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OF

THE LAW OF SCOTLAND

Tutor.

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The legal representative and guardian of the person, and the administrator of the estate, of a pupil, failing the father and (after his death) the mother. The office is derived from the Roman law (*tueri*, to defend), and "in the doctrine of tutors the law of Scotland nearly resembles the Roman" (Ersk. i. 7. 2). The tutor is to "stand in the pupil's place and act for him, as he himself would do, were he of perfect age" (Fraser, *P. & C.* 143). "An infant (*i.e.* a person in pupillarity) has no person in law; he cannot act or pursue; even an action for his benefit being raised in the tutor's name *quâ* tutor. The pupil cannot consent nor dissent: he does nothing, everything being done in the name of his tutor" (*Sinclair*, 1828, 6 S. 340, Ld. Craigie; see PUPIL). As the father as administrator-in-law, and the mother as guardian under the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27, s. 8), have all the powers of a tutor, the subject will most conveniently be considered under the following heads:—

I. The Father as Administrator-in-law.
II. The Mother as Guardian.
III. Guardians under the Act of 1886.
IV. Tutors Nominate or Testamentar.
V. The Powers and Duties of Tutors.
VI. Tutors-at-law, and
VII. Tutors-Dative (in independent articles).

I. THE FATHER AS ADMINISTRATOR-IN-LAW.

As administrator-in-law the father is tutor as well as curator to his lawfully begotten children (Ersk. i. 6. 54); but a bastard being in law *filius nullius*, his real father is not his administrator (Ersk. i. 6. 55; *Wilson*, 10 March 1819, F. C.), and cannot nominate tutors to him, though he may dispone property to him under the management of a person appointed by himself, or a trustee, who may direct the child's education (Fraser, 175).

If capable of the duties of his office (*infra*, p. 3), the father is the "most preferable" of guardians to his immediate children, the grandfather having no title to the office (Stair, i. 6. 6; Ersk. *supra*; *Ld. Lamington*, 1685, Mor. 16306); and until the Act of 1886 (see *Mother*, *infra*) no other could claim to share the duties of administration (Stair, i. 5. 12, and More's *Nab*; Ersk. *supra*). An apparent exception to the father's right is, that tutors, or more properly trustees, appointed by the donor to manage property gifted to a pupil, are alone entitled to the management thereof. Where, again, the father's right is merely excluded by the donor, the Court of Session (and, when competent, the Sheriff) are bound if asked to appoint an independent judicial factor *loco tutoris* (Ersk. i. 6. 54); but it appears that even in that case the father may interfere in the child's interests (Fraser, 166; *Fidlar*, 1745, Mor. 16350).

The father does not need to have attained majority (Fraser, 165); he needs no judicial proceeding nor caution (see exceptions, *infra*; Stair; Ersk. *supra*): was under no obligation to make up tutorial inventories (see *infra*), nor is he liable for omissions (Stair; Ersk. *supra*). Although nearest heir, he is, unless barred by his conduct, entitled to the custody of his pupil child (see Custody of Children).

Restrictions on Father's Right as Administrator.—(1) The Court of Session have power to interfere for the protection of pupil children. Accordingly, where the father's conduct shows gross violation of a parent's duty in regard to his child's property, or where their interests conflict, a judicial factor *loco tutoris* will be appointed to supersede him in the management (*M'Nab*, 1871, 10 M. 248; *Johnston*, 1822, 1 S. 558; *Barclay*, 1698, 4 Br. Sup. 405), but it appears that he will not be removed from his office of administrator-in-law (*Robertson*, 1865, 3 M. 1077). Cases have occurred where the father being in poverty, and not resident in Scotland, he was prevented from acting as administrator until he *found caution* (*Goran*, 1633, Mor. 16263; *Graham*, 1794, Mor. 16383; Ersk. i. 6. 55; *Wilkie*, 1688, Mor. 16311; Bell, *Prin.* s. 2068). But poverty of itself is not a sufficient ground for appointing a judicial factor (*Wardrop*, 1869, 7 M. 532) or for ordering the father to find security (*Stevenson's Trs.*, 1857, 19 D. 462: 1861, 4 Macq. 86); on the other hand, a father insolvent has been ordered to find security before receiving payment from the pupil's debtor (*Wilkie*, 1688, Mor. 16311).

(2) For the law as to restricting the father's right to custody where the child is in danger from *manifest cruelty*, oppression, or contamination, see Custody of Children.

(3) The father's right to be sole guardian may also be controlled and restricted by the mother under the powers given her by the Guardianship of Infants Act, 1886 (*q.v.*) (see *Mother*, *infra*).

(4) Where the interests of father and pupil are opposed in judicial proceedings, or where the father refuses to appear or concur on behalf of a pupil, a Curator *ad litem* (*q.v.*) will be appointed (see Pupil; *Park*, 1876, 3 R. 350). Where the father failed to show that any conflict of interests

would arise, a petition by him for the appointment of a judicial factor was refused (*Cochrane*, 1891, 18 R. 456).

For an account of the father's powers over the child, and rights and duties in regard to custody, aliment, and education of pupil child, etc., see CUSTODY OF CHILDREN; PATRIA POTESTAS; ALIMENT; PARENT AND CHILD.

Father's Powers and Duties as Tutor.—The father's rights and duties as administrator extend to all the child's property, whether derived from himself or a third party, and are identical, except as before mentioned, with those of ordinary tutors (Fraser, 165), which will be detailed afterwards. He may obtain *special powers* from the Court when necessary, or highly expedient, to deal with the pupil's affairs, and is now under the Pupils Protection Act (see *Douglas*, 1867, 6 M. 178 (lease); *Ld. Clinton*, 1875, 3 R. 62 (feu); *Berwick*, 1874, 2 R. 90; *Logan*, 1897, 25 R. 51 (to sell—high expediency); cf. *Gilligan's Factor*, 25 R. 876 (to sell); see also *Scott's Trs.*, 1837, 14 R. 1043, where a bond granted by a father as tutor-at-law over his pupil son's heritage, without authority of the Court, was held null: for the earlier rule, see *Sawers*, 1850, 12 D. 905; *White*, 1855, 17 D. 599; *Bellamy*, 1854, 17 D. 115; *Mackenzie*, 1855, 17 D. 314; *Mackenzie*, 1866, 5 M. 158). The Court were formerly unwilling to grant power to borrow or sell, as the father was not within the provisions of the Pupils Protection Act, or under the Accountant of Court, and did not find caution (see *White*, 1855, 17 D. 599)). They were sometimes in use to order that a *curator bonis* be appointed (*Sawers, supra*); or, having granted power of sale, delayed the warrant till a *curator bonis* was appointed to receive the price (*Mackenzie*, 1866, 5 M. 158 (tutor-nominate)). Further, power to sell or borrow was rarely granted unless it was shown to be absolutely necessary (see *Sawers* and cases *supra*). The later rule is not so stringent, but a case of clear and "high expediency"—not merely a hope of gain, but the avoidance of loss—must be made out (*Campbell*, 1880, 7 R. 1032; 1881, 8 R. 543; *Logan*, 1897, 25 R. 51; compare *Gillespie*, 1898, 25 R. 876. *Quære*: As father is now under the Pupils Act, should case of *Logan* not have been brought before the Junior Lord Ordinary?).

The father may petition the Court to order trustees, who hold a fund for pupil children, to make an annual payment to him as an individual for the maintenance and education of the children (*Edmiston*, 1871, 9 M. 987; cf. *Seddon*, 1891, 19 R. 101; 1893, 20 R. 675, where the father was resident in New Zealand, and the Court required that the children be provided with a legal guardian (which the father was not), before ordaining payment).

A father who *sues* as tutor and administrator-in-law for his pupil son is held liable personally for expenses if unsuccessful in the action (*Fraser*, 1897, 19 R. 564; *Wilkinson*, 1897, 24 R. 1001; *White*, 1894, 21 R. 649; see PUPIL).

Resignation.—Although it has been said that there is no such *office* as that of administrator-in-law, and that it is a position inseparable from the relation of parent and child, it would appear that the father could always practically resign by consenting to the appointment of a judicial factor to manage property belonging to the pupil (see *Robertson*, 1865, 3 M. 1077; *M'Nab*, 1871, 10 M. 248; see *Graham*, 1881, 8 R. 996, lunatic major son); and under the Guardianship of Infants Act, 1886 (s. 5), the Court (Court of Session, or Sheriff) may, on the application of the mother, remove the pupil from the father's custody.

As already indicated, the father was privileged in respect that he was under no obligation to lodge tutorial inventories, and was not liable for

omissions. A change has been operated by the Guardianship of Infants Act, 1886. By sec. 12 of that statute "tutors being administrators-in-law, tutors-nominate, and guardians appointed or acting" in terms of the Act, are made subject to the provisions of the Pupils Act, 1849, except that, unless the Court directs, they are not bound to find caution. This enumeration includes the father. It is doubtful, however, whether the effect of this section, and sec. 31 of the Pupils Act, which latter empowers the Court to accept the resignation of any "tutor coming under the provisions of the Act," is to give an administrator-in-law as full power to resign as the "tutors" who originally fell under the provisions of the Act, viz. tutors-at-law and tutors-dative. In any case, the duties of maintenance and education, etc., which are inseparable from the relation of parent, cannot so be got rid of.

It is evident that unless the father voluntarily comes under the provisions of the Pupils Act, or makes some application to the Court for powers, it is difficult for the Accountant to discover the existence of such administrators, and insist on them coming under his supervision. See CURATOR; MINOR; PUPIL; GUARDIANSHIP OF INFANTS ACT; CUSTODY OF CHILDREN.

II. THE MOTHER AS GUARDIAN.

Females, though not competent for the office of tutor-at-law, could be nominated tutors-testamentar, and also appointed tutors-dative (Fraser, 171). But women, while married, could not be tutors of any kind, and a mother, though acting as a testamentary tutor, was formerly disqualified by her second marriage (Fraser, *supra*; *Kerbechil*, 1586, Mor. 9585; see argument in *Chalmers' Trs.*, 1897, 24 R. 1047). This is not now the case (see *Campbell*, 1888, 15 R. 784; *Maquay*, 1888, 15 R. 606; see also *Stevensons*, 1894, 21 R. (H. L.) 96).

As to the mother's right to *custody* formerly and now, see CUSTODY OF CHILDREN.

