would have been held to be illegal (*Walsby*, 1861, 3 El. & El. 516), though there was a tendency by some English judges to regard a strike as lawful if not accompanied by violence, intimidation, or the like (*Druitt*, 1866, 10 Cox C. C. 592).

So the combination of a number of persons to induce a strike would also have been an illegal act.

Following on a Parliamentary Commission in 1867, there was passed in 1871 the Criminal Law Amendment Act (38 & 39 Vict. c. 38), which repealed the Act of 1825, and limited conspiracies in restraint of trade to conspiracies to do things prohibited by the Act. It was found necessary to again amend the law, and the rights of trade unions in this matter are now regulated by the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86). By sec. 3 "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act, if committed by one person, would not be punishable as a crime." Certain saving clauses follow, providing that any conspiracy for which punishment is awarded by any Act of Parliament is not affected, nor the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or Sovereign. Nor does this change in the law apply to the wilful and malicious breach of contract by employees of authorities supplying gas or water (s. 4), nor to wilful and

malicious breach of a contract involving injury to property (s. 5). Summary remedies are provided by the Act for these particular breaches; and further, sec. 7 enumerates certain acts for which a person is liable to summary conviction and punishment by fine or imprisonment. These are where any person, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority—

1. uses violence to or intimidates such other person, or his wife or children, or injures his property (see *Curran*, [1891] 2 Q. B. 545; *Judge*, 1887, 36 W. R. 103);
2. persistently follows such other person about from place to place (see *Smith*, 1889, 54 J. P. 596);
3. hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof;
4. watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place;

But attendance at or near such a place merely in order to obtain or communicate information is not deemed watching or besetting.

5. follows such other person with two or more other persons in a disorderly manner in or through any street or road.

Offenders are tried in the Sheriff Court, subject to appeal to the Justiciary Court (ss. 17–20).

The Act does not apply to seamen or to apprentices in the sea-service (s. 16). This means seamen as defined by the Merchant Shipping Acts, *i.e.* persons employed or engaged on board ship (*R.* v. *Lynch*, [1898] 1 Q. B. 61; *Kennedy*, [1891] 1 Q. B. 77).

There are not any reported cases in Scotland under this Conspiracy Act of 1875. In England the law as to *Picketing* under the Act has been frequently discussed, the most recent being *Lyons*, [1896] 1 Ch. 811. This case is not affected or overruled by the principles laid down by the House of Lords in *Allen* v. *Flood* (*Lyons*, 1898, 15 T. L. R. 128).

Under the present law, outside of these statutory provisions, strikes, like trade unions, are not contrary to law, at least so far as the doctrines as to restraint of trade are concerned, and up to a certain point a strike can be conducted with perfect legality. They have, however, no power to coerce people, and to prevent them working for whom they please, and on what terms they please. A strike only becomes criminal when accompanied by acts which themselves are criminal, and for which the members of the union, whether acting separately or in combination, will be prosecuted, and not the union itself. The circumstances of each case must decide whether the limits to their actings which the law allows have been overstepped.

Authorities.—Wright's *Conspiracy*; Erle on *Trade Unions*; Guthrie on *Trade Unions*; Davis on *Friendly Societies and Trade Unions.*

See Conspiracy; Friendly Societies; Trade Disputes Conciliation Act.

Trade, Usage of, Custom of.—See Custom of Trade.

Tradition.—See Delivery of Moveables.

Transaction—"Any agreement between two parties tending to the settlement of doubtful and controverted claims. It does not apply in strictness to mere contingencies" (Bell's *Dict.* and *Dig.*).

A transaction may be reduced on the ground that it has been induced by misrepresentation or fraud (*Dempster*, 1873, 11 M. 843); but not on the ground of error as to legal right (*Kippen*, 1874, 1 R. 1171).

Transference (Process).—A. *Ordinary Appeals for Removal to Court of Session from Inferior Courts.*—The procedure is regulated by 31 & 32 Vict. c. 100, ss. 70–71, and by Act of Sederunt, 10th March 1870, s. 3. Within two days from receiving the note of appeal, the Clerk of the inferior Court must *himself* (*Innes*, 1859, 12 D. 1007) transmit the process to one of the Clerks of the Division to which the appeal is taken, who must subjoin to the appeal a note of the day on which it is received (s. 71 of the Statute). The further procedure is regulated by A. S., 1870, s. 3. If the appeal has been held to be abandoned in the manner provided for in the Act of Sederunt, the process is retransmitted to the Clerk of the inferior Court, the Clerk of Court having first engrossed on the interlocutor sheet and signed a certificate to this effect: "[*Date*] Retransmitted in respect of the abandonment of the appeal"; and in respect of said certificate, the judge of the inferior Court will, upon motion, grant decree for payment to the respondent of £3, 3s. of expenses. So long as the process has not been actually retransmitted, the Court has allowed trifling errors to be corrected, if the other side has not been prejudiced (*Park*, 1874, 12 S. L. R. 11; *Young*, 1875, 2 R. 456; *Walker*, 1877, 4 R. 714; *Boyd*, 1888, 16 R. 101).

In appeals under the Debts Recovery Act, 1867 (30 & 31 Vict. c. 96) the procedure in regard to transmission of process is similar to that in ordinary cases (ss. 11–14). When appeal has been made, the Sheriff Clerk transmits the whole process to one of the Principal Clerks of the Division to which the appeal is taken (or to one of the Principal Clerks of the First Division if the Division is not named in the appeal); A. S., 14th October 1868, s. 20, provides for such cases being sent to certain Clerks specified. When an appellant fails to move in an appeal under the Debts Recovery Act, s. 14, it is the duty of the Clerk to the process at once to transmit the same to the Sheriff Clerk, without any steps being taken by the respondent to move the Court to dismiss the appeal; and the respondent will not be allowed the expenses of enrolling, etc. (*Baird*, 1869, 7 M. 862).

B. *Appeals for Removal of Process.*—Processes may be transferred from the Sheriff Court to the Court of Session as follows, namely—

(1) By appeal on the ground of incompetency, including defect of jurisdiction, and personal objection to the judge (*i.e.* interest or relationship). The appeal may be taken both under 50 Geo. III. c. 112, s. 36, and in virtue of the common law power of the Court to control irregular proceedings in inferior Courts. The procedure was formerly by advocation, but appeal was substituted as a mode of review by the Court of Session Act, 1868, ss. 65, 66. See INCOMPETENCY.

(2) By motion on the ground of contingency (Court of Session Act, 1868, s. 74). Formerly, when contingency existed between an inferior Court process and a process in the Court of Session, it was necessary to present a note of advocation *ob contingentiam* (50 Geo. III. c. 112, s. 86) in the Bill Chamber; but the following procedure can now be adopted by any party desiring to transfer the inferior Court process to the Court of Session. A copy of the inferior Court record, or of such pleadings as may have been lodged, and of the interlocutors in the cause certified by the Clerk is lodged in the Court of Session process, and the Lord Ordinary or Division before whom that process is depending is moved to grant an order on the Clerk of the inferior Court for the transmission of the inferior Court process. If the

Lord Ordinary or Division is satisfied that there is contingency, warrant is granted to the Clerk of the inferior Court, and the process is transmitted accordingly (Court of Session Act, 1868, s. 74). The decision of the Lord Ordinary, or Court, upon the motion for transmission is final; but in the event of the application being refused, either party may renew the motion at any subsequent stage of the cause (s. 75). When transferred, the action becomes a Court of Session process, and if desired may be conjoined. See CONTINGENCY OF A PROCESS.

(3) By appeal for jury trial. (*a*) In ordinary actions under the Judicature Act, 1825 (6 Geo. IV. c. 120, s. 40). "In all cases originating in the inferior Courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session, by Bill of Advocation . . ." Note of appeal is now substituted for bill of advocation, and the procedure is the same as in an ordinary appeal for review (*i.e.* by note of appeal in the form prescribed by the Court of Session Act, 1868, ss. 66 *et seq.*). But it is still subject to the conditions specified in the Judicature Act, s. 40. Appeals for jury trial are presented to the Inner House, but may be remitted to the Outer House (Court of Session Act, 1868, s. 73).

See under APPEAL, *Appeals for Removal of Process, Appeal for Jury Trial*; Mackay, *Manual*, p. 599.

(*b*) In competing petitions for service. Where competing petitions have been conjoined, or where any person competently appears to oppose a petition of service, any of the parties may at any time before the Sheriff has begun to take the proof, remove the proceedings to the Court of Session by note of appeal in the form prescribed by Court of Session Act, 1868, ss. 66 *et seq.* (31 & 32 Vict. c. 101, s. 41,—re-enacting 10 & 11 Vict. c. 47, s. 17; and see ss. 43 and 44).

(4) By note for transmission of process.—(*a*) In actions relating to heritable rights, etc., under the Sheriff Courts Act, 1877, s. 9 (40 & 41 Vict. c. 50).

The actions formerly competent only in the Court of Session, but rendered competent in the Sheriff Court by the 1877 Act, s. 8, may be transferred to the Court of Session under sec. 9. The defender may at any time before the closing of the record, or within six days thereafter, lodge a note in the process in the following terms: "The defender prays that the process may be transmitted to the Court of Session [signature of defender or agent and date]." The Sheriff Clerk forthwith transmits the process to the Keeper of the Rolls of the First Division of the Court of Session, and the Lord President determines the Lord Ordinary and the Division before whom it shall depend. The process is then transmitted to the office of such Lord Ordinary, and thereafter the action proceeds as if it had been raised before him. If the defender is successful in his action, but the Lord Ordinary or Court is of opinion that the action might have been properly tried in the Sheriff Court, they may only allow him expenses on the Sheriff Court scale (s. 9 of Act).

(*b*) In actions under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42).

Actions of damages under the Employers' Liability Act, 1880, must be raised in the Sheriff Court, but such actions may be transferred to the Court of Session at the instance of either party, in the manner and subject to the

conditions prescribed by sec. 9 of the Sheriff Court Act, 1877 (Employers' Liability, s. 6). The whole cause is removed and not merely the claim under the statute (*M'Avoy*, 1881, 9 R. 100; *Morrison*, 1882, 10 R. 271). Such actions may also be transferred for jury trial under 31 & 32 Vict. c. 100, s. 73; 6 Geo. IV. c. 120, s. 40, when an order for proof is made like other actions above £40 (*Paton*, 1885, 12 R. 538).

See APPEAL; Mackay, *Practice*; Balfour, *Court of Session Practice*; Dove Wilson, *Sheriff Court Practice*.

Transportation of Convicts.—See PENAL SERVITUDE.

Transumpt, Action of.—The action of transumpt is an action to enforce the production of a deed or other writing with a view to having it copied, and to have it declared that the copy, when made and duly authenticated, shall be held to be equivalent to the original, or at least shall have the same effect as if the original had been recorded in a public register, and the copy were an extract.

It arose at a time when writs common to several parties had not clauses of registration, or when parties were not willing to publish them by registration, and it enabled parties who were entitled to raise it to obtain what was the equivalent of an extract.

The action was only competent when the defender or haver of the writ was under an obligation in writing to grant transumpts, or when the pursuer could prove that he had an interest in the writings "*ex gr.* that they made part of the title deeds of his lands."

The conclusions of the action were that the defender be ordained to produce the writing in question, that the copy of it inserted in the summons be collated with the principal, and that the transumpt or collated copy, signed by the Clerk of Court, be declared to be as effectual as if it were an extract of a registered writ. If the pursuer obtained decree, the transumpt accordingly became equivalent to the original in all cases, except in actions of reduction improbation, when the original writings had to be produced.

The proper parties to this action are the granter and grantee, or their respective representatives, of the writing in question, and also the haver of the writ; and unless these parties are all parties to the action, or expressly consent to the writings being transumed, the transumpt will not receive effect (*Duncans*, 1758, Mor. 16161). This action is an accessory one, and is distinguishable from the action of exhibition and delivery, which is an ordinary principal action. It was competent either in the Court of Session or inferior Courts, but is now almost unknown in practice.

[Du Cange, *Glossarium*; Stair, iv. 31; Bankt. iv. 24. 58; Ersk. iv. 1. 50; *Jurid. Styles*, iii. 22.]

Trawling.—Trawling is the name given to the method of catching fish by means of mechanism operating at the bottom of the sea. Trawling is regulated by statute, and by bye-laws promulgated by the Fishery Board, which recognise and deal with three modes of trawling, viz. beam trawling, seine trawling, and otter trawling.

The Scottish Fishery Board was established by the Fishery Board (Scotland) Act, 1882 (45 & 46 Vict. c. 78), which provides (s. 5 (1)) that the Board shall take cognisance of everything relating to the coast and deep sea fisheries of Scotland, and take such measures for their improvement as the funds under their administration and not otherwise appropriated may

admit of, but without interfering with any existing public authority or private right.

By the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), it is provided (Sched. First, Article xix.) that when trawl fishermen are in sight of drift-net or of long-line fishermen, they shall take all necessary steps in order to avoid doing injury to the latter. Where damage is caused, the responsibility shall lie on the trawlers, unless they can prove that they were under stress of compulsory circumstances, or that the loss sustained did not result from their fault (see *Combe*, 1886, 1 Wh. 150; *Leslies*, 1886, 14 R. 288; *Masson*, 1892, 20 R. 176).

By the Sea Fisheries (Scotland) Amendment Act, 1885 (48 & 49 Vict. c. 70), it is provided (s. 4) that when the Fishery Board for Scotland, hereinafter called the Fishery Board, are satisfied that any mode of fishing in any part of the sea adjoining Scotland, and within the exclusive fishery limits of the British Islands, is injurious to any kind of sea-fishing within that part, or where it appears to the Fishery Board desirable to make experiments or observations with the view of ascertaining whether any particular mode of fishing is injurious, or for the purposes of fish culture or experiments in fish culture, the Fishery Board may make bye-laws for restricting or prohibiting, either entirely or subject to such regulations as may be provided by the bye-law, any method of fishing for sea-fish within the said part, during such time or times as they think fit, and may from time to time make bye-laws for altering or revoking any such bye-laws.

A bye-law under this Act shall not be of any validity until it is confirmed by the Secretary for Scotland.

A bye-law shall not be confirmed until the expiration of one month after notice of the intention to apply for its confirmation has been given by the Fishery Board by advertisement in one or more newspapers circulating in the county or counties adjoining the part of the sea to which such bye-law applies.

The Secretary for Scotland shall allow any person to make a representation for his interest against the confirmation of any bye-law, on a notice of objection being given by such person to the Fishery Board within the said period of one month, and may, if he see fit, allow parties to be heard thereon.

Every bye-law when confirmed shall be published in the *Edinburgh Gazette*, and in such further mode as the Secretary for Scotland may direct.

A copy of the *Edinburgh Gazette* containing a bye-law shall be evidence in all legal proceedings until the contrary is proved of the due making, confirmation, and existence of such bye-law, without further or other proof.

Any person contravening a bye-law duly confirmed shall be guilty of an offence under the Sea Fisheries Act, 1883, and shall be liable on summary conviction to a fine not exceeding one hundred pounds, and failing immediate payment of the fine to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment, if no imprisonment has followed on the conviction.

The following section of the Act (s. 5) deals with trawlers, and provides that every British sea-fishing boat propelled by steam, fishing in any part of the sea adjoining Scotland, shall, in addition to having the number and letters painted on the bow in manner provided by the Sea Fisheries Act, 1883, have the initial letter or letters of the port to which it belongs, and the registry number in the series of numbers for that port, painted in white oil-colour on a black ground, on the funnel twelve inches from the top, and on the quarter three or four inches below the gunwale, and so as to be

clearly visible, of the dimensions prescribed for the letters and numbers on the bow by the regulations in force for the time being for the lettering, numbering, and registering of British sea-fishing boats under the Sea Fisheries Acts or any Acts amending the same.

This section shall be enforced in the same manner as if it were contained in such regulations.

It shall be the duty of the Fishery Board to enforce the provisions of the Sea Fisheries Acts, and of any Orders in Council following thereon, with respect to the numbering and lettering of fishing-boats, by directing their officers, being sea-fishery officers, to use the powers in that behalf conferred upon sea-fishery officers by the said Acts and Orders in Council.

By the Herring Fishery (Scotland) Act, 1889 (52 & 53 Vict. c. 23), it is provided (s. 6 (1)) that it shall not be lawful to use the method of fishing known as beam trawling or otter trawling within three miles of low-water mark of any part of the coast of Scotland nor within the waters specified in the schedule annexed to the Act, save only between such points on the coast or within such other defined areas as may from time to time be permitted by bye-laws of the Fishery Board for Scotland, and subject to any conditions or regulations made by these bye-laws. Provided that this section shall not apply to the Solway Firth nor to the Pentland Firth; and provided also that nothing herein contained shall affect the powers of the Fishery Board under sec. 4 of the Sea Fisheries (Scotland) Amendment Act, 1885.

(2) The Fishery Board may from time to time make, alter, and revoke bye-laws for the purposes of this section, but a bye-law shall not be of any validity until it is confirmed by the Secretary for Scotland.

(3) This subsection, which imposed penalties for contravention of the enactment of subsection (1) and of any bye-law of the Fishery Board, was repealed by sec. 3 of the Herring Fishery (Scotland) Act Amendment Act, 1890 (53 Vict. c. 10), which provides as follow:—

Any person who uses any method of fishing in contravention of the 6th section of the Herring Fishery (Scotland) Act, 1889, or of any bye-law of the Fishery Board duly confirmed, shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding one hundred pounds, and failing immediate payment of the fine to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment, if no imprisonment has followed on the conviction; and every net set, or attempted to be set, in contravention of this section shall be forfeited, and may be seized and destroyed or otherwise disposed of by any superintendent of the Herring Fishery or other officer employed in the execution of the Herring Fishery (Scotland) Acts.

It is further provided by the Herring Fishery (Scotland) Act, 1889 (s. 7 (1)), that the Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam trawling and otter trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, in any area or areas to be defined in such bye-law, and may from time to time make, alter, and revoke bye-laws for the purposes of this section, but no such bye-law shall be of any validity until it has been confirmed by the Secretary for Scotland (*Wilson*, 1896, 2 Adam, 114: *Whyte*, 1897, 24 R. (J. C.) 55).

(2) This subsection, which imposed penalties for contravention of any bye-law made in virtue of the powers conferred on the Fishery Board by the foregoing subsection, was repealed by sec. 10 (5) of the Sea Fisheries Regulation

(Scotland) Act, 1895 (58 & 59 Vict. c. 42), and sec. 10 (4) of said Act was substituted therefor. (See *infra* for the provisions of this last-mentioned subsection.) It is further provided by the said Herring Fishery (Scotland) Act, 1889 (s. 8), that it shall not be lawful to land or to sell in Scotland any fish caught in contravention of the Act, or of any bye-law made thereunder, and all superintendents and other officers employed in the execution of the Herring Fishery (Scotland) Acts are hereby empowered and required to prevent the landing or sale of any fish so caught (*Poll*, 1898, 35 S. L. R. 637).

The said Sea Fisheries Regulation (Scotland) Act, 1895, remodelled the constitution of the Fishery Board (s. 4), and established sea-fishery districts (s. 5), and fishery district committees (s. 6), which were empowered (s 8 (1)), from time to time, subject to such regulations as might be made in that behalf by the Fishery Board, to impose penalties, and also to make bye-laws to be observed within their district, for, *inter alia*, the following purpose:—

For restricting or prohibiting, either absolutely or subject to such regulations as may be provided by the bye-laws, any method of fishing for sea fish or the use of any instrument of fishing for sea fish, and for determining the size of mesh, form, and dimensions of any instrument of fishing for sea fish.

It is further provided by said Act (s. 9 (1)) that the Fishery Board may, by bye-law or bye-laws, direct that the method of fishing known as seine trawling shall not be used in any area or areas within the limits specified in sec. 6 of the Herring Fishery (Scotland) Act, 1889, or in the schedule annexed to that Act, as defined in such bye-law, and may from time to time make, alter, and revoke bye-laws for the purposes of this section.

(2) Any person, who uses such method of fishing in contravention of any such bye-law, shall be liable, on summary conviction, to a fine not exceeding five pounds for the first offence, and not exceeding twenty pounds for the second or any subsequent offence; and every net set, or attempted to be set, in contravention of any such bye-law, may be seized and destroyed or otherwise disposed of by any superintendent of the herring fishery or other officers employed in the execution of the Herring Fishery (Scotland) Acts. Provided always that, if no conviction shall follow, any net so seized shall be forthwith returned, and due compensation shall be made for any loss or damage occasioned thereto by such seizure.

Sec. 10.—(1) The Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam trawling and otter trawling shall not be used in any area or areas under the jurisdiction of Her Majesty, within thirteen miles of the Scottish coast, to be defined in such bye-law, and may from time to time make, alter, and revoke bye-laws for the purposes of this section. Provided that the powers conferred in this section shall not be exercised in respect to any areas under Her Majesty's jurisdiction lying opposite to any part of the coasts of England, Ireland, or the Isle of Man, within thirteen miles thereof.

(2) No bye-law under this section shall be confirmed by the Secretary for Scotland until he shall have directed a local inquiry to be held in the district adjoining the part of the sea to be included in the bye-law; at which inquiry all persons interested shall be heard, whether resident in the district or not; and notice of such inquiry shall be sent to all committees of sea-fishery districts in the United Kingdom.

(3) Provided that no area of sea within the said limit of thirteen miles shall be deemed to be under the jurisdiction of Her Majesty for the purposes of this section unless the powers conferred thereby shall have

been accepted as binding upon their own subjects with respect to such area by all the States signatories of the North Sea Convention, 1882.

(4) Any person who uses any such method of fishing in contravention of any such bye-law, shall be liable on conviction, under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding one hundred pounds, and failing immediate payment of the fine to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment, if no imprisonment has followed on the conviction; and every net set, or attempted to be set, in contravention of any such bye-law, may be seized and destroyed, or otherwise disposed of, by any superintendent of the herring fishery or other officers employed in the execution of the Herring Fishery (Scotland) Acts. Provided always that, if no conviction shall follow, any net so seized shall be forthwith returned, and due compensation made for any loss or damage occasioned thereto by such seizure.

(6) Failing payment by a certain date named in the conviction of the fine imposed upon the person or persons convicted, decree therefor may be pronounced against the owner or owners of the offending vessel or boat, and upon such decree being pronounced, the person or persons convicted shall be relieved therefrom and from all penalties attaching thereto.

In virtue of the powers conferred upon the Fishery Board in the foregoing statutes, bye-laws regulating trawling in the seas adjacent to the coasts of Scotland have from time to time been passed.

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), contains certain provisions applying to trawlers. These relate to the engagement of seamen (ss. 399–408), the payment of wages and discharge of seamen (ss. 409–412), the certificates of skippers and second hands (ss. 413–416), and the conveyance of fish from trawlers (s. 417).

Treason.—By the ancient law of Scotland treason was either proper or constructive. Treason proper comprehended all offences which were held to be high treason itself—offences against the State or the sovereign (see 1424, cc. 3, 4; 1449, c. 25; 1455, c. 54; 1584, c. 129; 1661, c. 5; 1662, c. 2; 1689, cc. 1, 2; and 1703, cc. 1, 3). Constructive treason embraced all offences which, though in themselves bearing none of the characters of treason, were, from their serious nature, punished as treason (see 1528, c. 8; 1587, cc. 50, 51; 1592, c. 146; and 1681, c. 15). In both these classes of treason the punishment was death, forfeiture of real and personal estate, and loss of honour and privilege.

By the Act of 7 Anne, c. 21, ss. 1, 23, the English law of treason was adopted as that of Scotland. The basis of the law of treason in England is 25 Edw. III. stat. 5, c. 2, which established the various modes of committing treason.

Under that statute, the following acts are treason:—

1. To compass or imagine the death of the king, or of his queen, or their eldest son and heir.

The word "king" means sovereign reigning, whether ceremonially crowned or not, and applies to a king *de facto* as well as *de jure*. It applies to the heir of the king, though not yet crowned, from the moment of his predecessor's death. The term includes a queen regent, but not her consort.

The words "his queen" refer only to the wife of the reigning sovereign, so long only as the marriage lasts.

The words "eldest son and heir" indicate only the eldest son of the

sovereign, and not the presumptive heir, nor eldest daughter where there is no son.

If a usurper is in possession of the throne, the treason laws do not apply to acts done against the rightful heir to the Crown.

Overt Acts.—There must be overt acts indicating treasonable intention. Thus, lying in wait to kill the king, preparing arms or poison for this purpose, consulting as to means of doing so, bribing a person to do so, are direct overt acts.

There may be dubiety as to whether writings or words spoken amount to overt acts.

(1) *Writings.*—Speculative writings, unpublished, are not treasonable. Writings which relate to an existing treasonable conspiracy may, though unpublished, amount to a proper overt act. A general impeachment of monarchy is not treasonable; but if published writings arraign the existing sovereign as a tyrant, they are treasonable.

(2) *Words Spoken.*—If the language used is general and not relative to any design, it is not treasonable. Spoken words, however, may affix a treasonable character to an ambiguous act; and, conversely, the character of the act done may affix a treasonable signification to words spoken.

The law of treason is extended, as regards the person of the sovereign, by the Act 36 Geo. III. c. 7, which is made perpetual by 57 Geo. III. c. 6. By this statute it is treason "to compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of the sovereign."

In the case of the king's wife or heir, the compassing must be directed against their lives, and not merely aim at restraint of their persons.

2. It is treason if a man violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir.

It matters not whether the carnal knowledge be by force or consent, and it is treason in the woman consenting as well as in the man.

3. It is treason to levy war against the king within his realm.

(1) There must be a levying of war. A mere consultation or conspiracy to levy war is not enough. But the mere raising and assembling of a warlike force, or attack on the king's troops for public reasons, or holding out a castle against the king's troops, amounts to levying of war.

(2) The war must be levied against the king. It is enough that the royal prerogative or authority is attacked, or reformation of the established laws or political institutions is attempted by force. But a rising is treasonable only when it aims at the accomplishment of a general object, or takes cognisance of a matter of general concern. When tumult arises from a special provocation, or merely to redress a local grievance, this is riot only, and not treason.

(3) The levying of war must be within the king's realm. This includes the narrow seas, so that it is treasonable to attack a royal vessel there.

4. It is treasonable to adhere to the king's enemies, or aid or comfort them within the realm or elsewhere. Every alien is an enemy who comes into this country in open hostility, though his State be at the time friendly with Great Britain. Acts of adherence to those opposed to the king's allies are treasonable.

5. It is treason to counterfeit the king's Great or Privy Seal, or the Crown Seals appointed by the Act of Union to be used in Scotland.

6. It is treason to slay the king's chancellor, treasurer, or justices while in office. This includes the slaying of any of the judges of the Scottish Supreme Courts while sitting in judgment.

7. It is treasonable (1 Anne, stat. 2, c. 17) to endeavour, by any direct and overt act, to hinder the succession to the Crown of the person entitled to succeed according to the provisions of the Act of Settlement, and, by 6 Anne, c. 7, it is treason to maintain and affirm, advisedly and directly, by writing or printing, that any person has right to the Crown of these realms, otherwise than by the Act of Settlement, or that the King and Parliament cannot make laws to bind the Crown and descent thereof. But to do the same by teaching, preaching, or advised speaking does not amount to treason.

Persons who are Amenable to Trial for Treason—

(1) Everyone born of a British father, whether resident at home or abroad.

(2) Every natural-born subject of a friendly State who is resident in this country. If war breaks out between his State and Great Britain, he must leave this country before he is entitled to take service under his own prince. If he remains, he is treated as a British subject. Foreign ambassadors are guilty of treason when they attempt the sovereign's life.

(3) An enemy coming to Great Britain under protection of a royal safe-conduct is amenable to the laws against treason.

(4) Accessories, whether before or after the fact, are principals in treason.

Procedure.—In Scotland treason may be tried by the Court of Justiciary or by any Royal Commission of Oyer and Terminer, containing at least three Lords of Justiciary. If the Lord Advocate desires it, any trial for treason pending before the Commission may, by a *certiorari* under the Great Seal, be transferred to the Justiciary Court. A grand jury of twelve must, within three years after the offence, find a true bill against the traitor, and the trial then proceeds before a petty jury of twelve. A copy of the indictment and list of the jury must be served on the prisoner, the *induciæ* being fifteen days. The accused has right of peremptory challenge of jurors to the number of thirty-five. Two concurring witnesses to each overt act libelled, or one witness to each of two or more overt acts of the same species of treason, are required (1 Edw. VI. c. 12; 5 & 6 Edw. VI. c. 11; 1 & 2 Phil. and Mary, c. 10; 7 Will. III. c. 3). The Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35), does not apply to treason, nor affect the procedure in any prosecution or trial therefor (s. 75).

Punishment.—(1) Death. The accused is to be drawn on a hurdle to the place of execution and hanged or beheaded (the latter only in the case of men) (30 Geo. III. c. 48). After death the body is quartered (54 Geo. III. c. 146).

(2) Confiscation of moveables.

(3) Forfeiture of honours and heritage held in fee-simple to the Crown.

(4) Corruption of blood, no one succeeding to the traitor as heir, or through him (see *Gordon*, 1 Pat. 558).

In England the punishment of treason is now hanging, the consequences of forfeiture and attainder having been abolished by 33 & 34 Vict. c. 23, an Act which does not apply to Scotland.

[Hume, i. 512; Alison, i. 596; Ersk. iv. 4. 20; Bankt. ii. 3. 46; Stair, ii. 3. 66; Macd. 226; Anderson, *Crim. Law*, 28; Stephen, Com. 12th ed., ii. 441; iv. 137.]

Treason-Felony.—In 1848 an Act was passed to enable the ordinary criminal Courts to try and punish in the usual way treasonable practices of minor political significance, without the necessity of dealing

with them as high treason. By this statute (11 Vict. c. 12) it was provided (s. 3) that "if any person whatsoever shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend to deprive or depose our most gracious lady the Queen, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or to put any force or constraint upon, or in order to intimidate or overawe both Houses, or either House of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom or any other of Her Majesty's dominions or countries under the obeisance of Her Majesty, her heirs and successors; and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed," he shall be guilty of felony.

This statute thus makes the crime of treason-felony consist in—

1. Devising the deposition of the sovereign or successors; or
2. Devising the levying of war on the sovereign in order to—
   (1) Compel a change of measures or counsels.
   (2) Intimidate Parliament.
   (3) Stir up or induce foreign invasion.

The crime is complete when such devising has been—

(*a*) published in print or writing;
(*b*) openly and advisedly spoken of;
(*c*) indicated by overt act or deed.

It is competent to try under the statute offences which may amount to high treason (s. 7).

Punishment.—The statutory penalty is penal servitude (20 & 21 Vict. c. 3, and 27 & 28 Vict. c. 47) for life, or any period not less than seven years, or imprisonment not exceeding two years, with or without hard labour.

There has been only one prosecution under the statute in Scotland, viz. *Cumming and Others*, 1848, J. Shaw, 17. (See also *Mulcahy*, L. R. 3 H. L. 306, 328.)

[Macdonald, 232; Stephen, *Com.*, 12th ed., iv. 153; Anderson, *Crim. Law*, 34.]

Treason, Misprision of.—The term *misprision* is derived from the old French *mes*, wrongly, and *prendre*, to take. In the law of England the term, in its widest signification, denotes every serious misdemeanour which has no *nomen juris*. By the law of that country, a misprision is held to be implied in every treason or felony, so that a person may be proceeded against either for the treason-felony or for a misprision only. In England, however, the term is now rarely used in this wide sense, but is practically confined to the two phrases, misprision of treason and misprision of felony.

The crime of misprision of treason consists in knowing of a treasonable act and failing to communicate this knowledge, with all reasonable speed, to a judge or justice of the peace. It follows that whenever a new treason is enacted, there results a new misprision of treason. If the guilt exceed a bare failure to reveal, the charge will not be limited to misprision. The conduct of the accused may be such as to warrant his being indicted for high treason.

The mode of prosecution for misprision of treason is the same as that provided for high treason.

Punishment.—The punishment of misprision of treason is perpetual imprisonment, forfeiture of goods, and of the profits of lands during the life of the offender.

[Hume, i. 551; Ersk. iv. 4. 28; Bank. ii. 261; More, ii. 397; Swin. *Abridg. voce* "Treason"; Sweet's *Law Dict., sub voce*; Macdonald, 232; Anderson, *Crim. Law*, 34.] See TREASON.

Treasure Trove.—The right to treasure trove is one of the *Regalia Minora*, and as such is vested in the Crown. It is communicable to a subject, but only by express grant, not being included among those rights which a barony charter carries by implication. Similarly, if a subject having a grant of treasure trove from the Crown feus out his land, the right to any treasure which may be found in it remains with the superiority unless it be expressly conferred upon the vassal (Stair, ii. 1. 5; ii. 3. 60).

Treasure trove is defined by Paulus as follows: "Thesaurus est vetus quædam depositio pecuniæ cujus non extat memoria ut jam dominum non habeat" (*Dig.* 41. 1. 31. 1). The Roman law as to the right of property in such finds underwent alteration at various times, but the general principle finally established was that treasure trove belonged to the owner of the soil in which it was found if the discovery were made by (1) himself, (2) his servant employed to search on his behalf, or (3) a stranger making a deliberate and unauthorised search. On the other hand, where a person discovered treasure fortuitously and without express search in another's land, it was divided equally between the finder and the proprietor of the soil (*Inst.* ii. 1. 39). The following definition given by Chitty (*Prerogative of the Crown*, p. 152) accurately expresses the modern English law on the subject in terms which are equally applicable to Scotland: "Treasure trove is where any gold or silver in coin, plate, or bullion is found concealed in a house or in the earth or other private place, the owner thereof being unknown, in which case the treasure belongs to the King or his grantee having the franchise of treasure trove." This right in the Sovereign as against both the owner of the soil and the finder, which is in such distinct contrast with the doctrine finally adopted by the civil law, was probably not unconnected in its origin with the feudal law, which reserved to the King a supreme right in all the lands of his subjects. It would appear, however, to be rather of the nature of an exaction which the Crown's power enabled it to enforce, than the outcome of any equitable principle, although the right has been said to have been conferred upon the Crown with a view to preventing strife and contention as to the ownership of finds. A misconception of what properly constituted a *res nullius* in construing the maxim, "Quod nullius est fit domini regis," the feudal transcript of the civil law rule, "Quod nullius est fit occupantis," may also have contributed to bringing about the present state of the law. The term *res nullius* is only appropriately applied to things which have never had an owner, or which have been intentionally abandoned by their owners, or, in another use of the expression, to things of a religious character, with none of which classes does treasure trove fall (*Inst.* ii. 1. 7 and 12–17).

To bring a find within the operation of the law of treasure trove it is essential (1) that it consist of gold or silver; (2) that there be proof or sufficient presumption of its having been hidden or concealed; (3) that the owner or his representatives be unknown and unascertainable. Although it

have been made in Scotland to extend the scope of the Crown's right to articles not of gold or silver. Thus in 1888 a claim was made on behalf of the Crown to a pre-historic jet necklace and certain other antiquarian objects found in Forfarshire, but was waived in favour of the owner of the soil in which the treasure was found, on condition of his presenting the articles to the National Museum (*Proceedings of the Society of Antiquaries of Scotland*, xxv. 64). Such a claim plainly involved an undue extension of the Crown's right.

The circumstances in which the treasure is found must be such as to point to its having been intentionally concealed, or having formed part of a hidden hoard, and not to its having been merely accidentally lost or purposely abandoned. According to Blackstone, it is the *hiding*, not the *abandonment*, which seems to be the basis of the Crown's right (Kerr's *Blackstone's Comm.* i. 268). Thus the objects must be found *in* the earth, or in some secret recess or hiding-place in a wall or house, not on the surface of the earth or in the sea. Where a single object, such, for example, as a ring, is found, even in the earth, it is thought that it need not necessarily be treasure trove, if circumstances point to the probability of its having been originally lost accidentally (see Opinion of Sir R. B. Finlay and G. H. Blakesley, *Proceedings of the Society of Antiquaries*, 2nd series, xiv. 222). In the case of valuable objects of gold or silver interred along with dead bodies, it is questionable whether such, on their subsequent discovery in a later age, come properly within the definition of treasure trove, seeing that deliberate abandonment on the part of the owner is implied and the element of concealment is absent.

If the owner of the treasure trove or his representatives be traceable or even sufficiently presumable, then of course the Crown's claim is excluded in his or their favour (see *Cleghorn*, 1696, Mor. 13523; More, *Notes to Stair*, cxlvi).

Treasure trove found in lands the proprietors of which do not possess by grant the right to it, is claimed in Scotland by the Queen's and Lord Treasurer's Remembrancer, or the local procurator-fiscal on his behalf. Where a prompt and full report is made of the discovery by the finder, the Crown will in general give full bullion value for the objects. A Treasury Order of 27th August 1886, addressed to the Chairmen of Quarter Sessions, provides for the return to the finder of such coins and objects as are not actually required for national institutions, and for payment to him, less certain deductions, of the sums received from such institutions as the antiquarian value of the coins and objects retained (*Archæological Journal*, xliii. 348). Balfour speaks of the concealment of treasure trove as a crime, and apparently regarded it as a species of treason (*Practicks*, p. 517); but Hume states categorically that *occultatio thesauri* is not now a crime in Scotland, if indeed it ever was such (i. 62–3). In England, on the other hand, concealment of treasure trove is a misdemeanour punishable by fine or imprisonment (Stephen's *Digest of the Criminal Law*, 308: Kerr's *Blackstone's Comm.* iv. 107); and it is part of the duty of a coroner to hold an inquest as to treasure trove (The Coroners Act, 1887, s. 36; *Att.-Gen.* v. *Moore*, [1893] 1 Ch. 676).

With regard to articles not coming within the exceptional category of treasure trove, the general common law rule is that the finder of such has a right to them as against all the world except the true owner (*Armory*, 1 Smith's *L. C.*, 10th ed., 343; *Bridges*, 1851, 21 L. J. Q. B. 75), a right recognised by the Burgh Police (Scotland) Act, 1892, s. 412, subject to certain safeguards in the interest of the original owner. This applies to

things lost through error and to things abandoned and unclaimed. It is probably not applicable to objects of antiquarian interest (unless found on a road or in some other public place), as distinguished from articles recently lost. If such antiquarian finds be discovered under the earth, the claim of the proprietor of the soil to them as *partes soli* appears indisputable, and prehistoric articles, such as flint arrowheads and the like, found on the surface would also appear to be claimable by the proprietor of the soil for the same reason (*Elwes*, 1886, 2 T. L. R. 782).

[*Other Authorities.*—Rhind, *Law of Treasure Trove*, Edinburgh, 1859; Bankt. i. 85. 16; i. 211. 9; ii. 1. 8; Ersk. ii. 1. 12; Bell, *Prin.* ss. 1291, 1293; Rankine on *Landownership*, 3rd ed., p. 224; Note by Fountainhall, 3 Br. Sup. 148; *Gentle* v. *Smith*, 1788, 1 Bell's Ill. 375; *Sands* v. *Bell and Balfour*, 22 May 1810, F. C.; *Regina* v. *Thomas and Willett*, 1863, 33 L. J. M. C. 22; *Regina* v. *Toole*, 1867, Ir. R. 2 C. L. 36. As to the case of an urn full of silver coins found at Aberdeen, see *The Times* of 3rd June 1856. The authorities on the subject are exhaustively collected in Murray's *An Archæological Survey of the United Kingdom*, Glasgow, 1896, pp. 57–71, to which is appended a summary of the various Continental laws on the subject.]

Treating.—See Corrupt, etc., Practices.

Trees.—See Timber.

Trespass.—By the law of Scotland the proprietor or occupier of corporeal property is entitled to prevent any stranger intruding thereon. Such intrusion is termed trespass, a word borrowed from English jurisprudence. The subject of trespass in pursuit of game has already been dealt with in the article upon Poaching. Apart from some culpable ancillary purpose, such as poaching or malicious mischief, trespass is not a criminal offence. There is a popular superstition to the contrary, and the country abounds with placards threatening trespassers that they will be prosecuted with the utmost rigour of the law. But all such placards are *bruta fulmena*. The only remedy competent against the trespasser is an action of interdict against his return on a subsequent occasion. It is a valid answer to such an action that the alleged trespass was for an urgent purpose, such as the suppression of fire, the prevention of crime or capture of the criminal, personal safety, or the rescue of cattle or other property, or the destruction of a noxious animal. It is also a good defence to such an action, that the trespass was of an innocent or incidental character, not done with the view either of asserting a right or of defying the right of the proprietor, and that there is no cause to apprehend a repetition of it (*Hay's Trs.*, 1877, 4 R. 398; *Stewart*, 1877, 4 R. 879; *Macleod*, 1881, 14 R. 92). Otherwise, if a trespass has been committed, decree of interdict will be granted, and the respondent will be found liable in expenses. If the interdict be broken, the respondent may, of course, be punished by fine or imprisonment. If a trespasser, on being found and challenged, refuses to remove, the proprietor is not entitled to remove him by force (see Eglintoun, M'Laurin's C. T. p. 505). He must tolerate the nuisance for the time being, and interdict its recurrence. This rule applies, however, only to outdoor trespass. The owner or occupier of houses or other buildings is entitled to employ force to expel intruders. Other cases may, perhaps, be figured where the employment of force would be held to have been justified, as where trespassers persisted in smoking

in a stackyard, or insulted females or annoyed an invalid. Where trespass is accompanied with the destruction or injury of property, the offence may be punished as malicious mischief.

The Trespass Act, 1865.—Certain kinds of trespass have been rendered criminal by this Act, which provides (s. 3) that "every person who lodges in any premises, or occupies or encamps on any land being private property, without the consent and permission of the owner or legal occupier of such premises or land, and every person who encamps or lights a fire on or near any private road or enclosed or cultivated land, or in or near any plantation, without the consent of the owner or legal occupier of such road, land, or plantation, or on or near any turnpike road, statute labour road, or other highway, shall be guilty of an offence punishable" with a penalty not exceeding twenty shillings or fourteen days for a first offence, and not exceeding forty shillings or twenty-one days for a second or any subsequent offence. Private prosecution is not allowed (s. 5), and all prosecutions must be begun within one month after the offence was committed.

[Rankine, *Landownership*; Irvine, *Game Laws*.]

Trial.—See Jury Trial; Criminal Prosecution.

Triennial Prescription.—I. I. *Meaning and Effect of the Statute.*—The Statute 1579, c. 83, introduced into some of the commonest transactions of daily life a form of prescription which subsequent Scottish legislation was not slow to imitate. (See Quinquennial Prescription; Sexennial Prescription of Bills; and Vicennial Prescription, I. Holograph Writings.) In virtue of this sort of prescription the mere lapse of a certain time does not operate the total extinction of a claim or obligation, but a certain "specified and very safe mode of proof" is imposed upon the pursuer as a condition of his having an action. The words of the statute are as follows:—

"It is statute and ordained . . . that all actiones of debt, for house-mailles, mennis ordinars, servands' fees, merchants' comptes, and uther the like debts, that are not founded upon written obligationes, be persewed within three zeires, utherwise the creditour sall have na action, except he outher preife be writ, or be aith, of his partie."