The mother's position in regard to her pupil children has been ameliorated and defined by the GUARDIANSHIP OF INFANTS ACT, 1886 (*q.v.*). For a detailed account of her privileges thereunder, reference is made to the article on the statute: it may be enough here to state the following points:—

(1) On the father's death the mother becomes guardian of the pupil children, alone or jointly with any guardians nominated by the father, or by the Court if it think fit (s. 2) (*Martin*, 1888, 16 R. 185; see *Jack*, 1886, 14 R. 263). The Court means either Division of the Court of Session (in vacation the Lord Ordinary on the Bills), or the Sheriff Court within whose jurisdiction the respondents reside (s. 9).

(2) The mother may nominate a guardian to act along with the father after her death if the Court approve, and after the death of both to act alone, or jointly with the father's nominee (s. 3 (1) (2); *Fenwick*, 1893, 20 R. 848).

(3) The Court of Session (either Division) may remove the mother as guardian (also any testamentary guardian), and appoint another (s. 6; s. 12).

(4) The mother, as guardian under the Act, is tutor with all the powers (s. 8; *Willison*, 1890, 18 R. 228); and comes under the provisions of the Pupils Protection Act and the supervision of the Accountant of Court, but does not need to find *caution* unless the Court directs (s. 12). In *Mackenzie* (1866, 5 M. 158), where the mother was tutor-nominate, the Court granted

power to sell, but as she was not bound to find caution, warrant was delayed till a *curator bonis* should be appointed to receive the price.

(5) The Act does not apply to bastards, and a mother cannot under its provisions appoint a guardian to such (*Brand*, 1888, 15 R. 449).

III. GUARDIANS APPOINTED BY THE COURT UNDER THE ACT OF 1886.

The Court of Session, as we have seen, have power to appoint a guardian to act with the mother (s. 2), and to remove any testamentary guardian (1886 Act, ss. 6, 8, 3) and appoint another guardian in his place. The right to appoint, but not to remove, is competent also to the Sheriff (s. 9). As the word "guardian" is declared by the Act (s. 8) to mean "tutor," we have here a new class of tutor, in addition to tutors at law and dative, appointed by judicial authority, with apparently all the powers of an ordinary tutor, except in so far as these are limited by the deed appointing (see *infra*) the guardian in whose place he comes.

The Court of Session have it also in their discretion, if the welfare of the pupil demands it, to remove the guardian appointed by themselves (s. 6).

By sec. 13, the common law jurisdiction of the Court of Session is saved in regard to appointing or removing tutors or judicial factors *loco tutoris*.

These guardians are subject to the provisions of the Pupils Protection Act, and the supervision of the Accountant of Court (s. 12, and Judicial Factors Act, 1889, s. 6). It is to be noted that though such guardians may be appointed by the Sheriff, and, as has been pointed out, are under the Pupils Act, the Act of 1886, in sec. 6, provides that "either Division of the Court of Session may, in their discretion, on being satisfied that it is for the welfare of the infant, remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of this Act" (but see *Souter*, 1890, 18 R. 86, where, after consultation with the First Division, the Second Division held it incompetent for them to consider in the first instance a petition for the removal of a *curator bonis* on the ground of misconduct, since the application fell under the Distribution of Business Act, 1857, s. 4 (5), which directs that all applications under the Pupils Act shall be brought before the Junior Lord Ordinary).

Parties Eligible for the Office of Tutor.—The general rule is that all persons *sui juris*, and of sane mind, are eligible for the office of tutor. To this rule, however, there are exceptions.

1. *Age.*—A Tutor-at-law (*q.v.*) must be twenty-five years of age before he can be appointed (Stat. 1474, c. 51; Ersk. i. 7. 5). Though a tutor-nominate may be named to the office while a minor, he cannot act until he has attained majority (see More's *Notes* to Stair, xxxv).

2. *Outlaws and aliens* are incapable of being tutors. The father's tutorial power ceases when he is denounced; but the paternal authority of an alien is said to be recognised (Fraser, 171). It was held to be no disqualification that a curator is *resident* abroad (*Dalhousie*, 1698, 4 Br. Sup. 405; cf. *Fergusson*, 1870, 8 M. 426; *Ld. Macdonald*, 1864, 2 M. 1194); and a person residing in England may be appointed tutor, but the Court has right to interfere (*Bell*, 1784, Mor. 16374; *Robb*, 22 Dec. 1814, F. C.; *Hadden*, 1822, 1 S. 334; More's *Notes*, 35, 41; Bell's *Prin.* s. 2073). In *Fenwick* (1893, 20 R. 848) the guardian appointed resided in Canada; the question

raised was one of custody, and the Court did not pronounce on the validity of the appointment (Fraser, 173).

3. *Females.*—An unmarried woman may be a guardian, tutor nominate, or dative, but not tutor-at-law; her appointment falls on her marriage (Ersk. i. 7. 12; Fraser, 171, and authorities there; *Stoddart*, 30 June 1812, F. C.), except in the case of the mother (*Campbell*, 1888, 15 R. 784; see argument in *Chalmers' Trs.*, 1897, 24 R. 1047; see *Mother, ante*).

4. *Firm.*—It has been held in England that it is incompetent to appoint a partnership or firm to be guardians (Fraser, 171).

Religious opinion does not now seem to be a ground of disqualification (More's *Notes*, xliv; 57 & 58 Vict. c. 41, s. 8).

Where persons nominated tutors are incapable by law, their names are held *pro non scripto* (except in the case of minors (*ante*)), and the other tutors properly qualified are entitled to act (Ersk. i. 7. 3; *Laird*, 1711, Mor. 7431).

IV. TUTORS NOMINATE OR TESTAMENTAR.

Formerly the *father* alone was entitled to nominate tutors-testamentar to his lawfully born children, the mother, grandfather, or other ascendants having no such power even after the father's death.

In regard to the *mother* a change has been effected, as we have seen, by the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27). The mother, on the father's death, is not only tutor to her pupil children, either alone or jointly with any guardian nominated by the father, or by the Court in its discretion; but she may also by deed or will appoint tutors to act after the death of herself and the father, either alone or jointly with the father's nominee; or to act jointly with the father after her death, if the Court confirm such appointment on being satisfied that the father for any reason is unfitted to be the sole guardian (s. 3 (1) (2)).

Strangers, who bestow property on a pupil, may no doubt appoint a person to manage such property, but the latter is no more than a trustee or administrator of that property. The father is not excluded as tutor, nor prevented from nominating tutors-testamentar. It is extremely doubtful if third parties could make it an effectual condition of the bequest, that their nominees should have the guardianship and education of the pupil, to the exclusion of the father (Fraser, 175).

The father has no power to nominate tutors to a *bastard* child (Ersk. i. 7. 2; *Murray*, 1555, Mor. 16226); though he may appoint a person to manage property left by him to the bastard, and may make it a condition that such party shall be allowed the custody and education of the child (Fraser, *supra*).

The tutor must be the result of the father's personal selection, and he cannot delegate the power to a third party. *Tutor incertus dari non potest.* Accordingly, where a father in his trust settlement confers on his trustees power to assume new trustees, and appoints his trustees, "named or to be named or assumed, and the survivors and survivor of them," tutors to his pupil children, the assumed trustees are not entitled to act as tutors (*Walker*, 1874, 2 R. 120).

1. *How Appointed.*—Tutors may be nominated by the father in any deed *inter vivos* or *mortis causa*, though the appointment is generally made in the last will and testament (Stair, i. 6. 6; Ersk. i. 7. 2). It may be competently made in the last moments of life (Ersk. *supra*; see *Walkinshaw*, 1743, Mor. 16348 and 4049); thus differing from the rule in regard to curators, who must be nominated *in liege poustie* (Stat. 1696, c. 8; Ersk.

supra; see *Fenwick*, 1893, 20 R. 848, where Ld. M'Laren doubts if the mother can, on deathbed, appoint a tutor under the Act of 1886). Not only may the appointment be made on deathbed, but it may competently be revoked then, or at any other time (Stair; Ersk. *supra*; *Scott*, 1775, Mor. 6585). No express nomination as "tutors" is necessary if the meaning be plain (*Nimmo*, 1610, Mor. 16239; *Forbes*, 1613, Mor. 16241).

2. *Forms of Nomination, and Mode of Acting and Voting.*—Tutors-nominate, like curators, may be appointed (*a*) simply, (*b*) jointly, (*c*) with a quorum, (*d*) with a *sine quo*, or *quibus, non*, or (*e*) conditionally. The effect of these different forms of nomination is described in the article on Curator, vol. iv. 29 (*q.v.*). Where a father appointed his testamentary trustees to be tutors and curators, declaring that if the nomination should fail a prior nomination should take effect, and where the second nomination fell *quoad* curators because not made *in liege poustie*, it was held that the nomination of tutors, because separate, subsisted (*Greig*, 1872, 11. M. 20).

3. *Privileges.*—Various privileges were accorded to these tutors. No *service* or other judicial proceeding prior to entering on office, no *oath de fideli*, and, as a general rule, no *caution* (unless their financial position or honesty was suspected), were necessary (Stair i. 6. 6; Ersk. i. 7. 3; Fraser, 181, n. (*b.*)).

They were bound, however, to make up tutorial inventories (1672, c. 2); and by the common law were liable *in solidum* for *omissions* as well as intromissions, though under Stat. 1696, c. 8, fathers might in the deed of nomination declare that the liability should not be *in solidum*, and should only extend to "actual intromissions with the means and estate descending from the father." These exemptions could only be granted *in liege poustie* (Ersk. i. 7. 27; Bell, *Prin* s. 2072; *Johnston*, 1751, Mor. 3230); and in spite of them the Court of Session, if suspicious of honesty or solvency, will, on application, ordain caution to be found, as they could require under the common law (see *infra*, *Extent of Tutor's Liability*, and the Guardianship of Infants Act, 1886, s. 12 *ad fin.*).

Tutors-nominate appear now to be privileged in regard to tutorial inventories, since they have been recently, as mentioned, brought under the Pupils Act (Guardianship Act, s. 12). In regard to *omissions*, it seems that the Trusts Act, 1861, applies (Trusts Act, 1884, s. 2; Fraser, 180, 181). See Trust; Curator.

These tutors are preferred to all others (Stair i. 6. 7; Ersk. i. 7. 3; *Ramsay*, 1688, Mor. 16313); and unless it will prejudice the pupil, exclude any tutor at law, or dative, or judicial factor (Fraser, 457 and 484; see also Fraser, 182; Judicial Factor, vol. vii. 174). They may, however, be, by action, forced to accept or renounce (More's *Notes*, xxxvii; see *Callendar*, 1693, Mor. 14701); or be debarred by being made parties to a tutor-at-law's service (Ersk. i. 7. 4; *Campbell*, 1627, Mor. 16246). If they have explicitly declined, tutors-nominate cannot thereafter claim office in preference to the tutor-at-law or tutor-dative (*Ramsay*, *supra*).

Formerly a father might appoint a factor to act under tutors, and though a tutor is now a trustee, it would appear still competent to do so (*Fulton*, 1831, 9 S. 442; Fraser, 182).

4. *Acceptance of Office.*—Tutors may decline office if they please; and having accepted, may renounce with the authority of the Court on stating a good reason (Fraser, 193. *Quære* as to the effect of trust legislation upon this; Trust Acts, 1861–1884). The acceptance, as in the case of curators, may be either (*a*) *express*, by the tutor's signing a declaration on the deed, or a minute to that effect (Ersk. i. 7. 20; *Bruce*, 1854, 17 D. 265);

or (*b*) *implied*, by the performance of such acts as can be attributed only to that authority (see CURATOR, *Acceptance*, for authorities and details). But the acts must be distinctly referable to such an origin, and not of a slight and trifling kind, such as might be attributed to friendship, or some like cause (Ersk. i. 7. 20; *Beatson*, 1678, Mor. 16298; 3 Br. Sup. 378; *Watson*, 1715 (Robertson, *Personal Succession*, p. 134)). When a party is appointed testamentary trustee and tutor, and intromits with the pupil's effects, it has been decided that a distinct record of the acceptance of the office of trustee only, and rejection of that of tutor, should be made to exempt the party from liability as tutor (*Mollison*, 1833, 12 S. 237; cf. *Watson*, *supra*).

Declinature prevents a subsequent demand for the office (Stair, i. 6. 24; More's *Notes*, xxxvi). Mere delay, on the other hand, though prolonged, does not infer renunciation, or a presumption that there has not been acceptance (*Ramsay*, 1688, Mor. 16313; *Bruce*, 1854, 17 D. 265).

5. *Making up Tutorial Inventories.*—A testamentary tutor, like a curator, was bound under the sanction of certain penalties (see CURATOR, iv. 32; Fraser, 204; Act, 1672, c. 2) to make up tutorial inventories before he could enter on the duties of his office. Since these tutors have been brought within the Pupils Act, these old cumbrous forms are now superseded, and tutors are now on the same footing in this respect as tutors at law and dative (49 & 50 Vict. c. 12). Accordingly, the *rental*, *list*, and *inventory* lodged with the Accountant of Court in terms of the former statute, are now equivalent to tutorial inventories under the Act of 1672, and any report of additional funds belonging to the pupil as equivalent to an eik to a tutorial inventory (Pupils Act, s. 30). Such list and inventory form the basis of *accounting*, as the old inventory did (see JUDICIAL FACTOR), and though the penalties for failure to make up and lodge tutorial inventories may not now apply, penalties of sufficient stringency are imposed by the Pupils Act for failure in duty under that statute (see JUDICIAL FACTOR, *Penalties*, vii. 185). It has apparently yet to be decided whether the common law and statutory penalties apply where the tutor, as is often the case when he is also a trustee, has failed either to make up tutorial inventories, or to lodge a list and inventory with the Accountant of Court. As in the case of the father, unless they submit themselves to him, it is difficult for the Accountant in many cases to discover the existence of tutors-nominate, and enforce compliance with the Pupils Act.

The penalties imposed by the statute of 1672 had to be recovered by the minor, the right to insist not passing to his creditor (*Harkness*, 1836, 14 S. 1015); and, on the other hand, action for them had to be instituted during the tutor's life, otherwise the obligation did not transmit against his heir (*M'Turk*, 1830, 8 S. 995; *Mollison*, 1833, 12 S. 241). It has been judicially indicated that where the penalties have been imposed on surviving tutors, a claim of relief lies against the representatives of deceased tutors (see *Murray*, 1832, 10 S. 276).

V. POWERS AND DUTIES OF TUTORS-NOMINATE.

A. Ordinary Powers and Duties.

As the office of tutor was not the creature of statute, but part of our common law or usage derived from the Roman law, the rules as to the powers and duties are to be found in the institutional writers and in the large body of decisions which gradually grew up from early times. The decisions are much more infrequent in recent years, since the development of the office of trustee has led to the father in most cases appointing the trustees under

his trust settlement to be tutors and curators to his pupil and minor children, —in which case it has been usual for the nominees to administer the estate *quâ* trustees, and to refrain from giving up tutorial inventories. The powers conferred by law or usage on tutors were, for the most part, those "included in the notion of administration" (Ersk. i. 7. 16). A considerable change, as already indicated, has been effected in recent years by the operation of one or two statutes, relaxing the tutor's position on the one hand, and bringing him under the restriction of a statute and the supervision of the Court on the other,—on the one hand giving him the powers of a trustee, on the other imposing upon him the duties of a judicial factor. These changes have already been referred to, but it may be useful to indicate somewhat more fully the effect of the statutes.

(1) By the Trusts Amendment Act, 1884, s. 2 (47 & 48 Vict. c. 63), "trust," in the construction of the Trusts (Scotland) Acts, 1861–1898, means not only any trust constituted by any deed or other writing, or by Act of Parliament, or resolution of any corporation or public body, but also "the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise"; and "trustee" "includes tutor, curator, and judicial factor." The power to make abatement of rent in leases, and to accept renunciation of leases, conferred by the Trusts Act, 1867, and Amendment Act, 1887, is declared to apply to trustees as defined by the Act of 1884 (see Judicial Factors Act, 1889, s. 19); and the provisions of the subsequent Trust Acts of 1891 (s. 2) and 1897 are equally applicable to tutors as included under the general term "trustee." There appears to have been, so far, no decision as to whether the power to resign given to trustees by sec. 1 of the Trusts Act, 1861, applies to tutors-nominate, or how the provision of that statute, that trustees shall not be liable for omissions, squares with the common law rule that tutors are liable for omissions (Fraser, 299), or the further rule that such tutors are only liable for *culpa levis in concreto*, with the 14th section of the Pupils Act, which provides that exact diligence can only be dispensed with in certain circumstances by the Accountant with the approval of the Lord Ordinary.

(2) The Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), provides in sec. 12 that tutors, being administrators-in-law, tutors-nominate, and guardians appointed or acting in terms of that Act, who shall by virtue of their office administer the estate of any pupil, shall be deemed tutors within the meaning of the Pupils Protection Act, 1849, and shall be subject to the provisions thereof. The section provides, further, that such tutors, etc., shall not be bound to find caution in terms of secs. 26 and 27 of the Pupils Act unless the Court shall so direct. The Pupils Act originally only included under the term "tutor" any person who should be served tutor-at-law to a pupil, or appointed tutor-dative to any pupil or insane person (ss. 1 and 25). The tutor is therefore, where possible, to act and be treated as a judicial factor *loco tutoris*, who, it will be observed, is also included under the term "trustee" in the Trusts Act, 1884. On the general question, then, of the powers, duties, and liabilities of tutors, reference is made to the articles on JUDICIAL FACTOR, TRUSTEE, and, where necessary, CURATOR, whose general powers in regard to the management of the estate, investments and accounts, diligence, extent of liability, disability to be *auctor in rem suam*, closely resemble those of tutors. What follows must be taken subject to this reference.

1. POWERS AND DUTIES IN REGARD TO PERSON, EDUCATION, AND ALIMENT OF PUPIL.—(1) *CUSTODY.*—The father, and failing him the mother, is entitled by law to the custody of legitimate children during pupillarity, unless the

Court see fit to interfere in the interests of the children. Formerly the father's nominee was preferred even to the mother, unless the child was in infancy (*Borthwick*, 1845, 8 D. 318, per Ld. Pres.); and after it attained seven years of age, the tutor, if not next in succession or otherwise disqualified, obtained the custody (Ersk. i. 7. 7).

Where the father or mother fail by death or incapacity, the tutor nominate, or at-law, or dative, is still entitled to the custody, unless he be the child's nearest heir in whole or part, or has the interest, by purchase or otherwise, which the apparent heir would have in the succession (Ersk. *supra*; Stair, i. 6. 15). If the tutor is disqualified in this or any other way (corrupt conduct, enmity, or adverse interest), the nearest cognate is preferred. (For a detailed account of the rules and authorities on this subject, see CUSTODY OF CHILDREN; see also JUDICIAL FACTOR, *Aliment of Pupil, Custody of Pupil, Payments out of Capital.*)

(2) *EDUCATION AND RESIDENCE.*—The mother as tutor, failing the father (1886 Act), is bound and entitled to superintend the pupil's education, which ought to be consistent with its position and means (see *Buchan*, 1842, 4 D. 1268). Failing the mother, these rights and duties devolve upon the tutor (subject to the control of the Court), who, before the Act of 1886, was frequently found entitled to interfere even with the mother in regard to education and residence (Bell, *Prin.* s. 2083; *Fisher*, 1827, 6 S. 270; *Borthwick*, 1845, 8 D. 318). But where the father has prescribed a course of education, this, if unobjectionable, must be adhered to (Fraser, 223; *A* v. *B.*, 1553, Mor. 16224; *Borthwick*, *supra*). Schemes by tutors for the pupil's education were approved by the Court in *Denny* (1863, 1 M. 268) and *Stuart* (1860, 22 D. 1504, 23 D. 55; 1861, 23 D. 446, 449; 4 Macq. 1; 23 D. 902).