The object of the enactment was plainly "to preserve a party after a certain period of time from claims for money founded on old claims of a loose nature, and to be made out by the slippery, or faithless, or dishonest statements of witnesses" (*Campbell*, 1848, 10 D. 361, per Ld. J.-Cl. Hope); and for long after the passing of the Act, the Court appears to have felt no difficulty in its application (see, *e.g.*, *Ord*, 1630, M. 11083; *Wilson*, 1680, M. 11089; *Thomson & Hay*, 1708, M. 11093; *Douglas*, 1736, M. 11102). But towards the close of last century doubts seem to have arisen as to its true meaning. The question was agitated whether the presumption on which the statute was based was that payment had been made during the currency of the *triennium* or after its close; and some of Ld. Pres. Blair's remarks in giving judgment in *Leslie*, 15 Nov. 1808, F. C., though not necessarily the decision itself, gave rise to the view, which was subsequently carried to a great extreme, that there are latent in the statute certain exceptions and limitations which it is for the Court to give effect to. In *Leslie's* case, it is true, the prescription was held to apply, and the decision was arrived at upon a construction of the defender's oath. Nevertheless, the inferences drawn from that case would have deprived many litigants of the protection of which they stood specially in need; for they amounted

to the three propositions: (1) that if the contractor of the account [illegible] within three years from the termination of the account, the statute does not apply; (2) that the representative of the alleged debtor must aver payment in order to be entitled to the benefit of the statute; and (3) that after the lapse of three years the creditor need not prove the resting-owing, but merely the constitution of the debt sued for, and that whether the defender be the original debtor or his representative (see *Elder*, 1833, 11 S. 591; *Auld*, 1842, 4 D. 1487). The tendency to read into the statute qualifications of this nature was firmly checked by the decision of the Second Division in *Alcock*, 1842, 5 D. 356, where the opinion of Ld. J.-Cl. Hope may be taken as at once the clearest and most authoritative exposition of the meaning and effect of the statute; and, finally, in *Cullen*, 1853, 15 D. 868, the case of *Auld* was expressly overruled by the unanimous decision of the whole Court, and the view taken in *Alcock* was upheld. Since that date, there has been no attempt to question the interpretation of the Act there given. It may now be regarded as settled law that "there is no warrant for allowing any presumptions of payment or of non-payment to bear on the construction of the statute, or to regulate its operation. . . In the application of the statute, the Court has really no right to restrain and narrow the protection afforded by the effect ascribed to any particular presumption as to payment or non-payment in ordinary cases of a proper prescription; for the statute recognises no such materials for its construction or application; and its terms exclude all considerations but the simple element of dates. And if the dates are such as bring the case within the simple predicament of the statute, the rule is simply the statute itself" (per Ld. J.-Cl. Hope in *Cullen*, *ut sup.* 872).

The onus, then, imposed upon a pursuer after the expiry of the triennium is to prove both the constitution and the resting-owing (*Robertson*, 1840, 2 D. 1343) of the debt for payment of which he sues, in a particular manner, viz. by the writ or oath of his party, *i.e.* of the defender whom he brings into Court. There is no extinction of the claim, and consequently the arrestment of a debt which has suffered the prescription will found jurisdiction (*Shaw*, 1869, 7 M. 449), though a prescribed account will not entitle a creditor to vote in a sequestration (*Wink*, 1849, 11 D. 995). Hence, also, it follows that, strictly speaking, there can be no "interruption" of the triennial prescription. "The true sense of the statute is that unless the action in which you seek to prevail is brought within three years, you have no action at all, and any other action just goes for nothing" (*M'Leod*, 1829, 7 S. 483, per Ld. Glenlee). "So long as the action has to be brought to recover, the action for debt has not been pursued, and therefore the statute is pleadable and applies" (*Cochran*, 1841, 4 D. 76, per Ld. J.-Cl. Hope).

But this rigid view of the statute has generally been departed from, and it seems to be well settled, possibly with some aid from the doctrine of personal bar, that pursuit within the three years other than the action in which prescription is pleaded will deprive the defender in the latter of his right to the benefit of the statute. A formal action is not necessary to constitute pursuit in this sense. A demand made in a competent judicial or quasi-judicial proceeding before a tribunal which can competently entertain and give effect to it will suffice, whether as a matter of fact such proceeding leads to effective decerniture or not (*Monkland Railways Co.*, 1855, 17 D. 1041). "I think it is quite settled that there may be an action in which a party may be allowed a proof *pro ut de jure*, after the lapse of the statutory period of three years, provided he has made a competent claim

in a previous competent action within the statutory period, although that claim shall not have been pursued to a successful issue" (*Stock Journal Co.*, 1898, 25 R. 1016, per Ld. Kinnear). This doctrine is well illustrated by the case of *Ferrier*, 9 July 1811, F. C., where the production of a claim for furnishings with an oath of verity in a process of cognition and sale was held not to be equivalent to pursuit, on the ground that "there was no procedure by which the creditors could have enforced their claim or obtained a decree" (per Ld. Robertson). On the other hand, the lodging of a claim in a process of multiplepoinding or of ranking and sale (*Stuart*, 1823, 2 S. 200), or the judicial production of the account in question in defence by way of counter-claim (*Sloan*, 1827, 5 S. 692), will preserve a debt from the operation of the statute. Similarly, where parties had agreed to the submission of a disputed claim within the prescriptive period, and the reference fell owing to the death of the arbiter, it was held, in an action raised on the claim after the expiry of the triennium, that the application of the statute was excluded, and, separately, that the defender was barred *personali exceptione* from pleading the prescription (*Dunn*, 1854, 16 D. 944, where see opinions of Ld. Rutherfurd). If the pursuer's failure to sue timeously be due to the action of the defender, the latter will not be allowed to plead the statute (*Caledonian Ry. Co.*, 1886, 13 R. 773). It is not enough, however, to obviate its application that there has been mere citation of the defender (*Campbell*, 1799, M. 11120), or that there has been a timeous action which was subsequently abandoned (*Gobbi*, 1859, 21 D. 801).

Minority is not deducted in reckoning the years of the triennial prescription (*Brown*, 1709, M. 11150), agreeably to the general rule that minority is never deducted unless specifically excepted (*Baird*, 1861, 23 D. 1080). Nor is the *annus deliberandi* to be discounted (*Douglas*, 1736, M. 11102). Absence from the country will not suspend the operation of the statute (*M'Ghie*, 1776, M. 11112).

II. *Debts to which the Statute is Applicable.*—The class of debts enumerated in the statute is extensive, and has rather been enlarged than restricted by judicial interpretation.

(1) House maills or rents prescribe from year to year when the house is let on a verbal lease (*Cumming's Trs.*, 1825, 3 S. 545). But the statute does not apply where there is a written lease, or where the subject let is other than a house (*Ross*, 1627, M. 12735; *Minister of Kilbucho*, 1628, M. 11083).

(2) Debts due for entertainment at board fall within the description of "mennis ordinars," whether the entertainment be supplied by an innkeeper or by a schoolmaster (*Thomson*, 1808, Hume, 466). Alimentary debts arising *ex debito naturæ* do not fall within the scope of the statute (*Davidson*, 1739, M. 11077; *Thomson*, 1842, 4 D. 833); but a claim for board and lodging supplied to a child *ex contractu* suffers prescription, even though the contract be not express but merely implied (*Taylor*, 1858, 20 D. 401; *Ligertwood*, 1872, 10 M. 832). If the agreement between the father and the person boarding the child be to make termly or yearly payments, each term's or year's aliment runs a separate course of prescription (*Frazer*, 1836, 16 S. 1045); but where no such agreement was averred, it was held that the account must be regarded as a continuous whole (*Bracken*, 1891, 18 R. 819).

(3) Servants' wages are liable to the prescription, each term's amount prescribing separately (*Ross*, 1680, M. 11089; *Douglas*, 1736, M. 11102; *Alcock*, 1842, 5 D. 356). Even where no definite remuneration had been stipulated for, a claim for payment in respect of services rendered to a

brother-in-law was held to fall within this class of debts, and therefore to be subject to prescription (*Smellie*, 1835, 13 S. 514).

(4) "Merchants' accounts" is a phrase which is held to include merely shopkeepers' accounts, and not to apply to accounts current between merchants in the modern sense of the term (*Hamilton*, 1795, M. 11120; *M'Kinlay*, 1851, 14 D. 162; *Laing*, 1871, 10 M. 74; *M'Kinlay*, 1885, 13 R. 210; *Brown*, 1891, 18 R. 889. The distinction between the case of *M'Kinlay*, 13 R. 210, and *Batchelor's Trs.*, 1892, 19 R. 903, where the statute was held to apply, is certainly a fine one). It is for the Court to determine, after proof, if necessary, whether a given account falls within the one class or the other.

(5) The comprehensive general description, "other the like debts," has been held to justify the application of the statute to the remuneration of factors (*Grubb*, 1835, 13 S. 603), printers (*Neill*, 1850, 12 D. 618), surveyors (*Stevenson*, 1850, 12 D. 673), advocates' clerks (*Fortune's Exrs.*, 1864, 2 M. 1005), surgeons (*Macdowall*, 1849, 12 D. 170), and law agents (*Somerville*, 1675, M. 11087; *Leslie*, 15 Nov. 1808, F. C.; *Wallace*, 1829, 7 S. 542). The fees due to an engraver for preparing parliamentary plans (*Johnston*, 1860, 22 D. 393), to the clerk in a reference (*Farquharson*, 1755, M. 11104), and to a stockbroker for services in promoting a railway (*White*, 1868, 6 M. 415), have been held to fall within the statute. When a person of the class whose claim for remuneration is liable to the prescription receives a fixed salary instead of being paid by fees for work done, each year's salary seems to prescribe separately (*Smith*, 1845, 7 D. 499). "Tradesmen's" accounts must be added to the long list of those affected by the prescription (*Bigo*, 1692, M. 11029; *Tweedie*, 1694, M. 11092), and so are debts arising out of the contract of *locatio operarum* (*Mackay*, 1851, 14 D. 207. But contrast *Donaldson*, 1819, Hume, 481). It was held by the Ld. Ordinary (Kinloch) in *Gobbi*, 1859, 21 D. 801, that the statute applied to a single purchase of goods as well as to a continuous account, and it is thought that this decision, in spite of earlier cases which point in an opposite direction (*e.g. Macgregor*, 1811, Hume, 472; *Smith*, 1827, 5 S. 314; *M'Dougall*, 1833, 7 W. & S. 19, per Ld. Chan. Brougham), would be followed at the present day.

What has been said with reference to the accounts of law agents, engineers, and the like must be taken subject to the qualification that these accounts are subject to prescription only if the services rendered have been in the ordinary course of the pursuing creditor's employment. Thus the claim of an engineer for fees as a parliamentary witness was held to fall outwith the statute (*Blackadder*, 1851, 13 D. 820) and a similar decision was pronounced in the case of a contractor employed to give evidence before a parliamentary committee (*Barr*, 1864, 2 M. 1250. Contrast *Deans*, 1853, 16 D. 317, the case of a solicitor). Disbursements made by a law agent which it falls within the province of a law agent to make, *e.g.* fees to counsel, witnesses, etc., are affected by the statute (*Scott*, 1832, 10 S. 375); but advances made by him in the capacity of cashier, factor, or the like are not (*Richardson*, 1863, 1 M. 940, per Ld. Curriehill). The Court has sometimes allowed an account to be broken up, and a distinction made between the items subject to prescription and those which were not (*Monereiff*, 1836, 14 S. 830). But, as a rule, the account or claim is considered as a whole, and its nature as a whole will determine whether the statute is to be applied to the several items or not (*Ewart's Trs.*, 30 June 1829, F. C.; *Murray*, 1870, 8 M. 722. Cf. *Hodge*, 1854, 11 S. 482).

The statute does not apply to cases of mandate (*Barry's Representatives*,

1822, 1 S. 402: *Walker*, 1832, 10 S. 672; *Paterson*, 1812, *Simpson*, 1813, both in 13 D. 825, *n.*) or *negotiorum gestio* (*Drummond*, 1740, M. 11103); to a soldier's claim against his officer for pay (*Graham*, 1709, M. 11093); to a parochial schoolmaster's salary (*Nicolson*, 1747, M. 11080); to poor's rates (*Munro*, 1857, 20 D. 72); or to the claim of one of several debtors against his *correi* in respect of a merchant's account which he has paid (*Bland*, 1825, 3 S. 294). A mandatary's claim against his mandant for outlays (*Saddler*, 1795, M. 11120; *Grant*, 1881, 9 R. 257), and a tradesman's or agent's claim in respect of cash advances made by him (*Ker*, 1827, 5 S. 742; *Smith*, 1829, 7 S. 771; *Maclaren*, 1874, 2 R. 185), do not fall within the statute. When the case really turns out to be one of accounting, *e.g.* between heir and executor, or between the master and owners of a ship, the prescription does not apply (*Brunton*, 1822, 2 S. 54; *Freer*, 1826, 4 S. 399; *Waddel*, 1825, 6 S. 172; *Butchart*, 1781, M. 11113; *Mackintosh*, 1849, 11 D. 1244).

Claims arising out of written obligations are not affected by the prescription (*Blackadder*, 1851, 13 D. 820). But the writing must contain a distinct obligation by the defender; otherwise the statute applies (*N. B. Railway Co.*, 1873, 1 R. 309). Where a sack-contractor issued to his customers, and they signed, a printed form containing the conditions of his contract with them, the prescription was held to be excluded (*Chisholm*, 1883, 10 R. 760). But where a written offer to execute furnishings was verbally accepted, it was held that the contractor's claim was subject to prescription (*Chalmers*, 1878, 6 R. 199. See also *Campbell*, 1843, 5 D. 755).

III. *Terminus a quo.*—Prescription operates upon closed, not current, accounts (*Somerville*, 1675, M. 11087; *Leslie*, 15 Nov. 1808, F. C.); and the currency of an account ceases with the last act of the current employment. Consequently, in a claim arising out of a contract, it was held that prescription ran from the date of the completion of the work, and not from the date of the measurer's report (*M'Kay*, 1851, 14 D. 207). But the *bonâ fide* addition of new items within the three years will reopen the account and make it current once more (*Torrance*, 1840, 3 D. 186. See also *Whyte*, 1829, 8 S. 154). The currency of an account is a matter of fact, and if in reply to the plea of the statute the creditor points to the most recent items in the account as having preserved its currency down to a date within the triennium, it is competent for the defender to aver, and he will be allowed before further answer to prove, that these items are fictitious and inserted merely for the purpose of avoiding the operation of the prescription (*Ross*, 1888, 16 R. 224; *Stewart*, 1844, 6 D. 889; *Aytoun*, 1882, 9 R. 631. See also *Moffat*, 1825, 3 S. 329). In determining this question of fact much weight will be given to the state in which the creditor has kept his books (*Wilson*, 1826, 4 S. 427). The items which are relied upon by the pursuer as keeping the account still open must be strictly on the same account and on the same employment (*Campbell*, 1824, 3 S. 25). But a claim by an agent in Edinburgh against one in the country was dealt with as *unum quid*, although it consisted of separate branches corresponding to the various clients (*Fisher*, 1836, 14 S. 660; cf. *Elder*, 1833, 11 S. 591); and where a law agent sued for payment of two accounts, there being an interval of more than three years between the close of the first and the beginning of the second, he was held entitled to prove that the accounts were a continuous whole, in respect of unbroken continuity of employment during the intervening period (*Wotherspoon*, 1868, 6 M. 1052). Even where the later items of an agent's account had been paid by a co-debtor of the defender, the pursuer was held entitled to found upon them for the purpose

of excluding the operation of the statute (*Fisher, ut sup.* But contrast *Lord*, 1831, 10 S. 81).

There must be identity of the creditor to establish the continuity of an account (*Wotherspoon*, 1868, 6 M. 1052). The assumption of a new partner by a firm introduces an entirely new *persona* on the scene. There is a new contract of employment, between new parties (*Wotherspoon, ut sup.*). But it is not decided whether the continuity of an account is necessarily destroyed by the fact that a firm to which part of it was incurred is dissolved, and the business carried on by a partner to whom the remainder of the account has been incurred (*Barker*, 1841, 3 D. 965).

With regard to the identity of the debtor, Mr. Erskine lays it down that the continuity of an account is not *ipso facto* interrupted by the death of the debtor, for the heir is *eadem persona cum defuncto*, and if part of the account has been incurred by the deceased and part by his heir, or even his executor, the course of employment may well be regarded as continuous (*Inst.* iii. 7. 17). This view is borne out by the cases of *Graham*, 1670, M. 11086, and *Ormiston*, 1709, M. 4981, where the difference in the representative character of a widow and an heir is brought out. Mr. Bell, however, says that it is well settled that the debtor's death closes an account (*Com.* i. 349), and upon that view of the law the cases of *Kennedy*, 1741, M. 11104, and *Lyon*, 1819, Hume, 481, were decided. If the last item in an account was ordered by the deceased debtor, that item and not the one immediately preceding will be the starting-point of the prescription, even although the article in question was not actually furnished until after the debtor had died (*Broughton*, 1826, 4 S. 501).

IV. *Writ or Oath of Party.*—The writ or oath of the following persons has been held to be writ or oath of party in the sense of the statute: of the debtor's factor (*Smith*, 1831, 9 S. 474, though it is doubtful if this case can stand with the much more recent decision in *Bertram*, 1874, 2 R. 255); of the debtor's wife where she is *præposita* (*Young*, 1802, M. 12486. Contrast Ld. Young's opinion in *Mitchells*, 1882, 10 R. 378, to the effect that the resting-owing of debts incurred by a wife after marriage must be referred to her husband's oath), and of the partner of a company where the debt is properly a company debt (*Neill & Co*, 1850, 12 D. 618). On the other hand, when a company has been dissolved the oath of a partner's representatives will not suffice to prove the constitution and resting-owing of a debt of that company (*Nisbet's Trustees*, 1829, 7 S. 307); and where it was proposed to refer the subsistence of a debt alleged to be due by a dissolved company to the oath of a partner who had been sequestrated and discharged, such a course was held to be inadmissible (*Neill & Co.*, 1849, 11 D. 979). A tradesman cannot prove the resting-owing of a prescribed account by the oath of the debtor's housekeeper (*Gilmour*, 1797, M. 12042), and it may be questioned whether it is permissible to refer a prescribed debt alleged to be due by the owners of a ship to the oath of the ship's-husband, unless he be one of the owners himself (*Duncan*, 1829, 7 S. 821; 1831, 9 S. 540). As a general rule, the oath of one of several joint owners will not bind the others (*Duncan*, 1831, *ut sup.*). The oath of a debtor's heir or representative is, of course, equivalent to the oath of the debtor himself, though in a ranking and sale raised by an heir against his father's estate it was held incompetent to refer the prescribed claims of certain competing creditors to his oath, on the ground that the question at stake was really one between creditors, and that therefore the heir was not the "party" (*Little*, 1826, 4 S. 429).

The writ of party by which the debt may be proved need not be formally

authenticated. A mere jotting in the debtor's handwriting will be sufficient (*Donaldson*, 1766, M. 11110). Nor need the writing contain an express and direct acknowledgment of the constitution and resting-owing of the debt. It is enough if, by a sound and reasonable process of construction, such acknowledgment may be inferred from the terms of the document. Instances where such writings have been construed are the cases of *Smith*, 1834, 9 S. 474; *Wallace*, 1829, 7 S. 542; *Macandrew*, 1851, 13 D. 1111; *Stevenson*, 1849, 11 D. 1086; *Fiske*, 1860, 22 D. 1488; and *Mitchells*, 1882, 10 R. 378. The debtor's account-books are writ of party in the sense of the statute: but in determining whether they prove resting-owing, much will depend upon the regularity with which they have been kept. The absence from the books of a municipal corporation of an entry of the discharge of a debt due by it has been held to be conclusive of resting-owing (*Leslie*, 15 Nov. 1808, F. C.; *Buchanan*, 1828, 7 S. 35); while the opposite result was arrived at in the case of books kept by the trustee in a sequestration (*Ellis*, 1849, 11 D. 1347). If an entry in the debtor's books is relied on by the creditor, it must unequivocally refer to the specific debt in question and afford evidence that the debt was constituted (*Nisbet's Trustees*, 1829, 7 S. 307). It has been held competent to interpret writings of the debtor by the aid of letters written by the creditor to him (*Stevenson*, *ut sup.*); but writing of the pursuer *per se* is not equivalent to writ of the defender, though recovered out of the hands of the latter (*M'Pherson*, 1865, 3 M. 727). An exception to this rule may be made where the writings of the pursuer are of the nature of receipts for payments of interest or the like, preserved by the defender in his repositories as his own proper vouchers (*Campbell's Trustees*, 1895, 22 R. 943: a case on the sexennial prescription).

There appears to be some doubt whether, in order to prove the resting-owing of a debt, the writing of the debtor founded on must be subsequent in date to the expiry of the triennium. Mr. Bell (*Com.* i. 349) expresses the opinion that a writing dated within the three years is not enough, it being requisite that the writing should be "intended to serve as a voucher to the creditor for his debt." This view was taken by Ld. Ivory in *Stevenson*, 1849, 11 D. 1086. But, in the absence of any indication in the statute, the preferable doctrine seems to be that the sufficiency of the proof depends primarily on the terms and not on the date of the document (see *Thomas*, 1868, 6 M. 777; *Davidson*, 1806, Hume, 460).

Failing production of writ of the pursuer's party, the constitution and resting-owing of the debt sued for can only be proved by his oath (see OATH ON REFERENCE); and where the pursuer has acquiesced in a reference to the defender's oath, he will not be allowed subsequently to maintain that prescription is inapplicable (*Macdonald*, 1829, 7 S. 306). When the defender's oath has been emitted, it is for the Court to determine its import. Every oath must be construed upon its own terms (*Fyfe*, 1841, 4 D. 152, per Ld. Pres. Boyle), though the fundamental principle must be kept in mind that the onus lies upon the pursuer to prove non-payment, and not upon the defender to prove that the debt has been discharged (see *Cooper*, 1877, 5 R. 258). It is a natural consequence of this discretion that the decisions seem occasionally to conflict with one another. One set of cases seems to proceed upon the assumption that a mere *nihil novi* or *nihil memini* from the defender is not sufficient to procure him absolvitor (*e.g. Campbell*, 1824, 3 S. 25, per Ld. Craigie; *Cooper*, 1824, 2 S. 609; affd. 1826, 2 W. & S. 59; *Berry's Reps.*, 1822, 1 S. 402; *Jackson*, 1873, 11 M. 475; *Hunter*, 1835, 13 S. 369. Contrast *Gordon*, 1860, 22 D. 903). Another set of cases seems to proceed upon the view that a *nihil novi* or *nihil*

memini on the part of the defender is conclusive against the pursuer's claim (see *Fyfe*, 1837, 15 S. 1188, per Ld. Mackenzie).

In the majority of cases where difficulty has been experienced in construing the oath of party, the deponent has admitted the constitution of the debt, but has qualified the admission by certain statements, as, for example, that the debt has since been discharged or compensated. When the oath is to this effect, the Court has to determine whether the qualification so adjected to the admission of constitution is, as it is called, "intrinsic" or "extrinsic"; that is to say, whether it is *per se* probative, or whether it must be independently established *pro ut de jure*. The rules for the application of this distinction were laid down categorically by Ld. Deas in *Cowbrough*, 1879, 6 R. 301, and are as follows:—

1. If the oath bear that some other mode of extinction than payment in money was stipulated for at the contraction of the debt, that other mode, if the debtor swears it was acted upon, will be a competent and intrinsic quality of the oath.

2. If the debtor depones to an express subsequent agreement to hold the debt extinguished by some other mode than payment in money, that other mode will be a competent and intrinsic quality of the oath.

3. An express subsequent agreement by the creditor to forgive the debt in whole or in part, deponed to by the debtor, will be instrinsic and receive effect accordingly.

4. An oath that the debt has been compensated is usually extrinsic, because compensation, if not sworn to have been agreed to by the creditor, as a rule involves matter of law, and matter of law cannot be established by the deponent's oath.

In view of these distinct propositions, it is unnecessary to examine the cases in detail. It must suffice to refer to *Thomson*, 1855, 17 D. 1081; *Law*, 1843, 6 D. 201; *Meyer*, 1851, 14 D. 99; *Stewart*, 1804, Hume, 416; *Knox*, 1861, 24 D. 16; *Paden*, 1751, M. 13207; *Campbell*, 1676, M. 13203; *Aitken*, 1702, M. 13205; *Lauder*, 1727, M. 13206; *Trotter*, 1687, M. 13204, as illustrations of intrinsic quality; and to *Turnbull*, 1830, 8 S. 735; *Napier*, 1838, 1 D. 245; *Fife*, 1860, 23 D. 30; *Wilson*, 1871, 9 M. 920; *Hepburn*, 1806, Hume, 417; *Gow's Exrs.*, 1866, 4 M. 578; *Mitchell*, 1842, 5 D. 169; *Grant*, 1845, 7 D. 274; *Miller*, 1819, Hume, 480; *Gaylor*, 1851, 27 S. J. 35; *Workman*, 1699, M. 13234, as illustrations of extrinsic quality (see also BILLS, SEXENNIAL PRESCRIPTION OF). Where the debtor depones, in addition to admitting the constitution of the debt, that he gave a third party money in order to pay it, that oath seems to be held affirmative or negative of the reference according as it is not or is the character or function of that third party to make such payment (*Mette*, 1830, 8 S. 387; *Goudall*, 1825, 8 S. 387, *n.*; *Crichton*, 1857, 19 D. 661; *Mackay*, 1849, 11 D. 982; *Smith*, 1807, Hume, 462).

It has been held that where a pursuer upon record makes averments or admissions tantamount to an acknowledgment of constitution and resting-owing, the necessity of proof by oath is superseded (*Ritchie*, 1836, 14 S. 216, per Ld. Gillies. See also *Gordon*, 1826, 4 S. 585; *Mitchell*, 1842, 5 D. 169; *Bryson*, 1825, 4 S. 182. Cf. *Maule*, 1822, 1 S. 475). This view, however, must be accepted with great caution, for, as was pointed out in *Mitchell*, 1842, 5 D. 356, 366, the system of pleading in Scotland requires the whole defences in a cause to be put upon record at once, and it is not fair to a defender to draw from his pleadings as a whole inferences to displace a plea of prescription. It is at least certain that any judicial admission of a debt by a defender must be express and unequivocal to supersede the necessity for his

oath on reference (*Darnley*, 1845, 7 D. 595, per Ld. Fullerton), and it has even been questioned whether admissions by a party on record are his writ in the statutory sense, and render proof as prescribed by the statute unnecessary (*Darnley, ut supra*, per Ld. Jeffrey; *Cullen*, 1853, 15 D. 868, per Ld. J.-Cl. Hope). In *Anderson*, 1847, 9 D. 1222, the defender, besides pleading the triennial prescription, proponed a defence denying the alleged contract and consequently (it was maintained) admitting non-payment. The plea of prescription was nevertheless sustained by Ld. Cuninghame; and a similar decision was recently given in the like circumstances by Ld. Kincairney (*Miller*, 10 June 1898, 25 R. 995).

II. The Statute 1579, c. 81, enacts that—

"All actions of spuilzies, ejectionsis, and utheris of that nature be persewed . . . within three zeiris after the committing theirof, utherwise the perseweris alleged hurt never to be heard thereafter. Providing that this Act extend not to minours, but to persew within three zeiris after their perfite age."

The statute has always been held to mean that the pursuer of an action of reparation for SPUILZIE (*q.v.*), or EJECTION AND INTRUSION (*q.v.*), loses the privilege of proving the extent of his injury by his own oath *in litem*, unless the action be brought within the specified period (*Constable of Dundee*, 1587, M. 11067; *Baillie*, 1835, 13 S. 472). The years of minority are expressly excepted.

III. The Statute 1576, c. 82, enacts that—

"All actions of removing be persewed within three zeiris after the warning, with certification and they failzie, the warneris sall never be heard thereafter to persew the samin upon that warning."

The three years run from the term to which the warning is made (*Borthwick*, 1629, M. 11076). See TENANTS.

[*Authorities.*—I. Stair, ii. 12. 30; Ersk. *Inst.* iii. 7. 17, 18; *Prin.* iii. 7. 6; Bell, *Prin.* ss. 628–633; *Com.*, 7th ed., i. pp. 348–351; Dickson on *Evidence*, ss. 484–528 [476–520]; Napier on *Prescription*, pp. 714–813; Millar on *Prescription*, pp. 116–153.

II. Stair, i. 9. 16; ii. 12. 30; Ersk. *Inst.* iii. 7. 16; Napier on *Prescription*, pp. 710–712; Millar on *Prescription*, pp. 115, 116.

III. Stair, ii. 9. 43; ii. 2. 30; Ersk. *Inst.* iii. 7. 18, 36; Napier on *Prescription*, pp. 712, 713; Millar on *Prescription*, p. 116.]

Trout-Fishing.—See FISHINGS.

Truck Acts, The.—These Acts have for their object the abolition of a system of payment of wages in goods, or otherwise than in money, which largely prevailed last century and early in this century, especially in mining and manufacturing districts. The name "truck" implies a process of barter or exchange, and may possibly have the same origin as the word "traffic" (cf. the Scottish word "troke," and see Skeat's *Etymological Dictionary of the English Language*, "truck," "traffic"): the system was, practically, the exchange of labour for goods. The system has been thus described: "The plan has been for the masters to establish warehouses or shops, and the workmen in their employment have either got their wages accounted for to them by supplies of goods from such depots, without receiving any money, or they have got the money with an express understanding that they were to resort to the warehouses or shops of their masters for the articles of which they stood in need" (Tomlins,

Law Dictionary, "Truck System"; also M'Culloch, *Dictionary of Commerce*). It is obvious that workmen would thus be exposed, as in fact they were, to receiving goods either inferior in quality or over-estimated as to value,—owing to the master's contractual monopoly,—and to the risk of being made or induced to take goods beyond their need or ability, and so of falling under a master's power. On such grounds legislative restrictions were enacted to correct the mischief arising from the unfair disadvantage involved in the practice, and to secure, so far, that the person employed should obtain the stipulated remuneration for services rendered (Baron Bramwell in *Archer*, 1862, 2 B. & S. p. 89; Ld. Chan. Herschell in *Hewlett*, [1894] App. Ca. p. 389).

There are now three statutes dealing exclusively with this practice, namely, of 1831 (1 & 2 Will. IV. c. 37); of 1887 (50 & 51 Vict. c. 46), and of 1896 (59 & 60 Vict. c. 44). The Act of 1887 extends (making applicable to Ireland) and amends that of 1831, and the Act of 1896 enacts further amendments: the three are now read together as "The Truck Acts, 1831 to 1896" (s. 12 of the Act of 1896), and apply to England, Scotland, and Ireland. The Act of 1831 was a consolidating Act, following on the repeal (by 1 & 2 Will. IV. c. 36) in detail of previous particular enactments—from the time of Edward IV. onwards—of like character. Of these, 12 Geo. I. c. 34 seems to be the first in terms prohibiting payment of wages "in goods or *by way of truck*," and "deduction from . . . wages . . . on account of any goods sold or delivered," in connection with the woollen manufacture (ss. 3, 4; see also 22 Geo. II. c. 27, s. 12); 57 Geo. III. c. 115 prohibited this "pernicious practice" in the steel and cutlery manufacture; and 57 Geo. III. c. 122, in collieries, in Great Britain and Ireland (s. 1), and by a subsequent section (s. 3) extended the application of these Acts of Geo. I. and Geo. II. to Scotland (and Ireland).

The principal enactments of the consolidating statute (of 1831) are as follows:—

Contracts, in certain trades, for hiring of "artificers," or for the performance of labour by "artificers," must be for wages in money (coin or bank notes, or, of consent, bank drafts or orders); and any other arrangement is illegal and void (ss. 1, 8; for trades affected, s. 19). The wages themselves must be paid in money; and payment in goods, or otherwise, is illegal and void (s. 3). Any provision in such contract respecting the expenditure of wages "due or to become due" with regard to place, manner, or person, makes the contract illegal and void (s. 2; see opinion of Justice Grantham in *Lamb*, [1891] 2 Q. B. p. 287; also of Ld. Chan. Herschell in *Hewlett*, [1894] App. Ca. 391). Wages so far as not paid in money may be recovered, as servants' wages are recovered, or by other process (s. 4); the employer has no set-off in such action, nor claim of reduction for goods, wares, etc., provided as wages to the artificer or for his labour, or sold to him at any shop or warehouse in which the employer has an interest (s. 5); and the employer has no action for goods so sold by him, or sold from any such shop or warehouse (s. 6). Penalties are enacted against employers offending, by themselves or others, directly or indirectly, in contravention of secs. 1–3, namely, a fine of not more than £10 for the first offence, £20 for the second, and conviction as for a misdemeanour (in Scotland as "offence") and fines up to £100 for a third (s. 9). A partner is not liable to conviction for his partner's offence against the Act, committed without his knowledge, but the co-partnership property is attachable when the offending partner does not pay any wages, or penalty, etc., ordered to be paid; and wages are recoverable from any partner (s. 13). By ss. 19,

repealed under the Act of 1887 (see below), the trades affected by the Act were specified in detail, being in fact all the principal branches of manufacture of the day: domestic servants and servants in husbandry were excluded—as domestic servants still are (see below). An employer or his agent may supply or contract to supply to his employee, medicine, medical attendance, fuel, or materials or tools for mining, or provender for horses used in his occupation; let him a house; supply or contract to supply him with victuals prepared and to be consumed on employer's premises; and he may make or contract to make a stoppage or deduction from wages because of rent, or the supply of medical attendance, or of the various classes of excepted articles, or of money advanced for the same, provided the stoppage or deduction does not exceed the true value of what is thus supplied (apart from medicine, medical attendance, and rent), and there be (in all cases) a signed written agreement to the effect (s. 23). An employer may also advance money to his employee for the purpose of contributions to a Friendly Society or Savings Bank, or for relief in sickness (s. 24): a written agreement is not needed in these cases (Act of 1887, s. 17). By the interpretation clause "contract" is anxiously defined, and means "any agreement, understanding, device, contrivance, collusion, or arrangement whatsoever on the subject of wages, whether written or oral, whether direct or indirect, to which the employer and artificer are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them shall have endeavoured to impose an obligation on the other of them" (s. 25). The terms "artificer," "employer," "wages," are also defined (by s. 25), but that part of the section is repealed under the Act of 1887 (s. 17).

The Act of 1887 makes the "artificer" of the original Act include "workman" as defined in the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90, s. 10), viz., as follows: "The expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour" (s. 2). Where an advance of wages is stipulated or customary, such advance must be paid—and without deduction of interest or discount (s. 3). A servant in husbandry may contract for food, drink (not intoxicating), a cottage, or other allowances in addition to money wages (s. 4). An employer has no set-off or counterclaim, in any action by a workman for wages, for goods supplied at his order or by his agent, and there is no right of action for such goods—saving in respect of medicine, tools, etc., excepted under the Act of 1831, s. 23 (s. 5; see Act of 1831, ss. 5, 6). By sec. 6 stipulations with respect to the expenditure of wages "paid" (see also s. 2 of Act of 1831) are prohibited to the employer or his agent as a condition of employment; and dismissal of a workman on such ground is also prohibited. Deduction for sharpening or repairing tools can only be made by a separate agreement (s. 8). Deductions for medicine, medical attendance, and tools, with relative expenditure, must be submitted annually to two auditors appointed by the workmen concerned (s. 9). Workmen making articles at home, or through their own families only, and the persons buying such articles, are brought under the two Acts as workmen and employers, and the price is regarded as wages for the seven days before delivery—in

cases where the articles are under £5 value, and are made of certain specified material, wool, linen, cotton, leather, silk, bone, etc. The operation of this provision may be suspended by the Queen in Council, in the interest of the workmen (s. 10). Sec. 11 applies, in case of offences under this Act to an employer or his agent, the penalties of the original Act; sec. 12 gives the employer the right, on the conviction of his agent, to prove his own diligence and his ignorance of the offence—the duty being laid, in such circumstances, on the procurator-fiscal to prosecute the actual offender; and under sec. 13, the prosecution of offences and recovery of penalties are placed under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881 (subs. (1), see also sec. 14); the duty of enforcing the Acts is laid on the inspectors of factories and of mines (subs. (2)); and the duty of prosecution is laid (in Scotland) on the procurator-fiscal, with like power also to the inspectors —all prosecutions being in the Sheriff Court (subs. (4)).

The Act of 1896 in its leading sections forbids contracts for deduction from wages, or for payments to the employer, in respect, first, of fines, unless (*a*) the terms of the contract are kept affixed (in a "notice") where they may be easily seen, or the contract is in writing and signed by the workman, (*b*) the contract specifies the acts or omissions, and the amount of the fine or the particulars from which it is ascertainable; (*c*) the act or omission specified is likely to cause damage or interruption of business; (*d*) the fine is a reasonable one, in the whole circumstances: also such deductions or payments themselves, unless (*a*) these are under such a contract; (*b*) particulars showing the acts or omissions and the amount of fines are supplied to the workman on each occasion—these enactments being made applicable to shop assistants in the same manner as to workmen (s. 1). Such contracts are forbidden, secondly, in respect of bad or negligent work or injury to the materials or other property of the employer, save under exceptions similar to 1 (*a*) and (*d*) *supra*, and unless the deduction or payment does not exceed the actual or estimated damage: also such deductions or payments, save under the same exceptions as 2 (*a*) (*b*) *supra* (s. 2). Similar prohibitions, with substantially similar exceptions, follow, thirdly, with respect to the case of the use or supply of materials, tools, machines, room, light, heat, "or in respect of any other thing to be done or provided by the employer in relation to the work or labour of the workman"—the latter clause creating, apparently, some difficulty as to the other exceptions in the Act of 1831, s. 23 (s. 3). The penalties under sec. 9 of the original Act are made applicable to these offences (s. 4). Such illegal deductions or payments are recoverable by the workman, within six months, but, where there has been consent or acquiescence, only any excess over what the Court may find to be fair and reasonable (s. 5). Employers making contracts under this Act must produce them, on written demand, to the inspectors, and give a copy to the contracting workman or shop assistant at the time of making, and also on demand; and such employer must keep a register of deductions or payments for fines purporting to be made under such contract, which shall be open to the inspector—all under 40s. penalty (s. 6). Contracts under the Act are not liable to stamp duty (s. 7). The Secretary for State has power to exempt from the operation of the Act; but Parliament may annul the order (s. 9). By sec. 10 the provisions of the 1887 Act, with regard to the duty of inspectors (s. 13 (2)), is made to apply to the case of laundries and of places where work is given out by the occupier of a factory or workshop, or by a contractor, or sub-contractor.

Provisions with regard to deduction of wages for education of children, contained in the Act of 1831, s. 24, and of 1887, ss. 7, 9, are of little if

any moment now that elementary education is practically free. Provisions in sec. 7 of the former Act, and sec. 16 of the latter, whereby a parish relieving a workman or his family may recover from the employer wages earned within the three preceding months and not paid in cash, are apparently little known, but seem nevertheless to be available for enforcement.

There are few Scottish decisions interpreting these enactments. In *Finlayson*, 1864, 2 M. 1297, it was the basis of judgment (in the Inner House) that payment (in part) of wages by orders for goods on a shop or store was a contravention of the Act of 1831 (s. 3), even although the employer had no interest in the shop or store. The exceptions under sec. 23 of the same (the original) Act have been dealt with in two cases. In *Hynd*, 1884, 22 S. L. R. p. 702, Ld. M'Laren held that a pay-ticket, signed on receipt of wages, which bore that deductions were to be made for doctor, smith, fire-coal, water, and house-rent, was not "an agreement or contract . . . in writing" for the relative (actual) stoppage or deduction, as required in the proviso at the close of sec. 23 excepting from the prohibition of secs. 1 and 3. "In my opinion," he says, "receipts for the wages of past services are not the kind of agreement in writing which the statute prescribes. I think that either the agreement must apply to the particular fortnightly payment, or it must be a prospective and continuous agreement." This case was not appealed. The other case, *M'Farlane*, 1888, 16 R. (J. C.) 28, was a High Court case. There the Court decided that a signed pay-ticket, bearing the following terms: "Received payment of £ , and I hereby authorise you to deduct from my wages in future, so long as I am in your employment, the amount of my house-rent," was not a written agreement justifying (under sec. 23) a deduction for rent for a period subsequent to the period of employment, and, further, that a regulation of the employment which practically stipulated for right to deduct for non-removal from houses on the expiry of employment was not a contract as to rent, within the meaning of the same section, but a contravention of sec. 2. A recent case in the Sheriff Court of Ayr (*MacKenna*, 1899, 6 S. L. T. 456) raised the question whether under sec. 6 of the Act of 1887 a condition imposed on employees that they should not spend wages at a certain store (a co-operative store) was illegal; but, while the Sheriff-Substitute held that this condition was illegal, the High Court, on appeal, dismissed (3rd March 1899) the charge, on the ground of want of sufficient specification of the party charged and of the method of the contravention, so that the question on the merits was not determined. With regard to the application of the term "workman," the cases of *Oakes*, 1884, 11 R. 579, and *Wilson*, 1878, 5 R. 981, may be referred to, and of "artificer," "employer," *Phillips*, 1874, 2 R. 224.