(3) *ALIMENT.*—The tutor is bound to provide for his ward's aliment and education out of the income of the estate (Ersk. i. 7. 24; Fraser, 223). Formerly it was with difficulty that he was allowed to exceed the annual income (*Pearson*, 1678, Mor. 16296; *Duncanson*, 1715, Mor. 16336; Ersk. *supra*); and where it is considerable, he will not be justified in expending it all on these purposes, even to benefit the mother and the family (*Harpers*, 1633, Mor. 16262 *ad fin.*; *Munnoch*, 1836, 15 S. 302; 1842, 4 D. 662). Where the income is inadequate, in any case, or in respect of the pupil's position, he will *ex necessitate* be allowed to encroach on the capital (Stair, i. 6. 18; Ersk. i. 7. 24; More's *Notes*, xxxviii; *Blair*, 1802, Mor. 16388; *Lambe*, 1837, 16 S. 219; Bell, *Prin.* s. 2084), in which case it is proper for him to apply to the Court for special powers,—now upon a report by the Accountant (*Kennedy*, 1860, 22 D. 567; *Duncanson*, *supra*; *Mundell*, 1862, 24 D. 327; *Hamilton*, 1859, 21 D. 1379; 1860, 22 D. 1095: see JUDICIAL FACTOR, *Payments out of Capital*, vii. 191). He may apply, for this purpose, for powers to sell heritage (*Lindsay*, 1857, 19 D. 455), or borrow (Thoms on *Factors*, pp. 118, 215), or purchase an annuity (*Innes*, 1846, 8 D. 1211; *Paisley*, 1857, 19 D. 653; see JUDICIAL FACTOR, *Aliment*, vii. 183). In any case of difficulty as to the proper amount, the safe course for the tutor is to apply to the Court, upon a report by the Accountant, to fix the amount suitable, in the same way as judicial factors are accustomed to do (cf. *Maxwell*, 1747, Mor. 16352, with *Wodrow*, 1830, 8 S. 604, where the Court held that the tutor must exercise his own discretion).

2. POWERS AND DUTIES IN REGARD TO THE ESTATE.—"The office of tutor is strictly one of administration. With regard to property, its object is rather to preserve than to acquire; to keep the pupil's estate

in the same condition as the tutor found it, so far as consistent with its nature, rather than to attempt by speculations to improve it, because it can never be improved without risk (Stair, i. 6. 3; Ersk. i. 7. 16). In accordance with this view are the powers granted to the tutor, for, while he has received the most ample administrational authority, he is denied many of the powers of a proprietor, except in cases where an urgent necessity" (or high expediency) "otherwise demands it. His duties are peculiar in another respect; they arise not from any contract between the tutor and the pupil, nor simply by the constitution of the law, but *quasi ex contractu* (Stair, i. 6. 4)" (Fraser, 227). "In all cases of active administration, the tutor has the power to perform the requisite acts, without the consent or concurrence of the pupil, and the tutor performs them, too, in his own name *qua* tutor" (Fraser, 228). "Tutors (at common law) may only do necessary deeds for their pupils; either such as the pupil is obliged to do, as payment of his debts, which the tutor may do willingly, without compulsion of law, or otherwise deeds necessary for management of his estate, as selling of his lands, or labouring the same, uplifting his rents and annualrents, uplifting the sums that are not secured, carrying on any work which was left to the pupil, which cannot otherwise be disposed of" (Stair, i. 6. 18; Ersk. i. 7. 16).

The *father*, if the pupil's property does not come from himself, has no higher powers of administration than an ordinary tutor; he is favoured to the extent of not being liable for omissions (Stair, i. 5. 12; Ersk. i. 6. 55).

Tutors-nominate, again, must conform to the powers bestowed on them by the deed of appointment. Where there are none such, they have no higher authority than tutors-at-law (see Stair i. 6. 18, quotation *supra*). They are entitled to administer the pupil's affairs as they think best in the circumstances. If formerly they kept within the ordinary powers of a tutor as regards management, the Court would not interfere, except it might be to order caution if circumstances demanded it; any alleged rash or indiscreet conduct was only considered when the time of accounting arrived. Now, if the tutors come under the Accountant, their annual account of intromissions will be audited "on the general principles of good ordinary management for the real benefit of the estate, and of those interested therein" (Pupils Act, s. 13).

(1) *Recovery of Estate.*—Tutors-nominate are not now bound to lodge tutorial inventories. On the other hand, where they do not, of their own accord, submit themselves to the Accountant of Court, it is difficult if not impossible for him, in ignorance of their existence, to enforce observance of the provisions of the Pupils Act. It has not been decided whether the penalties for failure to lodge inventories (see Curator, iv. 32), or those imposed by the Pupils Act (see ss. 6, 19, 20, 21), apply where the tutors fail to conform to the latter statute. But where the tutors come under the provisions of the Pupils Act, their first duty will be, as in the case of a judicial factor, to lodge a *Rental* of lands, specifying leases, burdens, etc.; a *List* of moneys due to the estate, interest therefrom, and documents vouching the same; and an *Inventory* of furniture, stocking, and moveable goods and rights, as at the date of appointment (Notes by Accountant, in Parliament House Book; Pupils Act, ss. 3 and 12). They will also collect all money not safely invested, and be reasonably diligent in ascertaining the exact nature and amount of the estate. They must do their utmost to recover rents, interests, and debts, and for this purpose, while avoiding all unnecessary litigation (*Ross*, 1878, 5 R. 1015), must raise actions (with

expedition determined by the circumstances of the debtor, cf. *M'Murdoch*, 1699, Mor. 3509, and *Watson*, 1623, Mor. 16242), and use all ordinary diligence against the moveable and heritable estates of debtors (Ersk. i. 7. 16). While it is their duty to recover all ordinary personal debts *quam primum* (see *M'Murdoch*, 1699, Mor. 3509; Ersk. i. 7. 24; Fraser, 230; *Forman*, 1853, 15 D. 362), and while they have power to call up and discharge debts heritably secured, the latter power should not be exercised if the result is to deprive the pupil of a good investment (*Gib*, 1769, Mor. 16363; 5 Br. Sup. 632). They are not liable, however, for failure to pursue a hopeless claim (*Condie*, 1834, 13 S. 61; *Ritchie*, 1837, 16 S. 219; see *Cleland*, 1844, 7 D. 147); and where there are a number of debts, small in amount and similar in nature, they are apparently entitled to sell them in bulk (Fraser, 232).

The debtor ought to satisfy himself as to the tutor's title and circumstances before payment (*Forbes*, 1673, Mor. 16287; *Graham*, 1794, Mor. 16383; see also *Stevenson's Trs.*, 1857, 19 D. 462; 1861, 4 Macq. 86); and where there are more than one, he should pay to and get a discharge from all, unless payment to one is rendered safe by the deed of nomination (Dirl. and Stew. 443–4; Fraser, 232).

Where the pupil's funds are *in trade*, they should be withdrawn, but this must be done with due regard to his interests (*Guthrie*, 1853, 16 D. 214; *Accountant of Court*, 1858, 20 D. 1176; see *Brownlie*, 1879, 6 R. 1233). The profits derived from the pupil's funds so invested belong to the pupil (*Cochrane*, 1855, 17 D. 321; *Guthrie, supra*; *Laird*, 1855, 17 D. 984); while tutors, like trustees, are personally liable for all loss sustained (see cases above; also *Bon Accord Co.*, 1850, 13 D. 295; see TRUSTEE).

Titles.—The tutor must recover all writs and titles, and make up the title, *in the pupil's name*, to both heritable and moveable estate (Ersk. i. 7. 24; *Johnstone*, 1838, 16 S. 541; *Maconochie*, 1857, 19 D. 366, Ld. Curriehill); and is liable for any loss sustained by neglect in the matter (see *Edmiston*, 1635, Mor. 16264; Ersk. *supra*). Tutors may also enter vassals (Ersk. i. 7. 17; Bell, *Prin.* s. 2084; *Mackay*, 1796, Mor. 16384). It would appear that both these acts are within the ordinary tutorial powers,—though applications to the Court for special powers have been entertained (*Waddell*, 1851, 13 D. 739; Fraser, 244, 500; JUDICIAL FACTOR, vii. 181, 190; consider, however, the effect of the Pupils Act). The method of completing title under sec. 24 of the Titles to Land Act, 1868 (as amended 1869), appears to apply only to JUDICIAL FACTORS (*q.v.* vii. 178–9). The tutor's vitious intromission does not render the pupil liable (*Kerr*, 1839, 1 D. 628; 1842, 1 Bell's App. 288).

(2) *REALISATION AND INVESTMENT.*—The moveable estate must be prudently and expeditiously realised, as already stated, and properly invested within a reasonable period.

Money ought to be *banked* at once in the tutor's name in one of the good Scottish banks (see *Sanders*, 1879, 7 R. 157; Pupils Act, s. 5); and *invested*, if possible, within three months from the expiry of the annual balance (Fraser, 235–6, where former rules also stated). Besides the penal interest imperatively due under sec. 5 (*supra*), tutors were and are, of course, liable in interest at common law for failure to invest (JUDICIAL FACTOR, *supra*; TRUSTEE; Fraser, 236).

Investment.—Tutors, as trustees (Trusts Act, 1884, s. 2), will now, as the Accountant of Court advises (Notes by the Accountant, Parliament House Book), be content in all probability to confine themselves within the limits of investment prescribed for trustees by the Trusts Acts of 1884 and 1898

(see CURATOR, iv. 34). Loans over unfinished properties, investments in shares, loans secured by personal security, continuance of funds already invested in trade, are all disapproved by the Court; and, though the Accountant has to consider the sufficiency of investments, the ultimate responsibility in all respects lies with the tutor (*Annan*, 1897, 24 R. 851). In lending money upon heritable security tutors will observe the provisions of the Trusts Amendment Act, 1891, s. 4 (see *Wood*, 1893, 1 S. L. T. No. 326). For a full account of the tutor's powers in regard to investment, see JUDICIAL FACTOR, vii. 180; CURATOR (*supra*); TRUSTEE.

It has been decided that a tutor cannot *purchase* house property (*Lamb*, 1834, 12 S. 775), and doubt was expressed whether he was entitled, as an ordinary act of administration, to purchase land in pupil's name, though such purchases have been passed by the Court (*Kennedy*, 1823, 2 S. 375; Bell's *Prin.* s. 2084; see Ersk. i. 7. 25; *Graham*, 1798, Mor. 5599). In former times, however, applications to the Court were frequent (Ersk. *supra*), and now that tutors are under the supervision of the Accountant they will probably think it right, before employing the pupil's funds in such a manner, to obtain judicial authority on a report by the Accountant.

It is the rule that tutors must keep the funds invested *in this country*, and subject to the orders of the Court. This was strictly followed in regard to *capital*; but the Court have frequently granted applications to send *income* out of Scotland for the support of the ward (*Murray*, 1849, 11 D. 710; *Hardwick*, 1855, 18 D. 97; *Accountant of Court*, 1858, 20 D. 1174; see *Montgomerie* and *Paisley*, at p. 240, Fraser, *P. & C.*; *Seddon*, 1891, 19 R. 101; 1893, 20 R. 675). There are now limited powers of investment in Indian and Colonial stocks conferred by the Trusts Act, 1884, s. 3 (*a*) 7, and (*b*) 13.

(3) *MANAGEMENT.*—The rule which the tutor-nominate must follow is that of "good ordinary management" for the real benefit of the estate and the pupil (Pupils Act, s. 13). He is bound to show the discretion and diligence which he bestows on his own affairs. He will keep capital and income separate, collect rents and interest, pay taxes and ordinary outgoings, and bank the surplus estate for investment (*Nairne*, 1863, 1 M. 515). More than fifty pounds must not now be kept in his hands beyond ten days, otherwise twenty per cent. interest will be due (Pupils Act, s. 5).

For a detailed statement of a tutor's *ordinary general powers and duties*, reference is made to the article on JUDICIAL FACTOR *loco tutoris* (vii. 181), whose general powers those of a tutor closely resemble. As a trustee, where such acts are not at variance with the terms of his appointment, he may (1) appoint and pay factors and law agents; (2) grant leases of agricultural lands not exceeding twenty-one years (see *Brown's Tutors*, 1867, 5 M. 1046; *Morison's Tutors*, 1861, 23 D. 1313,—powers granted by the Court), and of minerals not exceeding thirty-one years, and remove tenants; (3) abate or reduce temporarily or permanently the rent, royalty, or other consideration in any lease of lands, houses, minerals, metals, or other subjects, and accept renunciations of such leases; (4) uplift, discharge, or assign debts; (5) compromise, submit, and refer claims connected with the estate, subject, of course, to the pupil's power to reduce within the *quadriennium utile* (see MINOR; Fraser, 245); and a decree-arbitral will not form a sufficient ground for a charge against the pupil when major (*Ayton*, 1711, Mor 14997); (6) when satisfied, pay debts without requiring constitution thereof (Trusts Acts, 1867, s. 2; 1884, s. 2; 1897, ss. 2, 3; Judicial Factors Act, 1889, s. 19).

Though a tutor has power to appoint a factor or law agent at an

adequate salary, he must exercise proper care both in the appointment and supervision of the factor (Ersk. i. 7. 16). Failure to call the factor to account during a long period will entail liability for defalcation (*Anderson*, 1844, 7 D. 92 (L. O.); *Home*, 1837, affd. 1841, 2 Rob. 384; More's *Notes*, xxxviii, xxxix; see TRUST), and one of several tutors cannot claim remuneration for acting as factor and law agent unless the testator has expressly sanctioned such appointment (see TRUST).

A tutor may carry on a *lease* falling to the pupil (see Fraser, 259, 287; *Wilson*, 1789, Mor. 16376; *Cochrane*, 1854, 17 D. 337, Ld. Cowan); but, in the interest of the ward, the usual course is to obtain authority to renounce when the landlord is willing (see *Blyth*, 1808, Hume, 889; *Grahame*, 1851, 14 D. 312; *M'Ewan*, 1852, 2 Stu. 137; *Robertson*, 1841, 3 D. 345; see Thoms, *Judicial Factors*, pp. 83–4).

All *debts* should be paid (Ersk. i. 7. 24), the tutor having the right to demand constitution when he thinks the claim really doubtful, in which case he has frequently been freed from liability for expenses (*Thomson*, 1840, 2 D. 1234; see PUPIL, *How sued*). Annual income may be applied to discharge heritable obligations (*Graham*, 1798, Mor. 5599; see converse in *Halliday*, 1687, 2 Br. Sup. 106); but the tutor will not be allowed to charge an entailed estate with debts of the entailer, where it appears from his trust deed and deed of entail that these debts should be liquidated from the rental (*Lawson*, 1864, 2 M. 1422). While a tutor cannot build a new mansion-house, he is bound to keep the existing one in repair (*Graham*, 1798, Mor. 5599; Ersk. i. 7. 24; JUDICIAL FACTOR); and, for that purpose, may even uplift money heritably secured (*Hill*, 1665, Mor. 16276). He may also, with authority, apply consigned money in payment of permanent improvements on an entailed estate (*Stuart*, 1855, 17 D. 378).

All obligations which transmit from the father against the pupil must be implemented by the tutor, *e.g.* an obligation to feu or lease (Ersk. i. 7. 24; *Aberdeen*, 26 Nov. 1823; see *Thomson*, 1837, 9 Jur. 371, and 15 S. 807; *Special Powers, infra*).

Entails.—For the tutor's powers in regard to entailed lands, see the Entail Acts, as follows: 1848, ss. 31 and 50; 1853, s. 18 (consent); 1868, ss. 3, 5; 1875, s. 12 (2) (application); 1882, s. 11 (application), s. 12 (consent); Pupils Act, 1849, s. 7 (*Maxwell*, 1877, 4 R. 1112; *Monereiff*, 1894, 1 S. L. T. No. 531; see CURATOR, iv. 33; JUDICIAL FACTOR, vii. 182, 192; ENTAIL, v. 42 *et seq.*).

Powers in regard to Moveable Property.—The tutor's powers over moveables are, with few exceptions, those of a proprietor. While he cannot make a gift of the pupil's property, he may sell any part of it, subject to reduction (Ersk. i. 7. 17), and ought to sell at the best prices everything saleable which is liable to cause loss if kept unsold (Ersk. i. 7. 24–5; *Stevin*, 1666, Mor. 16277). This general power not only covers the right to assign debts personally secured, including bills (Fraser, 247), but also extends to the assignation of a heritable bond (*Neilson*, 22 Nov. 1771, *Arniston Session Papers*, vol. 102–4), even where the principal debt has been paid by the cautioner (Ersk. i. 7. 19).

Powers in regard to Heritable Property.—Heritage can only be alienated by authority of the Court in special circumstances (*Special Powers, infra*). As mentioned above, however, the tutor may assign a heritable bond; and he may also grant an assignation or discharge to the debtor (*Graham*, 1735, Mor. 16339, and Elch. v. "Tutor," No. 3; *Lyon*, 1665, Mor. 16272).

(1) Where, however, (*a*) the obligation to dispone was undertaken by the father (Ersk. i. 7. 17; Bell, *Prin.* s. 2084; *Aberdeen*, 1823, 2 S. 527), or (*b*)

where the law can compel an alienation (Ersk. *supra*),—*e.g.* in the case of joint ownership, or of a purchase of teinds by the heritor (*Graham*, 1798, Mor. 5599), the renunciation of a wadset or discharge of a heritable bond (*Graham*, 1735, Mor. 16339), or renewal of investitures,—the tutors may act without judicial authority (Fraser, 253). In these cases the succession to the pupil may be altered (see *Kennedy*, 1843, 6 D. 40; *Moncreiff*, 1856, 18 D. 1286; JUDICIAL FACTOR, vii. 182).

(2) It has also been said that where the property comes from the father, who has given power to sell, the tutor may exercise such power; but this may be doubted (Fraser, 252; see *Parrot*, 1810, Hume, 889).

Lord Fraser says, "Should the tutor grant a security over the estate, it is thought that if there be no lesion, and the money has been properly applied for the minor's use, the bond will be upheld, just as it is thought a sale in the same circumstances would be" (p. 256, and authorities in notes (*a*) and (*b*). This seems to follow from the law as to the effect of the Court's intervention, see JUDICIAL FACTOR, vii. 192).

Altering Succession to Pupil's Estate.—(1) The tutor is barred from making *direct* alterations on subsisting substitutions, with no other end, or obvious result, than to change the succession (Ersk. i. 7. 18; see *Stevenson*, 1718, Mor. 14852, Rob. App. p. 216; *Sharp*, 1671, Mor. 16285; *Tennent*, 1673, Mor. 16288; see *Strathallan*, 1837, 15 S. 971; and 1840, 2 D. 840). It was held that a tutor could not change heritable into moveable even to enable his ward to regulate his succession by testament on arriving at puberty (*Sharp*, *supra*; Ersk. i. 7. 18; Fraser, 261); but in *Brown* (1897, 24 R. 962) the proceeds of heritage sold by a factor *loco tutoris* in the ordinary course of administration, in virtue of special powers granted by the Court, were decided to be carried by the ward's settlement made after he attained puberty.

(2) (*a*) Acts of the tutor, done in the course of ordinary administration because deemed expedient by him, and altering the nature of the subject from heritable to moveable—*e.g.* purchases of land, or adjudications—do not, it is generally agreed, change the succession,—the altered subject is held as a *surrogatum* (*Ross*, 1793, Mor. 5545; *Graham*, 1798, Mor. 5599; *Adv.-General*, 1850, 13 D. 450; *Moncreiff*, 1856, 18 D. 1286). It seems, however, that the altered nature of the property would determine the course to follow in regard to diligence, completing title, etc. (see Fraser, 263).

(*b*) But where the character of the property is changed by the operation of a statute, or the general law (Lands Clauses Act, 1845; see *Graham*, *supra*), or by the diligence of creditors, or some other cause outwith the tutor's control, the succession is regulated by the nature of the subject as at the date of the succession opening (see *Kennedy*, 1843, 6 D. 40; *Stuart*, 1855, 17 D. 380; *Heron*, 1856, 18 D. 917). A tutor of a pupil heir of entail is entitled to apply consigned money in repayment of outlay permanently improving the estate (*Stuart*, *supra*).

The above rule, however, is to be applied reasonably, and not judaically, so as to lead to absurd consequences (see Fraser, 265).

Trade; Speculation.—The tutor is debarred from risking the pupil's funds by embarking in trade (*Cochrane*, *infra*, per Ld. Cowan; *Graham*, 1798, Mor. 5599; *Calder*, 11 Dec. 1811, F. C.; Bell, *Prin.* s. 2084). If he does so, the risk is his, while all profits fall to the pupil (*Cochrane*, *infra*). Further, if the tutor embark *quâ* tutor in a trade partnership or banking company, he will not only be liable personally to third parties for partnership debts, but will be personally bound to contribute *inter socios* (*Lumsden*,

1865, 3 M. (H. L.) 89 (*Western Bank* case); cf. *Duncanson*, 1715, Mor. 16336 and 8928; Ersk. i. 7. 24; see TRUSTEE; *City of Glasgow Bank* cases). The general rule is that the speculation is unjustifiable where it is "hazardous and uncertain" (Fraser, 268).

The Court will not, by granting special powers, sanction even the *continuance of a going business* (see *Cochrane*, 1855, 17 D. 337; 1857, 19 D. 1019; *Philip*, 1827, 6 S. 103); though they have indirectly afterwards approved of a factor's conduct in carrying on a business involving risk (*Macleod*, 1856, 19 D. 133; *Gilray*, 1872, 10 M. 715; 1876, 3 R. 619; see JUDICIAL FACTOR). "There is, however, no rule requiring a tutor to sacrifice the estate by immediate realisation. . . . I should be slow to sanction the doctrine, that either tutors or trustees can under no circumstances retain even permanent investments made by the deceased, which they would not have been themselves justified in making" (*Acc. of Court*, 1858, 20 D. 1184, Ld. Deas). The winding up must be done prudently.