In England there have been more numerous decisions—collected, up to 1888, in Peace's *Digest of the Law Relating to Truck* (in his book on *The Coal Mines Regulation Act*, 1887), pp. 205–224; up to 1885, in Manley Smith's *Master and Servant*, pp. 603–608; and, up to 1883, in Macdonell's *Master and Servant*, pp. 367–377: see also, for English as well as Scottish cases, Fraser's *Master and Servant*, 3rd ed., pp. 442–451. By certain decisions, beginning with *Riley*, [1848] 2 Ex. 59, personal service has been required to support the operation of the original Act: see *Pillar*, [1869] 38 L. J. C. P. 294; also *Sleeman*, [1864] 33 L. J. Ex. 153, where Chief Baron Pollock made the test a contract for labour as distinguished from a contract for the result of labour. Various decisions, too, under the Amendment Act of 1887, seem to have included or excluded certain classes

of employees as "workmen" under that Act, by the test of manual labour as the principal object of the employment, *e.g. Hunt*, [1891] 1 Q. B. 661 (the cases there cited may also be referred to, of which *Clark*, [1887] 18 Q. B. D. 683, and *Morgan*, [1884] 13 Q. B. D. 832, run counter to *Wilson*, *supra*, as to tramway-car conductors: see, in *Phillips*, p. 227, view of Ld. Pres. Inglis with regard to English Common Law Courts precedents). *Gould*, 59 L. J. M. C. 9, was a case where a brickmaker who was also a licensed victualler was held an offender for giving workmen money to pay for liquor supplied on credit, and deducting it from their wages. In *Hewlett*, [1892] 2 Q. B. p. 662, affirmed by the House of Lords, [1894] App. Ca. 383, it was held that deductions from wages paid into a sickness and accident club, by agreement, were not struck at by secs. 1 and 3 of the original Act, the whole wages payable being paid in coin, and that assuming (but not deciding) that they were struck at by sec. 2, the employee's assent made the wages actually received full discharge of the employer's obligation. This is the only ultimate interpretation of the statute which we have, but it does not go beyond the points of the particular case. The view of the Queen's Bench Division that the deductions in question were struck at by the first or by the second section of the Act was not upheld, and therefore their very interesting analysis of secs. 1-6, 23, and sec. 5 of the Act of 1887, is not of authority. Further, the Acts are regarded as highly penal, and are therefore to be strictly construed. In *Cutts*, [1867] L. R. 2 Q. B. 357, it was held that the agreement in writing, required under sec. 23, need not specify the amount or amounts to be deducted (in this case for medical attendance and rent). Deductions made as a mode of calculating wages have been held free from the operation of the Acts—in *Chawner*, [1846] 8 Q. B. 311, and *Archer*, [1859] 2 B. & S. 61—the latter being, however, a case where three judges out of six differed and where elaborate judgments were given on both sides. Justice Keating, one of the dissenting three, expressed his view of the evil to be remedied by the Act thus: "The giving by masters to their workmen, in exchange for their labour, wholly or in part, things of *uncertain* value, instead of money, the value of which is *certain* (p. 76: see *Smith*, [1877] L. R. 3 C. P. D. p. 113). In *Lamb*, [1891] 2 Q. B. 281, it was held that sec. 6 of the Act of 1887 did not cut down the exceptions protected by sec. 23 of the original Act, and that the proviso at the end of sec. 5 of the later Act was surplusage.

Prosecutions under the original Act were before the Justices of the Peace, and no prosecutor was named: hence the absence of reported prosecutions in Scotland. Now, under the Summary Jurisdiction Acts, and the Truck Amendment Act of 1887, prosecutions are in the Sheriff Court and, in practice, by the procurator-fiscal (see Fraser's *Master and Servant*, p. 784). Under the Summary Jurisdiction Act of 1881 (44 & 45 Vict. c. 33), the penalties imposed by the Truck Acts may be mitigated. Convictions may be quashed, by the High Court of Justiciary, on the ground of fundamental nullity and illegality, on an appeal taken on a point of law (as in *M'Farlane*, 16 R. (J. C.) 28).

The original Truck Act was found not to apply to deductions for frame rents or the like in the hosiery manufacture, and, consequently, the Act 37 & 38 Vict. c. 48 (the Hosiery Manufacture (Wages) Act, 1874) was passed. Under it, too, the provisions with regard to penalties are strictly construed (*Willis*, L. R. 10 Q. B. 383).

See, in addition to authorities referred to *supra*, p. 324, Bell, *Prin.* ss. 36 (8), 192 (2); also MASTER AND SERVANT; WAGES.

Trust.

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Definition.

The contract of Trust is not an easy one to define, and an entirely satisfactory definition of it has never been given. The older writers speak of it either as a species of mandate, or as a species of deposit, or as a combination of the two (Stair, i. 12. 17; i. 13. 7; Ersk. iii. 1. 32; Bell, *Com.*, 5th ed., 1, 31). This last view has the sanction of the late Ld. President (Inglis), who, in a recent case, defined a trust as "a contract made up of the two nominate contracts of deposit and mandate. The trust funds are deposited for safe custody, and the trustees receive a mandate for their administration" (*Croskery*, 1890, 17 R. 700). But in neither mandate nor deposit does the property vest in the mandatary or depositary, whereas in trust the property vests in the trustee. The mandatary or the depositary holds as agent, while the trustee holds as principal. The contract may perhaps be explained as one in which the legal title to property is transferred to a person called a trustee, who does not acquire an unlimited right to the property, but who holds it subject to an obligation to use it in accordance with the directions, express or implied, of the person who constituted the trust, for the benefit of certain persons of whom he may or may not himself be one. The whole doctrine and practice of trusts, according to Professor Bell, depends upon the following principles: (1) That a full legal estate is created in the person of the trustee, to be held by him against all adverse parties and interests, for the accomplishment of certain ends and purposes. (2) That the uses and purposes of the trust operate as qualifications of the estate in the trustee, and as burdens on it preferable to all who may claim through him. (3) That those purposes and uses are effectually declared by directions in the deed, or by a reservation of power to declare in future, and a declaration made accordingly. (4) That the reversionary right, so far as the estate is not exhausted by the uses and purposes, remains with the truster, available to him, his heirs and creditors (Bell, *Prin.* s. 1991). Though it is true that a full legal estate is created in the person of the trustee, and that while he holds it, the other parties interested under the trust have only a bare right of action against him; yet the peculiarity of his tenure of the estate is this, that he only holds it *qua* trustee, and so long as he remains trustee, and that it does not transmit to his heirs, nor can his creditors attach it. If the trustees fail, by death or otherwise, the title to the estate remains in suspense, until it vests either in a beneficiary upon his making up a title to the estate, or in new trustees or a judicial factor appointed by the Court. It is necessary for the existence of a trust, that the trust estate should be unequivocally in the possession of the trustee and under his control (see *Mess*, 1898, 25 R. 398; *Barney*, [1892] 2 Ch. 265).

In the contract of trust there are three parties concerned; the truster, who constitutes the trust, and gives over the property; the trustee, who receives and holds the property; and the beneficiaries, who are to derive benefit from the property thus handed over. Either the truster or the trustee or both may be beneficiaries. The trustee, however, cannot be the *sole* beneficiary; for if he were to become so, his right as trustee would be

extinguished *confusione* in his larger right as beneficiary, and he would be entitled to hold the property for his own use absolutely.

A trust can be created by any person who is legally capable of disposing of property, with regard to that property.

The whole question of the Administration of Trusts may be more conveniently dealt with under the title TRUSTEE, and to that title also reference is made for the discussion of the Trust Purposes. TRUST DEEDS FOR CREDITORS are also dealt with in a separate article. In this article it is proposed to set forth the different classes of trusts which are known to our law, and to deal with the questions of the Constitution, Proof, and Revocation of Trust, and also with the application of international law to the subject.

CLASSIFICATION.

In the first place, then, it may be convenient to state briefly the several kinds of trust which exist, as, according to their objects and character, they are ordinarily classified.

(1) SIMPLE AND SPECIAL.—When the duty of the trustee amounts only to an obligation to hold the trust estate, and hand it over to the person entitled to it when called upon to do so, the trust is called a Simple Trust. In such a case the trustee is little more than a depositary, and has no administrative functions to perform. Whenever he has made up his title to the estate, the person beneficially interested may call on him to denude in favour of him or his assignee. He differs, however, from a depositary in this respect that he may hold the estate for a third party, and not for the person from whom he received it. A Simple Trust, for example, exists where heritable property is held by the individual partners of a firm for behoof of the firm.

In a Special Trust, on the other hand, the trustee has certain active duties to perform beyond the mere holding of the estate. All trusts which are granted for the management of the truster's estate or for the payment of his debts, and all testamentary or marriage-contract trusts which are created to provide for the administration of the estate, come under this head. A simple example may be given:—Where a testator directs his trustees to hold an estate for A. in liferent and for B. in fee, the trust is a special one. It has to be maintained during A.'s life in order that the liferent may be paid to him, and upon A.'s death the fee is paid over to B., and the trust comes to an end. Should A., however, predecease the testator, the trust, when it comes into operation at the testator's death, would resolve itself into a simple one, and the duty of the trustees would be merely to convey the estate to B.

Special Trusts, again, may be either *Discretionary* or *Administrative*, according as the truster has or has not conferred upon the trustees discretionary powers with regard to the management of the estate, that is to say, powers which involve the application of a certain amount of judgment by the trustees. Where no such powers have been given, the trust must be administered in accordance with the rules prescribed by the truster in his trust deed, or failing such rules, in accordance with the ordinary rules of law.

(2) PUBLIC AND PRIVATE.—A Public Trust is one which is constituted for the benefit of the public at large or of some considerable portion of it answering to a particular description (Lewin on *Trusts*, 9th ed., 181; while a Private Trust is constituted for the benefit of the truster himself, or his creditors, or in order to carry out family arrangements with regard to the

estate, as in the case of marriage-contract and testamentary trusts. Among Public Trusts are included trusts for charitable purposes, and in a legal sense there appears to be no difference between a public and a charitable trust (see *Dolan*, 1867, 5 Eq. 60; affd. 1868, 3 Ch. App. 676, per Romilly, M. R., 5 Eq. 62). But in ordinary language a distinction is drawn between trusts for purposes of public utility, such as the making and repairing of roads and bridges, or the supplying of a district with water or gas, and trusts such as those which provide for the building or maintenance of hospitals, or for the relief of the poor. The subject of CHARITABLE TRUSTS (*q.v.*) has been already dealt with.

The important distinction between public and private trusts is that the former may be of permanent duration, while the latter may not. In the English case of *Goodman* (1882, 7 App. Ca. 633), Ld. Cairns, speaking of a grant in favour of the inhabitants of a borough, said: "A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals, or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, that is to say a public interest, it will be free from any obnoxiousness to the rule with regard to perpetuities."

With regard to private trusts, the Entail Act of 1848 (11 & 12 Vict. c. 36) limits the duration of trusts of heritage. Sec. 48 provides that liferent interests can only be granted in favour of a party in life at the date of the grant, and, further, that where land or estate is held in liferent in virtue of any deed granted after the date of the Act by any party of full age, born after the date of the deed, the conditions and limitations contained in the deed shall have no effect, and the party "shall be deemed and taken to be the fee-simple proprietor of such estate." Sec. 47 is intended to prevent the defeat of the Act by trusts, and provides that where any land or estate is held in virtue of any deed of trust dated after the date of the Act, either directly or through trustees, by a party of full age, born after the date of the trust deed, the conditions and limitations contained in the deed are of no effect, and the party "shall be deemed and taken to be the fee-simple proprietor of such land or estate." With regard to heritable property, then, it is impossible to create a liferent or to put the estate in trust for a longer period than the life of a person in life at the date of the deed, or during the minority of a person born after that date. By sec. 17 of the Entail Act of 1868 (31 & 32 Vict. c. 84), a similar rule is made with regard to liferents of moveable estate, constituted by means of a trust or otherwise, and it is declared that in calculating the limits of time, the date of any testamentary or *mortis causa* deed shall be taken to be the date of the death of the granter, and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage.

LAWFUL AND UNLAWFUL.—Trusts which are constituted for purposes which are illegal or immoral or contrary to the public policy of the realm are unlawful trusts and are invalid. Amongst trusts which are illegal are those which are conceived in favour of the truster himself to the exclusion of his creditors, or which are intended to create unlawful preferences (*Learmonth*, 1871, 10 M. 107; 1875, 2 R. (H. L.) 62; *Watson*, 1874, 1 R. 882; *Ker*, 1866, 5 M. 4; *Wood*, 1850, 12 D. 963; *Wright*, 1847, 9 D. 1151; *Roseberry*, 1823, 2 S. 443). In England it has been held that a conveyance by a bankrupt, two days before his bankruptcy, to a trustee for the purpose of making good breaches of trust which he had committed on estates upon which he was trustee, was not a fraudulent preference within the meaning

of sec. 48 of the Bankruptcy Act of 1883, the object being not to prefer one creditor to another, but to protect the granter from the consequences of breaches of trust committed by him (*New France & Gerrard's Tr.*, [1897] 2 Q. B. 19).

The fact that a trust is interposed because the truster's purpose could not be carried out by a direct conveyance does not necessarily render the trust unlawful. Thus it is quite competent to make an annuity alimentary, and therefore protected from the general creditors of the annuitant, by making it payable through the machinery of a trust (see *Murray*, 1895, 22 R. 927, per Ld. M'Laren, at p. 941). Where the main purpose of the trust is lawful, but an unlawful condition has been adjected to it, the condition will be disregarded, and the trust allowed to stand. A provision, for example, that an annuity should be paid without deduction on account of income tax is invalid (*Blair*, 1858, 21 D. 15; *Robson*, 1861, 23 D. 429, 5 & 6 Vict. c. 35, s. 103; 16 & 17 Vict. c. 34, s. 5).

Again, a condition attached to a legacy to the effect that the legatee should not reside with her parents, they being of good character, has been disregarded as *contra bonos mores*, and the legacy has been treated as unconditional (*Grant*, 1898, 25 R. 929; *Fraser*, 1849, 11 D. 1466). But all trusts the main purpose of which is either illegal in the sense of being an attempt to evade some positive law, or *contra bonos mores*, are treated as void. A trust for behoof of a mistress, which is presumed to have been granted in consideration of continued cohabitation, is void (*Johnstone*, 1835, 14 S. 106). But where the trust appears to have been intended as reparation for injury sustained, and not as an inducement to continued cohabitation, it will be upheld (*Webster*, 1886, 14 R. 90; *Gibson*, 1815, 1 Bell, *Ill.* 61). Where a testator bequeathed an annuity of £2000 to his son, and an additional annuity of £1000 if he should have married with his consent during his lifetime, or should thereafter marry with the consent of his trustees, it was held that the rule which makes a condition in restraint of marriage inoperative did not apply, as a provision had been made for the son in any event (*Bourse*, 1898, W. N. 150–3; see *Gilbert*, 1715, 1 P. Wms. 284). A provision in favour of an innocent third party contained in a deed which might itself be struck at as *in turpi causa* is effectual (*Young*, 1880, 7 R. 760).

It has already been seen that a private trust may not be constituted to last in perpetuity, and trusts which are intended to have that effect are invalid. The Thellusson Act (*q.v.*) (39 & 40 Geo. III. c. 98) prohibits the accumulation of the income of a fund under any settlement of real or personal property for any longer term than the life of the granter, or the term of twenty-one years from the death of the granter, "or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mère* at the time of the death" of the granter, "or during the minority or respective minorities only" of any person or persons who under the trusts of the deed would for the time being, if of full age, be entitled to the income or rents directed to be accumulated. This Act did not apply to the rents of heritable property in Scotland until the Entail Act of 1848 was passed (11 & 12 Vict. c. 36, s. 41). The rents, therefore, of heritable property under trusts constituted prior to 1848 do not fall under the Act, and can be accumulated beyond the twenty-one years (*Cathcart*, 1883, 10 R. 1205; *M'Larty*, 1864, 2 M. 489).

In the sense of the Act, accumulation takes place whenever the beneficial enjoyment of the produce of the estate is postponed. The period of twenty-one years runs from the date of the death of the granter, and

not from the expiry of any liferent or annuity, upon the expiry of which the income is directed to be accumulated (*Campbell's Trs.*, 1891, 18 R. 992; *Webb*, 1840, 2 Beav. 493; *Att.-Gen.* v. *Poulden*, 1843, 3 Hare, 555; *Nettleton*, 1849, 3 De G. & S. 366). In the special case of *Maxwell's Trs.* (1877, 5 R. 248), where trustees had accumulated income in terms of their deed for twenty-one years counting from the expiry of an annuity granted by the deed, the question put to the Court and decided was as to whether the direction to accumulate beyond that time was void, and no question was raised or decided as to the legality of prior accumulations.

With regard to the disposal of the rents or income directed to be accumulated, after the expiry of the period prescribed by the Act, it is provided that they shall "go and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." The deed or disposition will stand except as regards the direction to accumulate. Where there is a distinct present gift of the estate, upon which the direction to accumulate is a burden, the person to whom the estate is destined will be entitled to the income after the period of legal accumulation has expired (*Maxwell's Trs.*, 1877, 5 R. 248; *Mackenzie*, 1877, 4 R. 962; *Ogilvie*, 1846, 8 D. 1229). In a recent English case the House of Lords has decided that where there is an absolute vested gift payable upon the occurrence of a future event, with a direction to the trustees to accumulate and to pay the accumulation of income with the capital upon the occurrence of that event, the Court will not enforce a trust to accumulate in which no person has an interest except the legatee, that is to say, that a legatee may put an end to accumulation which is exclusively for his benefit, and this whether the legatee be an individual or a charitable institution. Where a direction to accumulate is for this reason of no effect, the Thellusson Act has no application (*Wharton*, [1895] App. Ca. 186). Where there is no distinct present gift of the estate, the income, so far as affected by the Act, is regarded as undisposed of, and falls to the testator's heir in heritage or in moveables (*Logan*, 1896, 23 R. 848; *Elder*, 1892, 20 R. 2; *Campbell*, 1891, 18 R. 992; *Catheart*, 1883, 10 R. 1205; *Smyth*, 1880, 7 R. 1176; *Pursell*, 1865, 3 M. (H. L.) 59; *Lord*, 1860, 23 D. 111; *Keith*, 1857, 19 D. 1040; *Turnbull*, 1845, 7 D. 872, 6 Bell's App. 22). According to the decision in *Lord* (*ut supra*; see also *Wilson*, 1894, 22 R. 62), the person who holds the position of heir *ab intestato* is to be looked for as at the date of the testator's death, and not as at the date when intestacy is ascertained. But in *Campbell* (*ut supra*), where the question concerned the rents of heritage, the majority of the Second Division (Ld. Young dissenting, and contrary to the opinion of Ld. Kincairney, Ordinary) held that each term's rent as it accrued belonged to the person holding at that time the character of heir-at-law of the truster. In that case, Ld. Rutherfurd Clark said: "The Lord Ordinary sustains the claim of the representative in heritage of George Gunning Campbell, the heir-at-law of the truster as at his death. But this assumes that the rents belonged to George Gunning Campbell. If they did not, they could not be taken up by his representative. He died in 1858. To my mind it is clear that rents which did not become due till 1889 could not belong to a person who died before that date. I should think it a self-evident proposition that the interest of money or the rent of lands cannot belong to one who dies before they accrue. If the truster had died intestate, and George Gunning Campbell had succeeded as his heir, the latter would have been entitled to the rents which accrued due up to his death, and to no more. It can make no difference that we are dealing

with a case where the rents are set free by the operation of the Thirlage Act. That circumstance can never enlarge the rights or estate of the heir *ab intestato*. I am therefore of opinion that the rents cannot be claimed by anyone as the representative of George Gumming Campbell" (18 R. 1008). In this case the question was of no importance, as in any view the rents fell to George Gumming Campbell's representative, but it is respectfully suggested that it is the *right* to the rents which belongs to the heir, and that that right can be transmitted to his representatives, just as a right to an annuity payable during the life of another person can be transmitted by the possessor thereof to his representatives. The decision in *Campbell's* case was followed, however, by a majority of the First Division (Ld. Adam dissenting) in *Logan's Trs.* (1896, 23 R. 548).

Trusts may also be divided into those which are created by the deliberate intention of the truster, and those which are held to arise by operation of law, viz. Resulting and Constructive Trusts. These latter will be considered immediately (see p. 336). For Executory Trusts, see p. 359.

Constitution.

Writing is not necessary in order validly to constitute a trust; the mere transference of the property from the truster to the trustee, accompanied by a declaration of the trust purposes, is sufficient. But, in the general case, trusts are constituted by writing, and it may be noted that the Trusts Acts apply only to trusts constituted "by any deed or local Act of Parliament."

No special or technical language is necessary in order to constitute a trust. It is sufficient if there is evidence of an intention on the part of the truster that his property should be held in trust, and if it is possible to point to the property to be dealt with, to the beneficiaries to whom it is destined, and, to some extent, to the methods in accordance with which it is to be administered. Especially in the case of trusts for charitable purposes, the Court will go a long way to supply any deficiencies occurring in the trust deed (see *Mags. of Dundee*, 1858, 3 Macq. 134).

There are two forms of trust deed in common use, the one being an absolute disposition of the property to the trustee, qualified by a separate back-bond or back-letter declaring the trust, and the other being a deed which bears *in gremio* the trust purposes, or which, declaring that the property is disponed in trust, refers to a separate document, written or to be written, which sets forth the trust purposes. In the case of *inter vivos* trusts, such as those constituted for the management of the truster's estate or the extrication of his affairs, the absolute disposition with separate back-bond is the form usually adopted, on account of the greater facility in dealing with the estate which it gives to the trustee. The ordinary trust disposition bearing *in gremio* the trust purposes is as a rule found the more convenient form to adopt in the case of family and testamentary settlements. But in this latter case, it is sometimes convenient, in order to avoid unnecessary publication of family arrangements, to express in the deed itself merely the fact that the property is held in trust, and to refer to another document for the trust purposes. When heritable property is conveyed by a trust deed valid according to the law of Scotland for purposes to be afterwards declared, the trust purposes may be declared by any deed valid by the law of the place where it is executed (*Cameron*, 1831, 9 S. 601: 1833, 7 W. & S. 106).

The important distinction between the absolute disposition with back-bond and the ordinary trust disposition is that the former divests the

granter of his title to the estate, leaving him merely the creditor upon the trustee's obligation to reconvey, while the latter does not necessarily divest him, but merely burdens his right (see *Robertson*, 1840, 2 D. 279, per Ld. Fullerton, at p. 291).

(1) Absolute Disposition with Back-Bond.—The effect of a deed of this nature is to divest the granter, and vest the estate in the trustee, subject to the equitable rights of reversion. The trustee is therefore liable in all the consequences lawfully deducible from the title upon which he holds, such as, for example, the payment of feu-duties or ground-annuals (*Gardyne*, 1851, 13 D. 912; 1853, 1 Macq. 358; *M'Lelland*, 1857, 19 D. 574; *City of Glasgow Bank*, 1882, 9 R. 689; *Clark*, 1850, 12 D. 1047; rev. 1854, 1 Macq. 668). Still, in a question with the granter of the deed or with the person beneficially interested in it, the absolute disposition does not give the trustee more than a fiduciary right to the estate disponed. The publication or recording of the back-bond has important results in questions arising with third parties. Where the estate is vested in a person by a title *ex facie* absolute, though really in trust, and the right of the beneficiary, whether he be the truster or another, rests upon a latent back-bond, the trustee can, though his action may be in breach of duty or even grossly fraudulent, communicate a valid right to a purchaser or a lender upon the security of the trust estate, who transacts with him for value, and without notice of the interest of the beneficiary (see per Ld. Watson in *Heritable Reversionary Co.*, 1892, 19 R. (H L.) at p. 47; *Redfearn*, 1813, 1 Dow's App. 53; *Burns*, 1840, 2 D. 1348; *Mansfield*, 1833, 11 S. 813). But in such a case, the validity of the right acquired by the disponee for value does not rest upon any power of the trustee to give this right, but upon the principle that a true owner who chooses to conceal his right from the public, and to clothe his trustee with all the *indicia* of ownership, is thereby barred from challenging rights acquired by innocent third parties for onerous considerations under contracts with his fraudulent trustee (*ib.*). Proof, however, that the purchaser or assignee knew of the latent trust will invalidate the contract with the trustee, and give a preference to the truster or beneficiary (Stair, iv. 6. 5). The recording of the back-bond, or its production in legal proceedings (*Keith*, 1795, Bell, Folio Cases, 234), is equivalent to publication, and when the back-bond is published a purchaser will be held to have had notice of the trust.

The creditor of the trustee, or his trustee in bankruptcy, is not in the position of an onerous assignee. The trustee in bankruptcy takes the property of the bankrupt subject to all the rights and equities that affected it at the time of the bankruptcy, and therefore property which is held by a bankrupt under a disposition *ex facie* absolute but really in trust, does not, whether the back-bond is recorded or not, pass to the trustee in bankruptcy (*Heritable Reversionary Co., ut supra*; *Forbes*, 1898, 25 R. 1012; *Fleeming*, 1868, 6 M. (H. L.) 113, per Ld. Westbury; *Abbott*, 1870, 8 M. 791; *Gordon and Dingwall*, 1824, 1 S. (N. E.) 566; *Thomson*, 1784, Mor. 10229). Personal creditors do not as a rule give credit on the strength of a presumption that property standing in the name of their debtor is his private property. "Unless they are going to advance money on heritable security, they know nothing of his title deeds, and trust only to his personal credit" (per Ld. M'Laren in *Heritable Security Co.*, 18 R. 1175). "An heritable bond is good because it is the price of the estate; the adjudger seeks to mend his former security" (per Ld. Monboddo in *Thomson, ut supra*).

(2) Deed bearing *in gremio* the Trust Purposes.—The position of the radical title to the estate, in the case of a deed which bears on its face that

it is a conveyance for trust purposes, depends upon circumstances. Where the ultimate purpose of the trust is a reconveyance of the reversion of the estate to the truster, the radical title to the estate remains in the truster, even although the primary purpose of the trust may be the payment of debts which exceed in their amount the value of the estate (*Campbell*, 1801, Mor. "Adjudication," No. 11; *M'Millan*, 1831, 9 S. 551; 1834, 7 W. & S. 441; *Fairlie*, 1827, 8 S. 937; *Gilmour*, 1873, 11 M. 853). No higher title passes to the trustee than that which is necessary to enable him to carry out the trust purposes. The only practical difference between such a trust and a heritable security is that in the latter case the heritable creditor holds the estate in satisfaction of a debt due to himself, while in the former the trustee holds in satisfaction of debts due by the truster to third parties. In order, however, that the truster may retain the radical title to the estate, it must be clear from the deed itself that the surplus of the estate, if any, after the trust purposes have been fulfilled, is to revert to him. When, for example, the trust deed bears to be a conveyance of the whole property for behoof of the creditors in consideration of receiving a discharge from them, the Court will not, in the event of there being a surplus after the debts are paid, hold that a resulting trust for the granter is implied (*Smith*, [1891] L. R. App. Ca. 297: rev. 1890, 45 Ch. Div. 38). (See TRUST DEED FOR CREDITORS.)

Where, however, the ultimate purpose of the deed is to settle an irrevocable interest in the reversion of the estate upon a third party, the granter is entirely divested of the radical right, and this even though the deed reserves to him a liferent interest in the estate. In short, the radical right is in the person beneficially interested in the reversion.

Where the radical right remains with the truster, he is the heritable proprietor of the estate, and his title remains to all effects "precisely as it was before the trust was granted, subject only to the security thereby created, and the acts of the trustee in conformity with the powers conferred upon him" (per Ld. J.-Cl. Moncreiff in *Gilmour*, 1873, 11 M. 853, at p. 857). The fact that the trustees have a power of sale does not affect his rights as proprietor so long as the estate is unsold, nor is it necessary that he should remain in possession of the estate. Thus the heir of the truster cannot complete his title by conveyance from the trustee (*Gilmour*, *ut supra*). Thus, also, the truster can sell the estate subject to the burden imposed upon it by the trust (see *Brisbane*, 1826, 4 S. 422), or grant heritable securities affecting it (*Lindsay*, 1844, 6 D. 771). His right to the reversion can be adjudged or attached by his creditors (*Campbell*, 1801, Mor. "Adjudication," No. 11; *Globe Insurance Co.*, 1874, 17 D. 210; *Cameron*, 1830, 8 S. 440). He can execute an entail of the property to the extent of his reversionary interest (*M'Millan*, 1831, 9 S. 551; 1834, 7 W. & S. 441; *Herries*, 1838, 16 S. 948; *Murray*, 1850, 13 S. 54; *Williams*, 1872, 10 M. 362). He can assign that interest (see *National Bank*, 1886, 14 R. (H. L.) 1). In a recent case, where a person had granted a disposition *ex facie* absolute, but really in security, it was held that when the property was reconveyed to him, he had a good title to sue a railway company for damage done to the property during the time that the lands were held under the *ex facie* absolute disposition (*M'Bride*, 1894, 21 R. 620: see also *Vincent*, 1899, 6 S. L. T. 375).

Where the truster retains an interest of a heritable nature in the estate, he, and not the trustee in whose name the title to the estate is, is the person entitled to vote in respect of the property in parliamentary and other elections, and this is so even in the case of a conveyance *ex facie*

absolute, so long as the trust is competently proved (*Stewart*, 1869, 8 M. 13; *Skeete*, 1873, 1 R. 18; *Monteith*, 1868, 7 M. 300;—as to proof of trust in such cases, see *Jardine*, 1865, 4 M. 138; *Stewart*, 1868, 7 M. 298; *Skeete*, 1879, 7 R. 12).

Proof of Trust.

Act 1696, c. 25.—In a question between truster and trustee, or persons in their right, where the property is held under a deed *ex facie* absolute, trust can only be proved by the writ or oath of the alleged trustee (Act 1696, c. 25; see *Duggan*, 1797, Mor. 12761, 3 Pat. 610; *Mackay*, 1829, 7 S. 699; *Lyon*, 1830, 8 S. 789; *Chalmers*, 1845, 7 D. 865; *Dunn*, 1898, 25 R. 461). The Act provides "that no action of declarator of trust shall be sustained as to any deed of trust made for hereafter, except upon a declaration or back-bond of trust, lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intended, or unless the same shall be referred to the oath of the party *simpliciter*." In terms, this Act only applies to cases where trust is averred, but no distinction has ever been drawn in this respect been an *ex facie* absolute disposition alleged to have been granted in trust, and a similar disposition alleged to have been granted in security. It has always been held that in the latter case as well as in the former, proof of a latent qualification of an absolute title is limited to writ or oath (see *Leckie*, 1854, 17 D. 77).

The Act is not limited to feudal conveyances. It has been held to apply to an assignation of right to moveables (see *Dunn*, 1898, 25 R. 461, per Ld. Pres. at p. 467), and it applies to a conveyance of a personal right to property in whatever form that conveyance may be found. Thus missives of sale, which in law are equivalent to a minute of agreement of sale, may constitute a "deed of trust" in the sense of the Act (*Dunn*, 1898, 25 R. 461; see *Horne*, 1877, 4 R. 977).

The Act, of course, does not apply where the deed bears *in gremio* to be a trust deed, as in such a case no declarator of trust can be necessary. It does not apply where no deed of trust is averred (*Gardiner*, 1897, 4 S. L. T. 355); or where the alleged trustee has voluntarily interposed as *negotiorum gestor* (*Spreul*, 1741, Mor. 16201, Elchies, *voce* "Trust," No. 1; see opinion of Ld. J.-Cl. Inglis in *Marshall*, 1859, 21 D. 521); or where the averment is not a proper averment of trust, as, for example, where it was averred that certain members of a club had purchased property under an agreement by which they were bound to make over the property to the club upon being paid the price they had given for it. In such a case, as the property in question had never belonged to the club, it was impossible for the club to constitute a trust with regard to it, and therefore in an action raised by the club against the members, it was held that trust was not relevantly averred, and that the Act did not apply (*Govan New Bowling Green Club*, 1898, 25 R. 485). In such cases, proof *prout de jure* is allowed.

Where the averment is that the contract was mandate and not trust, parole proof is admissible, as, for example, where the pursuer avers that the defender has, without authority, taken the title in his own name, instead of in the pursuer's (*Horne*, 1877, 4 R. 977; *Mackay*, 1829, 7 S. 699); or where he avers that the defender, as agent, has taken the title in his own name, without preserving written evidence of the trust, as he was instructed to do (*Pant Mawr Quarry Co.*, 1883, 10 R. 457). "The statute only applies where one man alleges that he has trusted another to take the title in his own name" (per Ld. Pres. Inglis in *Horne*, *ut supra*).

"When the allegation is not trust but partnership, the Act 1696 does not apply. The fact that a partner holds on behalf of the company may be proved *prout de jure*" (per Ld. J.-Cl. Moncreiff in *Forrester*, 1875, 2 R. 755). In this case it was held competent to prove *prout de jure* that an insurance policy upon the life of a partner in a firm had been held by him for behoof of the firm. But in the later case of *Laird* (1884, 12 R. 294), where a patent had been taken out in the names of two persons, one of whom was a partner in a firm and the other the manager, it was held, in an action brought by the other partners to have it declared that the patent was held in trust for the firm, that the proof was limited by the Act. An attempt was made to distinguish this case from that of *Forrester*, but the two decisions are difficult to reconcile.

It is competent for third parties to prove trust *prout de jure*, as the Act only applies to questions between truster and trustee. Thus, the creditors of the granter of an *ex facie* absolute disposition may prove *prout de jure* that it was in reality granted by their debtor in trust (*Wink*, 1867, 6 M. 77, see opinion of Ld. Benholme, at p. 82; *City of Glasgow Bank*, 1882, 9 R. 689, per Ld. Pres. Inglis, at p. 692). The trustee is also entitled to prove *prout de jure* that he holds only as trustee, and not as absolute proprietor (see *Murdoch*, 1832, 10 S. 445). Where, for example, in an action for damages for slander, the jurisdiction of the Court depended on the possession of heritable property in Scotland by the defender, it was held to be competent for him to prove *prout de jure* that the property was held in trust (*Hastie*, 1886, 13 R. 843; see also *University of Aberdeen*, 1876, 3 R. 1087, 4 R. (H. L.) 48; *Stewart*, 1868, 7 M. 298; *Middleton*, 1861, 23 D. 526; *Harper*, 1850, 22 Sc. Jur. 577; *Eliband*, 1827, 6 S. 69).

A relevant averment of fraud in the constitution of the title will let in parole proof, but the fraud must be something more than the mere denial by the alleged trustee of the existence of the trust. "That fraud which consists only in denying the existence of a trust which does not appear upon the face of the deed itself, is plainly distinguishable from a fraud which induces the granting of the deed" (per Ld. Pres. Inglis in *Tennant*, 1868, 6 M. 876; see also opinion of Ld. J.-Cl. Inglis in *Marshall*, 1859, 21 D. 521).

It is competent to prove by parole evidence the loss of the back-bond, or to show that it is in the possession of the trustee, and has been improperly retained by him (*Kennoway*, 1752, Elchies, voce "Trust" No. 16; *Chalmers*, 1845, 7 D. 865; *Walker*, 1857, 20 D. 259).

Where the defender admits that the absolute disposition does not represent the true contract between him and the pursuer, but that it is subject to qualifications, parole evidence of these qualifications is admitted (*Grant's Trs.*, 1875, 2 R. 377; *Murray*, 1870, 8 M. 722; *Fortune*, 1841, 10 S. 115; *Grant*, 1898, 6 S. L. T. 259). Where it is admitted or proved that the *ex facie* absolute disposition was originally granted in trust, but it is averred that the parties afterwards agreed that the disposition should be absolute, the question is not one regarding the constitution of trust, and the Act does not apply, the onus being on the defender to prove the alteration of the original contract (*Walker*, 1857, 20 D. 259).

The Act does not apply to a case in which the truster is a person under a legal disability, and where the alleged trustee is already in a fiduciary relation to the truster, as where a wife avers that money invested by her husband in his own name was in reality held by him in her behalf (*Anderson*, 1898, 6 S. L. T. 260).

The Act speaks of "a declaration or back-bond of trust, lawfully sub-

scribed by the person alleged to be the trustee." A very free interpretation has been put upon these words by the Court. The document need not be probative. In spite of the express words of the Act, it need not even be signed by the alleged trustee. Unsigned entries in his business books, if unequivocally instructing trust, are sufficient, and a remit may be made to an accountant to ascertain the purport of the entries founded on (*Seth*, 1855, 17 D. 1117; *Walker*, 1857, 20 D. 259; *Knox*, 1850, 12 D. 719; *Thomson*, 1873, 1 R. 65); but "it would be quite competent by evidence to show that the books, rightly understood, did not import a trust" (*Seth*, *ut supra*, per Ld. J.-Cl. Hope, 17 D. 1124). In *Thomson* (*ut supra*), entries in the business books of the deceased trustee, in his own hand, showing that he had received the money, and a letter from the pursuer to him found in his repositories, and proved to have been delivered to him at the time the entries were made, explaining the transaction, were held to be equivalent to the deceased's writ, and competent evidence of the alleged trust. Any writing under the hand of the alleged trustee, or any writing signed by him, is sufficient, so long as it clearly shows the existence of a trust, and does not merely give rise to the inference (*Macfarlane*, 1837, 15 S. 978; *Taylor*, 1833, 12 S. 39; *Mackay*, 1829, 7 S. 699; *Ramsay*, 1748, Mor. 12757). Where the writing founded on is ambiguous, it is competent to inquire into the circumstances in which it was executed and delivered (*Evans*, 1871, 9 M. 801; *Stewart*, 1777, 5 Br. Sup. 631). In *Evans*, an opinion was expressed by Ld. Benholme that the declaration of trust contemplated by the statute is a writing in some way delivered to the party interested as truster (9 M. 804). Where the evidence offered was a letter by the agent of the deceased alleged trustee, professing to have been written by his authority, it was deemed insufficient, and the parole evidence of the agent as to his authority was not admitted (*Marshall*, 1859, 21 D. 514). The result might have been different had the pursuers been able to produce any writing under the hand of the alleged trustee authorising his agent to write such a letter (*ib.*, per Ld. J.-Cl. Inglis, p. 523). A written acknowledgment of the trust by the executor of the alleged trustee has been held sufficient (*Montgomerie*, 7 Feb. 1811, F. C.).

Trusts arising from the Operation of Law.

In addition to trusts constituted in writing by the truster, and the outcome of his deliberate intention, there are other trusts the existence of which will, in certain circumstances, be recognised by law. Such trusts may be either *Resulting Trusts* or *Constructive Trusts*.

(1) Resulting Trusts.—Where property is held in trust, and the trust purposes declared in the deed do not exhaust the beneficial interest in the estate,—"without such declaration of purposes as disposes of them in all events" (per consulted judges in *Boyle*, 1858, 20 D. 943),—the Court will recognise a "resulting trust" with regard to the residue in favour of the truster or his heirs. There is always a presumption against the person who holds the estate as trustee having himself also a beneficial interest in it, a presumption which can only be overcome when there is in the deed an indication of the truster's intention that the trustee's interest should be beneficial as well as fiduciary (see *Anderson*, 1898, 25 R. 493; *Rogers*, 1733, 3 P. Wms. 193; *Wych*, 1712, 3 Brown's Parl. Cases, 44; *Hughes*, 1843, 13 Sim. 496). Where there is no such indication, the Court, rather than let the trustee take the beneficial interest, will recognise a resulting trust for behoof of the truster or his representatives.

A simple case of a resulting trust is one in which a testator leaves his

estate in trust for the payment of certain legacies, without naming a residuary legatee, and the payment of these legacies does not exhaust the estate. Here a resulting trust will be held to arise with regard to the surplus, for behoof of the truster's heir-at-law or next of kin. In a trust for behoof of creditors, where there is a surplus after payment of the debts, there may be said to be a resulting trust with regard to the surplus for behoof of the truster; but, strictly speaking, where the truster is entitled to the reversion of the estate under such a trust, the payment of the surplus to him should be considered as one of the trust purposes. From the English case of *Smith* (1891, L. R. App. Ca. 297) it appears that in order that the truster may retain an interest in such a surplus, a provision to that effect, express or implied, must be found in the terms of the trust deed. In this case the deed was interpreted as being a conveyance of the whole estate for behoof of creditors in consideration of receiving a full discharge, and it was held that the truster had no right to the surplus remaining after the debts had been paid.

A resulting trust arises where a beneficial interest is given under a trust to an individual, without mentioning his heirs, and that individual dies before the trust comes into operation. Again, where a testator conveys his whole property to trustees, and after dealing with part of it, he reserves power to deal with the residue in a subsequent deed, and fails to do so, he will be held to have died intestate *quoad* the undisposed-of residue, and a resulting trust will be held to arise in favour of his heir-at-law or next of kin, even though it should appear from the deed that it was not the testator's intention that the residue should be thus disposed of (*Sinclair*, 1840, 2 D. 694; see *Enohin*, 1862, 31 L. J. (N. S.) 402). Where by marriage contract a wife had conveyed all her property to trustees for behoof of her husband in liferent, but only to the extent of one half, and to her children in fee, and had not disposed of the liferent of the other half of the estate, it was held that it was payable to her, and did not fall to be accumulated with the fee (*Higginbotham*, 1886, 13 R. 1016). "Where anyone creates a trust, and expresses no trust purposes, or the purposes which he expresses fail, then there is a resulting trust for himself if he continues in life, or, if not, for those who, after his death, come in his place" (per Ld. Young in *Edmond*, 1898, 1 F. at p. 163).

Where property is left in trust, and the trust purposes are set aside as uncertain or inextricable, a resulting trust arises for behoof of the heirs of the truster (*Mason*, 1844, 16 Jur. 422). So also where the disposal of the estate is left to the discretion of the trustees, *e.g.* among charities to be selected by them, and the trustees decline office, or die without exercising the discretion, a resulting trust arises (*Robbie*, 1893, 20 R. 358). So also where the trust purposes are set aside as illegal (see *Symes*, 1870, 9 Eq. 475). When a direction to accumulate income is struck at by the Thellusson Act, a resulting trust arises with regard to the income which cannot be accumulated (*Logan's Trs.*, 1896, 23 R. 848; *Elder*, 1892, 20 R. 2; *Campbell's Trs.*, 1891, 18 R. 992; *Maxwell's Trs.*, 1877, 5 R. 248; *Lord*, 1860, 23 D. 111; and other cases cited *supra*, p. 330). In a recent case a father had put a sum of money into the hands of his daughters "to be administered for behoof of" his son. The daughters had authority to expend the money for behoof of their brother at such times and in such ways as they might think proper, and there was a further provision that "should the whole not be disposed of in the lifetime of" the son, "my said daughters may dispose of the balance in any way they should think proper." The father also left a trust disposition and settlement with a residuary clause. On

the death of the son, part of the money was still in the daughters' hands. It was held that neither they nor the son's executor had a beneficial interest in it, that the direction to dispose of it "in any way they should think proper" was not a good and enforceable trust direction and was void from uncertainty, and that the consequence was a resulting trust for the residuary legatee under the father's settlement (*Anderson*, 1898, 25 R. 493).

In the case of *Edmond* (1898, 1 F. 154) an attempt was made to set up a resulting trust. Here the testator had left part of his estate to trustees, declaring that the liferent was to go to his son. There were no trust purposes disclosed with regard to the fee of the estate, but a sealed envelope had been left with instructions endorsed upon it that it was not to be opened until after the death of the testator's son. The son asked for declarator that his father had died intestate *quoad* the fee of the estate, as the trustees could show no trust purposes, but the Court, considering that the sealed envelope might contain the trust purposes (which it did), ordered it to be opened, in spite of the testator's instructions, rather than declare a resulting trust.

Even though the heir-at-law or representative *ab intestato* of the truster has no interest under the trust deed, the fact that the trust purposes may at any time either wholly or partially fail, and that a resulting interest may thereupon arise in his favour, gives him a title to see that the trust is properly administered, and that the funds are not perverted from the proper trust purposes (*M'Leish*, 1841, 3 D. 914).

Constructive Trusts.—A constructive trust is held to arise wherever anyone obtains or holds property to which he is not equitably entitled for his own absolute use. Thus a heritable creditor, even though he has and may exercise a power of sale, is not entitled to treat the security-subject as if it were absolutely his own. In exercising his own rights, he must have regard to those of the postponed creditors and of the debtor, and to this extent he is constructively a trustee for them (see per consulted judges in *Beveridge*, 1829, 7 S. 281, quoted by Ld. Pres. Inglis in *Stewart*, 1882, 10 R. 203). So also a liferenter must deal with the estate which he liferents in such a way as not to prejudice the rights of the fiar, and an heir of entail in possession must have regard to the interests of future heirs of entail (see *Queensberry*, 1820, 6 Pat. 551, per Ld. Redesdale). Exception could be taken, for example, to the granting of leases at an unreasonably low rent, especially where a grassum was taken (*ib.*; and see per Ld. M'Laren in *Montgomerie*, 1895, 22 R. at p. 474). In *Muirhead* (1858, 20 D. 592) the question was raised whether an heir of entail could be prevented from working the minerals on the estate to his own profit, but to the exhaustion of the estate and the injury of subsequent heirs of entail. It has been recently held in England that where a constructive trustee has expended money upon permanent improvements on the estate, he is *primâ facie* entitled to be recouped to the extent of the increased value, irrespective of the fact that he is entitled to the beneficial liferent of the estate (*Rowley*, [1897] 2 Ch. 503).

As a trustee or any person holding a fiduciary position cannot be *auctor in rem suam*, that is, cannot make profit for himself out of his position, the law assumes that any profit made by him by means of his office is made for behoof of the beneficiary. "Where an agent or other trustee takes money from a person with whom he contracts for his constituent, the law assumes that he takes it at the cost of his constituent, and admits no evidence to the contrary" (per Ld. Young in *Huntingdon Copper Co.* 1877,

4 R. 294, 5 R. (H. L.) 1). A trustee, therefore, when he transacts with regard to the trust estate, is assumed to do so in the interests of the estate and the beneficiaries. A trustee cannot lawfully purchase the trust property for his own behoof, and such a purchase will be considered to be for behoof of the estate, and there will be an obligation upon the trustee to reconvey (see *York Buildings Co.*, 1795, 3 Pat. 378; *Hamilton*, 1839, 1 D. 673; 1842, 1 Bell's App. 574).

So also "one partner cannot treat privately and behind the backs of his co-partners for a lease of the premises where the joint trade is carried on; if he do so, and obtains a lease in his own name, it is a trust for the partnership" (per Grant, M. R., in *Featherstonehaugh*, 1810, 17 Ves. Jun. 298, quoted by Ld. Cowan in *M'Niven*, 1868, 7 M. 181; see *Marshall*, 26 Jan. 1815, F. C., 23 Feb. 1816, F. C.; *Wilson*, 1789, Mor. 16376, *Ladyhaire*, 1632, Mor. 9503; *Palmer*, 1684, 1 Vern. 276; *Grace*, 1799, 1 Bos. & Pul. 376).

Implied Trusts.—It may be convenient here in a word to refer to what are known as Implied Trusts. The only peculiarity of an Implied Trust is that the intention of the testator is drawn by implication and not from the express words of the deed. The intention is found in the deed, and is not, as in a constructive trust, what the law presumes would have been the intention of the truster had he known that his declared purposes would fail, nor, as in a constructive trust, what the law creates as the result of the action of the trustee. It is quite settled that the expression of a truster's *wish* with regard to the disposal of his property is equivalent to the expression of his *will* (*Crichton*, 1828, 3 W. & S. 329; *Dundas*, 1837, 15 S. 427; *Mags. of Dundee*, 1858, 3 Macq. 153); and wherever he points out the property, the way in which he wishes that it is to go, and the persons who are to be benefited, a trust will be implied, even though it is not expressly declared (see per Ld. Alvanley in *Malim*, 1794, 2 Ves. Jun. 335; *Mags. of Dundee, ut supra*). "Words which say that one person holds property 'on behalf of' or 'for behoof of' another, are words which come up to and satisfy the idea of the word 'trust,' just as much as the word 'trust' itself, if the circumstances of the case are consistent with that interpretation" (per Ld. Chan. Cairns in *Gillespie*, 1879, 6 R. (H. L.) 107). A bequest to "A. for the benefit of herself and of her sister B.," implies a trust in A. for behoof of B. with regard to B.'s share of the bequest (*Macpherson*, 1894, 21 R. 386). For a list of the words expressive of the truster's wish or desire, which in England have been held equivalent to an expression of his will, see Lewin, *Trusts*, 9th ed., p. 137.

There is a distinction, however, between a wish or recommendation by the truster that a particular object should be benefited, and a recommendation that a particular power, such as a power to sell, conferred upon the trustees should be exercised. In the former case it is obligatory upon the trustees to follow the recommendation, in the latter it is not, but is left to their discretion. Moreover, some phrases have been held to be too indefinite to constitute a trust by implication. A recommendation to "be kind to," or "to consider," or "to make provision for" certain persons, does not constitute a trust for that purpose, and the grantee takes the property under no legal obligation to observe the recommendation (see *Sale*, 1827, 1 Sim. 534; *Bardswell*, 1838, 9 Sim. 319; *Wood*, 1844, 14 Sim. 379). A distinction is drawn between the expression of the granter's desire that certain persons should receive a definite benefit from his estate and what is merely an expression of his desire that those whom he primarily intends to benefit should take into consideration the claims or necessities of certain other persons. Where a conveyance, which is itself absolute, contains a recommen-

tion, there is no implied trust in the institute, and he can, "in the character of absolute fiar, evacuate the substitution by a deed merely gratuitous" (Ersk. iii. S. 44; see *Greig*, 1833, 6 W. & S. 426; *M'Dowall*, 1847, 9 D. 1284). And again, where the gift is absolute, but is accompanied by a request that the property should be disposed of in a particular way on the death of the grantee, the request is not legally binding upon the grantee, but may be defeated at pleasure (*Barclay's Executor*, 1880, 7 R. 477; see *Hill*, [1897] 1 Q. B. 483). A testamentary writing to the following effect: "I wish to leave everything that may be considered mine . . . entirely at your disposal, knowing that you will do as I wish with it . . . I would like you, out of the interest of my money, to give A. and B. a handsome remembrance of me," was held to import an absolute gift, and not a trust for the purpose of carrying out the testator's wishes (*Wilson*, 1878, 5 R. 539). Where a testator left a sum of money to his widow upon condition that at her death she should leave "at least two-thirds of what may be at her disposal" to his relatives, it was held that her right to dispose of her funds onerously or gratuitously during her life was not limited (*Murray*, 1895, 22 R. 927).

Revocation.

Power to Revoke.—(1) *Trusts inter vivos.*—Where a trust deed is unilateral, the truster, unless he has given a *jus quæsitum* in the deed to a third party, retains the right to revoke it at pleasure. Thus where a person, in order to protect his estate from his own acts, conveys it to trustees for his own behoof, the trust is revocable by him at any time (see *Mackenzie*, 1878, 5 R. 1027). Similarly, where a lady, in contemplation of marriage, conveyed her estate to trustees for behoof of herself in liferent and the issue of the marriage in fee, it was held that the conveyance was revocable, at all events before the marriage had taken place (*Murison*, 1854, 16 D. 529). In a later case, a deed granted in similar circumstances was held to be revocable by the wife, with her husband's consent, a year after the marriage had taken place, there being no children of the marriage in existence (*Watt*, 1897, 24 R. 330). Such trusts, being revocable, would not protect the estate against the truster's creditors.

But where, by delivery of the deed to the trustees, the truster has vested the estate in them for behoof of his creditors or of beneficiaries who are in existence at the date of delivery, the deed is not revocable (*Shedden*, 1895, 23 R. 228; *Robertson*, 1892, 19 R. 849; *Downie*, 1895, 32 S. L. R. 715; *Spalding*, 1874, 2 R. 237; *Tennent*, 1869, 7 M. 936; *Gilpin*, 1869, 7 M. 807; *Smitton*, 1839, 2 D. 225; *Turnbull*, 1825, 2 W. & S. 80), unless the truster has in it reserved a power to revoke (see *Robertson, ut supra*). The delivery of the deed may be constructive, as by registration (see *Tennent, Smitton, ut supra*). The fact that the interest which the beneficiary takes is contingent upon his survivance of a certain period, or upon some other circumstance, will not make the deed revocable (see *Robertson, ut supra*). But when a trust is constituted merely for the administration of the granter's affairs in his lifetime, it does not divest him of the radical interest in the estate, and he retains his power to revoke it. And this may be so even though the deed contains clauses of a testamentary character, disposing of the fee (*Byres*, 1895, 23 R. 332). "When the trust as originally constituted contains words of disposal of the fee or reversion, then it is a question of construction whether an irrevocable right is intended to be given to the beneficiaries, or whether the beneficial provisions are properly and in substance testamentary" (per Ld. M'Laren at p. 337). "In general, if the

beneficial provisions are expressed in the form of a direction to trustees to divide the surplus estate at the granter's death, and if there is nothing in the deed establishing an intention on the part of the granter to renounce the power to revoke which, as I have said, always remains to him when the trust is for administration, then I should say the trust is one for administration first and for testamentary purposes afterwards, but that no right is given to anyone in the truster's lifetime. But of course an owner of property may divest himself in his lifetime of all his rights, including the right to revoke the deed by which he divests himself. There is no difficulty in framing such a deed as when delivered will give an indefeasible interest to the beneficiaries named in it. If the primary purpose of the trust is administration for the granter's benefit, then I think the presumption with reference to any further declaration of purposes is that the granter does not part with the power of future disposal. But this presumption may be displaced by a clear expression of the intention to constitute an immediate beneficial interest in the persons favoured" (*ib.*).

(2) *Testamentary and Marriage-Contract Trusts.*—With regard to trusts constituted by testamentary settlements,—amongst which may be included marriage-contract settlements which regulate the succession to the property after the death of one or both spouses,—the general rule, subject to certain important exceptions, is that such trusts are revocable by the granter at any time during his life, and this even where the deed contains a clause declaring it to be irrevocable, for this clause itself can be revoked (see *Mitchell*, 1877, 4 R. 800, per Ld. Gifford, at p. 808). The first exception is the same as that just referred to in dealing with *inter vivos* trusts, viz. where the truster has put the deed beyond his control by delivering the deed to trustees, and thereby vesting the estate in them for behoof of beneficiaries in existence at the time of delivery (see cases quoted *supra*). The second exception is where the element of contract enters into the deed, as frequently occurs in the case of mutual settlements or marriage contracts. In the case of a mutual settlement executed by spouses, where the considerations given are manifestly unequal, the question of Donation Inter virum et uxorem (*q.v.*) comes in, and permits revocation. And a mutual settlement in which there is no element of contract, as where one party provides the whole of the property dealt with, is revocable (see *Hyart*, 1895, 22 R. 625; *Stiven*, 1873, 11 M. 262). Even where a mutual settlement reserves a power to the parties or the survivor of them to revoke, the survivor can only exercise this power with regard to the share of the property which belongs to him (*Kay*, 1892, 19 R. 1071; *Lang*, 1885, 12 R. 1265; *Welsh*, 1871, 10 M. 16). But where the mutual settlement confers the fee of the property of the predeceaser upon the survivor, the result is that the deed becomes merely the testamentary settlement of the survivor, and is revocable by him (*Nicoll's Exrs.*, 1887, 14 R. 384). On the subject of marriage-contract trusts, it may be stated shortly that such a trust is pactional, not only with regard to the parties contracting, but with regard to the children of the marriage, and cannot be revoked (see *Macdonald*, 1893, 20 R. (H. L.) 88); and, further, that it cannot be revoked during the subsistence of the marriage, even with the consent of all parties interested, where revocation would affect any provision made for behoof of the wife in the event of her survivance (see *Anderson*, 1837, 15 S. 1073; *Pringle*, 1868, 6 M. 982; *Hope*, 1870, 8 M. 699; *Menzies*, 1875, 2 R. 597; *Elliott*, 1894, 21 R. 975; but see also *Ramsay*, 1871, 10 M. 120). (On the subject, see Fraser, *Husband and Wife*, 1489, 1498.)

Method of Revocation.—Revocation may be either express or implied

Express revocation may be made by any deed probative by the law of the truster's domicile or by that of the place of execution. A deed executed abroad, which is not valid to convey heritable property in Scotland, may yet operate as a revocation of a prior conveyance of such heritage (see *Leith*, 1848, 10 D. 1137; *Purvis*, 1861, 23 D. 812). Revocation of a testamentary settlement is implied by the execution of a later deed or of a codicil to the original deed, the provisions of which are inconsistent with those of the former deed. Thus a testamentary settlement may be revoked by a marriage contract subsequently entered into (*Bertram*, 1888, 15 R. 572). It is a question of construction in each case whether there is an implied intention on the part of the testator to revoke the prior deed (see *Mellis*, 1898, 25 R. 720; *Sutherland*, 1893, 20 R. 925; *Rae*, 1893, 20 R. 826; *Dalglish*, 1891, 19 R. 170; *Logan*, 1890, 17 R. 425; *Clouston*, 1889, 16 R. 937; *Dalglish*, 1889, 16 R. 559; *Wright*, 1889, 16 R. 677; *Stirling Stuart*, 1885, 12 R. 610; *Tronson*, 1884, 12 R. 155; *Lindsay*, 1880, 8 R. 281; *Kirkpatrick*, 1874, 1 R. (H. L.) 37). There is a presumption that a testamentary settlement which makes no provision for children *nascituri* is revoked by the birth of a child to the testator after the date of the settlement, and this even though he had children at its date (*Elder's Trs.*, 1894, 21 R. 704, and cases there cited), but it does not follow that a prior will which has been expressly revoked by the later one, is thereby restored, although it contains provisions for children *nascituri* (*Elder's Trs.*, 1895, 22 R. 505). It would rather seem that "whenever a last will is cut down by the operation of the rule or presumption that we are now considering, all previous testamentary settlements must fall along with it except such as are obligatory and matter of contract" (*ib.*, per Ld. M'Laren, 22 R. 512). Only those children of a testator whose interests are affected by the deed in question can take advantage of their implied revocation, and maintain that the deed has been revoked. The right does not transmit to their representatives (*Colquhoun*, 1829, 7 S. 709; *Watt*, 1760, Mor. 6401). (See Succession; Testament; Revocation.)

Domicile of Trust and Jurisdiction.

The main factor in determining the domicile of the trust—that is to say, under the laws of what country the trust is to be interpreted and administered—is the intention of the truster. Thus a truster can expressly create a foreign trust in order that it may be administered according to the laws of the foreign country (*Attorney-General* v. *Felce*, 1894, 18 T. L. R. 337; *Cigala's Trusts*, 1878, 7 Ch. Div. 351; see per Ld. Pres. Inglis in *Mitchell and Baxter, ut infra*). In a marriage contract, for example, there may be a declaration that the contract shall be construed and regulated by the law of a country, which may not be, or continue to be, that of the contracting parties (*Stair*, 1844, 6 D. 904). But apart from an express declaration by the truster, the presumption is that he intends his own domicile to be that of the trust (*Smith*, 1891, 18 R. 1036). This presumption, however, yields to circumstances. The form and place of execution of the deed, the nationality of the truster, the situation or origin of the trust estate, and the domicile of the trustees appointed, have all a bearing upon the interpretation of the truster's intention. Thus, where a marriage contract was entered into between an Englishman and a Scotswoman in the form of a Scottish deed, executed in Scotland, the trustees appointed being Scotsmen, and the marriage being celebrated in Scotland, it was held to be the presumed intention of the parties that the construction and legal effect of the deed should be determined by the law of Scotland (*Corbett*,

1879, 7 R. 200). Again, where a woman of Scottish origin, wife of a domiciled Englishman, by a deed in Scottish form, and executed in Scotland, conveyed to trustees (a majority residing in Scotland to be a quorum) a fund which she was entitled to dispose of under the settlement of a Scottish testator, and which was secured over heritage in Scotland, it was held that the deed must be interpreted according to the law of Scotland (*Mitchell and Baxter*, 1875, 3 R. 208). Again, where a testator, by a will executed in Jamaica, left funds to trustees resident in Scotland for the purpose of erecting and endowing a school there, it was held that all questions with regard to the execution and administration of the trust were to be determined by the law of Scotland (*Ferguson*, 1853, 15 D. 637; see also *Rainsford*, 1852, 14 D. 450; *Brown*, 1890, 17 R. 1174, per Lord Fraser, Ordinary, at p. 1177). Again, "the presumption seems to be overcome when the testator deliberately clothes the expression of his will in the technical law language of his native country, or, it may be, the country of his adoption, though not of his domicile" (M'Laren, *Wills and Succession*, i. 34).

Capacity of Truster.—The law of the truster's domicile in general decides the question of his capacity to create a trust. When a contract is executed in a country by a person domiciled there, who, by the law of the country, has not the capacity to contract, it will not be valid in any country (*Cooper*, 1888, 15 R. (H. L.) 21). But where a contract is entered into by a person *capax* either by the law of his domicile or by the *lex loci contractus*, it is valid.

Execution of Deed.—Testamentary writings executed abroad are valid as regards moveable property if they are executed in accordance either with the law of the testator's domicile or with that of the place where they are executed (*Purvis*, 1861, 23 D. 812). "All the respect that, by the law of nations, is due to deeds executed abroad, is, that they shall be regarded as if they had been executed here, according to the formalities of our own law" (Bankt. i. 1. 82). With regard to heritable property, the rule is that the deed must be validly executed according to the *lex rei sitæ* (*Dundas*, 1783, Mor. 15585, 2 Pat. App. 618; *Crawford*, 1774, 1 Hailes, 550; *Leith*, 1846, 10 D. 1137; *Purvis, ut supra*). But there is a distinction between an actual conveyance of heritable property, and the revocation of a prior settlement of heritage. The latter can competently be made by a deed valid only by the *lex loci actus* (*Leith*; *Purvis, ut supra*). Where a testator had conveyed his whole estate, including heritage in Scotland, by a *mortis causa* deed executed in Scotland, to Scottish trustees for certain purposes, and had afterwards executed a testamentary deed in Ireland, bearing to be his last and only will and testament, appointing other trustees, and declaring other purposes, but which was improbative by the law of Scotland, and insufficient to carry Scottish heritage, it was held that the conveyance of Scottish heritage was not revoked by the later deed, but was an effectual conveyance to the Scottish trustees for the purposes declared by the testator in the settlement or in subsequent writings, and that as the Irish deed contained the ultimate testamentary intentions of the deceased, the Scottish trustees were bound to give effect to them so far as they were able, and were therefore bound to convey the heritage to the Irish trustees for the purposes declared in the Irish deed (*Richmond*, 1864, 3 M. 95; see also *Innes*, 1882, 9 R. 1046; *Studd*, 1883, 10 R. (H. L.) 53). By statute, wills or testamentary writings executed abroad by a British subject and valid either by the *lex loci actus*, or by the law of his domicile at the time, or by that of his domicile of origin, are, with regard to personal estate, valid for the

purpose of being admitted to probate or of confirmation; and any such writings executed within the United Kingdom are, for similar purposes, held to be well executed if valid according to the law of that part of the United Kingdom in which they are executed; and no subsequent change of domicile affects their validity, or alters their construction (24 & 25 Vict. c. 114).

Jurisdiction.—Where a trust is constituted in Scotland and is to be executed in Scotland, the Scottish Courts have jurisdiction over the whole subject-matter of the trust (*Kennedy*, 1884, 12 R. 275, per Ld. M'Laren; *Robertson*, 1888, 15 R. 914; *Orr-Ewing*, 1885, 13 R. (H. L.) 1, per Ld. Watson, at p. 23; *Ashburton*, 1892, 20 R. 187; *Thomson*, 1895, 22 R. 866). Foreigners, therefore, who are trustees on Scottish trusts, are amenable to the Scottish Courts. They are entitled to the benefit of the law of Scotland for vindicating or protecting the trust property, and therefore when a claim is made against them which affects the trust property, they are bound to meet it in the Scottish Courts (see *Ferrie*, 1831, 9 S. 854). But they are only subject to the jurisdiction *qua* trustees and not *qua* individuals. At the same time, it is the law of Scotland, and not that of their domicile, which measures their responsibility in matters connected with the trust estate. The jurisdiction extends to questions which relate to the existence of the trust, as well as to those which concern its interpretation or administration (*Ashburton*, *ut supra*). Where the trust estate consists of heritable property in Scotland, the Scottish Courts have jurisdiction with regard to that property (*Martin*, 1879, 7 R. 329; *Charles*, 1868, 6 M. 772; and as to converse case of Scottish trustees holding real property in England, see *Hewit*, 1891, 18 R. 793).

The fact that trustees who are foreigners have taken out confirmation in Scotland under a Scottish trust deed is sufficient to subject them to the jurisdiction of the Scottish Courts in questions arising in connection with the trust, even though they are not personally present within the jurisdiction. In an action by a legatee against two foreign trustees, Ld. Kyllachy held that the jurisdiction constituted against them by their having taken out confirmation in Scotland, remained unaffected in spite of the fact that they were not in Scotland, and that the whole trust estate had been distributed twelve years before (*M'Gennis*, 1891, 18 R. 817. See also *Robertson*, 1888, 15 R. 914; *Halliday*, 1886, 14 R. 251). But mere decerniture as executor, without confirmation, is not sufficient to found jurisdiction (*Robson*, 1867, 6 M. 4); nor is the fact that the trustee, having himself a foreign domicile, is, as an individual, proprietor of heritage in Scotland, where the trust is not a Scottish one, and no part of the trust estate is situated in Scotland (*Mackenzie*, 1868, 6 M. 932; *M'Lachlan*, 1831, 9 S. 588). It has recently been held by Ld. Kyllachy that the representatives of Englishmen who had been trustees in a Scottish trust, are subject to the jurisdiction of the Scottish Courts in an action of accounting raised against them by a judicial factor on the trust estate (*Rintoul*, 1898, 5 S. L. T. 382), though in an earlier case it was held that such jurisdiction was personal to the foreign trustee himself, and did not extend to his representatives (see *Trotters*, unreported, referred to in 35 *Journal of Jurisprudence*, p. 3). Where a foreign trustee has claimed in a multiplepoinding, the fund *in medio* being situated in Scotland, his representatives are subject to the jurisdiction of the Court in that action (*Crockart*, 1852, 15 D. 202).

It must be noted that the holding of investments sanctioned by sec. 3 of the Trusts Act of 1884 does not of itself subject the trustees

to the jurisdiction of the English or Irish Courts (17 & 18 Vict. c. 63, s. 3).

Where a trustee upon a foreign trust is personally subject to the jurisdiction of the Scottish Courts, these Courts have jurisdiction over him in matters connected with the trust estate, even though the estate is not situated in Scotland. "That a Scotch Court may act *in personam*, when the pursuer and defender are within its jurisdiction, although the subject-matter of the suit may not be so, seems indisputable. *Johnston* v. *Johnston* (Mor. 4788) is an instance, as old as 1579, where the subject-matter was real estate beyond the jurisdiction. If, in the case of immoveables, the *situs rei* does not exclude the jurisdiction, there is no intelligible principle on which it can be held to be excluded by the mere *situs* in the case of moveables" (per Ld. Chan. Halsbury in *Orr-Ewing*, 1885, 13 R. (H. L.) 8; see *Ferguson*, 1796, 3 Pat. App. 503; *Morison*, 1790, Mor. 4601; *Peters*, 1825, 4 S. 107; *Macalister*, 1834, 13 S. 171; *Macmaster*, 1834, 12 S. 731; *Thomson*, 1851, 14 D. 217; *Boe*, 1857, 20 D. 11). Arrestments *jurisdictionis fundandæ causa* will give the Court jurisdiction against trustees as well as other grounds of jurisdiction *in personam* (*Innerarity*, 1840, 2 D. 813; *M'Morine*, 1845, 7 D. 270; *Rigby*, 1833, 11 S. 256; *Campbell*, 1809, Hume, 258).

Forum non conveniens. — Though the Scottish Courts have such jurisdiction, they do not always exercise it. It is open for a foreign trustee who is summoned before the Scottish Courts to plead *forum non conveniens*. "The reason assigned by the Scots Courts for declining to entertain actions against foreign trustees or executors when they come to Scotland, or when trust or executry estate is under arrestment there, is not that the Court of Session is an incompetent, but an inconvenient *forum*. It necessarily follows that the plea of *forum non conveniens* must fail in cases where the trustees are not liable to suit, or are evading an accounting in the proper *forum* of the trust, which the law of Scotland regards as the only convenient *forum* so long as the pursuer can there obtain the redress which he seeks. In *Macmaster* (1833, 11 S. 685) the Lord Justice-Clerk (Boyle) said: 'The decisions go to this, that if the executor of a foreign will come here he may be called before the Court because he could not in the foreign country.' And the Lord President (Inglis) in *Clements* (1866, 4 M. at p. 592), which was a case of partnership accounting, observed that 'the cases in which the plea of inconvenient *forum* has been sustained are chiefly of two classes: 1st, where foreign executors have been sought to be called to account in this country for the foreign executry estate situated in another country. In these cases the question always was whether it was more for the true and legitimate interest of the executry estate, and all the claimants, that the distribution should take place where the executors have had administration. There is, of course, in most cases, a strong presumption in favour of that consideration, and accordingly the plea is generally sustained in such cases.' I have no fault to find with the explanation thus given by the present head of the Court of the *rationes* by which the *forum* in which administration has taken place has also been held by Scots Courts to be the one convenient *forum*, to the exclusion of their own jurisdiction. But it is equally accurate to say that the only reason which has induced the Courts in Scotland in such cases to uphold their own jurisdiction has been, as stated by Ld. J.-Cl. Boyle, because the trustee or executor could not be called to account in the more convenient *forum*. I am not aware of any authority in the law of Scotland for entertaining an action in the Court of Session against foreign trustees who can be called to account and who are willing to

account in the proper *forum*, though action has been sustained in cases where they were neither liable nor willing to answer in that *forum*. There is another and intermediate class of cases, in which it is doubtful whether the Courts of the *forum conveniens* may have it within their power to give the pursuer a full remedy, or to enforce their orders against the persons of the trustees and the trust estate. In such cases the Court of Session will not dismiss the suit, but will sist procedure, not with the view of superseding, but of aiding the action and supplementing the powers of the foreign Court, in order that full justice may be done" (per Ld. Watson in *Orr-Ewing*, 1885, 13 R. (H. L.) 27; see also *Peters*, 1825, 4 S. 107; *Macmaster*, 1834, 12 S. 731).

The doctrine of *forum non conveniens* is applied in cases where trustees are called to account generally for their intromissions, or where the question is one raised by beneficiaries, but as a rule a creditor is entitled to sue in any Court of competent jurisdiction (*Carron Co.*, 1857, 19 D. 318), unless perhaps where there is, or necessarily will be, a competition among the creditors in the *forum conveniens* (*ib.*).

Jurisdiction *ex reconventione*.—Where a foreigner claims in a multiplepoinding or a sequestration in Scotland, he is subject to the jurisdiction of the Scottish Courts in any action raised against him in connection with the same matter, as, for example, an action raised by the trustee in the sequestration for reduction of an illegal preference acquired by him (*Ord*, 1847, 9 D. 541); or for implement of a contract entered into by him with the bankrupt (*Barr*, 1879, 7 R. 247).

Scottish Trusts Acts not applicable to English Trusts.—Where part of an English trust estate consists of heritage in Scotland, the Scottish Trusts Acts are not applicable, and petitions for the appointment of new trustees upon such trusts, or for authority to sell such heritage, will be refused on the ground that the Courts of one country cannot enlarge the powers of trustees who are answerable to the Courts of another country (see *Hall*, 1869, 7 M. 667; *Brockie*, 1875, 2 R. 923; *Carruthers*; *Allan*, 1896, 24 R. 238).

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Trustee.

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A trustee is the person appointed to hold and administer a trust estate. In a wider sense, the word is held to include any person who holds property in a fiduciary capacity, *i.e.* in whom property is vested which he holds for behoof of another. Thus a person may be a trustee even though he is not definitely appointed, by deed or otherwise, to the office, *e.g.* in a con-

structive trust (see *supra*, p. 338). As has been seen in dealing with constructive trusts, a heritable creditor, or an heir of entail in possession, or a liferenter, may occupy a fiduciary position with regard to the property in his possession. So also the heritors of a parish hold the parish church and churchyard as trustees for the parishioners (*Roxburghe*, 1876, 3 R. 734; *Steel*, 1891, 18 R. 911, per Ld. Pres. Inglis, at p. 917).

So wide is the meaning attached to the word, that persons are frequently spoken of as trustees when their position is in reality rather that of agents. The real test is that in trust the property belongs to the trustee, who deals with it as owner, subject to an equitable obligation to account for it to someone else. "The property of the thing intrusted, be it land or moveables, is in the person of the intrusted, else it is not proper trust" (Stair, i. 13. 7). In agency, on the other hand, the property is not in the agent, he deals with it merely as a mandatory, subject to the instructions of his principal, and with an authority which is terminable at the will of his principal. The directors of a company are not properly trustees; the property of the company is not legally vested in them as directors; they are rather in the position of managers or servants of the company (see *Faure Electric Co.*, 1888, 40 Ch. Div. 141; *Smith*, 1880, 15 Ch. Div. 247; *Sheffield, etc., Building Society*, 1889, 44 Ch. Div. 412). But they are treated in some respects as trustees, and some of the rules applicable to trustees are applied to them, for example, the rule which prevents a trustee from being *auctor in rem suam* (see *Aberdeen Ry. Co.*, 1864, 1 Macq. 461; *Huntingdon Copper Co.*, 1877, 4 R. 294, 5 R. (H. L.) 1; *Masonic Assurance Co.*, 1891, 8 T. L. R. 194). The official liquidator, also, of a company is in a similar position, though he is not, strictly speaking, a trustee either for the creditors or the shareholders, his position being that of agent for the company (*Knowles*, [1891] 1 Ch. 717, and cases there quoted; *Comfort*, 1891, 7 T. L. R. 475). Several branches of the subject which would naturally fall to be considered here, have been, for reasons of convenience, already dealt with, and reference is accordingly made to the separate articles on Appointment of Trustees; Assumption of Trustees; Assumed Trustees; Judicial Factors on Trust Estates; Removal of Trustees, and Resignation of Trustees.

Trustees within the Meaning of the Trusts Acts.

The two earlier Trusts Acts of 1861 and 1863 (24 & 25 Vict. c. 84, 26 & 27 Vict. c. 115) applied only to trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated. The Act of 1867 (30 & 31 Vict. c. 97), which was passed on the preamble that "it is expedient that greater facilities should be given for the administration of trust estates in Scotland," defines (s. 1) gratuitous trustees as "all trustees who are not entitled as such to remuneration for their services in addition to any benefit they may be entitled to under the trust, or who hold the office *ex officio*, and shall extend to and include all trustees, whether original or assumed, who are entitled to receive any legacy or annuity or bequest under the trust; provided always, that no trustee to whom any legacy or bequest or annuity is expressly given on condition of the recipient thereof accepting the office of trustee under the trust, shall be entitled to resign the office of trustee by virtue of this or of the said recited Acts" (those of 1861 and 1863), "unless otherwise expressly declared in the trust deed." The Trusts Act of 1884 (47 & 48 Vict. c. 63), on the preamble that whereas by the three Acts above quoted "certain powers are conferred on gratuitous trustees in Scotland," and after

enacting that it and the three recited Acts shall be read and construed together, provides (s. 2) that "in the construction of the said recited Acts and of this Act, 'Trust' shall mean and include any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by resolution of any corporation or public or ecclesiastical body, and the appointment of any tutor, curator, or judicial factor, by deed, decree, or otherwise. 'Trustee' shall include tutor, curator, and judicial factor. 'Judicial Factor' shall mean any person judicially appointed factor upon a trust estate, or upon the estate of a person incapable of managing his own affairs, factor *loco tutoris*, factor *loco absentis*, and *curator bonis*."

Prior to the passing of the 1884 Act, it was held that the Trusts Acts, including the Act of 1867, applied only to gratuitous trustees (*Mackenzie*, 1872, 10 M. 749), and the Court refused to appoint a trustee on a non-gratuitous trust under sec. 12 of the last-mentioned Act. But in a later case it was held that, in virtue of the definition given in the 1884 Act, sec. 12 of the 1867 Act applied to non-gratuitous trusts, and that the Court could competently appoint a new trustee on a trust for behoof of creditors (*Royal Bank*, 1893, 20 R. 741). There is a good deal of difficulty, however, in reading this extended definition into the earlier Acts, and there is a great dearth of authority upon the point. It seems clear, for example, that the power to assume new trustees given to gratuitous trustees by the 1861 Act cannot be exercised by officers of the Court who are included amongst trustees by the later Act. On the other hand, it might be maintained that the limitation of liability accorded to gratuitous trustees in 1861 is now applicable to all trustees as defined in 1884. The power to resign, given in 1861, is perhaps in a different position, for the proviso in sec. 1 of the 1867 Act, above quoted, which defines gratuitous trustees, may be held to mean that no trustee who receives remuneration for his services as trustee shall be entitled to resign in virtue of the provisions of the Acts. A trustee, of course, who is an officer of the Court, cannot resign without the authority of the Court which appointed him; and trustees who receive "a legacy, bequest, or annuity" under the trust upon condition of accepting office are still bound to go to the Court for authority to resign (see *Alison*, 1886, 23 S. L. R. 362; *Guthrie*, 1895, 22 R. 879; *Scott*, 1894, 22 R. 78; *Orphoot*, 1897, 24 R. 871).

Capacity to act as Trustee.

Speaking generally, any person who is legally capable of holding and dealing with property may act as a trustee. It does not disqualify a trustee that he is himself beneficially interested in the trust estate. Thus it is competent for the husband or wife or both to be trustees under their marriage-contract trust. But where a trustee is or becomes the sole beneficiary under the trust, the trust is extinguished *confusione*, and the property vests in him for his own absolute use.

Minors.—It is quite competent for a minor to act as trustee (*Hill*, 1879, 7 R. 68), and it is not unusual for minors to be appointed, as, for example, in testamentary or marriage-contract trusts, where it is not expected that the trust will come into active operation for some years; or where a minor who has entered into a partnership, becomes a trustee to hold heritable property for the partnership. But a minor who has curators cannot act in the trust without their consent; and further, all deeds granted by a minor trustee are liable to be set aside by him during the *quadriennium utile* on the ground of minority and lesion. In an old case it was decided that a minor could not be appointed trustee upon a sequestrated estate (*Threshie*, 30 May 1815, F. C.), but it is not incom-

petent for him to be decerned executor-dative (*Johnston*, 1829, 16 S. 541).

Married Women.—A married woman may act as a trustee (*Baillie*, 30 June 1812, F. C.). She cannot, however, act without her husband's consent (*Laird*, 1833, 12 S. 54; *Hill*, 1879, 7 R. 68). The appointment of a woman as trustee does not fall upon her marriage, but her husband is entitled to object to her continuing to act as much as to her accepting a new trusteeship. But if he does object, he must do so timeously (*Hill, ut supra*; see Bell, *Com.*, 5th ed., i. 32). Where a husband consents to his wife undertaking the office of trustee or executor, he becomes liable for the obligations incurred by her in that character, if she has no separate estate (*Pattisson*, 1886, 13 R. 550); but if she has separate estate, it would probably be liable in the first instance. Where husband and wife are both members of a body of trustees, the wife is entitled to act and vote separately from the husband (*Darling*, 1824, 2 S. 607; 1825, 1 W. & S. 188).

Corporations and Public Companies.—A corporation can act as trustee, unless prevented by the terms of its constitution; and it is frequently appointed as such where, as in the case of a charitable trust, continuity of existence is desirable. But a corporation or a public company which exists for the purposes of trade would not be entitled to undertake any obligation beyond those which were contemplated in its constitution.

Appointment of Trustees.

Nomination.—In the case of an *inter vivos* trust, where the purpose is the extrication of the truster's affairs, or the payment of his debts, it is usually found convenient to appoint a single trustee; but in testamentary trusts, or those constituted for purposes of family arrangements, several trustees are, as a rule, appointed, in order that the administration may receive the advantage of their combined discretion and diligence.

In trusts of the latter description the person or persons whom the truster appoints to be his trustees are, as a rule, named by him in the trust deed. The usual form is a disposition to "A., B., and C., and the survivors and acceptors, or survivor and acceptor of them." But where the disposition is "to A., B., and C.," without mention of survivors or acceptors, the trust will not fail so long as at least one of the persons nominated survives and accepts, upon the principle that "the truster prefers that any one of the trustees nominated should manage the estate, rather than a judicial factor" (per Ld. Pres. M'Neill in *Findlay*, 1855, 17 D. 1014). Where none of the persons nominated survive, or where such as do survive decline the office, the Court will appoint either new trustees or a judicial factor to administer the trust (*Graham*, 1868, 6 M. 958; *Blackwood*, 1894, 1 S. L. T. 631; *Cairns*, 1838, 16 S. 335; *Smart*, 1854, 16 D. 1004; *Russell*, 1855, 17 D. 1005). Where the disposition is to certain persons named and their heirs, the heir of any one of the persons named who does not survive the truster, does not become a trustee so long as any one of those named survives and accepts the office (see *Gordon*, 1851, 13 D. 1381). When a trustee who has accepted dies or resigns, the office transmits to the survivors, and the trust property is vested in them (see *Oswald*, 1879, 6 R. 461).

It is not necessary that the trustee should be actually named in the trust deed, so long as he is referred to in such a way as to make his identification possible. Thus he may be pointed out as the holder of an office, *e.g.* the minister of a parish (*Mags. of Edinburgh*, 1881, 8 R. (H. L.) 140; *Presbytery of Deer*, 1865, 3 M. 402; 1867, 5 M. (H. L.) 20; *Inc.*, 1557,

20 D. 11; *Murdoch*, 1827, 6 S. 186), or the magistrates of a burgh (*Mays. of Edinburgh, ut supra*), or, again, as the proprietor of an estate for the time being (*Wylie*, 1850, 12 D. 1110). But where "the chairman of the Parochial Board" of a parish had been nominated as an *ex officio* trustee, it was held that, when the Parochial Board was abolished and the Parish Council substituted for it by the Local Government Act of 1894, the chairman of the Parish Council was not entitled to act under the deed (*Parish Council of Kilmarnock*, 1896, 23 R. 833). In one case, where a sum destined for charitable purposes was directed to be administered by "the resident minister of the Presbyterian Church and the two highest civil officers in the town," the minister of the Established Church and the Sheriff-Substitute and Sheriff-Clerk Depute residing in the town were held to be the persons pointed out (*Boe, ut supra*). A destination of the estate to the same trustees as are appointed under another person's settlement is a good appointment, if the trustees can be identified (*Martin*, 1892, 19 R. 474). Persons nominated as "executors" have been held to be trustees, and to have the powers and privileges of trustees, where the purposes of the testator's will involved holding and administering the estate, and not merely distributing it (*Ainslie*, 1886, 14 R. 209); and where a person was nominated as "judicial factor to carry out the purposes of this trust," he was held entitled to be confirmed as executor-nominate, and would therefore be in the position of a trustee if he had to do more than distribute the estate (*Tod*, 1890, 18 R. 152).

The nomination of trustees need not be in the principal deed; or the nomination in the principal deed may be revoked, and a new nomination made in a codicil (see *Royal Infirmary of Edinburgh*, 1861, 23 D. 1213; *Mackilligan*, 1855, 18 D. 83); but the withdrawal, in a codicil, of a beneficial interest conferred upon the trustees-nominate in the principal deed, does not involve the withdrawal of their nomination (*Scott*, 1870, 8 M. 959).

Where the radical right remains with the truster, he has power to appoint new trustees when those originally appointed have failed (*Newlands*, 1882, 9 R. 1104; *Lindsay*, 1847, 9 D. 1297; *Tovey*, 1854, 16 D. 866). Or the truster may reserve a right to appoint new or additional trustees, but such a right does not entitle him to revoke the nomination of trustees already in office and substitute others (per Ld. Pres. Inglis in *Welsh*, 1871, 10 M. 16). Where spouses had executed a mutual settlement, and reserved a power, "during our joint lives or to the longest liver of us," to alter or revoke, it was held that the widow could not recall the nomination of trustees contained in the deed, and appoint new trustees upon her husband's estate (*Welsh, ut supra*).

A power to appoint may be given by the truster to another (see *Morison*, 1834, 12 S. 307). It has been held in England that the person to whom such a power is given cannot appoint himself (*Skeat*, 1889, 42 Ch. Div. 527). According to an old Scots decision, such an appointment is not illegal, but is "ungenteel *et contra bonos mores*" (*Bain*, 1694, 1 Fount. 595). The English view would probably now be taken.

New trustees may also be appointed by the trustees under a trust, acting under a power, express or implied, to assume (see ASSUMPTION OF TRUSTEES), or in certain circumstances by the Court (see APPOINTMENT OF TRUSTEES).

ACCEPTANCE OR DECLINATURE OF OFFICE.—A trustee-nominate incurs no responsibility until he has accepted office, and no one, whether appointed *ex officio* or otherwise, can be forced to accept (see per Ld. J.-Cl. Hope in

Shepherd, 1855, 17 D. 520). The fact that the trustee-nominate has promised the truster during his lifetime that he will act, does not legally bind him to accept office when the trust comes into operation (per Ld. Redesdale in *Doyle*, 1804, 2 Sch. & Lef. 239; per Ld. Deas in *Aiken*, 1867, 5 M. 288). When a trust comes into operation, the proper course is for the persons nominated as trustees to declare definitely whether they accept or decline the office, and for such declaration to be minuted in the books of the trust. But a formal acceptance is not necessary, and any evidence that the trustee-nominate knowingly acted as trustee is sufficient to show that he has accepted office (see *Gillespie*, 1879, 6 R. 813, *Ker*, 1879, 6 R. 575, 6 R. (H. L.) 52; *Mitchell*, 1855, 18 D. 284). Where a trustee-nominate attended the first meeting of trustees, but found himself in opposition to his co-trustees, and declined to act further, it was held that he had timeously declined (*Bannerman*, 1842, 5 D. 229). Such a case would now be met by the power of resignation given by statute to gratuitous trustees. Mere acceptance for a temporary purpose, such as to assume new trustees in order that the trust may be carried on, does not involve the trustee so accepting in liability for any further acts of administration (*Blain*, 1836, 14 S. 361), and it may be the duty of a trustee-nominate to accept for such a purpose (see per Ld. Brougham in *Millar*, 1837, 2 S. & M'L. 889). When a trustee has once declined, he would probably not be allowed to withdraw his declinature and accept, but mere delay in accepting does not necessarily mean declinature (*Darling*, 1823, 2 S. 607; 1825, 1 W. & S. 188). Where the ministers of a parish had for upwards of a century taken no part in the administration of a trust, it was held that their successors in office were not barred from acting (*Mags. of Edinburgh*, 1881, 8 R. (H. L.) 140).