(4) *REDUCTION ON GROUND OF MINORITY AND LESION.*—It will be kept in mind, in regard to the foregoing summary of a tutor's powers of administration, that his ordinary acts are not in all cases absolutely valid and binding. They are all subject to the ward's right to reduce within the *quadriennium utile* on the ground of enorm lesion (Ersk. i. 7. 34 *et seq.*; see MINOR, *Restitution on ground of Lesion*, p. 360).

(5) *HOW TUTORS SUE AND ARE SUED.*—See PUPIL; JUDICIAL FACTOR; *FATHER, ante.* Tutors have a good claim against the *pupil's estate* for expenses of litigation where these have been properly incurred (*Johnstone*, 1856, 18 D. 343; see *Baxter*, 1864, 2 M. 915; *Cameron*, 1844, 7 D. 92 (Ld. Cockburn); but compare *Haly*, 1749, Mor. 16354, and cases in Fraser, 273, note (b), where the action held improper and unwarranted).

In a question with the *opposite party*, the Court are inclined to deal more leniently with a tutor than trustees in regard to expenses (see *Thomson*, 1840, 2 D. 1234); but the father suing as administrator is held personally liable for expenses if unsuccessful (*Wilkinson*, 1897, 24 R. 1001; *White*, 1894, 21 R. 649; see *Fraser*, 1892, 19 R. 564). See EXPENSES.

While the tutor is liable to the extent of the estate for debts owing at the time he accepts office (Stair, i. 6. 20; Ersk. i. 7. 24), he is personally liable, as a general rule, for debts incurred, or obligations undertaken by him, even *tutorio nomine*, unless it appears that this was not the intention of the contracting parties (*Lumsden*, 1864, 2 M. 695; rev. 1865, 3 M. (H. L.) 89). See TRUST.

It has been held incompetent to refer to the *tutor's oath* matters arising prior to his appointment (*Stuart*, 12 Dec. 1815, F. C.); and unless he has been specially concerned with the transaction (*Cant*, 1665, Mor. 12929; *Hepburn*, 1661, Mor. 12480; Stair, i. 6. 20; *Hay*, 1666, Mor. 16276), his oath is not conclusive against the pupil, though he had probable grounds for knowing all the circumstances in regard to constitution and subsistence of the obligation (Stair, i. 6. 20; *Eccles*, 1664, Mor. 16270; *Mein*, 1699, 4 Br. Sup. 449; *Waddell*, 1707, Mor. 12484). See OATH ON REFERENCE; PROOF.

Haver.—In actions against a pupil the tutor is the party who should be examined as a haver (*Aitken*, 1628, Mor. 8907).

Arrestments should be left in the tutor's hands (More's Stair (*Notes*), 288); *charges* should be served upon (*Rae*, 1595, Mor. 16237), and *intimations* made to (*Queen's Advoc.*, 1566, Mor. 16230), the tutor alone (see Fraser, 162).

It is the general rule of law that the tutor's acts are considered as the proper deeds of the pupil, and bind him (*Orr*, 1822, 1 S. 412 (N. E. 386); *Forrester*, 1711, Mor. 16330; *Morton*, 1749, Mor. 8931), though, as we have seen, the tutor also may be personally liable. The pupil is also, when of full age, entitled to exact fulfilment of the tutor's contracts, and found upon his actings (Stair, i. 6. 27; *Jamieson*, 6 Dec. 1808, F. C.). But the pupil is neither to be hurt nor profited by the tutor's dole, and if profited may be sued (Stair, *supra*). Accordingly, it has been decided that the tutor's vitious intromission does not infer a passive title against the pupil (*Kerr*, 1842, 2 S. & M'L. 895; 1 Bell's Cases, 280).

(6) *Auctor in rem suam.*—A tutor, like any other person holding a fiduciary position, is debarred from entering into any contract with the pupil, or directly or indirectly using his position, or the funds intrusted to him, so as to secure an advantage or earn a profit for himself,—in other words, he must not be *auctor in rem suam*. For the rules and authorities applicable to this subject, see Auctor in rem suam, where they are set forth in detail (see also Curator; Fraser, 279 *et seq.*).

A deed will be sustained where the direct advantage accrues to a third party, and the tutor is only incidentally benefited (see *Carstairs*, 1672, Mor. 8962 and 16286; Fraser, 292). So also a quorum of tutors may validly grant a deed in favour of a co-tutor, in implement of obligations arising independently of the tutory (Ersk. i. 7. 19; Stair, i. 6. 17; *Duncanson*, 1715, Mor. 8928); and one of several tutors may receive a discharge from his co-tutors for provisions paid to the ward, subject of course to reduction on proof of lesion (see *Perston*, 1863, 1 M. 245, per Ld. Neaves and Ld. J.-Cl. Inglis). Where there is no quorum without the tutor in question, judicial sanction is necessary (Ersk. i. 7. 19; Bell's *Prin.* s. 2084; see also Stair, i. 6. 17). A tutor advancing money for the ward's behoof while holding office, has been allowed to adjudge therefor, on finding caution to repeat (*Ramsay*, 1662, Mor. 11523 and 16267; Bankt. i. 7. 40). A tutor may, however, raise action against the pupil for a debt due before the tutory began (*Donaldson*, 1629, Mor. 16253; Ersk. i. 7. 32), since there is no special legal presumption against the justice of the claim (*Dewar*, 1619, Mor. 16241; *Muir*, 1696, 4 Br. Sup. 298).

While the objection may be stated by the ward's onerous creditors, even against the singular successors of the tutor (*M'Dougal*, 1686, Mor. 16308), it cannot be stated by a third party not deriving right from the pupil (*Wilson*, 1789, Mor. 16376; Hailes, p. 1069).

(7) *Diligence prestable by Tutors.*—See Curator.

Fathers as administrators-in-law are favoured on account of their position, being only liable for *culpa lata* (Stair, i. 5. 12; Ersk. i. 6. 55; i. 7. 26). *Tutors-nominate* are liable for *culpa levis in concreto*,—or the diligence they show in their own affairs. *Tutors at law* and *dative*, in respect that they seek the office, must show exact diligence; they are subject to liability for *culpa levis in abstracto*,—that is to say, they must use such diligence as a prudent man would observe in his own affairs (Stair, i. 6. 21; Ersk. *supra*; see More's *Notes* to Stair, i. 6. 21; Fraser, 298). The liability only attaches from the date of accepting office (Ersk. i. 7. 20; *Muir*, 1697, Mor. 16316).

Extent of Liability.—(*a*) *Omissions.*—The general rule is that tutors are liable for omissions as well as intromissions, "that is, they are liable for all the loss and damage that may follow from having omitted to do an act which they were bound to perform, as well as for having done anything improperly" (Fraser, 299; as instances, see *Fergusons*, 1677, Mor. 16292; *Gray*, 1694, 4 Br. Sup. 188; *Cleland*, 1680, Mor. 9984, Fountainhall; *Duff*,

1788, Mor. 16375; 1793, 3 Pat. App. 283; for instances of exemption, see TRUST; *Scott*, 1862, 1 M. 57). *Fathers* are said not to be liable for omissions (Ersk. i. 7. 26; Stair, i. 5. 12; i. 6. 55); and *tutors-testamentar* may be exempted by the father from liability for omissions, or being bound *singuli in solidum* (Act 1696, c. 8), as regards "all means and estate descending from the father" (*Fraser's Trustees*, 1830, 9 S. 178; *Ainslie*, 1835, 13 S. 417). This exemption is lost by failure to make up inventories, or its equivalent (*Murray*, 1832, 10 S. 276; 1833, 11 S. 663; *Mollison*, 1833, 12 S. 237), or to perform any act obviously necessary to carry out the deed appointing (see *Moffat*, 1834, 12 S. 369; *Seton*, 1841, 4 D. 310; *Thomson*, 1852, 1 Macq. 236, Ld. Chancellor; *Forsyth's Factor*, 1853, 2 Stu. 187). Tutors are also exempt from *joint liability* where the father assigns to each his duties (Ersk. i. 7. 27; Stair, i. 6. 23).

It is to be noted, as before mentioned, that the Trusts Act of 1861, freeing trustees from liability for omissions, now applies to tutors; but neither a clause of immunity, nor sec. 1 of the Act of 1861, will protect against a "positive breach of duty" or *mala fides*, or exempt from the consequences of neglect to use the diligence prestable by the tutor (*Knox*, 1888, 15 R. (H. L.) 83); see TRUSTEE; CURATOR.

The tutor's *intromissions* must be within his powers of administration, and he will be liable unless he acts with a sound discretion, and with a due regard to the pupil's interest (Fraser, 301). This appears to follow from the rule as to the diligence required from a tutor (see *Gib*, 1769, 5 Br. Sup. 632; *Maul*, 1757, Mor. 3529; *Murray*, 1833, 11 S. 663; see TRUSTEE).

(*b*) *Liability in solidum.*—After acceptance, a tutor, if not exempted by the father, was held liable *in solidum*, although he had never intromitted with the estate, or taken part in the administration (Ersk. i. 7. 27; Stair, i. 6. 23; Fraser, 305; *Murray*, 1833, 11 S. 663).

(*c*) *Statutory Limitation of Liability.*—The latter rule as to liability, which also applied to trustees, was altered by the Trusts Act of 1861 (24 & 25 Vict. c. 84), which now applies to tutors (see Trusts Act, 1884, s. 2; CURATOR).

Though tutors had not the benefit of discussion, or division, they had right to an action of relief *inter se* (*Ross*, 1829, 1 Jur. 369; *Sinclair*, 1686, Mor. 14696; Ersk. i. 7. 27; Fraser, 305; see *Guthrie*, 1630, Mor. 14640). Further, a discharge granted by the minor to one would not free the others unless it bore to be in satisfaction of the whole (*Seaton*, 1668, Mor. 3547).

(8) *ACCOUNTING.*—Since the tutor is now brought under the supervision of the Accountant of Court, and is bound to close his account and lodge it with that official annually, the rules applicable to this subject are the same as in the case of a judicial factor *loco tutoris* (*q.v.*, vii. 183). For the common law rules applicable, or where the tutor has not come under the Pupils Act, see CURATOR, *Accounting*, vol. iv. at p. 40.