Joint Appointment—*Sine quo non*.—Where the appointment is a joint one, *e.g.* "to A. and B. jointly," it has been held that the nomination falls upon the failure by death or non-acceptance of any one of the nominees, and that the trust comes to an end upon the death or resignation of any one of the joint nominees who has accepted (see *Dawson*, 1863, 2 M. 196, *Drumore*, 1742, Mor. 14703). Where joint trustees are appointed, no act of administration can be performed without the consent of all. Joint appointments are therefore inconvenient and unusual in practice, and the Court will not hold an appointment to be joint unless the words of the deed are precise.

It is more common, though it is also inconvenient, to find the appointment of a *sine quo non*. Such an appointment is made when the truster desires that some one of the trustees he nominates should be consulted upon every act of administration, and when he therefore declares that that person shall be a *sine quo non*. The effect of the failure of a *sine quo non* upon the existence of the trust is doubtful. The one view is that his acceptance is essential unless it clearly appears from the deed that his acceptance was not intended by the truster to be a condition of the constitution of the trust (see Bell, *Conveyancing*, ii. 946; Stair, i. 6. 14; Brodie's *Notes*; *Donaldson*, 1770, Mor. 16364; *Vere*, 1791, Mor. 16378; *Scobie*, 1776, 5 Br. Sup. 634). The other view is that "the right of veto is a personal privilege conferred on the trustee in the case of his acceptance, whence it follows that, if he declined, the trust may be administered by a quorum of the other trustees in the ordinary way" (M'Laren, *Wills & Trs.* i. 180; *Scott*, 1775, Mor. 16371; *Drumore*, 1742, Mor. 14703). Again, where all the trustees fail except the *sine quo non*, the better opinion seems to be that the trust does not fail, as there is no reason why a trustee should be

disqualified from continuing the trust by himself, because the truster has reposed a higher degree of confidence in him than in his co-trustees (M'Laren, *Trusts*, i. 226). Where a body of trustees are appointed tutors and curators to a beneficiary under the trust, the appointment is a joint one, and one of the trustees cannot accept the office if the others decline it (*Johnston*, 1892, 20 R. 46).

Quorum.—It is competent for a truster to specify how many of the trustees nominated shall constitute a quorum. If he does so, it would seem to be necessary that enough to form a quorum should accept in order to prevent the failure of the trust (*Ramsay*, 1672, Mor. 14695; *Ireland*, 1833, 11 S. 626). But by the Trusts Act of 1861, in the case of gratuitous trustees, where no quorum is specified in the deed, a majority of the accepting and surviving trustees is a quorum (24 & 25 Vict. c. 84, s. 1). Less than a quorum cannot act as representing the trust, nor will an action at their instance on behalf of the trust be sustained (*Neilson*, 1885, 12 R. 499; *Morison*, 1873, 1 R. 116). But any trustee is entitled to act for the protection of the trust, as, for example, where he avers breach of trust on the part of his co-trustees (*Reid*, 1852, 14 D. 449; *Birnie*, 1891, 19 R. 334; see *Neilson*, *ut supra*, per Ld. Shand, 12 R. 520; *Mackenzie*, 1886, 13 R. 507), or where it is necessary to protect himself from liability as an individual (*Taylor*, 1836, 14 S. 817).

A quorum cannot act in any important act of administration, such as the assumption of new trustees, or the sale of the property under a discretionary power, without consulting all their colleagues, and submitting the proposed act for their consideration (*Reid*, 1852, 14 D. 449; *Kelland*, 1863, 2 M. 150; *Wyse*, 1881, 8 R. 983); but if this has been duly done, the act of a quorum is binding upon the estate (see per Ld. Pres. Inglis in *Alexander*, 1883, 10 R. 1195). A minority cannot object to the competency of the action of a majority and quorum on the ground that they were not formally summoned to the meeting, if it appears in fact that they knew that the meeting was to be held, and of the business proposed to be transacted at it (*Darling*, 1898, 25 R. 747).

A trustee can only incur personal liability in respect of acts done by a quorum, either when he is one of the quorum, or when he has concurred in or homologated their act (*Cuninghame*, 1879, 6 R. 679, 6 R. (H. L.) 98; *Roberts*, 1879, 6 R. 805; *Lumsden*, 1864, 2 M. 695; 1865, 3 M. (H. L.) 89). He is not liable when the action is done without his knowledge, and he disclaims it immediately upon becoming aware of it; and he would probably escape liability even for an action of which he approved, if it were carried out by his co-trustees in a manner of which he did not approve (see *Lumsden*, *ut supra*).

Making up Title to Estate.

A trustee, when he has accepted office, must make up a title to the estate. In the case of moveable estate, this is done by confirmation as executor where the trust is a testamentary one, or by delivery or intimated assignation where the trust is an *inter vivos* one. A title to heritable estate is made up when there is a direct conveyance to the trustee, and the truster had been infeft in the estate, either by (1) recording the deed with a warrant of registration, or (2) by expeding and recording a notarial instrument in the form of Sched. J of the Consolidation Act of 1868 (31 & 32 Vict. c. 101, s. 17). But where there is merely a general disposition of the estate to the trustees (see *Studd*, 1883, 10 R. (H. L.) per Ld. Watson, at p. 59), or where in a testamentary or *mortis causa* deed there is no direct conveyance

of the lands to the trustees or executors appointed, a title is made up by expeding and recording a notarial instrument in the form of Sched. L of the Consolidation Act (31 & 32 Vict. c. 101, s. 19; 37 & 38 Vict. c. 94, s. 46; see *Macleod*, 1883, 10 R. 1056; *Ainslie*, 1886, 14 R. 209; *Kerr*, 1888, 15 R. 520). Where the truster was not infeft, the trustee may make up his title, whether the estate is directly conveyed to him or whether he is merely the general disponee, by expeding and recording a notarial instrument in the form of Sched. J, or by recording the conveyance of the person last infeft along with a notarial instrument in the form of Sched. N of the Consolidation Act.

As in a *mortis causa* trust the condition of survivorship is implied (*Oswald*, 1879, 6 R. 461), upon the death or resignation of any of the trustees, the property passes to the remaining trustees, and vests in them, even where the nomination is of certain persons and their heirs. So long as one of the original trustees remains in office, the heirs of the predeceasers have no concern with the trust. But where the last survivor of a body of trustees dies, his heir may complete a title to the estate in the manner provided by the Consolidation Act, but only for the purpose of making it over to some person appointed by the Court, or by some person authorised by the trust deed to make such an appointment, or by the beneficiaries, for administration (37 & 38 Vict. c. 94, s. 43).

Secs. 11 and 12 of the 1867 Act provide for the making up of a title to the estate by assumed trustees and trustees appointed by the Court respectively.

Gratuitous Nature of Office.

The rule is that in the absence of any provision to the contrary in the trust deed, the trustee is presumed to give his services gratuitously, and further, that he is not entitled to make any profit out of his position as trustee. Formerly, even a trustee for creditors was held to fall within this rule (*Creds. of Johnston*, 1738, Mor. 13407, reprinted 21 D. 1383); but it was found that such trusts required in an especial degree the services of professional business men, who could not be expected to act gratuitously, and the custom now is that such trustees are entitled to a commission in the shape of a percentage on the money which passes through their hands (see *Dall*, 1870, 8 M. 1006).

Trustee cannot Charge for Professional Services.—But the trustee is not entitled to anything beyond this commission; and any trustee who acts as agent or factor for the trust, either himself or through a firm in which he is a partner, can claim no remuneration for his services, though he is entitled to take credit for his actual outlay (*Home*, 1841, 2 Rob. App. 384; *Gray*, 1856, 19 D. 1; *Manson*, 1855, 2 Macq. 80; *Fegan*, 1855, 17 D. 1146; *Steel*, 1841, 4 D. 310 (gratuitous trustees); *Lauder*, 1859, 21 D. 1353 (trustee for creditors); *Mitchell*, 1878, 5 R. 1124; *Flowerdew*, 1854, 17 D. 263 (judicial factor); *Gray, ut supra*; *Kennedy*, 1860, 22 D. 567; *Robertson*, 1849, 6 Bell's App. 422 (*curator bonis* or factor *loco tutoris*). The rule does not apply where the truster has authorised the trustees to appoint one of their own number to act as agent or factor. Such an office being in its nature remunerative, a power to appoint is held to imply a power to pay suitable remuneration (*Goodsir*, 1858, 20 D. 1141). So also the beneficiaries may either expressly or by implication sanction the employment and remuneration of one of the trustees as agent (*Ommanney*, 1854, 16 D. 721; *Dixon*, 1863, 2 M. 61; *Scott*, 1868, 6 M. 753; see *Aitken*, 1871, 9 M. 756). Where one of the trustees acts as law agent, he is not entitled to charge for his

attendance at the meetings of trustees on the same scale as if he had as trustee no duty of attendance, and was to be held as attending simply as law agent to the trust (*Turner*, 1897, 24 R. 673).

Trustee cannot Contract with himself.—"It is a rule of universal application that no one having duties of a fiduciary nature to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into" (per Ld. Chan. Cranworth in *Aberdeen Railway Co.*, 1854, 1 Macq. 461, at p. 471). A sale, therefore, by a *curator bonis* of his ward's estate to a company in which he is a director, is voidable at the instance of the ward, even where the estate consisted of shares over which the company had a right of pre-emption (*Dunn*, 1897, 25 R. 247). So also a contract between a railway company and a firm in which one of its directors is a partner is illegal and reducible (*Aberdeen Railway Co., ut supra*); and where the common agent in a ranking and sale purchased part of the estate at a judicial sale, the purchase was reduced (*York Buildings Co.*, 1795, 3 Pat. 378; see also *Gillies*, 1846, 8 D. 487; *Thorburn*, 1853, 15 D. 845; *Elias*, 1856, 18 D. 1225; *Faulds*, 1859, 21 D. 587). The same rule applies to prevent a trustee from taking a lease of the trust estate (*Attorney-General*, 1810, 17 Ves. 491; see *Montgomerie*, 1895, 22 R. 465). But such contracts are not in themselves void, but only voidable at the instance of any person interested, and the right to challenge them may be lost by *mora* or acquiescence (*Buckner*, 1887, 14 R. 1006; *Fraser*, 1847, 9 D. 415). It is illegal for trustees to lend trust funds to one of their number. "No circumstances will justify such a proceeding, and it is quite *ultra vires* of any body of trustees so to act" (per Ld. Pres. Inglis in *Croskery*, 1890, 17 R. 700; see *Perston*, 1863, 1 M. 245). Even the fact that the trustee to whom the loan is made is the liferenter of the whole fund, and gives suitable heritable security, does not alter the application of the rule (*Ritchie*, 1888, 15 R. 1086). Where trustees were sued as individuals on the ground that they had lent money to one of their own number, and were not called as a body, a plea of all parties not called was repelled (*Mackay*, 1897, 4 S. L. T. 466).

Trustee cannot make Profit for himself out of his Position.—"Whenever it can be shown that the trustee has so arranged matters as to obtain an advantage, whether in money or in money's worth, to himself personally through the execution of his trust, he will not be permitted to retain it, but be compelled to make it over to his constituent" (per Ld. Pres. Inglis in *Huntingdon Copper Co.*, 1877, 4 R. 298, at p. 308). Where, therefore, trustees have invested the trust funds in a trading concern, or in some other way not authorised by their deed or by law, they are not only bound to replace the money if it is lost, but in the event of the investment being profitable they are bound to impute the whole profits, and not merely legal interest on the money invested, to the trust (*Cochrane*, 1855, 17 D. 321; *Laird*, 1855, 17 D. 984; *Torrie*, 1832, 10 S. 597; *Grant*, 1869, 8 M. 77). Where the trustees of a deceased partner of a firm became entitled under the contract of co-partnery to his share in the business, they were held to be unable to enter into an arrangement with the surviving partner, who was himself one of their body, to the effect of increasing his share of the profit on condition of his continuing to act as managing partner (*Mackie*, 1875, 2 R. 312). Where a trustee had taken what was practically a bribe to induce him to make a particular investment, he was held to be bound not merely to

make good the loss which resulted from the investment, but to give up the money which he had received, as being money received by him on behalf of the trust estate (*Smith*, [1890] 1 Ch. 71).

Duties.

When a trustee has accepted office, it becomes his duty to carry out the purposes of the trust, and in doing so he is bound to exercise "the same degree of diligence that a man of ordinary prudence would exercise in the conduct of his own affairs" (per Ld. Herschell in *Rae*, 1889, 16 R (H. L.) 33), or he will incur liability to those interested under the trust. (This subject will be dealt with at greater length in considering the *Liability* of trustees.) He must, therefore, be diligent in realising the estate so as to make it available for the purposes of the trust.

Where the purpose of the trust is merely the payment of the truster's debts, as in the case of a trust deed granted for behoof of creditors, the duties of the trustee amount to little more than realising the estate, paying the creditors, and then handing over the surplus, if there be any, to the truster, or in accordance with the directions contained in the deed.

In the case of a testamentary trust, the first duty of the trustees will probably be to obtain confirmation as executors. Trustees nominated under such a deed are by the general practice allowed to take out confirmation as executors-nominate, even though they are not nominated as executors in the deed, and they are not therefore called upon to find caution (4 Geo. iv. c. 98, s. 2).

Payment of Expenses of Trust.—The expense of taking out confirmation is considered as one of the debts of the testator, and, with the death-bed and funeral expenses and certain other privileged debts, comes off the whole head of the executry and not off the dead's part only (*Monteith*, 1713, Mor. 3945). (See Privileged Debts.) Other expenses properly incurred by trustees in administering the trust are a proper charge against the estate, and may be taken credit for by the trustees. Such expenses include the reasonable remuneration of agents and factors (1867 Act, s. 2), the expense of petitions for special powers under the Trusts Acts, or of the discharge of trustees resigning during the subsistence of the trust, or of the representatives of trustees who have died (1867 Act, s. 9; see *Allen*, 1886, 23 S. L. R. 362), or of obtaining the sanction of the Court for proposed investments of the trust funds (*Crumpton*, 1886, 14 R. 55; *Maclean*, 1885, 12 R. 529; *Lloyd*, 1877, 5 R. 289). With regard to the expenses incurred in litigation as to the validity of the trust deed, etc., see p. 390. If a private trust be superseded by sequestration or by the appointment of a judicial factor, the private trustee does not lose his right of retention of the trust estate for his necessary outlay in the fair administration of the trust (per Ld. M'Laren in *M'Gregor*, 1898, 25 R. 482; see *Evans*, 1897, 25 R. 53). But an agent employed by a private trustee cannot, when the estate has been sequestrated, claim to be ranked preferably for his account, and it is doubtful if he is entitled even to an ordinary ranking (*ib.*).

Where the trust is a continuing one, the ordinary expenses of administration, such as the remuneration of agents or factors, come off the income of the trust, but the initial expense of realising the estate, and all extraordinary expenditure, properly form a charge against the capital. (See *Pearson*, 1840, 2 D. 1020; *Thomson*, 1856, 18 D. 1240; *Baxter & Mitchell*, 1864, 2 M. 915.) Within the category of extraordinary expenditure will fall the expense of applying for the appointment of a new trustee or judicial factor where the trust has become unworkable (*Adams*, 1851,

9 R. 213), and as a general rule the expense of applications for special powers under the 1867 Act (see *Howden*, 1895, 23 R. 113). The expense connected with the periodical examination of investments and changes in investments falls properly upon capital; but in making changes in investments, trustees must consider the interests of the trust estate as a whole, and not act merely to obtain a larger income for a liferenter to the detriment of the interests of the fiar (*Smith*, 1890, 18 R. 44). Where they make changes merely in the interests of a liferenter, and without prejudicing the fiar, they should stipulate beforehand with the liferenter that the expense incurred should be defrayed out of the income (*ib.* per Ld. Young, at p. 48).

Payment of Truster's Debts.—Trustees are bound to satisfy the creditors of the truster before they distribute the trust funds among the beneficiaries. Where they pay away the money to beneficiaries without retaining sufficient to meet a claim by a creditor timeously made, or of the existence of which they are aware, they will incur personal liability to the creditor (*Lamond's Trs.*, 1871, 9 M. 662; *Heritable Securities Investment Association*, 1893, 20 R. 675). From these decisions it appears that if trustees pay away any part of the estate to beneficiaries before all the truster's debts are paid, or if they pay a postponed creditor and leave a preferable creditor unpaid, they do so at their own risk, in the event of the estate proving to be insufficient, unless they can get the unpaid creditor to accept the security of the part of the estate which they set aside to meet his debt. Ld. M'Laren, who dissented from the judgment of the Court in the second of the cases quoted, expressed a strong opinion on the hardships which would result from the application of this rule, "because it means this, that wherever there are outstanding obligations—and nothing is more common in trust management, where the testator was a merchant or manufacturer, than outstanding obligations—the whole estate, heritable and moveable, is to be laid under an interdict, and not one penny can be paid to the family of the testator, because possibly at some future period investments which appeared ample may fail, and the creditors will hold the trustees responsible" (20 R. 702). The rule, however, only applies where the claim upon the estate is that of a creditor of the truster, and does not apply where beneficiaries only are concerned. Where trustees have set aside and properly invested a sum to meet a legacy not at once payable, and have, in accordance with the directions of the truster, made an immediate distribution of the residue of the estate, they will not be personally liable if, owing to a fall in the value of the investment, the fund set aside is eventually insufficient to meet the legacy (see per Ld. Adam in *Heritable Securities Investment Association, ut supra*; *Robinson*, 1880, 7 R. 694; 1881, 8 R. (H. L.) 127; *Scott*, 1895, 23 R. 52).

Testamentary trustees are in this respect subject to the same rules as executors. They are bound, therefore, to ascertain to the best of their ability, by advertisement and other means, what claims on the estate exist. With the exception of *privileged debts* (*q.v.*), which should be paid or provided for before any other claims are met, no debts should be paid until six months have elapsed from the date of the truster's death. Debts paid before that period has elapsed are paid by the trustees at the risk of incurring personal liability should the estate turn out to be insufficient to meet all the claims upon it. Creditors doing diligence on the estate within the six months are entitled to rank *pari passu* upon it. When the six months have expired, trustees may pay in safety *primo venienti*, unless they have, or ought to have, reason to doubt the solvency of the estate. A

creditor who comes forward afterwards "must look for payment not to the trustee, who has honestly and in good faith handed over the funds to the beneficiaries, but only to the beneficiaries or legatees, who have actually received the funds themselves" (per Ld. Gifford in *Beith*, 1875, 3 R. 186; see *Stewart's Trs.*, 1871, 9 M. 810). But where a creditor, who claims after the expiry of the six months, finds the estate still undistributed in the hands of the trustees, he is entitled to be ranked *pari passu* on the estate with other creditors who have already obtained decree against the trustees (*Russell*, 1791, Bell's Oct. Ca. 217). Trustees may safely pay a claim which they are satisfied is a good one without requiring the creditor to constitute it (30 & 31 Vict. c. 97, s. 2, subs. 7); but where the estate is small and the amount of claims uncertain, or where there is any doubt as to the existence or amount of an alleged debt, the trustees are entitled to protect themselves and the estate by requiring formal constitution (per Ld. Pres. Inglis in *M'Gaan*, 1883, 11 R. 249). When the six months have expired, creditors are preferable in the order of the dates of their citations (*Gray*, 1723, Mor. 3140). When a testamentary trustee has himself a claim upon the estate, his confirmation as executor is held to be a step of diligence for recovering what is due to him, for he cannot be expected to raise an action against himself. He is entitled, therefore, on the expiry of the six months, and if no other creditor has done diligence, to pay himself out of the estate, or to relieve himself of any cautionary obligation he may have incurred on behalf of the truster (*M'Dougall*, 1744, Mor. 10007: *M'Leod*, 1837, 15 S. 1043; *Elder*, 1859, 21 D. 1122).

The fact that the truster has acknowledged a particular debt in the trust deed, does not give the creditor therein any advantage over other creditors who claim timeously (*Carrichill*, 1624, Mor. 3864).

In the case of a trust expressly constituted for the payment of debts, or for the extrication of the truster's affairs, or where there is any reason to doubt the solvency of the estate, trustees should ascertain the full liability of the estate before making payment to any creditor; and in such a case they incur, of course, personal liability to any creditor who has lodged a claim, if they pay away the estate without satisfying him (see *Cruickshank*, 1893, 21 R. 257). But where the trust is created for family purposes, or as a testamentary settlement of the truster's affairs, the fact that it contains a provision for payment of the truster's debts does not make it a trust for creditors (see *Stewart's Trustee*, 1896, 23 R. 739; *Globe Insurance Co.*, 1849, 11 D. 618; 1850, 7 Bell's App. 296). Trustees, therefore under a family trust, are only liable for the debts of the truster to the extent of the estate at the time when it comes into their hands. They are not bound to segregate the estate for behoof of creditors. "It is sufficient if he retain funds of the value of the defunct's estate at the date of his death, and is ready to pay claims to the extent of the value. If he is not bound to segregate the estate, he can incur no liability for the profits which he may make from the use of the estate" (*Stewart's Tr., ut supra*, per Ld. M'Laren, 23 R. 745).

Administration or Distribution of Estate. — When the truster's debts have been paid, it becomes the duty of the trustees either to pay over the estate to the legatees or other persons taking interest under the trust, or to hold and administer it for behoof of the beneficiaries according to the terms of the trust. In the latter case, it is their duty to find suitable investments for the funds under their charge (see p. 371). In making payment of legacies to special legatees, trustees are only entitled to demand an ordinary receipt over a penny stamp (*Fleming*, 1861, 23 D. 443), and a

receipt for a legacy which is neither holograph nor tested, is, after proof that the signature is genuine, competent evidence of payment (*M'Laren*, 1869, 8 M. 106). But from the residuary legatee they are entitled to obtain a formal discharge, which involves an approval of the administration of the trust (*Fleming, ut supra*). Payment of a legacy may be made to the legal guardian or administrator-in-law of a minor or pupil beneficiary who cannot himself grant a discharge, but where the beneficiary is a minor, he should concur in granting the discharge. Where, owing to the financial position of the legal guardian, the trustees are doubtful of the propriety or safety of making payment to him, they are justified in requiring him to find caution (*Stevenson*, 1857, 19 D. 462; 1861, 22 D. (H. L.) 1, 4 Macq. 86). The Court will not authorise payments to be made to the fathers of minor beneficiaries, who by the law of their domicile are not administrators-in-law to their children (*Atherstone*, 1896, 24 R. 39; *Seddon*, 1891, 19 R. 101), unless they are appointed to that office by the Court of their domicile (*Seddon*, 1893, 20 R. 675).

When trustees are called on to pay a legacy, they are not entitled to demand from the legatee a discharge which would exclude a possible alternative claim which he might have against the estate. In the event of the alternative claim being successful, the legatee would be bound to account for the legacy paid to him (*Laing*, 1895, 22 R. 575). See LEGACIES.

ANNUITIES.—Where one of the trust purposes is the payment of an annuity, provision must be made for this before the amount of the residue can be ascertained or the trust funds paid away. When, therefore, the annuity more than swallows up the income of the funds, the deficiency must be made up from the capital (*Knox*, 1869, 7 M. 873). Where certain legacies were made payable three months after the death of the testator, and certain others upon the death of an annuitant, and the income was insufficient to meet the annuity, it was held that the first legacies were preferable, and fell to be paid three months after the testator's death, and that the amount necessary to make up the annuity must be taken from the capital from which the postponed legacies were to be paid (*Kinmond*, 1873, 11 M. 381). Unless the trust deed provides otherwise, the trust need not necessarily be kept up merely for the purpose of paying an annuity. The annuity may be renounced, or, with the consent of all parties interested, the trustees may purchase an annuity, and then distribute the estate amongst those entitled to it. Or, again, the annuitant may agree to take a bond for his annuity from the residuary legatee. In either of these cases the trust may be brought to a close (see *Watt*, 1825, 3 S. 544). Where the trustees are merely directed to pay over the estate under burden of an annuity, they are not entitled to demand heritable security for the annuity, unless there is a provision to this effect in the trust deed (*Kerr*, 1858, 20 D. 562). When all the trust purposes can be fulfilled at once except the payment of an annuity, the trustees may set aside a sum sufficient to provide for the annuity, and proceed to distribute the remainder of the estate; the trust being kept up until the death of the annuitant, when the sum set aside will fall to be distributed in accordance with the terms of the deed (see *Forsyth*, 1854, 17 D. 207; *Scheniman*, 1832, 10 S. 759).

ALIMENTARY ANNUITIES.—But where the annuity has been declared to be alimentary, it cannot be renounced, nor are the trustees entitled to pay over the estate to the residuary legatee on receiving from him a bond for the annuity, even with the consent of the annuitant. That is to say, a trust duly constituted for payment of an alimentary annuity cannot be brought to an end by the joint action of the annuitant and the parties having the beneficial right to the fee (per Ld. Watson in *Hughes*, 1892, 19

R. (H. L.) 33, at p. 35; see *White*, 1877, 4 R. 786; *Smith and Campbell*, 1873, 11 M. 639; *Cosens*, 1873, 11 M. 761; *Bennie*, 1845, 4 Bell's App. 221; *Menzies*, 1875, 2 R. 507; *Montgomery*, 1888, 15 R. 369); though in one case a judicial factor, who was directed to execute an entail of the trust estate, was held entitled to convey the estate to the heir of entail upon making the annuity a real burden on the estate, and expressly declaring in the deed of entail that the annuity was still payable to and prestable by him (*Munro*, 1878, 16 S. L. R. 126). Even where the alimentary annuitant comes into the beneficial fee of the estate from which the annuity is paid, the trust must be continued during the annuitant's life in order to pay the annuity (*Duthie*, 1878, 5 R. 858; see *Eliott's Tr.*, 1894, 21 R. 975; *Hughes*, 1892, 19 R. (H. L.) 33; *Barron*, 1887, 24 S. L. R. 735).

A wife cannot, *stante matrimonio*, discharge an annuity provided for her in the event of her surviving her husband by an antenuptial marriage contract, even though the annuity is not declared to be alimentary (*Kerr*, 1895, 23 R. 317; *Menzies*, 1875, 2 R. 507); and in such a case trustees are not entitled to purchase with the trust funds an annuity payable to the wife contingently on her surviving her husband, and to distribute the rest of the estate, in respect that the security of the trust funds is greater than that of a purchased annuity, and that a purchased annuity, not being protected by the trust, could be alienated by the wife (*Kerr*, *ut supra*: but see *Sutherland*, 1898, 6 S. L. T. 334).

Directions which cannot be carried out.—Directions which are self-contradictory or which cannot be carried out, or the carrying out of which would involve an illegal act, will be held *pro non scripto*. Thus where trustees were directed to settle a share of the estate in the marriage contract of a beneficiary in terms similar to the terms of the settlements of her two married sisters, and these turned out to be not only dissimilar but repugnant, the direction was held *pro non scripto* (*Murray*, 1898, 6 S. L. T. 193). Where there is a bequest to a beneficiary, with a declaration that it shall be forfeited upon the occurrence of a certain event, but no disposition of the subject in the event of forfeiture being incurred, the declaration is of no effect (*Leask*, 1898, 6 S. L. T. 207). So also where an absolute fee is given to a beneficiary, and an attempt is made by means of the trust to adject conditions to it, the conditions are of no avail, and the beneficiary is entitled to the free possession of the estate. This subject will be found more fully discussed at the end of the present article under the head Repugnancy (see p. 396).

Defeasible Directions.—Where trustees are directed to do something for behoof of a beneficiary which could be immediately undone by him,—for example, to purchase land and convey it to him as unlimited fiar, without conferring any right upon third parties (*Spens*, 1875, 3 R. 50; *Gordon*, 1866, 4 M. 501), or to purchase an annuity for him (*Dow*, 1877, 4 R. 403; *Kippen*, 1871, 10 M. 134; *Tod*, 1871, 9 M. 728), when the beneficiary could at once reconvert the land or the annuity into money,—the Court will not insist on these directions being carried out, and the trustees will be entitled to pay the money direct to the beneficiary.

Executory Trusts.—An executory trust has been defined as "not simply a trust under which an act has to be done, which applies to every case, but one in which there is something to be performed which is not defined by the original settlor; where he has expressed an intention in general words, which is to be carried out in a complete and legal form by the persons who are intrusted with the estate" (per Ld. St. Leonards in *Graham*, 1855, 2 Macq. 295, at p. 325). The case in which an executory

trust most frequently appears is where a truster has left his estate to trustees with directions to them to execute an entail upon a certain series of heirs. "The subject of an executory trust, properly so called, is the particular deed or instrument which is to be made, and not the property which is comprised in it" (per Ld. Westbury in *Sackville West*, 1870, 4 E. & I. App. 483, at p. 565). The trustees have no duties to fulfil with regard to the administration of the estate; their trust is fulfilled and exhausted when the contemplated settlement has been made. In a proper executory trust the truster confines himself to "a compendious indication of his general intention," and leaves it to his trustees to carry out this intention in the best way possible. But where the truster has fully expressed and defined the manner in which his intention is to be carried out, "his trustees cannot have the freedom which is allowed to them in the performance of executory trusts, but have no other duty than that of carrying the directions given to them into effect, even although they may be ineffective to attain the object which the testator may be supposed to have had in view" (per Ld. Kinnear in *Sandys*, 1897, 25 R. 261, at p. 268). Thus, where a truster directs his trustees to make a valid entail of lands, such an express trust will not be impaired by a specific direction to insert clauses which, taken alone, would be inadequate for that purpose. But, on the other hand, where he has conferred no power to make an entail, but has directed his trustees to carry out his expressed intention by a definite method, the trustees must conform their action exactly to the directions given, even though it may be apparent that the object of the truster cannot be effectually attained by the methods prescribed (*Sandys*, 1897, 25 R. 261; see cases there cited).

Powers of Administration.

A trustee derives his powers to administer the estate either from common law, from the trust deed, or from Act of Parliament. The ordinary powers of administration he possesses at common law; these powers have been to some extent augmented by the Trusts Act of 1867, and certain extraordinary powers can, by the same Act, be obtained by him in certain circumstances from the Court.

Powers under Trust Deed.—The truster can, of course, confer upon his trustees any powers which he pleases, and may also by express words or by implication prevent the trustees from exercising powers which they would otherwise possess. Where the power granted is permissive, it is left to the discretion of the trustees whether or not it should be exercised. In exercising such a power the trustees must use "the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs" (*Raes*, 1889, 16 R. (H. L.) 33, per Ld. Herschell). They are entitled to consult the beneficiaries upon the subject, but the final decision must be their own (see *Robinson*, 1881, 8 R. (H. L.) 127, per Ld. Chan. Selborne, at p. 129). Where, however, the power is peremptory, the trustee has no choice but to exercise it. For example, a power to sell may be given, to be exercised by the trustees if they think it necessary or expedient to do so in the interests of the trust estate; or it may be given in the form of a direction to sell, in which case it is the duty of the trustees to sell without unreasonable delay. "An authority and power to do something, which, if not done, would result in intestacy, is equivalent to a direction" (per Ld. Stormonth Darling in *Brown's Trs.*, 1898, 6 S. L. T. 43).

Powers under the Trusts Acts.—*Ordinary Powers of Administration.*—The Trusts Act of 1867, s. 2, gives trustees power to do certain

acts, most of which they were already entitled to do at common law. These acts are:

(1) To appoint factors and law agents, and to pay them a suitable remuneration.

(2) To discharge trustees who have resigned, and the representatives of those who have died.

(3) To grant leases of the heritable estate of a duration not exceeding twenty-one years for agricultural lands, and thirty-one years for minerals, and to remove tenants.

(4) To uplift, discharge, or assign debts due to the trust estate.

(5) To compromise or to submit and refer all claims connected with the trust estate.

(6) To grant all deeds necessary for carrying into effect the powers vested in the trustees.

(7) To pay debts due by the truster or by the trust estate without requiring the creditors to constitute such debts, where the trustees are satisfied that the debts are proper debts of the trust.

The section saves the powers of the truster by declaring that these acts can only be done when they are "not at variance with the terms or purposes of the trust." Of the powers thus granted, that to grant leases for a period which may extend beyond the terms of the trust administration, and that to submit claims to arbitration, are probably the only two which trustees did not already possess at common law.

To these powers has been added, by subsequent legislation, a power to make abatement or reduction, either temporary or permanent, of rents under agricultural or pastoral (50 & 51 Vict. c. 18, s. 2) or under mineral (60 Vict. c. 8) leases, and to accept renunciations of such leases (see *Barrie*, 1874, 2 R. 90). This power can be exercised by judicial factors and all other persons who come under the definition of trustee contained in sec. 2 of the 1884 Act, without applying to the Court for special powers (52 & 53 Vict. c. 39, s. 19; *Pattison's Curator Bonis*, 1890, 17 R. 303).

(1) *To appoint Factors and Law Agents and to pay them a Suitable Remuneration.*—This is a power which the trustee already possessed at common law (*Hay*, 1861, 23 D. 594), and may be taken to include his power to obtain the advice of counsel (*Shepherd*, 1855, 17 D. 516) or the professional assistance of accountants or other persons of skill (*Peddie*, 1860, 22 D. 707), where the circumstances of the trust render it necessary to do so. As a trustee cannot be *auctor in rem suam* (*q.v.*), he cannot, if he acts himself as agent, make any charge for his services as agent beyond his actual outlay, whether he be a gratuitous trustee (*Mitchell*, 1878, 5 R. 1124; *Gray*, 1856, 19 D. 1; *Manson*, 1855, 2 Macq. 80; *Broughton*, 1855, 5 De G., M. & G. 160), or a trustee for creditors (*Lauder*, 1859, 21 D. 1353), or a judicial factor (*Flowerdew*, 1854, 17 D. 263), or a *curator bonis* (*Kennedy*, 1860, 22 D. 567). But the truster may authorise his trustees to employ and remunerate one of their own number as agent, and a power to appoint one of the trustees will imply a power to remunerate him (*Gordon*, 1858, 20 D. 1141; see *Abercromby*, 1897, 4 S. L. T. 441). So also the beneficiaries may, expressly or by implication, sanction the employment and payment of a trustee as agent (*Ommanney*, 1854, 16 D. 721; *Dove*, 1863, 2 M. 61; *Scott*, 1868, 6 M. 753; *Aitken*, 1871, 9 M. 756). A trustee for creditors is not entitled to employ a law agent except for law business requiring his intervention, and not falling within the proper duties of a trustee (*Wilson's Tr.*, 1863, 2 M. 9). In *Ramsay* (1863, 2 M. 343) it was held that one of a body of trustees is not entitled to have a private agent at the expense of

the trust—if he has no confidence in the agent of the trust, he should propose a change of agency; that only in very special circumstances can a charge for double agency be allowed; but that where business is actually done for the benefit of the estate, it may be charged for against the trust estate, although there may be no specific evidence of express employment by the trustees (per Ld. Cowan, 2 M. 345). The fact that the truster has named an agent or factor does not prevent the trustees from superseding him and appointing another (*Cormack*, 1893, 20 R. 977, distinguishing *Fulton*, 1831, 9 S. 442). The agent appointed must be a person in good business repute at the time of the appointment (*Weall*, 1889, 42 Ch. Div. 674; *Thomson*, 1838, 16 S. 560); and the trustee must exercise due supervision over his actions (see *Home*, 1837, 16 S. 142; 1841, 2 Rob. App. 384). It is generally advisable to appoint a law agent even where the trust estate is small, as omission to do so on the ground of economy will not excuse the trustees if the trust gets into difficulties (see *Taylor*, 1876, 13 S. L. R. 268). The question of the trustee's liability for the actions of his agent or factor will be considered later; it is not affected by the power given by this section.

What constitutes "suitable remuneration" must be decided by the trustee in accordance with the discretion which would guide a man of ordinary prudence in the management of his own affairs, and unless the payment is grossly in excess of the ordinary business charges the Court will not interfere (see opinion of Kekewich, J., in *Weall*, 1889, 42 Ch. Div. 674). In *Thomson's Trs.* (1851, 13 D. 1326), where the trustees had allowed their agent, who was one of themselves, a commission of 5 per cent., the Court, on an objection being raised by the beneficiaries, cut it down to 2½ per cent.

(2) *To discharge Trustees who have resigned, and the Representatives of Trustees who have died.*—A trustee who has resigned is not liable for acts done in the administration of the trust after his resignation is completed; and he is entitled to demand a discharge from his co-trustees, which, however, will not relieve him from liability for acts done while he was a trustee. The position of the representatives of a trustee who has died is the same (*Duncan*, 1882, 20 S. L. R. 8). See RESIGNATION OF TRUSTEES *ad fin.*

(3) *To grant Leases of the Heritable Estate of a duration not exceeding twenty-one Years for Agricultural Lands, and thirty-one Years for Minerals, and to remove Tenants.*—At common law a lease granted by trustees was only effectual while the trust administration lasted, and was not binding upon the fiar who took the estate when the trust came to an end. This subsection gives the trustees power to grant leases which may outrun the duration of the trust, that is, "wherever a trustee might previously make a lease at all, he may now make a twenty-one years' lease, or a thirty-one years' lease" (per Ld. Blackburn in *Campbell*, 1883, 10 R. (H. L.) 67). Though it has not actually been decided, it would appear that trustees are entitled under the Act to open up and grant leases of new mineral fields (per Ld. Shand in *Campbell*, 1882, 9 R. 725, at p. 729; see *Baillie*, 1898, 6 S. L. T. 41), but the profits derived from such new mineral leases would not go to increase a liferenter's interest in the estate (*Campbell, ut supra*). A liferenter, however, is entitled to the proceeds of mineral workings which had been opened up and carried on by the truster, even where these had been abandoned by him as unprofitable, in the event of their being taken up again by his trustees (*Baillie*, 1891, 19 R. 220); and Ld. Stormonth Darling has held that a grant of "the free annual proceeds of my estate and of minerals therein" entitled the liferentrix to the proceeds of all the minerals worked

by the trustees, whether they had been worked by the trustee or not (*Laidlaw*, 1898, 6 S. L. T. 41; see also *Strain*, 1893, 20 R. 1025).

(4) *To uplift, discharge, or assign Debts due to the Trust Estate.*—This power is, of course, necessary for the administration of the estate. The trustee, when he has made up his title, as, for example, in a testamentary trust, by confirmation as executor, is the only person who has a title to sue for a trust debt (see *Horne*, 1848, 11 D. 141; *Hinton*, 1883, 10 R. 1110; *Bee*, 1888, 15 R. 1033, per Ld. Shand; *Henderson*, 1889, 16 R. 341, per Ld. Pres. Inglis), and the only person who can grant a valid discharge to a trust debtor (*Barnet*, 1831, 10 S. 128; *Hinton*, *ut supra*). Where the trustee has been confirmed as executor, his discharge is only valid to the extent of the sum to which he has been confirmed, and the debtor is not safe in paying a larger sum (*Buchanan*, 1842, 5 D. 211). A beneficiary is, however, entitled, when the trustee declines to sue an alleged debtor to the trust, to obtain the use of the trustee's name in order to sue, upon giving the trustee an indemnity for the expenses of the action (*Blair*, 1894, 1 S. L. T. 599; *Henderson*, 1889, 16 R. 341; *Brown*, 1888, 15 R. 581; *Spence*, 1832, 11 S. 212; *Sprot*, 1828, 6 S. 1083). But where an action was raised by a beneficiary against one of a body of trustees as an individual, alleging that she was a debtor to the trust, and against the trustees, alleging that they were acting in concert with the alleged debtor, the Court sustained the title to sue (*Watt*, 1890, 17 R. 1201). A debtor who has paid his debt to the trustee, and has received a discharge from him, is not concerned with the future application of the money (*Hutchison*, 1837, 15 S. 1100), unless he has paid it knowing that the trustee intends to misapply it (see *Taylor*, 1830, 4 W. & S. 444). A judicial factor or *curator bonis* can discharge a bond and disposition in security belonging to his ward without obtaining the authority of the Court (*Wills*, 1879, 6 R. 1096).

(5) *To compromise or to submit and refer all Claims connected with the Trust Estate.*—Trustees have always had power, at common law, to compromise claims (see *City of Glasgow Bank*, 1880, 7 R. 731; *Anderson*, 1856, 17 D. 596), though in special circumstances or cases of difficulty the Court has granted authority to compromise (*M'Dougall*, 1853, 15 D. 776; *Anderson*, 1857, 19 D. 329). But prior to this Act they could only submit or refer to arbitration matters falling within the ordinary administration of the trust, "such as references for the ascertainment of value, or for the fixing of an amount due, for example, on a professional account" (per Ld. J. C. Patton in *Thomson's Trs.*, 1867, 6 M. 150). In questions of more importance, not being ordinary acts of administration, they had no power to submit (*Thomson's Trs.*, *ut supra*), unless a power to do so was given in the trust deed (*Mackintosh*, 1863, 2 M. 48). When a question is submitted to arbitration by trustees, the reference does not fall by the death of the trustees who have submitted it, so long as there is someone to carry on the trust. The party to the reference is the trust, and not the trustees (*Alexander's Trs.*, 1883, 10 R. 1189). It is doubtful whether trustees could compromise a claim made by one of themselves against the trust estate (see *Lawrie*, 1892, 19 R. 675). In *Scott* (1897, 24 R. 462), Ld. Kincairney expressed his opinion that a *curator bonis* had power at common law to compromise claims relating to his ward's moveable estate, and further, that the Act of 1884, s. 2, which includes a *curator bonis* in the definition of trustee, is retrospective in its effects.

(6) *To grant all Deeds necessary for carrying into effect the Powers vested in the Trustees.*—Trustees have always, of course, possessed this power, and the subsection calls for no remark.

(7) *To pay Debts due by the Truster or by the Trust Estate without requiring the Creditor to constitute such Debts, where the Trustees are satisfied that the Debts are proper Debts of the Trust.*—This power enables the trustee to pay debts without requiring formal constitution. But it throws upon him the responsibility of satisfying himself that the debt is really owing, and does not affect any question that may arise should the estate prove insufficient to meet the claims upon it. It has been laid down that "though a decree of constitution is not always necessary, yet where the executry estate is small, and the amount of claims uncertain, and the existence or amount of the alleged debt at all doubtful, the executor is entitled to protect himself and the estate by requiring formal constitution" (per Ld. Pres. Inglis in *M'Gaan*, 1883, 11 R. 249). See PRIVILEGED DEBTS.

SPECIAL POWERS.

The third section of the 1867 Act enables the Court, on the petition of the trustees under any trust deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof:—

(1) To sell the trust estate, or any part of it.

(2) To grant feus or long leases of the heritable estate, or any part of it.

(3) To borrow money on the security of the trust estate, or any part of it.

(4) To excamb any part of the trust estate which is heritable.

All questions of expenses with regard to such applications are to be determined by the Court, and "where it shall be of opinion that the expense of such application should not be charged against the trust estate, it shall so find in disposing of the application."

The section also provides that where all the beneficiaries under the trust in existence at the date of presenting such petition are of full age and capable of acting, "it shall be in their power, by deed of consent, to grant authority to the trustees to do any of the said acts, the same not being inconsistent with the intention of the trust"; such authority being equivalent to authority granted by the Court. It will be noticed that in the case of authority granted by the beneficiaries, the condition which binds the Court to be satisfied that the proposed act is expedient for the execution of the trust is omitted.

In deciding as to the expediency of the proposed acts, the Court will in general make a remit to a man of skill, and be guided by his report. The phrase "not inconsistent with the intention thereof" has been interpreted to mean "not inconsistent with the main design and object of the trust" (*Weir*, 1877, 4 R. 876, per Ld. Pres. Inglis). Where a sale of the property would have been "expedient" in the interests of the liferentrix, but detrimental to those of the fiar, the Court held that the substantial interest was that of the fiar, and that that of the liferentrix was subsidiary (*Molleson*, 1888, 15 R. 665). Powers asked for under this section will not be granted where the truster has prohibited in the trust deed the action contemplated (see *Hay*, 1873, 11 M. 694; *Whyte*, 1891, 18 R. 376); but the mere expression of a wish that a particular course should not be adopted will not prevent the Court from granting authority, if it is satisfied that the adoption of that course is otherwise expedient for the proper execution of the trust (see *Jamieson*, 1872, 10 M. 755). Express words of prohibition, however, are not necessary. "An express direction to do something else inconsistent is just the same as an express prohibition against doing the thing that is in question" (per Ld. Young in *Thomson*,

1883, 11 R. 403). Power to do any or all of the acts mentioned in this section may be given to the trustees in the trust deed, and in that case no application for authority is necessary. Such a power will be presumed to have been given when the trustees have been expressly directed to do acts which necessitate the possession of the power. Thus a direction to pay debts, or to divide the estate, may imply a power to sell heritage (*Low*, 1872, 10 M. 872; *Meiklam*, 1852, 15 D. 159; *Graham*, 1850, 13 D. 420). A direction to purchase and entail land has been held to imply a power to expend the surplus of the estate in building a mansion-house on the land (*Sprot*, 1830, 8 S. 712). And where trustees had been directed to keep in repair a mansion-house, and to allow the liferenter to occupy it, the mansion-house being unfinished at the date of the truster's death, they were held to be entitled to complete it at the expense of the trust (*Brotchie*, 1869, 7 M. 1031).

But where a truster has given his trustees a special power in order that they may carry out a particular trust purpose, and has afterwards revoked that purpose, the grant of the power is also held to be revoked (*Grindlay*, 1853, 16 D. 27).

A power granted by the truster is personal to the trustees to whom it is granted, and does not pass to a judicial factor appointed in their room. He can, if he thinks the exercise of any such power necessary or desirable, apply to the Court under this section, and the Court will exercise its discretion in granting or refusing the authority craved (see *Mellerah*, 1888, 15 R. 665). This subject has been discussed under the title Judicial Factor on Trust Estate, vol. vii. p. 212.

(1) Power to Sell.—The Act here refers to heritable property, for no authority is required by trustees to enable them to sell moveable property belonging to the trust (see *Brownlie*, 1879, 6 R. 1233, per Ld. Shand, at p. 1241; *Dalgleish*, 1849, 11 D. 1030; *Lindsay*, 1849, 11 D. 1030).

Where no power to sell is given in the trust deed, a sale of the estate would seem strictly to be inconsistent with the truster's intention, but the Court, under this section, will grant authority to trustees to sell where the main design and object of the trust can thereby best be carried out, unless there is a direct prohibition against sale in the deed. Where the main object of the truster was to provide a home for his minor children, the Court, being satisfied that this object could best be attained by a sale of the heritable estate, granted power to sell, there being no power given in the deed (*Weir*, 1877, 4 R. 876). So also, where trustees were directed to hold certain heritable property for use as a Roman Catholic school, and in course of time these subjects became unsuitable for the purpose, the Court authorised them to sell the subjects and purchase at the sight of the Court others more suitable, on the ground that the main object of the truster was not that these particular buildings should be maintained as a school, but that a good school should be kept up (*Downie*, 1879, 6 R. 1013; see also *Cameron*, 1881, 18 S. L. R. 585; *Presbytery of Aberdeen*, 1860, 22 D. 1053; *Johnston*, 1804, Mor. 15112). But where the truster has expressly prohibited a sale the Court will not grant authority, however expedient a sale may appear to be (*Hay*, 1873, 11 M. 694). Where the truster had prohibited his trustees from selling until a definite time had elapsed, on the ground that he expected the property would rise in value, the Court refused authority to sell as being inconsistent with the intention of the truster, though it appeared unlikely that the property would rise in value, and though a sale might be expedient for the main purpose of the trust (*Marshall's Trs.*, 1897, 24 R. 478). But in a recent case, where a truster had directed his trustees to

hold the estate until the death of the longest liver of his daughters, and had given them power to sell it upon the occurrence of that event, Ld. Low, holding that the main design of the truster was to make provision for his daughters and grandchildren, and that if he had anticipated the depreciation of the property, he would have given a power to sell at an earlier date, remitted to a man of skill to report on the expediency of a sale (*Richardson*, 1898, 6 S. L. T. 313). A power to sell the heritable property with the exception of certain specified lands has been held to imply a prohibition against selling these lands (*Whyte*, 1891, 18 R. 376). But where a truster had *directed* his trustees to sell his whole heritable property except a certain specified estate, the Court held that this did not prevent it from granting authority to the trustees to sell that particular estate when circumstances rendered it necessary to do so in the interests of the beneficiaries (*Sutherland's Trs.*, 1892, 29 S. L. R. 903). The expression of a wish that if possible the estate should not be sold, is not equivalent to a prohibition against sale (see *Jamieson*, 1872, 10 M. 755). In *Molleson* (1888, 15 R. 665) and *Gilligan's Factor* (1898, 25 R. 876), petitions by judicial factors for power to sell were refused on the ground that a sufficiently strong case of expediency had not been made out.

Where the main purpose of the trust cannot be carried out without a sale, a power to sell will be implied in the deed. Thus a trust to pay debts implies a power to sell as much of the estate as may be necessary for the purpose (*Graham*, 1850, 13 D. 420; see also *Binnie*, 1888, 15 R. 417; 1889, 16 R. (H. L.) 23; *Henderson*, 1841, 3 D. 1049; *Campbell*, 1838, 1 D. 153; *Erskine*, 1829, 7 S. 594). Again, a direction to divide the truster's "means and estate, heritable or moveable, or the proceeds thereof," has been held to imply a power to sell engineering works which had been carried on by the truster, and other heritable subjects (*Thomson's Trs.*, 1897, 25 R. 19). A power of sale derived from the trust deed, or obtained in virtue of this Act, may be exercised either by public roup or private bargain, "unless otherwise directed in the trust deed, or in the authority given by the Court, or in the deed of consent to be granted by the beneficiaries," and such sales may be under reservation of feu-duties or ground-annuals, "and in all sales and feus it shall be lawful to reserve the mines and minerals, if so wished" (1867 Act, s. 4).

Where a trustee, whose deed gave him no power to sell, sold heritable property without obtaining the authority of the Court, a petition craving the Court "to approve, ratify, and confirm" the sale was refused (*Clyne*, 1894, 21 R. 849). Again, where a judicial factor had obtained authority to sell, with directions to expose certain heritable subjects for sale by public roup at an upset price, and if not sold to re-expose them at a reduced upset price, or to sell them by private bargain at a price not less than that at which they had been exposed, and where he had sold them by private bargain without first exposing them for sale by public roup, the Court refused to ratify the sale (*Drummond's Judicial Factor*, 1894, 21 R. 932). Opinions were expressed, however, that it was competent for the Court to ratify such a sale, and that in special circumstances it might be done. In a recent case a judicial factor sold by public roup heritable property forming part of the trust estate, subject to the express condition that if he did not obtain the authority of the Court for the proposed sale, or the Court's approval thereof, he should be at liberty to resile from it. A petition presented to the Lord Ordinary on the Bills (Ld. Kincairney) for approval of the sale was granted (*Don (Ogilvy's Judicial Factor)*, 3rd May 1898, not reported).

Trustees who have and exercise a power of sale, do not incur personal liability for any loss which may accrue to the estate owing to the sale so long as they have acted prudently and in *bonâ fide* (see *Bantic*, 1869, 16 R. (H. L.) 23, per Ld. Watson, at p. 26; *Fleming*, 1845, 7 D. 935; *Clelland*, 1844, 7 D. 147).

The Trusts Acts do not apply to English trusts, and the Court will not grant authority to English trustees to sell heritable property belonging to the trust situated in Scotland (*Carruthers*; *Allan*, 1896, 24 R. 236); but where an English Court has decided that a sale is expedient in the interests of the trust, and might have been carried out had the property been situated in England, the Court will authorise the sale (*Allan*, 1897, 24 R. 716).

In the exercise of its *nobile officium*, the Court will grant authority to a father, as administrator-in-law to his pupil child, to sell heritable property estate belonging to the child, where such a course is shown to be necessary or expedient (*Logan*, 1897, 25 R. 51).

Sales under the Lands Clauses Consolidation Act.—In addition to sales made in virtue of powers obtained under the Trusts Act or from the trust deed, trustees may be compelled to sell lands required "for undertakings or works of a public nature," under the Lands Clauses Consolidation Act of 1845 (8 Vict. c. 19). Special provision is made in that Act for the application of the price of lands compulsorily sold (ss. 67, 68, 69, and 70). But in *Dickson's Trs.* (1889, 16 R. 519), the Court authorised trustees to invest the price of lands compulsorily taken under this Act in accordance with their powers under their trust deed, without requiring them to apply it to any of the purposes specified in the Act.

(2) Power to feu or to grant Long Leases.—Trustees under charitable trusts have power to feu at common law (*Merchant Company of Edinburgh*, 1765, Mor. 5750), and therefore a petition by such trustees for power to feu is unnecessary (*Magistrates of Elgin*, 1882, 10 R. 342), even where the trust deed prohibits the sale or alienation of heritage (*Jamieson*, 1884, 21 S. L. R. 541). But where the truster's intention is clear that the property should not be feued, the Court will not grant authority (*Anderson*, 1876, 3 R. 639). In judging of the expediency of the proposed action, and in interpreting the truster's intention, the considerations which weigh with the Court are the same as in an application for power to sell. Executors, who were in the position of trustees in having to hold and administer the estate, have been held entitled to apply for power to feu under the Act (*Pettigrew's Exrs.*, 1890, 28 S. L. R. 14). In feus granted in virtue of powers obtained under the Act, mines and minerals may be reserved (30 & 31 Vict. c. 97, s. 4).

As regards power to grant long leases, it has been held that trustees who were directed "not to sell or dispose of" a warehouse, but to keep it in good repair, were not entitled to let it on a lease for ninety-nine years (*Petrie*, 1868, 7 M. 64). But where trustees were directed to hold the estate until the death of the last survivor of the truster's children, and then to sell it and divide the profits among his grandchildren, it was held that this direction did not imply a prohibition against granting a long lease before the date of sale arrived, and the trustees were authorised to grant a 999 years' lease, on the ground that this would, in the circumstances, aid rather than frustrate the truster's intention (*Birkmyre*, 1881, 8 R. 477).

(3) Power to borrow.—A trustee cannot borrow money on the security of the trust estate, even where it appears to be necessary for the administration of the estate, unless he has obtained authority to do so either from the truster or under the Act (see *Ralston*, 1882, 10 R. 72). Before 1867,

the Court would not grant authority to borrow when the deed did not confer it (*Kinloch*, 1859, 22 D. 174). Where a trustee has an alternative power to sell or to borrow, he must act in accordance with "the dictates of ordinary prudence" in adopting the one course or the other; and if he does so act, he will not be personally liable for any loss which may result to the estate from his action (*Binnie*, 1889, 16 R. (H L.) 23). In *M'Neill* (1883, 21 S. L. R. 168) trustees were directed to pay the income of the estate to the four daughters of the truster, the fee being given to the children of the daughters, and made payable to the family of each on her death. The truster expressed a wish that the estate should not be sold, and authorised his trustees, on the death of any one of his daughters, to have it valued in order that they might allocate it and divide it among the families. No power to borrow was given. On the death of one of the daughters, a valuation was made, but the trustees were of opinion that the estate was not capable of division for the purposes of the trust. The family of the deceased daughter were willing to accept a sum of money in full of their claims upon the estate, and the Court, in the circumstances, granted the trustees power to borrow that sum upon the security of the estate.

(4) Power to Excamb.—No case has been reported upon this point. The same considerations as to expediency and the intention of the truster would weigh with the Court in dealing with an application for this power.

Power to make Advances from Capital.—By the seventh section of the Act of 1867, the Court "may from time to time, under such conditions as they see fit, authorise trustees to advance any part of the capital of a fund destined, either absolutely or contingently, to minor descendants of the truster, being beneficiaries having a vested interest in such fund, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries, or any of them, and that it is not expressly prohibited by the trust deed; and that the rights of parties other than the heirs or representatives of such minor beneficiaries shall not be thereby prejudiced." Prior to the passing of the Act, the Court held that, in virtue of its *nobile officium*, it could authorise such advances where the beneficiaries had a vested interest in the fund. For example, where the trust estate was liferented by the widow of the truster, and on her death was divisible amongst such of her children as should survive her, it was held that there was a vested interest in the children as a class, and authority to make advances was granted (*Hamilton*, 1860, 22 D. 1095). But where the estate was liferented by the spouses, and on the death of the survivor it was directed to be divided amongst the children of the marriage then surviving, with a provision that if the children who survived the dissolution of the marriage should predecease the survivor of the spouses, it was to be paid over to the surviving spouse, it was held that there was no vesting in the children even as a class, and that the Court could not competently authorise an advance (*Mundell*, 1862, 24 D. 327).

The section above quoted speaks of advances being made to "beneficiaries having a vested interest" in the fund. This has been interpreted as meaning "beneficiaries who shall, if they survive, have the only right and interest in such fund, but who are now vested only with a contingent interest" (per Ld. Cowan in *Pattison*, 1870, 8 M. 575, at p. 578). The proviso that the right of parties other than the heirs or representatives of the minor beneficiaries shall not be prejudiced, means that "the right of stranger substitutes must not be affected; but the provision will be

operative in favour of minor descendants of the truster, though their heirs and representatives may be prejudiced" (*ib.*). Where vesting is postponed until the expiry of a liferent, and where, if all or any of the beneficiaries predecease that date, there is a destination over, not to the survivors of the class or to the issue of predeceasers, but to third parties, the Court has no power either at common law or under the Act to authorise advances from capital (*Baillie*, 1896, 33 S. L. R. 589). In *Weir's Trs.* (1877, 4 R. 876) there was held to be a complete compliance with the conditions required by the statute, and authority to make advances was granted. In *Lord's Trs.* (1894, 21 R. 995), trustees held an estate for behoof of the truster's children, who were all minors, subject to a direction to divide it among the children or the survivors on the youngest child attaining majority, and with a declaration that the provisions should not vest until the period of division. There was no destination over in the event of the children all dying before the period of division, and there was no direction as to the application of the accruing income. A petition by the trustees for authority to apply the whole or part of this income to the maintenance and education of the children was granted, in respect (1) that the unappropriated income formed part of the capital; (2) that although the interest of each child was contingent, and had not vested, the children as a class had a vested interest in the sense of the statute; and (3) that no persons had an interest in the estate other than the children and their heirs and representatives, as in the event of all the children dying before the provisions vested, the estate would fall to be dealt with as intestate succession of the testator, and would be payable to the representatives of the children, his next of kin (see also *Clark's Trs.*, 1895, 22 R. 706).

In *Baird's Trs.* (1892, 19 R. 1045) the trust estate was to be divided among the four daughters of the truster, vesting being postponed until the youngest attained majority. The trustees had power under the deed to make advances to the daughters on their marriage, such advances to be imputed to their shares. The trustees paid each of three daughters who were married during the subsistence of the trust a sum of £1000, and made her an annual allowance of £300. It was held that the granting of the annual allowances was *ultra vires* of the trustees; that the allowances paid, with interest thereon to the date of division, were to be imputed to each daughter's share of the estate; that the interest was to be calculated at the rate which the rest of the trust fund was yielding; and that no interest was chargeable on the sums of £1000. Again, where trustees had power to make advances from capital for behoof of one of the heirs of the estate, the liferentrix was held to have no power to interfere with the trustees in the exercise of their discretion (*Caithness*, 1877, 4 R. 977).

The Court has no power under sec. 7 of the 1867 Act to sanction payments already made out of capital for the maintenance of beneficiaries (*Ross*, 1895, 3 S. L. T. 308).

Power to make Advances from Income directed to be accumulated.—Where a testator has directed the income of his estate to be accumulated until a certain term, the Court may, in the exercise of its *nobile officium*, authorise the trustees to make advances from such income for behoof of the persons who will eventually be entitled to it (*Muir*, 1887, 15 R. 170; *Latta*, 1880, 7 R. 881). An application for advances from income directed to be accumulated, made within six months of the testator's death, was refused as contrary to the express directions of the truster's deed, and as in any case premature (*Thomson*, 1883, 11 R. 401); but an application made three years later by another set of beneficiaries under the same trust

was granted (*Webster*, 1887, 14 R. 501); and a new application, subsequently made, by the former set of beneficiaries, was afterwards granted. These applications were made alternatively under sec. 7 of the 1867 Act, or as an appeal to the *nobile officium* of the Court, but they were granted in virtue of the *nobile officium*.

Where the beneficiaries are not minor descendants of the truster, the Trusts Act does not apply, but the Court may act in virtue of its *nobile officium* (see *Colquhoun*, 1894, 21 R. 671; *Ritchie*, 1890, 17 R. 673; *Thomson*, 1888, 15 R. 719).

Power to make Allowance from Income.—Where trustees hold a sum of money for behoof of children who have a vested right to it, though the period of payment is postponed, they are bound to pay out of the income thereof such sum as may be necessary for the maintenance and education of the children (*Mackintosh*, 1872, 10 M. 933; *Stewart's Trs.*, 1871, 8 S. L. R. 367). In *Edmiston* (1871, 9 M. 987) the Court authorised trustees to pay an allowance of this nature to a father who was domiciled in England, for the maintenance of his children. But in *Seddon* (1891, 19 R. 101) the Court declined to allow trustees to pay to a father who by the law of his domicile was not the legal guardian of his children, until he had been appointed as such by the Courts of his domicile; but upon his being so appointed, they authorised the trustees to make payment to him (*Seddon*, 1893, 20 R. 675). A petition by Scottish trustees for authority to pay the income of legacies to the fathers of minor beneficiaries domiciled in England, and who, according to the law of England, could not give valid discharges, was refused on the ground that the Court had no power to grant the authority craved (*Athcrstone's Trs.*, 1896, 24 R. 39). Where a discretionary power as to the amount of the allowance to be made has been given to the trustees, the Court will not interfere "unless a gross case of dereliction or misconception of duty is presented" (per Ld. Deas in *Douglas*, 1872, 10 M. 943, at p. 946; *Spears's Trs.*, 1873, 11 M. 731). But where the discretionary power was in the hands of trustees who were themselves interested in the fund being kept as large as possible, the Court interfered and ordered an increase of the allowances made (*Thomson*, 1888, 15 R. 719). Where trustees were directed either to accumulate or to apply "for the outfit or establishment in business of the sons, or on the marriage of the daughters," the income of a fund destined to the truster's children, the Court held that these alternative directions did not exhaust the powers of the trustees, but that they were entitled to make such advances as they might think desirable for the maintenance and education of the children (*Christie*, 1877, 4 R. 620; see also *Briggs*, 1869, 8 M. 242). Where no discretionary power as to the amount of the allowance has been expressly given to the trustees, the Court has in several cases interfered to fix the amount on the application of the minor or some one on his behalf (*Muir*, 1887, 15 R. 170; *Baird*, 1872, 10 M. 482; *Mackie*, 1872, 10 S. L. R. 49).

Power to apply Trust Funds for payment of Heritable Debt.—Where trustees have been empowered or directed to invest the trust funds in the purchase of heritable property, they may apply to the Court for authority to apply the money in payment of any debt or burden affecting any heritable property destined to the same series of heirs, and subject to the same conditions which were to be applicable to the property directed to be purchased (30 & 31 Vict. c. 97, s. 8).

Procedure in Petitions for Special Powers.—An application to the Court under the authority of the Trusts Acts must be by petition addressed to the Court, and brought in the first instance before any one of the Lords

Ordinary, who may, after such intimation and inquiry as he may think fit, dispose of it. The power of the Lord Ordinary before whom the petition is enrolled may be exercised by the Lord Ordinary on the Bills during vacation, and all such petitions are, as respects procedure, disposal, and review, subject to the same rules and regulations as apply to petitions coming before the Junior Lord Ordinary in virtue of the Distribution of Business Act of 1857 (20 & 21 Vict. c. 26) (30 & 31 Vict. c. 97, s. 16). It has been held that a petition under the Act may competently be presented in vacation to the Lord Ordinary on the Bills (*Staveley*, 1883, 20 S. L. R. 565). Where, however, the exercise of the *nobile officium* of the Court is invoked, the petition must be presented to the Inner House, and cannot competently be dealt with by a Lord Ordinary, even where it contains subsidiary purposes which would themselves fall within his jurisdiction (*Mitchell*, 1864, 2 M. 1378; see *Tod*, 1895, 23 R. 36). A petition rested alternatively on the *nobile officium* and the provisions of the Act is competently presented to the Inner House (*Webster*, 1887, 14 R. 501; *Latta*, 1880, 7 R. 881). Where trustees under an English trust who had applied for authority to sell heritage in Scotland, and had been refused it on the ground that the Trusts Acts did not apply to English trusts, presented an application to the *nobile officium* of the Court, founding upon an order of an English Court authorising them to apply for authority to sell, the application was made to the Inner House, and the authority was granted (*Allan*, 1897, 24 R. 718).

Investments.

The investment of the trust funds is one of the most important and responsible of the duties which lie upon the trustee. He incurs a personal liability to the beneficiaries to make good any loss which may result from holding unauthorised investments, while at the same time he is not entitled to reap any personal advantage from any such investment which turns out to be profitable (see *Cochrane*, 1855, 17 D. 321).

When trustees have funds belonging to the trust in their hands, it is their duty to find a proper investment for them, and they are not at liberty to allow them to be idle, or to leave them in bank upon deposit receipt (*Melville*, 1896, 24 R. 243), though this latter course is the proper one to adopt as a temporary expedient pending the finding of a proper investment (*Melville, ut supra*). When trust money is so deposited, awaiting investment, the receipt should be taken in the name of the trustees, and not in that of their agent (*Ferguson*, 1898, 25 R. 697). When trustees had left money upon deposit receipt for nineteen years, they were held liable to the beneficiaries for the difference between the interest actually earned and three per cent., the rate which might have been obtained had the money been properly invested (*Melville, ut supra*). It has been held by Ld. Fraser that trustees who were authorised by their deed to invest "on such security, heritable or personal, or in such stocks as they shall think best," were entitled, as a temporary investment, to lend the money to a heritable security company of limited liability, the act of the trustees in lending the money being in good faith, proper inquiries having been made, and the company being in good repute at the time of the investment (*Lamb*, 1883, 20 S. L. R. 575).

Investments under 1884 Act.—In investing the trust funds the trustee must be guided by the powers of investment given to him in the trust deed, or by the investment clause of the Trusts Act of 1884. That clause (47 & 48 Vict. c. 63, s. 3) repeals sec. 5 of the 1867 Act, which gave a more limited power of investment, and provides that "trustees under any trust may,

unless specially prohibited by the constitution or terms of the trust, invest the trust funds—

(*a*) In the purchase of—

1. Any of the Government stocks, public funds, or securities of the United Kingdom.
2. Stock of the Bank of England.
3. Any securities the interest of which is or shall be guaranteed by Parliament.
4. Debenture stock of railway companies in Great Britain incorporated by Act of Parliament.
5. Preference, guaranteed, lien, annuity, or rent-charge stock, the dividend on which is not contingent on the profits of the year, of such railway companies in Great Britain as have paid a dividend on their ordinary stock for ten years immediately preceding the date of investment.
6. Stock or annuities issued by any municipal corporation in Great Britain, which annuities or the interest or dividend upon which stock are secured upon rates or taxes levied by such municipal corporation under the authority of any Act of Parliament.
7. East India stock, stocks or other public funds of the Government of any colony of the United Kingdom approved by the Court of Session, and also bonds or documents of debt of any such Government approved as aforesaid, provided such stocks, bonds, or others are not payable to the bearer.

(*b*) In loans—

9. On the security of any of the stocks, funds, or other property aforesaid.
10. On real or heritable security in Great Britain.
11. On debentures or mortgages of railway companies in Great Britain incorporated by Act of Parliament.
12. On bonds, debentures, or mortgages, secured on rates or taxes levied under the authority of any Act of Parliament, by municipal corporations in Great Britain authorised to borrow money on such security.
13. On Indian railway stock, debentures, bonds, or mortgages on which the interest is permanently guaranteed by the Indian Government,and payable in sterling money in Great Britain:—

Provided that the trustees shall not be held to be subject as defendants or respondents to the jurisdiction of any of Her Majesty's Courts of law or equity in England or Ireland, either as trustees or personally, in any suit for administration of the trust by reason of their having invested or lent trust funds as aforesaid."

By sec. 44 of the Local Authorities Loans (Scotland) Act of 1891 (54 & 55 Vict. c. 34), trustees who have power to invest in the mortgages, debentures, or debenture stock of any railway or other company "shall, unless the contrary is provided by the instrument authorising the investment, have the same power of investing money in stock issued under the provisions of this Act (other than stock for the time being represented by a stock certificate to bearer) as they have of investing it in the mortgages, debentures, or debenture stock aforesaid.

To the powers given in sec. 3 of the 1884 Act, there is added by the Trusts Act of 1898 (61 & 62 Vict. c. 42, s. 3) a power to invest—

(*a*) In the purchase of redeemable stock issued under the Local

Authorities Loans (Scotland) Acts by any local authorities in Scotland.

(*b*) In loans on bonds, debentures, or mortgages secured on any rate or tax levied under the authority of any Act of Parliament by any local authority in Scotland authorised to borrow money on such security.

In the section of the 1884 Act above quoted, the use of the term "Great Britain," as distinguished from "United Kingdom," will be noticed. This excludes Irish railway and corporation stock from the list of investments, and also prevents the loan of trust funds upon real or heritable security in Ireland. In the corresponding English Act (52 & 53 Vict. c. 32) the phrase used is "Great Britain and Ireland." The phrase "East India stock" occurring in subsec. (*a*) 7, is interpreted (s. 2) by the Act 30 & 31 Vict. c. 132, s. 1, as including "as well the East India stock which existed previously to the thirteenth day of August 1859, . . . as East India stock charged on the revenues of India, and created under and by virtue of any Act or Acts of Parliament which received Her Majesty's assent on or after the thirteenth day of August 1859." It will be noticed also that colonial stocks must be approved by the Court of Session before they are available as lawful investments. This approval must be obtained in each case where such an investment is proposed, the approval in each case meaning no more than that the particular stocks approved of are eligible investments in the particular case before the Court (*Accountant of Court*, 1886, 14 R. 55). But it would seem that a judicial factor, and perhaps also a trustee who has put trust under the superintendence of the Accountant of Court, under sec. 18 of the Judicial Factors Act of 1889 (see *infra*, p. 381), will be safe if he obtains for his proposed investment the sanction of the Accountant, who will "sanction investments approved of by the Court so long as they continue eligible" (per Ld. Mure in *Accountant of Court, ut supra*). In several cases the Court has sanctioned investments in colonial stock without requiring service of the petition upon the beneficiaries under the trust (*Anderson*, Dec. 1892; *Anderson*, 25th Jan. 1893, not reported). The following reported cases of stock approved of under this subsection may be referred to: *Maclean*, 1885, 12 R. 529; *Cunliffe*, 1893, 1 S. L. T. 399; *Shand*, 1893, 1 S. L. T. 190; *Brotherston*, 1893, 1 S. L. T. 227; *Blackwood*, 1894, 2 S. L. T. 190; *Robertson*, 1896, 5 S. L. T. 138; *M'Connell*, 1898, 5 S. L. T. 404; *Wilson*, 1898, 6 S. L. T. 146. By 43 & 44 Vict. c. 8, s. 7, securities of the Government of the Isle of Man are put in the same position as Colonial Government securities with regard to investments by trustees. A municipal corporation, in the sense of the Act, means a town council or county council, or some similar body (per Ld. Adam in *Cowan*, 1897, 24 R. 599); and a body of harbour trustees, consisting of the magistrates of a town and certain persons elected by shipowners and ratepayers, does not come under that designation (*ibid.*). The rates and taxes levied by such a body under its Act of Parliament, being payments made in return for services rendered, and being therefore precarious, are not of the nature of the rates and taxes referred to in the Trusts Act, which are rather rates and taxes for payment of which a municipal corporation is entitled to assess the community (*Hatton*, 1897, 24 R. 851; 1898, 25 R. (H. L.) 23; *Cowan, ut supra*).

In a case occurring before 1884, the Court sanctioned certain investments which had been made by a *curator bonis*, which were secured on rates leviable under the Aberdeen County and Municipal Buildings Act and other Acts, these having been reported by the Accountant of Court

to be unexceptionable (*Grainger*, 1876, 3 R. 479). There was in these investments no element of speculation; and they differed from the loans made to the harbour trustees in *Hutton's* and *Cowan's* cases, where the security depended upon the success of the harbour as a commercial undertaking.

By the National Debt Conversion Act of 1888 (51 Vict. c. 2, s. 27), trustees who hold stock converted by this Act into new stock, are entitled to sell the same and invest the proceeds in any of the securities recognised as legal trust investments, "notwithstanding anything to the contrary contained in the instrument creating the trust." Thus trustees who are explicitly forbidden to sell Consols held by them, are entitled, in cases which fall under this Act, to sell and invest the proceeds in any proper trust investment (*Tuckett's Trusts*, 1888, 36 W. R. 542).

The powers of investment conferred by the Act of Parliament do not restrict or control any power of investment expressly contained in the trust deed (30 & 31 Vict. c. 97, s. 6), but powers given in the deed will be strictly construed by the Court (see *Ritchies*, 1888, 15 R. 1086; *Roy*, 1895, 3 S. L. T. 330).

Investments under Powers given in the Deed.—A trust deed frequently gives what appears to be a very wide power of investment. For example, a power may be given "to invest the trust funds in any of the Government securities, or upon heritable security in Scotland, *or in such other way or on such other securities as my trustees shall think proper*" (see *Ritchie, ut supra*). But such a clause will not entitle the trustees to invest in any securities which are not recognised by the law as "proper" for the investment of trust funds, and only an express permission from the truster will justify them in making such an investment. And even in choosing from among the investments which are expressly permitted by the trust deed, a trustee has not the same freedom as a person *sui juris* dealing with his own estate would have. "Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard" (per Ld. Watson in *Learoyd*, 1887, 12 App. Ca. 727, at p. 733, quoted by Ld. Shand in *Maclean*, 1888, 15 R. 985). Where trustees had made an investment which undoubtedly fell within the *class* of investments permitted by their deed, but which ultimately turned out to be a bad one, it was held that if they had made proper investigation, they could and should have known that the security offered was insufficient, and that the investment was not a good one of the class, and that they were accordingly liable to make good the loss (*Johnstone*, 1899, 6 S. L. T. 439). Where trustees had been authorised by the truster to retain securities upon which his estate might be invested at his death, and had accordingly retained certain deposit receipts with a foreign bank which were not yet payable, and which could not easily have been realised, it was held that they were not liable for the loss which was sustained when the bank suspended payment before the maturity of the receipts (*Scott's Trs.*, 1895, 23 R. 52).

To make trustees liable for the loss sustained by a fall in the value of securities which they are authorised by the trust deed to hold, it is necessary to prove wilful default, including want of ordinary prudence on the part of the trustees (*Chapman*, [1896] 2 Ch. 763). But they are bound to exercise ordinary prudence in satisfying themselves from time to time of the soundness of the investments (*Thomson*, 1890,

18 R. 24; see *Robinson*, 1880, 7 R. 694; 1881, 8 R. (H. L.) 127; *Scott*, 1895, 23 R. 52).

Personal Security.—In a case in which trustees had been given power to lend the trust funds "on such securities, heritable or personal, as they may think proper," Ld. Watson said: "A power to lend on personal security has been held in Scotland to include lending on personal credit; but it must be kept in view that in requiring some kind of security to be taken, it was the plain object of the truster to preserve intact the capital of the trust estate for the benefit of the persons ultimately entitled to it. It appears to me that the authority to invest, which he gives for that obvious purpose and no other, cannot be construed as a licence to the trustees to take a worse instead of a better security,—that is to say, to accept a bare personal obligation so long as it is possible for them to obtain a pledge of heritable or moveable property. The power to lend trust money on personal credit may prove very useful to trustees who are in search of a permanent investment; but trustees who make a permanent loan on that footing must, in my opinion, if any loss results from it, justify their action by showing that no safer investment was open to them" (*Knox*, 1888, 15 R. (H. L.) at p. 86; see same case, reported as *Millar's Factor*, 1886, 14 R. 22).

Where a loan is made upon the security of moveable property, the liability of the trustee would be limited under sec. 4 of the Act of 1891 (quoted *infra*).

Heritable Securities.—At common law, and under the Act of 1884, trustees have power to invest in loans upon "real and heritable security in Great Britain." Real securities, in the sense of the Act, have been defined as "securities in which the value of the real subjects pledged should be alone or primarily looked to or regarded as sufficient to secure repayment of the proposed loan" (per Ld. Adam in *Cowan*, 1897, 24 R. at p. 598). Thus harbour trust mortgages, where what was assigned in security was "the rates, dues, and other revenues of the trust," and where there were no means by which the heritable subjects belonging to the trust could be attached or realised for payment of the creditors, were held not to be proper trust investments (*Cowan*, 1897, 24 R. 590; *Annan*, 1897, 24 R. 851; 1898, 25 R. (H. L.) 23; *Johnstone*, 1899, 6 S. L. T. 439; see *Greenock Harbour Trustees*, 1888, 15 R. 343). But it has been held that an English will which empowered the trustees to invest on real security authorised an investment on a railway mortgage, the ground of the judgment being that such a mortgage was a real security within the meaning of the power "because it gives to the mortgagee the security of the whole undertaking,—that is, of the whole real and moveable property of the company. It is true that it is a security which cannot be made available to the creditor by the ordinary diligence of the law. But he has a different kind of diligence in his right to obtain the appointment of a judicial factor, through whose administration the undertaking may be managed or disposed of for the benefit of the company's creditors. The mortgagee has therefore the security of the real property, which is what is meant by a real security" (*Breatcliff*, 1887, 14 R. 307, per Ld. Kinnear (Ordinary), quoted by Ld. Adam in *Cowan*, *ut supra*; see also *Lloyd*, 1877, 5 R. 289; *Haldane*, 1891, 8 R. 669, 1003).

Buildings in course of erection do not form a proper security for investment of trust funds, especially where it is proposed to complete the erection by means of the money borrowed (*Guild*, 1887, 14 R. 944; *Ross*, 1889, 16 R. (H. L.) 31, reversing 1888, 15 R. 1033; *Crabbie*, 1891, 18 R.

1065). When trust funds are lent on the security of heritable subjects any part of which is in the occupation of the owner or unlet, that fact should be taken into consideration in estimating the amount of the rental available for payment of the interest on the loan (*Maclean*, 1888, 15 R. 966). Where the primary purpose of the trust is the payment of an alimentary annuity, the trustees should be specially careful that the security is sufficient for the interest on the loan (*ib.*, per Ld. Pres. Inglis, at p. 987).

The liability of trustees lending upon heritable security has been limited by the Act of 1891 (54 & 55 Vict. c. 44), which provides (s. 4):

"(1) No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan, the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical valuator, instructed and employed independently of any owner of the property, whether such valuator carried on business in the locality where the property is situated or elsewhere, and that the amount of the loan, by itself or in combination with any other loan or loans upon the property, ranking prior to or *pari passu* with the loan in question, does not exceed two equal third parts of the value of the property as stated in such report. And this section shall apply to a loan upon any property on which the trustee can lawfully lend. (2) This section shall apply to transfers of existing securities as well as to new securities; and in its application to a partial transfer of an existing security, the expression 'the amount of the loan' shall include the amount of any other loan or loans upon the property, ranking prior to or *pari passu* with the loan in question"; and (s. 5) "Where a trustee shall have improperly advanced trust money on a heritable security, which would at the time of the investment have been a proper investment in all respects for a less sum than was actually advanced thereon, the security shall be deemed an authorised investment for such less sum, and the trustee shall only be liable to make good the sum advanced in excess thereof, with interest." Both these sections are retrospective.

Trustees are therefore safe in lending up to two-thirds of the value of the property; and where they have allowed a smaller margin than one-third, they are only liable to the extent of the excess of the loan over what they were entitled to lend. But the Act will only protect them if they have fulfilled the duty laid upon them of obtaining an independent report upon the value of the property. The valuator should not be selected or suggested by the owner of the property; and if the usual practice, by which the cost of the valuation is paid by the borrower, is followed, distinct evidence should be preserved that the valuator, though paid by the borrower, was selected and employed by the trustees. In *Raes* (1889, 16 R. (H. L.) 31, reversing 1888, 15 R. 1033), where trustees were held liable for loss resulting from an investment, the valuation had been made by an architect employed by the borrower, and the trustees had obtained no separate valuation. Again, a *curator bonis* lent funds upon the security of buildings in course of construction, on a valuation by an architect employed by the borrower, and made solely from plans, the buildings themselves not being examined. The security turned out to be inadequate, and it was held that the *curator bonis* was personally bound to replace the money lent (*Crabbe*, 1891, 18 R. 1065; see also *Fry*, 1884, 28 Ch. Div. 268; *Godfrey*, 1883, 23 Ch. Div. 483).

In a recent English case, a trustee was held not to be entitled to relief where he had acted on a valuation which stated merely the amount for which the property was a good security, and where he had advanced more than two-thirds of the value stated in the valuation. The valuator had been employed by his solicitor, who acted also for the mortgagor, and the trustee could not allege that he reasonably believed the valuation to have been employed independently of the owner of the property (*Shaw*, [1897] 2 Ch. 583).

Trustees are not entitled to act solely on the strength of the valuator's opinion that the security is sufficient. "If they employ a person of competent skill to value a real security, they may, so long as they act in good faith, safely rely upon the correctness of his valuation. But the ordinary course of business does not justify the employment of a valuator for any other purpose than obtaining the data necessary in order to enable the trustees to judge of the sufficiency of the security offered. They are not in safety to rely upon his bare assurance that the security is sufficient, in the absence of detailed information which would enable them to form, and without forming, an opinion for themselves" (per Ld. Watson in *Learoyd*, 1887, 12 App. Ca. at p. 734; see also *Crabbe*, 1891, 18 R. 1063, per Ld. M'Laren). Where prior bonds existed over the property upon which the money was lent, and a sufficient margin was not left, trustees were held liable for loss resulting from the investment (*Knox*, 1886, 14 R. 22; 1888, 15 R. (H. L.) 83).

Investments in Trade or Trading Companies.—Trustees are not entitled, unless they have the express permission of the truster, to invest their funds in trade, or to become partners in a trading concern. This rule prevents them from purchasing shares in a trading company, as such a purchase would make them partners in the company. On the other hand, a loan of trust money to a company, where the trustees stand outside the company as creditors and not partners, may be a good investment. Thus in *Forbes* (1888, 15 R. 1086) a loan of trust money to a heritable security company on deposit receipt was held to be a good investment; while a purchase of fully paid stock of a limited liability company was held to be *ultra vires* of the trustees (see also *Grant*, 1869, 8 M. 77; *Lamb*, 1883, 20 S. L. R. 575).

In order to justify an investment of trust funds in a trading concern, trustees must have an explicit authority so to invest them from the truster. The fact that the truster has himself invested his money in trade or in a trading company does not entitle the trustees to leave it there. "What the truster may have done in his life is no rule for the conduct of trustees appointed by him for the management of his estate after his death" (per Ld. Wood in *Cochrane*, 1855, 17 D. 332; see *Guthrie*, 1853, 16 D. 214; *Laird*, 1855, 17 D. 984). It is their duty to realise the money unless they have been given power to keep it where it is:—"to put the trust funds in a position of safety, although the truster may have left them in a position of danger" (per Ld. Shand in *Brownlie*, 1879, 6 R. 1241; see also *Robinson*, 1881, 8 R. (H. L.) 127; *Oswald*, 1879, 6 R. 461; *Dawson*, 1882, 20 S. L. R. 8). In realising such investments the trustees are bound to act prudently, and they are entitled to take a reasonable time in order that they may realise to the best advantage of the trust estate (see *Accountant of Court*, 1858, 20 D. 1176, per Ld. Deas, at p. 1184; *Brownlie*, *ut supra*; see also *Smith*, [1896] 1 Ch. 171; *Crowther*, [1895] 2 Ch. 56). But trustees may retain any investment made by the truster if it is one which they could have been entitled to make under the powers contained in their deed (*Robinson*, *ut supra*, per Ld. Watson, 8 R. (H. L.) 138).

An authority to retain investments made by the truster does not entitle trustees to purchase shares in a new company which is practically a reconstruction of one in which the truster had held shares (*Thomson*, 1889, 16 R. 517); and power to leave money invested on deposit with a particular firm will not hold after there has been a change in the firm (*Tucker*, [1894] 1 Q. B. 724). And in holding investments made by the truster, when they have authority to do so, trustees must exercise ordinary prudence, and satisfy themselves from time to time as to their soundness (*Thomson*, 1890, 18 R. 24; see *Scott's Trs.*, 1895, 23 R. 52). So long as they do this, they will not be held responsible for loss arising from them, unless they have acted negligently or in bad faith (see *Robinson*, 1880, 7 R. 694; 1881, 8 R. (H. L.) 127; *Chapman*, [1896] 2 Ch. 763). An express prohibition against investing in shares of an unlimited company does not imply a power to invest in those of a limited company (*Hardie*, 1895, 2 S. L. T. 520).

A power to invest in "bank stock" has been held to include stock of any of the Scottish banks in good repute at the date of the investment (*Cunningham*, 1879, 6 R. 1333). But where trustees had power to invest in the stock of "any chartered bank," it was held that they were not entitled to invest in the stock of a bank with unlimited liability registered under the Companies Act, 1862 (*Sanders*, 1879, 7 R. 157). A power to invest in bonds or debentures of any "company incorporated by Act of Parliament," does not authorise an investment in the securities of a company registered under the Companies Acts (*Davidson*, [1896] 2 Ch. 590; see *Elve*, [1891] 1 Ch. 501).

Where trustees made an *ultra vires* investment in bank stock, which afterwards rose greatly in value, it was held that the increase in value fell to be added to the capital sum, and that the trustees were bound immediately to realise the stock, and invest it according to the provisions of their trust deed (*Grant*, 1869, 8 M. 77).