The *Presumption* of *Intus habet*, and the rules as to *Decennial Prescription of Accounts*, apply to tutors in the same way as to curators (see CURATOR, iv. 41). When the tutors act under the Accountant's supervision, any risk of questions as to prescription is obviated by the latter's audit.

B. SPECIAL POWERS GRANTED TO TUTORS.

Fathers and tutors have from an early date been in use to apply to the *nobile officium* of the Court for special powers to perform certain acts of administration, which they could not do at common law. The rules applicable are practically identical with those stated in reference to JUDICIAL FACTORS (*q.v.*), and need not, therefore, be again detailed.

Generally speaking, wherever the act contemplated is an important or extraordinary step, thus falling outside the ordinary tutorial administration, it is necessary, or at least highly expedient, that formal judicial sanction should be obtained. For example, an alienation of heritage by a tutor without authority appears to be null as between tutor and ward, and may be set aside *exceptione* (*Dickson*, 1742, Elch. "Tutor," 15; Stair, i 6. 18); but it is not *ipso jure* void in a question with third parties, and will be sustained if profitable to the minor,—lesion, however, being presumed (see *Bontine*, 1838, 1 D. 286; *Morton*, 1749, Mor. 8931; Fraser, 252 and 256). On the other hand, the authority of the Court neither renders the act safe from subsequent challenge, nor relieves the tutor absolutely from responsibility (*Vere*, 1804, Mor. 16389; *Jamieson*, 1870, 8 M. 976 (Ld. Pres. Inglis); *Mathieson*, 1857, 19 D. 917). No special power seems necessary in order to make up title (*Graham*, 1852, 14 D. 357). Special powers to alienate will now be granted whenever necessary, or highly expedient in the interests of the ward and his estate (see *Gillespie*, 1898, 25 R. 876 (Ld. Pearson)).

Procedure.—Formerly the procedure was by a regular action of cognition and declarator brought in the Inner House of the Court of Session (see *Colt*, 1800, Mor. 16387; *Carrick*, 1829, 7 S. 848); later by a summary application by petition to the Inner House (*Sommerville*, 1836, 14 S. 451; *Finlayson*, 1835, 13 S. 861; 14 S. 219; *Mackenzie*, 1853, 16 D. 60; *Logan*, 1897, 25 R. 51; Fraser, 495–6); and now by a summary petition at the instance of the tutor to the Junior Lord Ordinary, on a report by the Accountant of Court, in terms of the Guardianship Act of 1886, the Distribution of Business Act, 1857, and the Pupils Protection Act, 1849; see JUDICIAL FACTOR.

1. *UNDER THE PUPILS ACT.*—The father, or tutor, may now apply for the powers given by sec. 7 of this Act, in the same way as a JUDICIAL FACTOR (*q.v.*, vii. 187–8; see *Molleson*, 1890, 17 R. 303).

2. *POWER TO SELL, BORROW, FEU, GRANT LONG LEASES, EXCAMB.*

(1) *To Sell.*—The Court formerly showed great reluctance in granting these powers to fathers and tutors-nominate, since they found no caution (*Sawers*, 1850, 12 D. 905 (to sell); *Graham*, 1852, 14 D. 357; *White*, 1855, 17 D. 599 (to sell or burden); *Campbell*, 1880, 7 R. 1032; 1881, 8 R. 543 (to feu)). As a rule, necessity, such as to avoid a threatened loss, or to aliment the ward, was the only ground recognised (*Vere*, 1804, Mor. 16389; *Finlayson*, 22 Dec. 1810, F. C.; *Mackenzie*, 1855, 17 D. 314 (to sell); *Finlayson*, 1835, 13 S. 861; *Wilson*, 1834, 13 S. 176; *Melville*, 1850, 12 D. 914; *Bellamy*, 1854, 17 D. 115 (to borrow); *Campbell, supra*): expediency or advantage was disregarded (*Graham, supra*; *Waddell*, 1851, 13 D. 739; *Boyle*, 1853, 15 D. 420; *White, supra*). Sometimes, even in cases of necessity, the Court, while willing to grant powers to sell, delayed proceedings by the parents till a curator *bonis* was appointed to receive and discharge the price (*Sawers*, 1850, 12 D. 905 (father); *Mackenzie*, 1866, 5 M. 158 (mother)).

Latterly the stringency of this rule has been relaxed, and a high expediency (*Gillespie*, 1898, 25 R. 876 (Ld. Pearson)) has been accepted as a ground for judicial sanction of sales and feus of the ward's estate (*Logan*, 1897, 25 R. 51 (father, to sell); *Ld. Clinton*, 1875, 3 R. 62 (father, feu); *Campbell*, 1880, 7 R. 1032; 1881, 8 R. 543 (tutors-nominate, to feu, and accept reconveyance of feu); see *Callander*, 1869, 6 S. L. R. 527 (to borrow); *Berwick*, 1874, 2 R. 99 (to accept renunciation of lease,—where it was remarked that powers may be given to tutors-nominate which would be refused to trustees)).

The necessity for obtaining special power in selling or feuing extends to all indirect modes of transference,—*e.g.*, to deeds constituting (Ersk. i. 7. 17; *Douglas*, 2 July 1802, Hume, *Sess. Papers*, i. No. 11), and renouncing, servitudes (Ersk. *supra*), creating real burdens, annuities or liferents, and otherwise restricting the proprietor's rights (Ersk. *supra*, Ivory's note; *Davidson*, 1826, 4 S. 632),—and in cases where the pupil's predecessor came under obligation to alienate or restrict, the Court will readily grant the necessary powers (*Aberdeen*, 1823, 2 S. 527; *Mark*, 1829, 8 S. 195).

(2) *To Borrow.*—The Court prefer that a tutor should borrow on the security of, rather than sell, the pupil's heritage; and power to borrow will be granted, as in sale, where the circumstances show necessity or high expediency (*Wilson*, 1835, 13 S. 1046; *Somerville's Factor*, 1836, 14 S. 451; *Crawford*, 1839, 1 D. 1183; *Bellamy*, 1854, 17 D. 115; *White*, 1855, 17 D. 599 (refused); see *Callander*, 1869, 6 S. L. R. 527); see JUDICIAL FACTOR; TRUST. It is thought that where the money has been properly applied for the pupil's behoof, a heritable bond will be upheld, though granted without prior judicial warrant (see Fraser, 256). Note the effect of trust legislation on these powers (*ante*), and see JUDICIAL FACTOR, vii. 189.

Feuing, excambing, granting long leases, are in the same position, *quoad* special powers, as selling, and borrowing upon, heritable property.

3. *LEASES.*—While tutors have now statutory power to grant ordinary leases for definite periods, and to accept renunciation of leases (*supra*—ORDINARY POWERS), they must still obtain the consent of the Court to renounce a lease, where the landlord is willing to accept. Authority will be granted where the renunciation is clearly necessary, or highly expedient (*supra—Sale*), in the pupil's interest (*Turner*, 1862, 24 D. 694; *Brown*, 1846, 9 D. 250; see *Berwick*, 1874, 2 R. 90).

It would appear that tutors have no power to engage the ward's funds in a new lease without the Court's authority (see Fraser, 268, 259).

4. *STATUTORY POWERS.*—Powers are in some cases given to tutors by statute entitling them to sell without the authority of the Court, when they would otherwise require it. For instance, under the Lands Clauses Act (8 & 9 Vict. c. 19, s. 7), *inter alios* husbands, tutors, curators, and other guardians for infants, minors, etc., being possessed of lands or any right therein, are empowered to sell, convey, dispose of, and disburden (s. 8) such lands or rights to the promoters of the undertaking, on complying with the provisions of the Act as to valuation (s. 9).

Again, in regard to *Entails* it would appear to be doubtful whether petitions to borrow and charge, or sell, feu, etc., need be preceded by a petition for special powers, since these things, under the statutes specially applicable, can only be effected at the sight of the Court, after the necessary remits and full inquiry (*Moncrieff*, 1894, 1 S. L. T. No. 531 (Ld. Low). See JUDICIAL FACTOR, *Entails*, vii. 192).

5. *BUILDING, REBUILDING, OR ENLARGING MANSION-HOUSE AND OFFICES.*—Special powers are necessary to enable a tutor to take such important steps,—the ground being necessity, or obvious high expediency amounting to necessity (*Sinclair Wemyss*, 1882, 9 R. 1131 (refused—and authorities there—Ld. Pres. 1133); see *Semple*, 1888, 15 R. 810 (*curator bonis*); see also *Ball*, 1838, 1 D. 109; *Maitland*, 1863, 1 M. 1104 (judicial factor)). The tutor, however, is bound to keep the existing house in repair (Ersk. i. 7. 24; *Graham*, 1798, Mor. 5599; *Hill*, 1665, Mor. 16276).

6. It is difficult, indeed impossible, to give an exhaustive enumeration

of the circumstances where an application for special powers is necessary. The following additional cases may be taken as illustrative :—

(1) *Power to collate and elect* (*Robertson*, 1841, 3 D. 345; see *Mitchell*, 1847, 10 D. 148; *Cowan*, 1848, 6 Bell's App. 222—Ld. Cottenham; see *Young*, 1880, 8 R. 205). Here, however, the Court is unwilling to interfere, and the guardian is not bound to collate (*Cowan*, 1845, 7 D. 872; affd. *ut supra*).

(2) *Payments out of capital*,—for aliment or education (*Maxwell*, 1747, Mor. 16352; cf. *Wodrow*, 1830, 8 S. 604; JUDICIAL FACTOR, vii. 191 (9)).

(3) *Aliment of those dependent on pupil*,—powers may be granted where the pupil is able to afford it, and there is poverty and a legal claim (*Grant*, 1838, 16 S. 652; see *Boyle*, 1855, 17 D. 790; Ersk. i. 6. 58; JUDICIAL FACTOR, vii. 190 (8)).

(4) Power to carry out an arrangement made by the father of pupil before his death has frequently been granted to judicial factors and tutors-dative when necessary from the nature of the act (see *Alexander*, 1857, 19 D. 888; *Crighton*, 1857, 19 D. 429; *Aberdeen*, 1823, 2 S. 527; *Boyle*, 1852, 14 D. 764).

(5) *Power to carry on trade* will not be granted (*Philip*, 1827, 3 S. 83; see *Guthrie*, 1853, 16 D. 214; *Lindsay*, 1848, 11 D. 232; Fraser, pp. 232, 236, 513). See JUDICIAL FACTOR, vii. 191.