A truster may empower his trustees to carry on any business in which he may be engaged at the time of his death, or to continue his interest in any business in which he may then be a partner (see *Lawrie*, 1892, 19 R. 675; *Beveridge*, 1869, 7 M. 1034; 1872, 10 M. (H. L.) 1). A contract of copartnery may provide that on the death of one of the partners, the business shall be carried on by the surviving partners and the trustees of the deceased partner (see *Beveridge*, *ut supra*); but where no such arrangement has been made, the surviving partners cannot be compelled to take the trustees of the deceased partner into partnership. Where no objections are raised by the surviving partners, trustees who have power to carry on their truster's business are entitled to enter into a renewal of the partnership arrangement which had previously existed. But where the other partner is himself one of the trustees, care must be taken to give him no increase of interest in the business, even in consideration of additional trouble which may fall on him in managing the business (see per Ld. M'Laren in *Lawrie*, *ut supra*, at p. 683). In *Mackie* (1875, 2 R. 312) the trustees of a deceased partner, who were entitled under the contract of copartnery to his share in the business, were held to be unable to contract with the surviving partner, who was himself a trustee, to the effect of increasing his share of the profits in order that they might retain his services as managing partner. Trustees who thus become partners in a business are collectively one partner, and each trustee individually is not a partner. One of their number is not entitled to sign in name of the partnership, or act in its name without the concurrence of the other partners. Nor can they delegate authority so to act to one of their

number. "They may be liable as partners to the public, they may be liable as representing themselves as partners; but they certainly have not that quality essential to partnership, viz. a right to share in the profits or an obligation to submit to the losses of the concern. As in a question between them and the parties whom they represent, the beneficiaries, for whom they act in trust, may, I think, be considered more correctly, and to a greater effect, partners of the company than the trustees themselves" (per Ld. J. C. Patton in *Beveridge*, *ut supra*, 7 M. 1041).

Where trustees, without authority, employ trust money in a trading concern, they are personally liable to make good any loss which may result from the venture; and in the event of there being a gain, that gain will accrue to the trust estate (see *Laird*, 1855, 17 D. 984; *Laird*, 1858, 20 D. 972; *Cochrane*, 1855, 17 D. 321; 1857, 19 D. 1019). Where trustees, without authority, employed the trust funds in a business in which they were partners, and paid the beneficiaries five per cent. on the capital so employed, there being no suggestion of *mala fides*, it was held that the beneficiaries were entitled to claim any profits realised from the employment of the capital, over and above the five per cent. paid to them (*Cochrane*, 1855, 17 D. 321). At a later stage in the same case, it was held that in ascertaining the amount of the profits made on the trust funds, not only the capital put in by the partners, but all other funds obtained on loan or otherwise, and invested in the business, must be taken into account, and that the payment to the beneficiaries was to be in the proportion which the trust funds bore to the whole funds so employed, the Court being of opinion that the capital put in under the contract of copartnery, and the periodical docquets fixing the interests of the partners in the excess of property over liabilities, however binding between the partners, were of no importance in a question with third parties, who were not entitled to share in the profits *qua* partners (*Cochrane*, 1857, 19 D. 1019).

But where a trustee improperly employs trust funds in a business in which he is a partner, the other partners in the business do not incur any liability to the beneficiaries under the trust for the money so employed, unless they have had notice that a breach of trust has been committed; but trust money so employed may be followed and recovered from the partnership if still in its possession or under its control (53 & 54 Vict. c. 39, s. 13; see *Laird*, 1858, 20 D. 972).

Where a truster directed his business to be carried on by his son, who had been in partnership with him, for behoof of himself and the truster's family, and gave his trustees a power to supervise the management and in their discretion to dissolve the firm and wind up the business, it was held that the trustees were not partners in the firm (*Morrison*, 1870, 8 M. 500).

The liability which a trustee, who invests in a trading concern or in shares of a joint stock company, incurs to creditors of the firm or company or to the other partners or shareholders, will be considered later (see p. 387).

Loan to Trustee.—The principle that a trustee cannot be owner *in rem suam*, and cannot make profit out of the trust, prevents trustees from lending trust money to one of their own number, even upon good security. Such a loan is absolutely illegal; "no circumstances will justify such a proceeding as it is quite *ultra vires* of any body of trustees so to act" (per Ld. Pres. Inglis in *Croskery*, 1890, 17 R. 697, at p. 700; see *Preston*, 1862, 1 M. 245; *Baird*, 1865, 4 M. 69; *Hay*, 1861, 23 D. 594; *Blair*, 1876, 14 S. 561). In *Ritchies* (1888, 15 R. 1086), trustees who had advanced part of the trust funds to one of their own number, who was the liferenter of the fund on the

security of a house which he was erecting for his occupation, were held to have acted *ultra vires*, and to be bound to replace the funds so lent.

Appropriation of Investments to Particular Legacies.—Unless authorised by the trust deed, either expressly or by implication, trustees are not entitled to allocate particular investments to meet particular legacies. Each legacy is entitled to the security of the whole estate; and where loss accrues to investments so allocated, that loss will fall, not upon the legacies to which they have been allocated, but upon the residue of the trust estate (*Scott*, 1895, 23 R. 52). But where the tenour of the trust deed shows that it was the truster's intention that such an allocation should be made,—*e.g.* where the truster evidently intended that funds should be set apart and invested to meet certain legacies which did not fall to be paid at once, but that there should be no delay in paying over the residue,—any loss resulting from the investment of the funds so allocated will not affect the rest of the trust estate (*Robinson*, 1881, 8 R. (H. L.) 127; but see *Teacher*, 1890, 17 R. 303).

Trustees cannot set off the profit arising from one breach of trust against the loss resulting from another (*Wiles*, 1854, 2 Drew. 258; *Deare*, 1895, 11 T. L. R. 183).

Entailed Money.—The price, or the surplus of the price, of any entailed estate sold under the orders of the Court may be consigned in bank on deposit receipt, subject to the orders of the Court, or invested in Consols, or, if the person entitled to it as heir of entail desires, it may be invested in "any of the Government stocks, public funds, or securities of the United Kingdom, or heritable security in Great Britain, or in stock of the Bank of England, or in East India stock, or the mortgages or debentures or debenture stocks of such municipal corporations or public trusts or railway companies as may be approved by the Court after inquiry, in trust for the applicant and the heirs of entail in their order" (45 & 46 Vict. c. 53, s. 23, subs. 4). In such a case the trustees to hold the investments are appointed by the Court (*ib.*). In a recent case Ld. Pearson has held that such trustees are bound to invest the money in accordance with the subsection quoted, and are not entitled to select from the more extended list of investments open to trustees under sec. 3 of the Trusts Act of 1884 (*Queensberry*, 1898, 5 S. L. T. 458). Where money invested under the Entail Act is called up, or where a change of investment is desired, the trustees are not bound to obtain the authority or approval of the Court in relation to new investments, "but may themselves make such new investments in accordance with the provisions of this Act, or they may apply to the Court, if they think proper, for such authority" (45 & 46 Vict. c. 53, s. 23, subs. 5). Until the first investment is found, or while it is waiting for reinvestment, the entailed money must be left in bank on a consignation receipt (*ib.*). See Entail.

Approval by Beneficiaries.—Until 1891 the approval of an *ultra vires* investment by the beneficiaries under the trust did not relieve the trustees from responsibility, or imply an obligation on the part of the beneficiaries to relieve them of liability incurred to third parties (*City of Glasgow Bank*, 1880, 7 R. 479); though in certain circumstances the beneficiaries might be barred by their actings from challenging the action of the trustees, or claiming repayment of money lost (see *Spence*, 1888, 15 R. 376; *Sanders*, 1879, 7 R. 157). But sec. 6 of the 1891 Act, which is retrospective in its action, provides that "where a trustee shall have committed a breach of trust at the instigation or request, or with the consent in writing, of a beneficiary, the Court may, if it shall think fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use, whether she

has or has not powers of disposal or alienation, make such order as to the Court shall seem just for applying all or any part of the interest of the beneficiary in the trust estate, by way of indemnity to the trustee or person claiming through him." It will be noticed that this clause only enables the Court to indemnify the trustee out of the interest in the trust estate possessed by the beneficiary at whose instigation or request the breach of trust has been committed, and does not affect his liability to other beneficiaries. It has been held in England, where a similar clause exists in the Trustee Act of 1888, that the words "in writing" apply to and qualify only the word "consent," and not the words "instigation or request" (*Griffith*, [1892] 3 Ch. 105; see *Ricketts*, 1891, 64 L. T. (N. S.) 263; *Bolton*, [1895] 1 Ch. 544). A verbal instigation or request is therefore sufficient to give the trustee the benefit of this section, and probably such instigation or request need not be expressly made, if it can clearly be implied from circumstances. It would appear that where an alimentary right is involved, no approval by the beneficiary would protect the trustees, who, by breach of trust, have hazarded the security of this right (see *Sanders*, 1879, 7 R. 157; *Holt*, [1897] 2 Ch. 525).

Superintendence of Administration by Accountant of Court.—The Judicial Factors Act of 1889 (52 & 53 Vict. c. 39, s. 18) provides that "where a person deceased has left a settlement appointing trustees or other persons with power to manage his estate, it shall be competent for such trustees or other persons to apply to the Court of Session for an order on the Accountant to superintend their administration of the estate, in so far as it relates to the investment of the estate, and the distribution thereof among the creditors of the deceased and the beneficiaries under the settlement, and the Court may grant such order accordingly, and, if such order be granted, the Accountant shall annually examine and audit the accounts of such trustees or other persons, and at any time, if he thinks fit, he may report to the Court upon any question that may arise in the administration of the estate with regard to any of the foresaid matters, and obtain the directions of the Court thereupon." Though the terms of this section seem to limit its application to the case of trustees appointed by a testamentary settlement, it would appear from sec. 6 of the same Act that trustees appointed by the Court may avail themselves of its provisions.

The application is made by petition to the Junior Lord Ordinary, and it would appear that it is not necessary either to print the petition or to serve it upon the beneficiaries or other persons interested under the trust (*Stevenson's Trs.*, 12th June 1897, unreported). The initial cost of the application is thus very small, while the annual audit fee chargeable against the income of the trust, amounts to "not more than 7 per cent on the factor's commission," or about £1, 1s. for an estate with an income of £200 per annum; £2, 2s. for one with an income of £500, and so on.

The section has been described by Ld. Pres. Robertson as one which "enables the trustees under any private trust to obtain immunity for their acts, in the important articles of investment and distribution, by subjecting their administration to the supervision of the Accountant of Court" (*Stair's Trs.*, 1896, 23 R. 1070). Beyond this dictum there is, however, nothing in the reported cases to show that the trustee does hereby obtain complete immunity with regard to these matters, or that the responsibility for them is altogether thrown from his shoulders upon those of the Accountant or the Court: but at the same time there can be no doubt that the section offers manifest advantages to trustees.

The result of putting a trust under the superintendence of the

Accountant is that the trustees receive from him annually a report which brings before them the whole position of the trust and its investments, and directs their attention to any matters which the Accountant thinks should be laid before them. At the same time the discretionary powers of the trustees are preserved intact. The superintendence of the Accountant only affects the matter of the investment of the funds, and the distribution thereof. The section "does not 'throw into Court,' to use a popular expression, the whole administration of the trusts coming under its operation. Those trusts go on, on the responsibility of the trustees, except in the matters of investment and distribution, as to which the trustees are entitled to the direction of the Accountant, and through him, of the Court" (per Ld. Pres. Robertson in *Stair's Trs.*, 1896, 23 R. 1070). It is not, therefore, competent for the Court, upon a report by the Accountant under this section, to give directions to trustees as to whether or not they should sell heritable property, where they have a discretionary power of sale (*Stair's Trs., ut supra*); nor will the Court, under such a report, decide a question as to the competency of an action raised by a beneficiary against the trustees (*Bonnar*, 1893, 1 S. L. T. 68). But when the question is one which concerns the investment or the distribution of the estate, the guidance of the Court can be easily and cheaply obtained through the medium of a report by the Accountant. It is thought that, where a superintendence order has been granted, the approval by the Accountant of a proposed investment in colonial stocks or bonds, under sec. 3, subsec. 7 of the Trusts Act of 1884, would be sufficient to protect the trustee from liability for making the investment (see *Accountant of Court*, 1886, 14 R. 55, per Ld. Mure, at p. 59). Particular stocks having been once approved by the Court, the responsibility of seeing that they continued to be eligible before they were sanctioned for another investment would seem to be thrown on the Accountant.

Expenses.—The expenses incurred in making investments, or in examining them from time to time, or in changing them, form a charge against the capital of the estate (*Smith*, 1890, 18 R. 44). But in making changes in the investments of the trust estate, the trustees are bound to consider the interests of the estate as a whole, and are not entitled to make such changes solely in the interests of a liferenter in order to give him a larger income, and to charge the expense thereof against the capital.

Liability.

(1) Liability to Beneficiaries.—This subject has been already partly considered in dealing with the duty of trustees with regard to investments.

The general rule is that a trustee is liable to the beneficiaries for any loss which the trust estate may sustain owing to want of diligent administration on his part. The degree of diligence required of the trustee, is, both in Scotland and England, "the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs," without reference to the business capacity which he himself actually possesses as an individual (per Ld. Herschell in *Raes*, 1889, 16 R. (H. L.) 33; see *Knox*, 1888, 15 R. (H. L.) 83; *Carruthers*, 1890, 17 R. 780; *Learoyd*, 1887, 12 App. Ca. 727; *Kennedy*, 1884, 12 R. 275; *Western Bank*, 1872, 11 M. 96; *Seton*, 1841, 4 D. 310). This rule applies as well to the initial realisation of the trust estate, so as to make it available for carrying out the trust purposes, as to the subsequent administration of the trust (see *Forman*, 1853, 15 D. 362). The application of the rule is the same whether

the trustee does or does not receive remuneration for his services (see *Jobson*, 1892 [1893] 1 Ch. 71).

Clause of Immunity.—It is usual for a truster to put into the trust deed a clause to the effect that each of his trustees "shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions." By the 1861 Act (s. 1) such a clause is read into every deed by which gratuitous trustees are appointed, if it is not already there. But any such clause will protect a trustee only to a limited extent, and the clause read into a trust deed by the 1861 Act affords trustees no further protection than was already theirs at common law. Dealing with a clause which declared that the trustees "shall not be liable for omissions, errors, or neglect of management *non singuli in solidum*, but each shall be liable for his own intromissions only," Ld. Watson said: "I see no reason to doubt that a clause conceived in these or similar terms will afford a considerable measure of protection to trustees who have *bonâ fide* abstained from closely superintending the administration of the trust, or who have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust and of the persons whom it concerns; but it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of *culpa lata*, or of gross negligence on his part, or of any conduct which is inconsistent with *bona fides*. I think it is equally clear that the clause will afford no protection to trustees who, from motives however laudable to themselves, act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer. I agree with the opinion expressed by Lds. Ivory, Gillies, and Murray in *Johnston* v. *Dawson* (4 D. 318), to the effect that 'clauses of this kind do not protect against positive breaches of duty'" (*Knox*, 1888, 15 R. (H. L.) 86; see also *Johnstone*, 1899, 6 S. L. T. 439). For examples of anxiously worded clauses of immunity which have been effective in affording protection to trustees, reference may be made to the cases of *Pass* (1880, 43 L. T. 605; 29 W. R. 332) and *Wilkins* (1861, 3 Giff. 116; 1862, 31 L. J. Ch. 41).

Liability for Acts of Co-Trustees.—A trustee is not, at common law, responsible for the acts of his co-trustees, unless he has authorised them, or acquiesced in them, or been negligent in not interfering with them. The provision of the 1861 Act, which declares that a gratuitous trustee shall not be liable for the acts and intromissions of his co-trustees, will not protect a trustee who is not already protected by the common law. On the question of the degree of diligence required of a trustee in supervising and interfering with the acts and intromissions of his co-trustees, it is not easy to lay down a hard-and-fast line. The general rule as to the amount of diligence required of a trustee has been already stated. He must exercise "the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs" (*Pass*, 1859, 16 R. (H. L.) 33, and other cases quoted *supra*). He must not therefore leave the active administration in the hands of his co-trustees. In *Cowan* (1890, 17 R. 769), one of two trustees had been the truster's law agent, and continued to act as agent and factor to the trust. The other trustee, who lived at a distance, left the management practically in his hands. The management having resulted in a loss to the trust estate, the Court held that there had been gross neglect of duty on the part of both trustees, and that both were liable. The fact that the non-acting trustee had asked his co-trustee for a statement of the affairs of the trust, and had suggested a meeting of trustees, did not avail to absolve him from liability, as nothing

had resulted from his suggestion (see also *Adair's Factor*, 1894, 22 R. 116; *Edmond*, 1866, 4 M. 1011; *Seton*, 1841, 4 D. 310; *M'Clymont*, 1827, 5 S. 346). But a trustee residing at a distance is entitled to place reliance on the judgment of his co-trustees in such a matter as the personal investigation of a security on which they propose to lend trust money, so long as he has no reason to suspect their good faith (*Kennedy*, 1884, 12 R. 275). Where a trustee has reason to believe that his co-trustee has misappropriated trust money, it is his duty to take steps to recover that money, and to prevent any more of the funds coming into the co-trustee's hands; and he will be guilty of *culpa lata* if he fails to take such steps within a reasonable time (*Millar's Trs.*, 1897, 24 R. 1038). But where a trustee can show that he could not have recovered the misappropriated money even if he had raised an action, he will not be held liable to make good the loss to the estate (*ib.*). In a case of misappropriation of trust funds by a co-trustee, a trustee will not be held liable unless he has unnecessarily put the funds within the power of the co-trustee; and where he has only followed the ordinary course of business in allowing his co-trustee to have control of money, he will not be personally liable (*Gasquoine*, 1894, 10 T. L. R. 220). It is quite proper that the title deeds and securities of the trust should be left in the custody of one of the trustees (see *Carritt*, 1889, 42 Ch. Div. 263); and in the event of loss resulting to the estate owing to his fraudulent dealing with these, his co-trustees will not be liable, unless they had cause to suspect his integrity (see *Cottam*, 1860, 1 J. & H. 243; *Isaac*, 1892, 8 T. L. R. 627); but where the securities are transferable by delivery, particular care should be taken as to their custody (*Lewis*, 1878, 8 Ch. Div. 591).

The fact that one of the trustees has been appointed agent or factor to the trust does not involve his co-trustees in any further responsibility for his actings as such than if he had been a stranger to the trust (see *Home*, 1841, 2 Rob. App. 384, per Ld. Chan. Cottenham, at p. 433).

Liability for Acts of Factors and Law Agents.—In appointing a factor or law agent to the trust, which they have power to do both at common law and under the 1867 Act, trustees are bound to see that the person appointed is properly qualified and in good business repute. They are further bound to exercise reasonable prudence in supervising the actings of the agent or factor, and in seeing that he remains habite and repute responsible. Subject to these conditions, they are entitled to delegate to him ordinary acts of administration, and to repose reasonable confidence in his integrity and capacity. They will not be held responsible for dishonesty or incapacity on his part so long as they had no reasonable grounds for suspecting him (*Home*, 1836, 16 S. 142; 1841, 2 Rob. App 384; *Cowan*, 1836, 14 S. 744; *Dalrymple*, 1784, Mor. 3534; see *Weall*, 1889, 42 Ch. Div. 674, per Kekewich, J., at p. 677; *Sutton*, 1871, 12 Eq. 373; *Hopgood*, 1870, 11 Eq. 74; *Bostock*, 1865, 1 Eq. 26). For circumstances in which trustees were held not liable for loss accruing to the estate through the defalcations of their agent, they having taken every reasonable precaution, and having been deceived by the agent, see *Ferguson* (1898, 25 R. 697). But trustees are not entitled to rely upon the representations of their agent as to the existence of the trust securities; they are bound to satisfy themselves by personal inspection (see *Dewar*, 1885, 54 L. J. Ch. 830). As to the duty of trustees with regard to the custody of title deeds and securities belonging to the estate, and the question how far they are entitled to leave these in the hands of their agent, see *Field* ([1894] 1 Ch. 425).

The beneficiaries under the trust have no title to sue the agent in respect of loss said to have arisen through illegal or improper investments

made on his advice, as the agent is not employed by them. Their recourse is against the trustees (*Rae*, 1888, 15 R. 1034; 1889, 16 R. (H. L.) 1). And it is no part of the duty of an agent to volunteer his advice to the trustee that an investment made by the truster is not one which they ought to retain (*Currors*, 1889, 16 R. 355).

So long as the factor does not act *ultra vires*, the estate will be bound by his engagements; but a trustee can only be made personally responsible for acts which he has expressly authorised the factor to perform or where he has neglected his duty of supervision (see *Edmond*, 1866, 4 M. 1011; *Cleg*, 1848, 10 D. 1325).

The rule as stated above applies also with regard to the liability of trustees for the acts of other persons employed by them in the business of the trust, whether professional men, such as accountants or stockbrokers, or servants. Care in selection and reasonable supervision is all that is required to protect the trustees from responsibility for the dishonesty or negligence of a person so employed (see *Speight*, 1883, 9 App. Ca. 1; *Robinson*, [1896] 2 Ch. 415; *Jobson*, 1892, [1893] 1 Ch. 71).

Liability for Loss resulting from Accident, etc.—When the trust estate suffers loss owing to circumstances beyond the control of the trustee, such as accident or robbery, the trustee is not liable unless it can be shown that he has been grossly negligent. It would seem to be the duty of a trustee, "as an ordinary prudent man of business," to insure the trust estate against fire, where, for example, it consists of house property, and in Scotland it would probably be so held. But it may be noted that in England, while a trustee is authorised by the Trustee Act of 1888 to effect such insurance, it is not obligatory upon him to do so (51 & 52 Vict. c. 59, s. 7).

(2) Liability to Third Parties.—The liability of trustees to third parties, creditors of the truster or of the trust estate, may or may not be limited by the value of the trust estate. Where a trustee himself incurs on behalf of the trust estate an obligation to a third party, the extent of his liability for its performance will be determined by the nature of the obligation. Thus it is competent for a trustee in contracting with a third party to limit his liability to the extent of the trust estate in his hands. But the limitation must expressly appear, and the other contracting party must be in a position which enables him to accept such a limited liability.

Debts of the truster, which devolve upon the trustees only by virtue of the trust, involve the trustees in no liability *ultra vires* of the trust estate (see *Cullen*, 1846, 8 D. 511, per Ld. Fullerton, at p. 521; *Stewart's Tr.*, 1896, 23 R. 739). But, at the same time, the trustees are bound to make the estate forthcoming to satisfy such debts; and hence the creditors of the truster, as well as the beneficiaries, have a right to see that the trustees are duly diligent in realising and administering the estate. A clause of protection, conceived by the truster in favour of his trustees, while it may have some effect in a question with beneficiaries, will not, in a question with the creditors of the truster, protect the trustees from the consequences of any want of diligence on their part (see *Cairns*, 1836, 14 S. 744, per Ld. Glenlee, at p. 751; *Doyle*, 1804, 2 Sch. & Lef. 239, per Ld. Redesdale).

Privileged debts (*q.v.*) may, of course, be paid at once by the trustees, but before paying debts which do not come within this category, the trustees should satisfy themselves that the estate is sufficient to meet the claims of all the creditors. By giving a preference to any creditor, either by paying his debt or by granting him security for it, they will incur personal liability to the other creditors in the event of the estate turning out to be insufficient. But creditors must lodge their claims in reasonable

time; and it has been held that trustees as well as executors, if they reasonably believe that all debts have been satisfied, may, after six months, pay away the trust estate even to legatees without incurring personal liability for unpaid debts (*Stewart's Trs.*, 1871, 9 M. 813; *Beith*, 1875, 3 R. 185). The question is whether the trustees knew or should have known of the debt in question, and whether the creditor so acted as to lead them to believe that the debt did not subsist (*ib.*). It may be, however, that if the estate has from the first been insufficient, the legatees will be obliged to pay back what they have received to the creditor (*Stewart's Trs., ut supra*). Where the trustees overestimated the value of the estate, and then proceeded to pay ordinary debts without retaining sufficient to meet a preferable claim, they were held personally liable to make good the deficiency (*Lamond*, 1871, 9 M. 662). Again, where trustees borrowed a sum of money upon the security of the trust estate, and therewith paid the debt of one of two creditors, the estate being at the time sufficient, according to a valuation, to meet both debts, they were held personally liable for payment of the other debt when the estate eventually turned out to be insufficient (*Young*, 1841, 3 D. 1020).

The trustee is also bound to satisfy himself that the debts are proper debts of the trust; and where there is any doubt upon the point, he is entitled to require the creditor to constitute his claim (*M'Gaan*, 1883, 11 R. 249). A trustee under a voluntary trust deed for behoof of creditors paid in good faith a claim which afterwards was held to be invalid. The payment was made in spite of a protest by the truster, and so precipitately that the latter had no opportunity of interdicting him. The trustee was held personally liable to repay the money (*Buttercase*, 1897, 24 R. 1128).

When the obligation is one created not by the truster but by the trustees themselves, even though *bonâ fide* on behalf of the trust, the trustees are personally liable for its fulfilment, unless they have expressly limited their liability to the extent of the trust estate, or it is clear from the terms of the transaction that the creditor expressly took the trust estate, as distinct from the individual trustees, as his debtor (*Cullen*, 1846, 8 D. 511, per Ld. Fullerton). In such cases the trustees are bound to warrant the sufficiency of the trust funds to the persons with whom they deal (see *Cullen, ut supra*; *Strathmore*, 1853, 15 D. 752; *Maclean*, 1850, 13 D. 90; *Eaton*, 1837, 15 S. 1012; *Thomas*, 1832, 11 S. 162; *Thomson*, 1829, 7 S. 787; *Jeffrey*, 1821, 1 S. 102; 1824, 2 Sh. App. 349; *Fairlie*, 1821, 1 S. 222). Where a trustee employs an agent to manage the estate, or where, taking over the truster's business, he employs the truster to act as his agent, he becomes responsible for any contracts entered into by his agent in the ordinary course of his administration (*Ford*, 1888, 16 R. 24; *Macphail*, 1887, 15 R. 47, where the claim was restricted to the value of the trust estate). But it must be clear that the case is one of trust as distinguished from security, and that the trustee is really in possession (see *Eaglesham*, 1875, 2 R. 960; *Miller*, 1876, 3 R. 548; *Stott*, 1878, 5 R. 1104; *Newcastle Chemical Co.*, 1881, 9 R. 110; *Mess*, 1898, 25 R. 398).

Where trustees granted a heritable bond over the trust estate and bound themselves "as trustees" to repay the sum borrowed, it was held that their liability was limited to the extent of the trust estate (*Gordon*, 1840, 2 D. 639; 1842, 1 Bell's App. 428). But "there are many cases in which a trustee is personally responsible, even though he may have contracted expressly as a trustee. If he draws or accepts a bill of exchange, or gives an order for work done on account of the trust, in these and similar cases, though he contracts as trustee, yet he is, in Scotland as in England, personally liable

for his engagements in the absence of express stipulation to the contrary. The nature of the contract in these cases shows that the party contracting must have meant to bind himself personally. Ordinary transactions of buying and selling could not go on upon any other principle, and this is therefore, in all such cases, *primâ facie* understood to have been the meaning of the persons engaged. The true question to be resolved in every case is, whether the circumstances do fairly show that the contracting parties were dealing only as trustees, and were not intending to incur liability beyond the amount of the trust funds" (per Ld Cranworth in *Lumsden*, 1865, 3 M. (H. L.) 96).

Liability as Shareholders in Public Company.—Another element, however, enters into the question of the liability of trustees as shareholders in a public company to the other shareholders or to the creditors of the company. It has been held that the directors of a joint stock company are not entitled to accept trustees as shareholders on the footing that their liability is to be limited to the extent of the trust estate (*Muir*, 1878, 6 R. 392; 1879, 6 R. (H. L.) 21; *Lumsden*, 1864, 2 M. 695; 1865, 3 M. (H. L.) 89; *Lumsden*, 1866, 5 M. 34 (*curator bonis*)). If the liability of trustees could be so limited, the result would be that "there would be two distinct classes of partners" in the company: "one of persons who became shareholders in the ordinary case, and who would be partners with unlimited liability; and the other of trustees who took shares in their fiduciary character, and who would be partners with limited liability" (per Ld Westbury in *Lumsden*, 1865, 3 M. (H. L.) 92). Trustees, therefore, who hold shares in a joint stock company are personally liable as partners in the company to pay calls upon the shares. The fact that the trustee had power under his deed to hold such shares does not affect his liability in a question with the creditors of the company, or the other shareholders. But it does affect his position with regard to the trust funds. Where the investment was one which he was authorised to make, he is entitled to relief from the trust funds so far as they will go (*Robinson*, 1880, 7 R. 691; 1881, 8 R. (H. L.) 127; *Cuningham*, 1879, 6 R. 1333). On the other hand, where the investment was unauthorised by the trust deed, the trustee is not entitled to pay the calls made upon him out of the trust funds, and will be bound to make good any loss resulting to the trust from the investment (*Sanders*, 1879, 7 R. 157; *Brownlie*, 1879, 6 R. 1233). In another of the *City of Glasgow Bank* cases, where a trustee had improperly invested in bank stock, the liquidators, after exhausting his funds, granted him a discharge on receiving an assignation of any right competent to him against the trust estate. The beneficiaries under the trust had approved of the investment made, but the Court held that their approval did not imply an obligation to relieve the trustee, and that the trust funds were not liable (*City of Glasgow Bank v. Parkhurst*, 1880, 7 R. 749). It must be noted, however, that the Act of 1891 (54 & 55 Vict. c. 44, s. 6) provides that where a trustee commits a breach of trust "at the instigation or request, or with the consent in writing of a beneficiary," the Court may, if it think fit, apply "all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him."

Where two partners of a firm were registered as "A & B" and the survivor of them for behoof of "the firm, it was held that they were liable as contributories jointly and severally, and not each merely for half of the stock held by them (*Gillespie and Paterson*, 1879, 6 R. 714, 6 R. (H. L.) 104).

Where trustees, who had power to hold stocks held by the truster, allocated various stocks to meet legacies to two beneficiaries, and kept and

rendered separate accounts to each beneficiary, they were held to have practically created two trusts, and therefore not to be entitled to relief from the one in respect of liability arising from the other (*Robinson*, 1881, 8 R. (H. L.) 127; rev. 1880, 7 R. 694).

Before trustees can be held liable as partners, it must be clear that they have authorised the transfer of the stock to their names (*Cuninghame*, 1879, 6 R. 679, 6 R. (H. L.) 98; *M'Ewen*, 1879, 6 R. 1315; but see *Lumsden*, 1865, 3 M. (H. L.) 89), or have acted in such a way as to preclude themselves from maintaining that they are not partners, *e.g.* by signing dividend warrants as trustees (*Roberts*, 1879, 6 R. 805; *Smith*, 1879, 6 R. 1017). But where a trustee had signed a mandate authorising the bank to pay to the agents of the trust dividends described as "standing in our names," it was held competent for him to prove by parole that he had signed the mandate under a mistake (*Gillespie*, 1879, 6 R. 813).

Where trustees or executors find that the estate coming into their hands consists partly of shares in a joint stock company, they may either make up a title by confirmation, which will entitle them to sell the shares without going on the register, and may intimate the fact of confirmation to the company as a mere notice that they have made up a title, or they may intimate the confirmation to the company, and request that the shares be transferred to their names, the effect of which will be that they become partners in the company (see *Wishart*, 1879, 6 R. 1341, per Ld. Shand, at p. 1349). So also a *curator bonis* can sell stock belonging to his ward without putting his own name on the register, or incurring liability as a partner; and where a bank had, without the *curator's* authority, put his name upon the register, and sent him a stock certificate in his own name for stock belonging to the ward's estate, it was held that the *curator* was not personally liable as a partner (*Lindsay's Curator*, 1879, 6 R. 671).

In a *mortis causa* disposition to trustees the condition of survivorship is implied, and therefore when one of a set of trustees dies, his representatives have no interest in the trust estate. So, when trustees hold shares in a public company, and one of them dies, his representatives are not liable for calls made in respect of these shares subsequent to his death, though they are liable to the extent of his estate for any obligations incurred by him as trustee prior to his death (*Oswald's Trs.*, 1879, 6 R. 461). Where, therefore, a body of trustees are registered as shareholders in a company, the death of one of them will reduce the number of persons liable as shareholders for future obligations, and this whether the existence of the trust is noticed on the register or not, so long as it appears in fact that they hold jointly with the condition of survivorship (*ib.*, per Ld. Pres. Inglis, at p. 470; *Kirby*, 1871, Reilly, *Albert Arbitration Reports*, 67, per Ld. Cairns). In the ordinary case, no intimation of death is necessary to dissolve a partnership, and the executors of a deceased trustee are under no obligation to intimate his death to a company in which he held shares. "If there was a duty on anybody to make intimation to the bank of the death of this trustee, it was a duty laid on his co-trustees and not upon his executors —upon those who really come in his place to represent him in regard to that trust estate of which he was originally an administrator. But I am not prepared to say that there is any positive obligation upon these surviving trustees, or that this failure on their part to make such intimation can be followed by any important consequences. And therefore it really comes to this, that there being nobody in such circumstances upon whom there can be imposed any duty to make the intimation which is said here to be wanting, the bank must be left to find out in the

best way they can when one of three co-trustees whom they have thought fit to register as partners of the bank dies and leaves the trust estate vested for the future entirely in his surviving colleagues (*Oswald's Trs.*, *ut supra*, per Ld. Pres. Inglis, at p. 465). There is a distinction, however, between the case of the death of one of a body of trustees and that of the death of a last surviving trustee. In the latter case there are no co-trustees in whom the property vests by survivance. In *Lord's Exrs.* (1879, 6 R. 830), where the name of the last survivor of a body of trustees had been allowed to remain on the register for six years after his death, it was held that, though the company was all the time aware of his death and though his executors did not know that he was a trustee on the particular trust, or that he held stock in the company as a trustee, yet, his name being on the register at the time of the stoppage of the company, his estate was liable, and his executors were consequently liable to the extent of the executry estate.

The effect of the resignation of a trustee upon his liability for shares held by the trustees has been already considered under the title RESIGNATION OF TRUSTEES (*q.v.*); but it may be mentioned here that resignation does not intimate itself, as death does, and that it is doubtful whether even intimated resignation, without an executed transfer, would divest the resigning trustee and transfer the shares to his co-trustees (see *Sinclair*, 1879, 6 R. 571; *Tochetti*, 1879, 6 R. 789). But where the company is not in liquidation, a trustee who has duly resigned and intimated his resignation to the company has an absolute right to have his name removed from the register (*Dalgleish*, 1885, 13 R. 223). As to the effect of the resignation of a last surviving trustee without an executed transfer, see *Shaw*, 1878, 6 R. 332.

In any case in which trustees have come under an obligation for behalf of the trust estate which involves them in liability to third parties, whether, for example, by granting a bond for money borrowed, or by holding shares in a joint stock company, they are bound *singuli in solidum* to make good the obligation. "Each of them equally has received the whole money; it has all been paid equally into the affairs of each of them,—that is, the trust affairs,—and each must be liable *in solidum* to repay it, whether out of the trust funds, if sufficient, or out of their own means, if necessary" (*Oswald's Trs.*, 1879, 6 R. 461, per Ld. Pres. Inglis, at p. 466; *Commercial Bank*, 1841, 3 D. 939).

Liability singuli in solidum.—In any question of liability founded upon delict or *quasi* delict, trustees are liable *singuli in solidum*, and where an action is raised against only one of them, a plea of all parties not called will not be sustained (*Mackay*, 1897, 4 S. L. T. 466; *Croskery*, 1890, 17 R. 697; *Western Bank*, 1860, 22 D. 447). *Quasi delict* is applied to actions which, while they are not of a criminal nature, are such as will found a claim for pecuniary reparation for damage sustained. *Ultra vires* or illegal acts by trustees are therefore of the nature of *quasi delict*, and the trustees committing them are liable *singuli in solidum* to the person affected, whether beneficiary or creditor (see *Croskery*, *ut supra*; *Stev.*, 1841, 4 D. 310; *Blain*, 1836, 14 S. 361).

(3) LIABILITY FOR EXPENSES.—When an action is raised against a trustee *qua* trustee, it is not competent under that summons to obtain a decree against him personally (*Ross*, 1846, 5 Bell's App. 57), but it is competent in such an action to find him personally liable for expenses, and in certain circumstances this will be done. The general rule is that a trustee who incurs expenses in litigating on behalf of the trust estate is

entitled to charge such expenses against the trust estate, and, if he has been found liable in expenses to his opponent, to charge these expenses also against the estate, even if they exhaust the funds, before paying the creditors of the trust (see *Drummond*, 1881, 8 R. 449). Such expenses will come, in the first place, off the residue in the case of a testamentary trust, but if this is insufficient to meet them, legacies left by the truster must suffer a proportional abatement (*Cameron*, 1844, 7 D. 92). Another question arises when the whole estate is insufficient to meet the expenses found due by the trustees in an unsuccessful litigation, and this will be considered immediately.

The rule as stated above is subject to the qualification that the litigation must be reasonable, reasonably conducted, and that the trustee must be in good faith. It applies to cases where the validity of the trust deed is challenged (*Ross*, 1896, 25 R. 897; *Watson*, 1875, 2 R. 344; *Munro*, 1874, 1 R. 1039), or is doubtful (*Whyte*, 1881, 8 R. 940; *Drummond*, 1881, 8 R. 449; *Tennant*, 1878, 6 R. 150; *Mitchell*, 1877, 4 R. 800), or where there is difficulty in ascertaining the meaning and effect of the deed (*Hamilton*, 1879, 6 R. 1216; *Ramsay*, 1876, 4 R. 243; *Spens*, 1875, 3 R. 50; *Graham*, 1850, 13 D. 420; *Speirs*, 1850, 13 D. 81; *Kirkland*, 1842, 4 D. 613; *Smitton*, 1839, 2 D. 225). Tutors have been found entitled to charge against their ward's estate the expenses of an unsuccessful litigation entered into in England to prevent their ward being made a ward in Chancery (*Johnstone*, 1856, 18 D. 343). In the recent case of *Crichton* (1898, 1 F. 24), an action for the reduction of a will, the issue submitted to the jury was framed in such a way as to involve the trustees in a charge of fraud, of which there was no averment as against them on the record. The will was reduced, and the trustees were in the circumstances allowed their expenses out of the estate; but the Lord President observed that the case did not involve any finding generally to the effect that trustees who are not charged with fraud are entitled to try the case at the expense of the trust estate, and should not rather go to the beneficiaries and say that they could not defend unless they were kept clear of expenses. It would seem, therefore, to be the duty of trustees in such a case where the existence of the estate as a trust estate is involved, where the trust estate is so small that there is a danger of its being entirely swallowed up in the litigation, to consult their constituents before embarking upon litigation and that the Court, in exercising its discretion with regard to expenses, will take into consideration the fact whether or not the trustees were in a position to do so. A distinction can be drawn between the case of a trustee for creditors or a trustee for major beneficiaries who are capable of giving their consent, and the case of a trustee for minor beneficiaries, or a *curator bonis* to an insane person, or trustees who are acting under statutory authority (see *Craig*, 1896, 24 R. 6, per Ld. M'Laren, at p. 20; *Young*, 1880, 7 R. 891, per Ld. Young, at p. 898; *Graham*, 1860, 23 D. 41, per Ld. J.-Cl. Inglis, at p. 44; *Angerstein*, 1874, 9 Ch. 479; but see *Hutton*, 1899, 6 S. L. T. 480). In practice, a trustee for creditors or an official liquidator as a rule obtains an indemnity for expenses from his constituents before embarking upon litigation.

The general rule applies also to cases where a trustee has a reasonable ground for making a claim on behalf of the estate or disputing a claim made against it, even if he is unsuccessful (see *Mackenzie*, 1894, 22 R. 233, per Ld. M'Laren; *Dickson*, 1829, 8 S. 99; *Kesson*, 1898, 1 F. 36; and, with regard to the liquidator of a company, *Bolton*, [1895] 1 Ch. 333). Again, the expenses of an action of multiplepoinding and exoneration,

brought by trustees to enable them to distribute the estate, will be granted be allowed out of the estate (*Jamieson*, 1888, 16 R. 15; *Douglas*, 1870, 13 D. 54; *Taylor*, 1836, 14 S. 817). Such an action may be brought by trustees where there is a doubt as to the persons entitled to the estate, or where the trustees are unable to obtain a valid discharge from the beneficiaries, even though there are no competing claims constituting double distress (see per Ld. Pres. Inglis in *Connell's Tr.*, 1872, 5 R. 756). But trustees are not entitled to bring a multiplepoinding to settle the validity of a claim upon the estate, unless the claim is one which, if valid, would cause double distress; and trustees bringing an incompetent action of this nature may be found personally liable in expenses (see *Mackenzie*, 1894, 22 R. 233; *Connell's Tr., ut supra*). Where trustees bring an action of multiplepoinding to have a question which has been raised as to the validity of the deed determined, it is their duty to lodge a claim as trustees, for the whole fund for the purposes of administration (*Hall*, 1892, 19 R. 567). Undue litigiosity in the conduct of the multiplepoinding may subject the trustees to personal liability (*Farquharson*, 1823, 2 S. 226). In a recent case, where marriage-contract trustees had resigned and a judicial factor had been appointed, the judicial factor, before the trustees had been discharged, sued them as individuals to account for their intromissions as trustees. They were assoilzied: and in their subsequent petition for discharge, it was held that they were entitled to retain the extrajudicial expenses incurred by them in the action out of the trust funds still in their hands (*Erentz*, 1897, 25 R. 53).

In all these cases, however, the question of liability for expenses is in the discretion of the Court, who may either refuse to allow the trustees to pay their own expenses out of the trust funds, or go further and find them personally liable for expenses to their successful opponents. Thus either of these courses may be adopted, according to circumstances, where the trustees have unsuccessfully defended a deed to the implement of which they have been accessory (see *Watson*, 1875, 2 R. 344, per Ld. Pres. Inglis), or where they have unjustifiably defended an action or improperly conducted their defence (see *Law*, 1876, 3 R. 1092; *Graham*, 1860, 23 D. 41; *Kay*, 1850, 12 D. 845; *Morrison*, 1848, 11 D. 297; *Nicol*, 1829, 7 S. 777).

Where a trustee is removed from office for misconduct, he may be found personally liable for the expenses of the petition to remove him, and he will not be allowed to charge his own expenses in opposing the petition against the trust funds (*Jackson*, 1865, 4 M. 177; *Thomson*, 1865, 3 M. 336). But there may be circumstances in which a trustee will be allowed out of the trust funds the expenses of opposing a petition for the appointment of a judicial factor on the trust estate, even where the opposition is unsuccessful (*Baxter & Mitchell*, 1864, 2 M. 915). Again, the expenses of a petition for the appointment of new trustees on a trust which has become unworkable may form a proper charge on the fund (*Jackson*, 1881, 9 R. 213). In *Laidlaws* (1884, 11 R. 481), a trustee who had unsuccessfully defended an action calling on him to denude, was found not liable for the expenses of his opponents, and was allowed his own expenses out of the trust funds.

A trustee whose action involves the trust in unnecessary litigation may be found personally liable for the expenses thereof (see *Ross*, 1876, 5 R. 1015). Where, for example, he has to sue for the recovery of documents which he has improperly allowed to leave his hands, he will not be allowed to charge his expenses against the trust (*Hall*, 1856, 18 D. 316). So also

where he unnecessarily compels a beneficiary to take steps to make good his claim, he may become personally liable for the beneficiary's expenses (see *Cameron*, 1844, 7 D. 92; *Murray*, 1831, 9 S. 631; *Ferguson*, 1869, 6 S. L. R. 238; *Adam*, 1867, 6 M. 31; *M'Eachern*, 1865, 3 M. 833; *Chapman*, 1895, 11 T. L. R. 177).

When trustees have acted improperly in defending an action, the fact that they have only been concluded against "as trustees" will not prevent the Court from finding them personally liable in expenses (*Kay*, 1850, 12 D. 845).

In actions between trustees regarding the trust estate, the expenses will not form a proper charge against the estate (*Fotheringham*, 1852, 14 D. 427).

The question whether a trustee who litigates unsuccessfully, but reasonably and in good faith, is personally liable for the expenses found due to his opponent in the event of the trust estate being insufficient to meet them, is not free from difficulty. The balance of opinion and authority appears to be that he is so liable (but see Ld. Young's opinion in *Craig*, 1896, 24 R. 6, at p. 13). The rule would thus seem to be that though there is a fiduciary relation between the trustee and a beneficiary, the fact of his fiduciary character has no effect in a question between him and a third party, and he litigates with him as an individual on the ordinary terms as to expenses. This has been held in the case of a trustee in a sequestration (*Gibson*, 1833, 11 S. 656; *Torbet*, 1849, 11 D. 694), and in the case of the liquidator of a company (*Consolidated Copper Co. of Canada*, 1877, 5 R. 393; see also *Angerstein*, 1874, 9 Ch. 479). But in such cases the trustee or liquidator has the opportunity, and the duty, of taking the advice of his constituents, and obtaining from them an indemnity for his expenses. A father, also, has been found liable for the expenses of a litigation undertaken by him as tutor to his pupil child (*White*, 1894, 21 R. 649). A curator, however, may be in a different position. He merely consents to an action, and does not, like a tutor or a trustee, litigate as an individual (see per Ld. Adam in *White, ut supra*, at p. 654; *Whitehead*, 1893, 20 R. 1045, at p. 1049). But it is in the discretion of the Court to award expenses against a curator where he has taken a prominent part in the action, and has not merely given a formal consent in order to make the action competent (*Fraser*, 1892, 19 R. 564).

It has been said that where it is intended to make a trustee personally liable for expenses, should the trust funds not be sufficient to meet them, he should be decerned against personally and not *qua* trustee (*Davidson's Tr.*, 1850, 12 D. 1069); but it has also been held that it is no ground to suspend a charge for payment of expenses against a trustee, who has been decerned against *qua* trustee, that he has no trust funds in his hands (*Gibson*, 1833, 11 S. 656; *Scott*, 1826, 5 S. 172; see *Clyne*, 1840, 2 D. 554). On the other hand, the judgment of the House of Lords in *Gordon* (1842, 1 Bell's App. 428) appears to be against this view; and in the recent case of *Craig* (1896, 24 R. 6) it was held that a judicial factor who had been found liable in expenses *qua* judicial factor was not personally liable to make good a deficiency in the factorial funds. From the opinions of the judges in this case, there would seem to be no difference in this respect between a judicial factor and any other person who litigates in a fiduciary capacity, and the result would appear to be that the Court may in its discretion limit the liability of a trustee to the extent of the funds in his hands by decerning against him for expenses *qua* trustee. In

exercising this discretion, the Court may perhaps be influenced by the consideration whether or not the trustee was in a position to consult his constituents before embarking upon litigation. A trustee who represents minor beneficiaries or an *incapax* may be in a very difficult position if he has to choose between neglecting his duty, by refusing to pursue or defend an action which, in the exercise of his judgment, he conceives to be for the benefit of the estate, and running the risk of personal liability for expenses in the event of the action being lost. In one case, indeed, it has been held that a *curator bonis* to an *incapax*, who had been found liable to his opponent for the expenses of an action, was only liable to the extent of the estate in his hands (*Forbes*, 1845, 7 D. 853). At the same time, a majority of the judges in the case of *Craig*—four to three—expressed the opinion that a judicial factor who litigates unsuccessfully, whether as pursuer or defender, is as a general rule personally liable for expenses to the successful party (see also *Drummond*, 1881, 8 R. 449; *Ferguson* 1863, 16 D. 260; *Law*, 1876, 3 R. 1192; *Young*, 1876, 3 R. 991; 1880, 7 R. 891).

A *curator ad litem* is in a different position from other trustees, and cannot be made personally liable for expenses (*Fraser*, 1847, 9 D. 903).

Expenses incurred in Promoting or Opposing Bills in Parliament.—The principle involved in the question of liability for parliamentary expenses is very much the same as that applied to the expenses of litigation.

A judicial factor appointed under the Railway Companies Act, 1867, on the undertaking of a railway company has been found entitled to apply to Parliament for an Act to enable him to sell the undertaking, and to charge the expenses of the application against the factory estate (*Haldane*, 1881, 9 R. 253; *Haldane*, 1882, 9 R. 854).

A body of statutory trustees is entitled to promote in Parliament a Bill which is necessary to remove obscurities in the Act by which they are appointed, or to remove practical difficulties in the way of the trust (*Leith Water Commissioners*, 1879, 6 R. 1050, per L. J.-Cl. Moncreiff, at p. 1059). In *Brighton* (1847, 16 L. J. Ch. 255) the Trustees of the Banks of the River Ouse were found entitled to the costs of opposing a Bill which would have injured the river's banks, the Lord Chancellor (Cottenham) explaining that every trustee is entitled to the fair expense of defending the trust property (see also *Leith Dock Commissioners*, 1897, 25 R. 126; *Campbell*, 1847, 9 D. 397). Private trustees also may be entitled to charge the estate with the expenses of opposing a Bill, if, in the circumstances, the opposition is justifiable (*Nicoll*, 1878, 13 W. N. 154; *Berkeley*, 1874, 10 Ch. 56).

But if public trustees go to Parliament for powers to change the purposes of the trust, or powers to do something not fairly within the contemplation of the trust, they go at their own risk as regards expenses. The rule is that the costs of parliamentary procedure cannot be charged against a public trust where they are not incurred in the fulfilment of the declared or clearly implied purposes of the trust, or in the exercise of powers conferred expressly or by clear implication on the trustees (see *Cowan and Mackenzie*, 1872, 10 M. 578, per Ld. Ardmillan, at p. 597). They are not entitled to charge against the trust funds, or against the rates which they levy, the expenses incurred in promoting a Bill to enlarge their powers. If the Bill is passed, they will probably obtain from Parliament authority to charge their expenses against the trust funds; but if it is not passed, they cannot do so (*Cowan and Mackenzie*, *ut supra*; *Mylne*, 1855, 18 D. 295; *Attorney-General*, 1850, 19 L. J. Ch. 197). They are not entitled to oppose public Bills unless these Bills directly affect the administration of their trust (*Wakefield*, 1878, 6 R. 259). Where the Water Commissioners of a

burgh unsuccessfully opposed a bill promoted by certain inhabitants to extend the water supply, it was held that they were not entitled to charge their costs against the trust funds (*Perth Water Commissioners*, 1879, 6 R. 1050). "Much, if not all, depends on the result of the parliamentary proceedings. It will be very difficult to show that opposition to a measure which Parliament has declared to be beneficial was due administration of the trust. This may not be conclusive, as success may not be conclusive the other way, but the verdict of the Legislature is an important and formidable factor in the result" (per Ld. J.-Cl. Moncreiff, 6 R. 1057). In *Leith Dock Commissioners* (1897, 25 R. 126), the Magistrates of Leith, who had successfully opposed a Bill for the purpose of amalgamating their burgh with the City of Edinburgh, were held not to be entitled to charge their expenses against the Public Health rate, which they had proposed to do. The question here decided was that they were not entitled to throw the whole expense upon that particular rate, but opinions were indicated by all the judges that the expenses might properly be made a charge against the general funds and property of the burgh.

Termination of the Trust.

The Court will not allow a trust to be continued after its purposes have been fulfilled, and its machinery has therefore become unnecessary. When nothing remains but to distribute the estate amongst those beneficially entitled to it, the trustees are bound to make this distribution and bring the trust to an end. They are at the same time entitled to a discharge of their intromissions, and this discharge must be without reservation (*Edmond*, 1860, 23 D. 21; *Elliot's Trs.*, 1828, 6 S. 1858; *Taylor*, 1837, 14 S. 817). But the granting of a discharge by a beneficiary does not prevent him from afterwards insisting that the business accounts of the trust should be taxed, if he can aver that there have been overcharges (*M'Farlane*, 1897, 24 R. 574).

As has already been seen, a special legatee need not give more than an ordinary receipt on payment of his legacy; but when the distribution is final, or when the payment is to the residuary legatee, and therefore involves approval of the administration of the trust, the trustees are entitled to a formal discharge (*Fleming*, 1861, 23 D. 443). Where they are unable for any reason to obtain such a discharge, or where the beneficiaries refuse to grant it, or if there is any doubt as to the parties amongst whom the estate should be distributed, the trustees are entitled to raise an action of multiplepoinding and exoneration, and to distribute the estate under the authority of the Court. It is not necessary, in such a case, that actual double distress should be averred; but it is not competent by such an action to settle the question of the validity of a claim upon the estate, unless the claim is one which, if valid, would cause double distress (see *Mackenzie*, 1895, 22 R. 233; *Davidson*, 1895, 3 S. L. T. 249; *Gordon*, 1895, 2 S. L. T. 540; *Frazer's Executrix*, 1893, 20 R. 374; *Connell*, 1878, 5 R. 735; *Jamieson*, 1888, 16 R. 15; *Blair*, 1863, 2 M. 284; *Dunbar*, 1850, 13 D. 54; *Taylor*, 1836, 14 S. 817; *M'Dougall*, 1830, 8 S. 1036). Unreasonable delay in granting a discharge, or vacillating conduct with regard to granting it on the part of the beneficiaries, will entitle trustees to obtain judicial exoneration and discharge (*Fotheringham*, 1852, 14 D. 427). A judicial factor, being an officer of the Court, cannot obtain his discharge in an action of multiplepoinding, but must, after distributing the estate, present a separate application for discharge to the Court (*Campbell*, 1870, 8 M. 988; *Carmichael*, 1853, 15 D. 473).

Where the trustee has difficulty in obtaining a discharge from the beneficiaries, it is also competent for him to bring an action concluding for

declarator that he has fully accounted for his intromissions, and for his discharge upon his paying or conveying the estate to those in right to it (see *Davidson's Trs.*, 1896, 23 R. 1117). In such a case, if it is conceded and if the trustee is found entitled to expenses, he is entitled to have the account taxed as between agent and client, in order that he may be kept *indemnis*, as he is denuding of the whole trust estate (*A.*). See EXONERATION AND DISCHARGE.

Where the existence of a liferent or annuity is the only obstacle to bringing the trust to an end, it is not always necessary to keep up the trust. Unless the annuity is alimentary (*White*, 1677, 4 R. 756; *Smith and Campbell*, 1873, 11 M. 639; *Cosens*, 1873, 11 M. 761; *Elliot's Tr.*, 1894, 21 R. 975; *Hughes*, 1892, 19 R. (H. L.) 33; *Duthie*, 1878, 5 R. 558; *Lorne*, 1887, 24 S. L. R. 735), or provided for by an irrevocable deed (*Kay*, 1895, 23 R. 317; *Menzies*, 1875, 2 R. 507; *Torry Anderson*, 1887, 15 S. 1073; *ante*, p. 359), it can be renounced by the annuitant; and on its renunciation the beneficiaries who have a vested interest in the estate can call on the trustees to denude in their favour (*Louson*, 1886, 13 R. 1003; *Urquhart*, 1886, 14 R. 112; *Ramsay*, 1871, 10 M. 120; *Pretty*, 1854, 16 D. 667; *Rainsford*, 1852, 14 D. 450; *L'Amy*, 1850, 13 D. 240; *Roberton*, 1846, 9 D. 152; *M'Murdo*, 1897, 34 S. L. R. 339). It may be observed that an alimentary liferent reserved by the truster himself may be renounced by him so as to set free the fund for division (*Hamilton*, 1879, 6 R. 1216). The claiming by a widow of her legal provisions, in lieu of a liferent provided for her by her husband, is equivalent to a renunciation of the liferent and sets the property free for division (*Annandale*, 1847, 9 D. 1204). But the renunciation of an annuity or liferent has no effect on the vesting of the interests under the deed. "In cases where the final distribution of a trust estate is directed to be made on the death of an annuitant and it clearly appears that in postponing the time of division the testator had no other object in view than to secure payment of the annuity, it may be within the power of the Court, upon the discharge or renunciation of the annuitant's right, to ordain an immediate division. But in order to the due exercise of that power it is, in my opinion, essential that the beneficiaries to whom the trustees are directed to pay or convey, shall have a vested and indefeasible interest in the provisions. That principle appears to me to be just in itself and to be firmly established by *Roberton* (1846, 9 D. 152), *Rainsford* (1852, 14 D. 450), and *Pretty* (1854, 16 D. 667). I cannot conceive that it should be in the power of any Court to give the testator's estate to persons other than those whom he has appointed to take. It may also be that in the circumstances supposed, the Court would be justified in directing distribution, although no beneficial interest had vested, if application were made to that effect by the entire class of persons to whom, or to one or more of whom, the beneficial interest must eventually belong" (per Ld. Watson in *Hutchison*, 1890, 17 R. (H. L.) 45, at p. 48; see *Hughes*, 1892, 19 R. (H. L.) 33; *Lorne*, 1881, 8 R. 502).

In *Haldane* (1895, 23 R. 276) a testator had instructed his trustees to pay the liferent of his estate to his widow, and on her death to pay certain provisions to his son and four daughters. The widow offered to discharge her liferent in regard to the son's provision, and in respect of this the son called upon the trustees for payment. In a special case it was held that the trustees were not *bound* to make payment to the son, as the daughters were entitled to *pari passu* payment along with the son, and it was possible that when the date of payment arrived the estate might not be sufficient to pay the provisions in full. But it was suggested that the trustees

might be *entitled* in the exercise of their discretion to accede to the son's demand.

Repugnancy.—Where the fee of an estate has vested in a beneficiary, the beneficiary is entitled to have it made over to him absolutely, in spite of directions to the trustees to retain it for purposes of administration. Such directions are void from repugnancy (*Ballantyne*, 1898, 25 R. 621; *Stewart*, 1897, 25 R. 302; *Greenlees*, 1894, 22 R. 136; *Ritchie*, 1894, 21 R. 679: *Millar*, 1890, 18 R. 301; *Brown*, 1890, 17 R. 517; *Clouston*, 1889, 16 R. 937; *Duthie*, 1889, 16 R. 1002; *Jamieson*, 1889, 16 R. 807; *M'Nish*, 1876, 7 R. 96; *Douglas*, 1879, 7 R. 295; *Allan*, 1872, 11 M. 216; see *Stainton*, 1850, 12 D. 571). Thus where trustees were directed to hold and manage the estate until the beneficiary reached the age of twenty-five, and there was a declaration that the estate should not vest in him until he reached that age or married with the consent of the trustees, it was held that on his marriage with that consent before reaching twenty-five he was entitled to call on the trustees to denude in his favour (*Millar*, *ut supra*). A fee thus situated will, therefore, fall to the beneficiary's trustee in bankruptcy (*Mackinnon*, 1892, 19 R. 1051). Where a testator had left certain property to his wife, and had declared that by accepting the provision she should be held to bind herself to leave a proportion of it to certain of his relatives, with a further declaration that the provision thus made for these relatives should be of an alimentary character, and should "be invested for them, and not paid in cash," it was held that as he had given his wife no directions to create a continuing trust to preserve the alimentary character of the provision for his relatives, the latter had, on the wife's death, an unrestricted right to the provision, and were entitled to immediate and unconditional payment thereof (*Murray*, 1895, 22 R. 927). Where, therefore, in order to prevent the actual money going into the hands of the person to whom the fee is given, it is practically necessary to set up a new trust, the Court will refuse to do so. But it has been held that where there is in existence a trust, and the trustees are expressly directed to retain in their own hands money which has vested in the beneficiary, there being no ulterior purposes, the direction is one which the trustees can obey, and they are bound to retain the money (*Christie*, 1889, 16 R. 913). This case, however, does not seem to decide more than that in such circumstances it is the duty of the trustees to maintain the trust as long as they can, and to afford such protection to the estate as it is in their power to do. It is not easy to see how they could resist a demand made by the beneficiaries or their creditors.

It has been recently decided in England that where there is an absolute vested gift, payable upon the occurrence of a future event, accompanied by a direction to the trustees to accumulate, and to pay the accumulations of income with the capital upon the occurrence of that event, the Court will not enforce a trust to accumulate in which no person has an interest except the legatee, that is to say, that a legatee may put an end to an accumulation which is exclusively for his benefit (*Wharton*, [1895] App. Ca. 186; see also *Lowman*, [1895], 2 Ch. 348). See Vesting.

Lapsed Trust—Completion of Title by Beneficiary.—Provision is made by the 1867 Act, s. 14, for a case where a trustee has died or become incapable of acting before handing over the property to the person entitled to it. That section provides that in such circumstances a beneficiary who is entitled "to the possession for his own absolute use" of any heritable or moveable property, the title to which has been taken in the name of a trustee or judicial factor, may apply by petition to the Court for authority

to complete a title to the property in his own name. Where an accepter-nominate, who had ingathered the whole estate, died before distributing it, a petition by those beneficially interested under the will for authority to make up a title under this section was granted (*Cowper*, 1897, 5 S. L. T. 117). But this procedure is only competent to the beneficiary himself, and not to his assignee (*Macknight*, 1875, 2 R. 667).

[See Stair, i. 12. 17; i. 13. 7; ii. 10. 5; iv. 6; iv. 45. 21; More, *Notes*, lxxi, cxliv, clxix; Erskine, iii. 1. 32; iii. 5. 8; iv. 1. 45; Bell, *Prin.* ss. 1591 *et seq.*; Bell, *Conveyancing*, 942 *et seq.*; Menzies, *Conveyancing*, 703; M'Laren, *Wills and Succession*; M'Laren, *Trusts*; Howden, *Trusts*; Menzies, *Trustees*; Forsyth, *Trusts*; Wood, *Trusts Acts*.]

See APPOINTMENT OF TRUSTEES; ASSUMED TRUSTEES; ASSUMPTION OF TRUSTEES; CHARITABLE TRUSTS; JUDICIAL FACTOR ON TRUST ESTATE; LEGACIES; REMOVAL OF TRUSTEES; RESIGNATION OF TRUSTEES; SUCCESSION; TESTAMENT; TRUST DEED FOR CREDITORS; VESTING; WILL.

Trust Deed for Creditors.—A trust deed for creditors is a deed by which a debtor conveys his estate to a trustee in order that the latter may hold it against the granter for behoof of his creditors, and for distribution among them towards satisfaction of their claims. It is of the essence of the trust that the trust disponee, whether selected by the debtor or by the creditors, holds the estate conveyed as representative of the creditors, and not merely as the mandatory or agent of the debtor (Bell *Com.* ii. 383; see *Mess*, 1898, 36 S. L. R. 73). His right in the estate is derived from the voluntary act of the debtor; but being once duly constituted, it is not revocable by the debtor. The deed is, in fact, a short-handed way of handing over the estate to the creditors. To convey it direct to the creditors themselves, while theoretically possible, is not a practicable arrangement where, as usually happens, the creditors are a numerous body; hence the method is resorted to of interposing a third party, as representative of the creditors, who undertakes the duty of realising the estate in their interests, and of dividing the proceeds among them in accordance with their legal rights and preferences.

It is obvious that the execution of such a trust conveyance cannot in itself affect the rights of the granter's creditors to have their debtor's estate distributed among them by the machinery which the law provides. Accordingly, the efficacy of such a trust, as an arrangement for extra-judicially liquidating the debtor's affairs, is dependent upon the consent of the creditors, in whose option it is to accede to the arrangement or not as they please. Considerations of economy, as well as a willingness to save the debtor from public bankruptcy, conduce to the acceptance of private trusts, and this mode of extrajudicial liquidation is very common.

A trust deed for creditors is reducible under the Act 1696, c. 5, if granted after the constitution of notour bankruptcy, or within sixty days prior thereto (*Mackenzie*, 1868, 6 M. 833; *Nicolson*, 1872, 11 M. 179), and also under the second part of the Act 1621, c. 18, if it defeats lawful diligence already begun (*Grant*, 1835, 13 S. 424; *Mackenzie*, supra). Apart from the application of these statutes, "a voluntary trust deed granted by a party insolvent but not bankrupt, for behoof of all his creditors equally and containing no extraordinary clauses, will be irrevocable by the granter and good and availing to bind non-acceding as well as acceding creditors, if the estate be reduced into possession by the trustee, and the debtor is not rendered notour bankrupt within sixty days. The trustee, in such a case, does not represent the debtor. He represents the creditors in their just

proportions, and all preferences by arrestment are excluded" (per Ld. Deas in *Nicolson*, 1872, 11 M. 179). The decisions on the subject do not yield any general definition of the kind of "extraordinary clauses" in a trust deed which will exclude it from the rule thus laid down. Clauses as to the discharge of the debtor are regarded as merely an excrescence on the deed; creditors are entitled to ignore them, but they do not invalidate the trust (*Henderson*, 1882, 10 R. 185; *Oyilvie*, 1887, 14 R. 399). Professor Bell's opinion (*Com.* ii. 384), that such clauses can be held *pro non scriptis* only where the granter of the trust deed is willing that they should be disregarded as an essential part of the deed, has not been approved (see *Henderson, supra*).

In order to exclude the diligence of non-acceding creditors under the rule above quoted, the trustee's title must be completed by infeftment, intimation, etc., as the case may be (Bell, *Com.* ii. 386; see *Lamb's Tr.*, 1883, 11 R. 76).

While a trust complying with the conditions of the above rule has the effect of excluding all the creditors from acquiring preferences by diligence, it does not prevent a non-acceding creditor from using arrestments in the hands of the trustee himself; but such arrestments will only attach any surplus or reversion of the debtor's estate that may remain after fulfilment of the purposes of the trust (*Marianski*, 1871, 9 M. 673). And as the existence of such a reversion implies that all the creditors at the date of the trust have been paid in full, arrestment in the hands of the trustee can afford no remedy to any but subsequent creditors.

If the trust deed be reducible under the Statute 1696, c. 5, or at common law, non-acceding creditors are entitled to ignore it, and do diligence against the estate (*Nicolson*, 1872, 11 M. 179)). If it is founded on in bar of their diligence, they may plead its nullity by way of answer (19 & 20 Vict. c. 79, s. 10).

A trust deed for creditors, whether containing extraordinary clauses or not, is liable to be superseded at any time by sequestration obtained by a creditor who has not acceded thereto (Bell, *Com.* ii. 391; *Lockie*, 1837, 15 S. 547; *Campbell*, 1862, 24 D. 1097; *Nicolson, supra*; *Kyd*, 1880, 7 R. 884; *Henderson*, 1882, 10 R. 185). An acceding creditor has been held entitled to resort to sequestration where the object of the trust was being defeated by the hostile proceedings of creditors who had not acceded (*Jopp*, 1844, 7 D. 260; *Campbell*, 1862, 24 D. 1097).

A trust deed may be superseded by cessio obtained at the instance of a non-acceding creditor, but the Sheriff is entitled to exercise a discretionary power in granting or refusing cessio (43 & 44 Vict. c. 34, s. 9 (3); *Robertson*, 1888, 16 R. 235).

The usual mode of constituting the trust is by a conveyance qualified *in gremio* by an expression of the trust purposes. The essential provisions are: (1) The realisation of the estate, (2) Payment of the creditors according to their legal rights and preferences, and (3) Restitution of any reversion to the debtor (Bell, *Com.* ii. 385). The right of the trustee, in order to be effectual against non-acceding creditors, must be completed by infeftment in the case of heritage, by delivery in the case of moveables, and by intimation in the case of debts or other such incorporeal rights (*ib.*, 386). It is unnecessary to enumerate the creditors in the deed (*ib.*, 387). Such enumeration, if made, seems to be binding on the debtor (*Ettles*, 1833, 11 S. 397; *Cruickshank*, 1893, 21 R. 257), and elides or interrupts prescription (Bell, *Prin.* s. 598; *Ettles, supra*; *Blair*, 1858, 21 D. 45, 21 D. 1004).

The trust deed may contain, besides the essential clauses above mentioned, other special provisions, as, for example, that the trustee shall be

judge of the creditors' claims, or applying the rules of ranking under the Bankruptcy Act, or providing for the debtor's discharge. Such provisions are not, apart from accession, binding on the creditors (*Goss*, 1747, M. 1210; *Sutherland*, 1724, M. 1199; *Ogilvie*, 1887, 14 R. 399), and their non-acceptance by a creditor does not bar him from claiming a dividend (*Ogilvie, supra*). Nor do such clauses as those above mentioned invalidate the trust (*Wilson*, 1762, M. 1214; *Johnstone*, 1870, M. App. "Bankrupt" No. 5; *Nicolson*, 1872, 11 M. 179; *Henderson*, 1882, 10 R. 195; *Lord*, 1884, 11 R. 76). The authorities, however, recognise that a trust deed may contain clauses so exceptional as to invalidate it, but what kind of clauses will have this effect has not been specifically decided (*see supra*).

Where all the creditors of the granter accede to the provisions of the deed, it becomes binding on them *ex contractu* as the mode of distributing the estate towards satisfaction of their claims, and any challenge of it on the head of bankruptcy or insolvency, or resort to sequestration, is excluded.

The most formal mode of constituting accession is by an express writing under the hands of the creditors or their duly authorised mandatories (see *Gibson*, 1824, 3 S. 263; *Henry*, 1897, 24 R. 1045). Accession may also be proved by the oath of the creditor, and also *rebus ipsis et factis*; but in the latter case a distinction has been drawn between the effect of accession as binding the creditors to abstain from proceedings hostile to the trust, and as binding them to an acceptance of extraordinary conditions of the deed (Bell, *Com.* ii. 393–5). To the first of these effects, accession may be inferred from attending a meeting of creditors and acquiescing in a resolution to accede (*Heriot*, 1766, M. 12404; *Wilson*, 1762, M. 1214; *Lee*, 1828, 6 S. 350; *Sturrock*, 1851, 13 D. 762), or from attending meetings from which acquiescence may be inferred (*Mackenzie*, 1854, 16 D. 1030). Mere knowledge of the trust is not sufficient (*Mackenzie, supra*, per Ld. Rutherfurd), nor lodging a claim with the trustee (*Athya*, 1881, 18 S.L.R. 297; *Kyd*, 1880, 7 R. 884), nor allowing decree to pass in name of the trustee against the creditor for a debt due by him to the truster (*Mudie*, 1822, 1 S. 458). Accession binding a creditor to accept extraordinary conditions of the trust, such as a consent to discharge the bankrupt on payment of dividend, or to make the trustee judge of the creditors' claims and preferences, or to grant the debtor an allowance, will, as a rule, be only held proved by express writing (Bell, *Com.* ii. 395). It may sometimes, however, be proved by facts and circumstances. Thus when the general creditors have been induced to forego an advantage for the sake of gaining the benefit of the accession of a particular creditor, things are no longer entire, and the creditor cannot resile. Thus the friends of the debtor may agree to relinquish securities, or to forego the opportunity of doing diligence, in order to secure the consent of other creditors to the arrangement. Creditors who bear and acquiesce in the proposal at a meeting, and who take partial benefit, as by drawing dividends under the arrangement, would not be entitled to plead that the deed of accession had not been signed by them (Bell, *Com.* ii. 395).

It is an implied condition of accession that the creditors be treated on a footing of equality, in the sense of no advantage being accorded to particular creditors beyond their legal rights in ranking. Thus if the assent of a creditor has been procured by a secret arrangement to pay him a larger sum than the dividend which he would in ordinary course be entitled to draw from the estate, the other creditors will be entitled to reduce the contract, or to demand repetition of what has been thus unfairly given, and a communication of the advantage to all the creditors (Bell, *Com.* ii. 395; see *Gordon Mack.*, 25 Nov. 1814, 15 F.C.). Further, the assurance of

each creditor is provisional on all the other creditors acceding; and, as has already been pointed out, if non-acceding creditors are doing diligence against the estate, an acceding creditor may also proceed with diligence (Bell, *Com.* ii. 395; *Watson*, 1724, M. 6397).

Where a creditor accedes, the accession is binding (1) on an assignee to the debt in respect of which it was given; (2) on the acceding creditor personally *quoad* any other claim on the estate thereafter purchased by him (Bell, *Com.* ii. 395; *Dick*, 1845, 8 D. 1. As to claim acquired fortuitously, see Bell, *Com. ib.*).

It is the duty of the trustee to reduce into his possession the estate conveyed to him, by infeftment, intimation, or otherwise, so as to exclude diligence at the instance of creditors. He has no title, however, to challenge preferences, unless it has by implication been conferred on him by the accession of creditors having a title to a trust deed containing a power to challenge (*Fleming's Trs.*, 1892, 19 R. 542). He must conform to any express provisions of the trust deed relative to management, and *quoad ultra* observe the rules of good management applicable to trust administration, as, *e.g.*, lodging the trust moneys in bank in his name *qua* trustee. He may be sued for negligence or malversation (*Bell*, 1834, 12 S. 738), and interdict may be obtained against him (*Pender*, 1831, 10 S. 19; see *Cruickshank*, 1893, 21 R. 257; *Tait*, 1897, 24 R. 1128).

With a view to distribution of the realised estate, the trustee adjudicates on the creditors' claims, and ranks them according to their rights and preferences. He may call upon a creditor to constitute his claim by action if not satisfied with the evidence adduced in support of it. A multiplepoinding is not, as a rule, a competent proceeding for settling disputes as to the division of the estate (*Kyd*, 1880, 7 R. 884; *Robertson*, 1899, 6 S. L. T. 353), the remedy of non-acceding creditors being to obtain sequestration, and of acceding creditors to proceed by direct action against the trustee (*ib.*). A trustee must see that all valid claims lodged with him are paid before handing back the estate in his hands to the truster, otherwise he will be personally liable therefor (*Cruickshank*, 1893, 21 R. 257).

The trustee is liable personally on all contracts and engagements which he enters into in the course of administering the trust (*Macphail*, 1887, 15 R. 47; *Ford*, 1888, 16 R. 24), unless he expressly contracts "as trustee" only (*Gordon*, 1842, 1 Bell's App. 428; see *Craig*, 1896, 24 R. 6). He is similarly liable on contracts of the debtor which he adopts. Thus where a tenant under a lease excluding assignees, assigned it to a trustee for creditors, who obtained the landlord's consent to the assignation, and entered into possession and ingathered the crop, 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 agreed to accept a renunciation of the lease by the trustee at the ensuing term of Martinmas (*Moncreiffe*, 1896, 24 R. 47). The trustee is personally liable also for expenses in litigations which he initiates or adopts (see *Buchanan*, 1827, 5 S. 745; *Torbet*, 1849, 11 D. 694). But a decree against him "as trustee" does not infer personal liability (*Craig*, 1896, 24 R. 6). Where he litigates unsuccessfully with a creditor claiming a ranking, he cannot operate his relief against the trust estate so as to diminish such creditor's dividend (*Cleghorn*, 1827, 5 S. 187; *Carsewell*, 1832, 10 S. 677).

Unless a remuneration to the trustee is provided for in the trust deed, or arranged to be given, he has no claim therefor (*Johnstone's Trs.*, 1738, M. 13407, and 21 D. 1383). He is not entitled to charge professional fees for work done by him (see *Lauder*, 1859, 21 D. 1353). For his outlays and

advances and remuneration which may be due to him, he has a lien over the estate in his possession (*Thomson*, 1880, 7 R. 1035; see *Mor.* 1368, 26 S. L. R. 73); but in the event of sequestration, he cannot in virtue thereof withhold the estate from sequestration trustee (*Ball*, 1870, 8 M. 1066).

The trustee may be called upon by the creditors to denude in their favour (Bell, *Com.* ii. 392; *Allan*, 1792, Bell's Oct. Ca. 538).

The provisions of the Trust Act, 1867, as to appointment of new trustees by the Court, have been held to apply to non-gratuitous trusts for creditor (*Royal Bank, Petrs.*, 1893, 20 R. 741).

The radical right in the trust estate remains with the truster. Thus it may be bequeathed or assigned by him (*Renton*, 1833, 12 S. 266; *Hervey, Furquhar, & Co.*, 1838, 16 S. 948), or entailed (*M'Millan*, 1831, 9 S. 551, affd. 7 W. & S. 441); and his heir-at-law, in making up title, must do so by service to the truster, and not by conveyance from the trustee (*Gilmour*, 1873, 11 M. 853). In virtue of his radical right the debtor has a title to prevent the trustee wasting or misapplying the estate (*Pender*, 1831, 10 S. 19; *Tait*, 1897, 24 R. 1128), and, failing accession of all the creditors, to apply for sequestration (*Thomson*, 1827, 5 S. 441); and ultimately, when the purposes of the trust have been carried out, he is entitled to call upon the trustee to account for his intromissions (Bell, *Com.* ii. 392; *Elwood*, 1860, 23 D. 21; *Ritchie*, 1881, 8 R. 747; *Tait*, *supra*; cf. *Martin*, 1836, 15 S. 227).

Where the trust deed stipulates for a discharge to the debtor upon full distribution of the estate conveyed, he is entitled to such a discharge from all creditors who have acceded to the trust so as to be bound by such a stipulation (see *supra*), and have received their proper dividends (*Gibson*, 1824, 3 S. 263). Otherwise the debtor is not discharged of his debts except to the extent of the dividends received by the creditors from the estate (Bell, *Com.* ii. 396).

[Bell, *Com.* ii. 382 *et seq.*; Goudy on *Bankruptcy*, 498 *et seq.*; Graham Stewart on *Diligence*, 54 *et seq.*]

Tug and Tow.—When one vessel employs another to tow her, the law implies an engagement that each vessel will perform her duty in completing the contract; that proper skill and diligence will be used on board of each; and that neither vessel, by neglect or misconduct, will create unnecessary risk to the other, or increase any risk which may be incidental to the service undertaken (*The Julia*, 1861, Lush. 224, 231). The tug must be efficient and properly equipped for the service (*The Undaunted*, 1886, L. R. 11 P. D. 46; *The Ratata*, L. R. [1897] P. 118; [1898] A. C. 513). If, *e.g.*, the master of the tug have failed to supply the tug with a sufficient quantity of coal, the owners of the tug are not freed from responsibility for this want of proper equipment by a provision in the contract of towage that the owners of the tug are not responsible for the default of the master (*The Undaunted*, *supra*). A contract to tow is not, however, a warranty to tow to destination, but an engagement to use best endeavours and competent skill for that purpose (*The Minnehaha*, 1861, Lush. 335). If performance of the stipulated service is rendered impossible by *vis major* or accident, the contract is at an end (*The Minnehaha*, *supra*; *The Medina*, L. R. [1898] P. 90). The risk is assumed to be no more than ordinary, under ordinary bad weather (M'Lachlan, *Merchant Shipping*, p. 293). Delay in the performance of the service, caused by accident to the tow, will not give to the tug a right to increased remuneration (*The Hjemmett*, 1880, L. R. 5 P. D. 227). Where, however, the towage agreement provides for demurrage being paid to the

tug in case of detention arising from accident, it is otherwise (*New Steam Tug Co.*, 1869, 7 Macph. 733). If a vessel is damaged, and that fact is concealed from the tug, towage service will be converted into salvage, and the tug entitled to salvage reward (*The Kingalock*, 1854, Spinks E. & A. 263). For the distinction between towage and salvage, and for the conversion of towage service into salvage, see SALVAGE, vol. xi. p. 74).

It is the duty of a vessel, even a steamship, to employ a tug when she is in such circumstances that she is not properly under control without one. She will be responsible for damage done by her in consequence of failure to do so (*The Gertor*, 1894, 7 Asp. M. C. 472). It may be proper and necessary for a vessel, in consequence of her length and the tortuous nature of the channel to be navigated, to have a tug astern to assist in steering (*The Strathspey*, 1891, 18 R. 1048, op. Ld. Kinnear, 1057). In ordinary circumstances it is the master's and not the pilot's duty to engage a tug; that is to say, where the tug is to be employed solely for accelerating speed, the responsibility of employing a tug rests with the master (*The Julia*, 1861, Lush. 224, 226). It is different where the ship is in distress, and it is a critical question whether to employ a tug or not (*The Julia, supra*), or where a tug is required to aid the manœuvring of the vessel: there the responsibility is with the pilot (*The Strathspey*, 1891, 18 R. 1048).

A tug under engagement to tow a ship when required, is not, if the circumstances are perilous to her own safety, bound to take a ship in tow upon orders from the master (*The Julia*, 1861, Lush. 224).

It used formerly to be laid down in absolute terms that the tug is the servant of the tow, and that the owners of the tow are responsible for the acts of the tug (*The Kingston-by-Sea*, 1850, 3 Wm. Rob. 152; *The Mary*, 1879, L. R. 5 P. D. 14; *The Sinquasi*, 1880, L. R. 5 P. D. 241). This is certainly a correct statement of the legal relation of tug and tow in many instances, but recent cases show that it cannot be universally applied (*The Stormcock*, 1885, 5, Asp. M. C. 470, opinion of Sir James Hannen at p. 472; *The Quickstep* 1890, L. R. 15 P. D. 196). "No general rule can be laid down. The question whether the crew of the tug are to be regarded as the servants of the owner of the vessel in tow must depend upon the circumstances of each case" (per Butt, J., in *The Quickstep, ut supra*, at p. 200). When a tug has a number of barges in tow, for example, she would not be regarded as their servant (*ib.*, p. 202; Parsons, *Shipping*, 536, there quoted; opinion of Ld. Selborne in *M'Cowan*, 1891, 18 R. (H. L.) 57, 58). In the ordinary case, however, the tug and tow are engaged in a common undertaking, of which the general management and command belong to the tow (*The Niobe*, 1888, L. R. 13 P. D. 55). The tug is bound to obey the orders of the tow (*The Christina*, 1848, 3 Wm. Rob. 27, 6 Moo. P. C. C. 371; *The Energy*, 1870, L. R. 3 A. & E. 48; *The Robert Dixon*, 1879, L. R. 5 P. D. 54; *Spaight*, 1881, L. R. 6 App. Ca. 217). Practically, the tow cannot always be giving directions to the tug, and when no directions are given by the vessel in tow, the rule is that the tug shall direct the course (*The St. Lawrence Tow Boat Co.*, 1873, L. R. 5 P. C. 308; *The Altair*, L. R. [1897] P. 105). Where, however, the tug is proceeding in such a fashion as to lead the tow into danger, the tow is not justified in permitting the tug to do so unchecked (*St. Lawrence Tow Boat Co., supra*; *The Niobe*, 1888, L. R. 13 P. D. 55; *The Altair, supra*). "It is true that the general direction is to be given by those on the vessel in tow; and also if a specific order is given by her to the tug, the responsibility must rest with the vessel in tow for the consequences of such order. But it does not follow from this rule that the vessel in tow is to be constantly interfering with the tug: it must depend

on the place and on the circumstances, as whether there are numerous small vessels about. Those in charge of the tug must exercise their judgment, and must not be constantly expecting to receive orders from the vessel in tow, which may be a considerable distance astern of them" (per Sir James Hannen in *The Iona*, 1886, L. R. 12 P. D. 34, 35; see also *The Sheppey*, 1880, L. R. 5 P. D. 241). It is not the duty of those on board the tow to control the movements of the tug when the towing is at night and with a long scope of hawser (*The Stormcock*, 1885, 5 Asp. M. C. 470). In one case it was held improper to remove a ship by means of a tug from one dock to another *at night*, because in such circumstances the tow had not sufficient control over the tug (*The Borussia*, 1856, Swab. 94). It is the duty of the tow to follow exactly the manœuvres of the tug (*The Jane Bacon*, 1878, 27 W. R. 35). Where vessels are likely to be met, the tow should have the means of immediately slipping or cutting the tow-rope (*ib.*). It is the duty of the tug to keep a look-out for both (*ib.*). But that does not free the tow from the obligation of herself keeping a look-out (*The Niobe*, 1888, L. R. 13 P. D. 55). For the purposes of the regulations for preventing collisions at sea, the tug and tow are regarded as one vessel (*The Cheadle*, 1860, Lush. 158, 14 Moo. P. C. C. 92; *The Warrior*, 1872, L. R. 3 A. & E. 553; *The American and The Syria*, 1874, L. R. 6 P. C. 127, 131; the law is the same in America—*The Civilta and The Restless*, 1880, 103 U.S. (13 Otto) 699). But a steamship with another vessel in tow is not to be regarded as a steamship in the sense of the regulations, so as to be bound in all circumstances to act as a steamship, *e.g.* by stopping and reversing her engines, or by keeping out of the way of a sailing ship (*The Kingston-by-Sea*, 1850, 3 Wm. Rob. 152, 154; *The Independence*, 1861, Lush. 270; 1861, 14 Moo. P. C. C. 103; *The American and The Syria*, 1874, L. R. 6 P. C. 127; *The Lord Bangor*, L. R. [1896] P. 28). She is not absolved altogether from obedience to the rules which apply to steamers, but allowance must be made by another vessel approaching her for her comparatively disabled condition, and additional caution observed (*The American and The Syria*, *ut supra*, at p. 131). Vessels towing and being towed exhibit special lights and sound special fog-signals (M. S. A., 1894, s. 418, Order in Council, 27th Nov. 1896, Sched. I., Articles 3, 5, 15 (*e*)).

As to liability for damages caused by collision in which tug and tow are involved, see COLLISION, *ante*, vol. iii. p. 98; *The Mary Hounsell*, 1879, L. R. 4 P. D. 204; *The Mary*, 1879, L. R. 5 P. D. 14; *The Stormcock*, 1885, 5 Asp. M. C. 470; *M'Cowan*, 1890, 17 R. 1016; 1891, 18 R. (H. L.) 57; *The Quickstep*, 1890, L. R. 15 P. D. 196). In a case of collision between two vessels, one of which is under tow, it is the duty of the tug to stand by the injured vessel (M. S. A., 1894, s. 422; *The Hannibal*, 1867, L. R. 2 A. & E. 53).

There is no maritime lien for towage (*Westrup*, 1889, L. R. 43 Ch. D. 241).

[M'Lachlan, *Merchant Shipping*, ch. vi.; Marsden, *Collisions*, ch. viii.]

Turnpike Acts.—See ROADS AND BRIDGES; HIGHWAYS.

Supplemental Notes.

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