6. *EFFECT OF JUDICIAL AUTHORITY*.—Even when judicially sanctioned the Act is open to reduction, while the guardian is not freed from responsibility (for authorities, see JUDICIAL FACTOR, vii. 192).

VI. TERMINATION OF THE OFFICE.

The office comes to a close in much the same way as that of CURATOR (*q.v.*), namely,—

(1) On the pupil arriving at *puberty*—in males the age of fourteen, in females, twelve: the father has no power to prolong the period (*Graham*, Hailes, 860 (Ld. Braxfield)).

(2) On the *death* of the pupil or tutor; though it would appear that on the civil death—outlawry—of the pupil, it is doubtful whether his property would be removed from the tutor's administration (Fraser, 309). On the tutor's death, the nearest agnate may serve tutor-at-law, or the Court may be asked to appoint a factor *loco tutoris*, or tutor-dative (Fraser, *supra*). Where the appointment of tutors-nominate is not expressly joint, the nomination subsists in the survivors or survivor (Fraser, 310).

(3) By the *failure*, or *fulfilment* respectively, of any *condition* on which the appointment depends (see CURATOR, iv. 39).

(4) The *marriage* of a female tutor voids the office (Stair, i. 6. 24; Fraser, 171); but the mother's second marriage does not disqualify her for being guardian under the Act of 1886 (see *supra*, *MOTHER*).

(5) Tutors were allowed by the Court to *resign* on "reasonable causes" shown (Act 1555, c. 35; Ersk. i. 7. 29; Stair, i. 6. 24; Bell, *Prin.* s. 2085; *Graham*, 1881, 8 R. 996; *Bannerman*, 1842, 5 D. 229), but not merely with consent of their co-tutors (see *Logan*, 1843, 5 D. 1066). By the Pupils Act, 1849, s. 31, the Court of Session—Junior Lord Ordinary (Distribution of Business Act, 1857, and Judicial Factors Act, 1889, s. 14)—have power, on cause shown, to *remove* or *accept the resignation* of any tutor or curator coming under the provisions of the Act (now all tutors—Guardianship Act, 1886, s. 12), and to appoint a judicial factor. It would appear also that the provisions of the Trusts Act, 1861, now apply.

(6) Tutors, including the father (*Johnstone*, 1822, 1 S. 588; *Glassford*, 1849, 11 D. 1030; but see *Walton*, 1850, 12 D. 912), could always, at common law, be *removed* by the Court of Session as *suspect* (Ersk. i. 7. 29). For the various grounds reference may be made to CURATOR, iv. 39 (6). They may now also be dealt with under the Pupils Protection Act, in regard to penalties, reports, etc., in the same way as judicial factors and tutors at law and dative (see secs. 5, 6, 19, 20, 21, 25; Judicial Factors Act, 1889, ss. 1, 7, 14).

By the Guardianship Act, 1886, s. 6, the Court in either Division, if it be for the welfare of the infant, may remove from his office any testamentary guardian, or any guardian appointed under that Act, and appoint another in his place.

Poverty, or *negligence* in managing his own affairs, was never a ground for removing a tutor (Fraser, 313, 314).

Formerly (1696, c. 8) a tutor nominate or testamentar might be ordained to find caution, and on failure might be removed (*Welsh*, 1778, 5 Br. Sup. 634; Mor. 16373; Ersk. i. 7. 29; *Balfour*, 1705, Mor. 16320); and it is still competent for the Court to order fathers, tutors-nominate, and guardians to find caution (1886 Act, s. 12) if the circumstances appear to the Court to require it.

The *procedure* for removal, when there was no criminal misconduct, was in recent years by means of a summary petition to the Inner House at the instance of the pupil (*Austin*, 1826, 5 S. 177), the pupil's relations, or a co-tutor (Stair, i. 6. 26; Ersk. i. 7. 29; *Wotherspoon*, 1774, 5 Br. Sup. 604; Fraser, 315, 316). It seems clear, since the judgment in *Souter* (1890, 18 R. 86), that tutors-at-law, and tutors-dative — who are appointed in the Inner House,—must be removed for misconduct (if not clearly criminal) in the same way as judicial factors, by petition addressed to the Junior Lord Ordinary, and not to the Inner House; but it is at least doubtful, looking to the mode of their appointment and the analogy of trustees, whether the combined effect of the Guardianship Act, 1886, s. 12, the Pupils Protection Act, and the Distribution of Business Act, 1857, renders this procedure obligatory, or even competent, in the case of tutors-nominate. Observe also that the first-mentioned Act (s. 6) provides that the Court of Session (*i.e.* either Division, and the Lord Ordinary on the Bills in vacation, s. 9), "may" in their discretion, and on being satisfied that it is for the welfare of the infant, remove from his office any *testamentary* guardian (*i.e.* tutor, s. 8), or any guardian appointed or acting by virtue of the Act, and may on the same ground appoint another guardian in his place. (For a full statement on the subject of *removal*, see JUDICIAL FACTOR, vii. 193; also CURATOR, iv. 39, 40; TRUSTEE).

Where there is urgency, an interim factor may competently be appointed (*Acc. of Court*, 1853, 16 D. 163; 1854, 16 D. 489).

If none having a better title claim the office, a factor *loco tutoris* will generally be appointed (*Wotherspoon*, 1775, Mor. 16372).

After the termination of the office the tutor's powers cease; subsequent tutorial acts are null (*Lockhart*, 1826, 5 S. 136; affd. 1829, 3 W. & S. 481), and the tutor cannot be compelled to complete any inchoate transaction (*Cass*, 1672, Mor. 16285). Unwarrantable subsequent administration will render the tutor liable as pro-tutor (Ersk. i. 7. 29; *Vallance*, 1630, Mor. 16255; Fraser, 318).

REDUCTION ON THE GROUND OF MINORITY AND LESION, EVEN WHERE SPECIAL POWERS ARE GRANTED; AND DECENNIAL PRESCRIPTION.—Both are

applicable to tutory (1696, c. 9). See MINOR, viii. 360; CURATOR, iv. 41; PUPIL, x. 123.

CAUTION; PROCEDURE.—See JUDICIAL FACTOR, vii. 195, 196.

PRO-TUTOR.—While "it is not every management of the affairs of a pupil that will infer a pro-tutory," yet when anyone acts *quâ* tutor, having no title to the office, and thus holds himself out as possessing the character of tutor, he will incur all the liabilities of that office (Stair, i. 6. 12; Ersk. i. 7. 28; Bell, *Prin.* s. 2102). The rules are identical with those applicable to PRO-CURATOR (*q.v.*).

TUTOR AD LITEM.—See CURATOR *ad litem*; CURATOR, iv. 44; Fraser, 153.

[Stair, i. 6. 1; More's *Notes*, xxxv, lv, ccexliv; Ersk. i. 7. 1; Bankt. i. 7. 1; Ersk. *Prin.* i. 7. 1; Bell, *Prin.* s. 2067; Bell, *Com.* i. 128; Fraser, *Parent and Child*, 145 *et seq.*; Kames, *Equity* (1825), 108, 334, 353, 467 Kames, *Stat. Law Abridg., h.t.*; Ross, *Lect.* ii. 559.]

See CURATOR; JUDICIAL FACTOR; TRUSTEE; PUPIL; MINOR; CUSTODY OF CHILDREN; GUARDIANSHIP OF INFANTS ACT.

Tutor-dative.

I. TO A PUPIL.—1. *APPOINTMENT.*—(1) *Mode.*—A tutor-dative may be appointed to a pupil when there are neither tutors-nominate, tutors-at-law, nor other guardians. Formerly nominated and appointed by the Crown, later by the Court of Exchequer, this officer is now appointed by the Court of Session in the Inner House (19 & 20 Vict. c. 56, s. 19) on summary petition intimated to the next of kin and the Crown (*Graham*, 1881, 8 R. 996; *Wilson*, 1857, 19 D. 286; Pupils Act, 1849, s. 25).

When the tutor-at-law renounces, and there are no tutors-nominate, this tutor may be appointed forthwith (*Martin*, 1859, 22 D. 45; *Simpson*, 1861, 23 D. 1292); but no tutor-dative may be appointed, if the tutor-at-law objects, till the expiry of year and day from the time when the latter might serve. The nomination is effectual if the tutor-at-law does not serve within that time (Fraser, 191; see TUTOR-AT-LAW TO PUPIL).

(2) *Who may be appointed.*—The Court may appoint any person or persons qualified to be appointed tutor-testamentar — even a female if unmarried (Fraser, 171, 191; Ersk. i. 7. 4), though she cannot be tutor-at-law (Stair, i. 6. 8; Ersk. i. 7. 12; Stat. 1585). Testamentary tutors whose nomination has fallen (Bankt. i. 7. 15), and tutors-at-law who decline to serve, may be appointed (*Urquhart*, 1860, 22 D. 932). The Court usually prefer those whom the ward's relations or the father have favoured.

Nomination.—Where several parties are appointed tutors-dative simply, without either a *sine quo non*, or quorum, the nomination, differing from that of tutors-testamentar, is held to be joint, so that it falls on the death of one (*Scott*, 1834, 7 W. & S. 211). For convenience, therefore, when several are appointed, the appointment is usually made in favour of all, and the survivor (*Wilson*, 1857, 19 D. 286; *Martin*, 1859, 2 D. 45).

Caution must be found in terms of the Pupils Act, s. 26.

2. *POWERS AND DUTIES.* — Except in regard to appointment and caution, the provisions of the Pupils Act, applicable to judicial factors, apply to tutors-dative (s. 25). Otherwise they have all the powers, and are under all the liabilities, of ordinary Tutors, and Tutors-at-law (*q.v.*), being liable for *culpa levis in abstracto*. The Trusts Act of 1884 (s. 2) declares that "Trustee" shall include "Tutor," however appointed, in the construction of the Trusts Acts.

3. The office *terminates*, except as before indicated, in the usual way. See TUTOR; TUTOR-AT-LAW.

II. TO AN INSANE PERSON.—1. *APPOINTMENT.*—This is the most ancient form of guardianship of the insane, and was originally allowed, even before the Statute of 1585, only on the verdict of an inquest proceeding on a brieve (Balfour, *Pract.* 122, 254; Bankt. i. 7. 11; M'Kenzie, *Inst.* i. 7. 14; *Inglis*, 1701, 4 Br. Sup. 517; Fraser, 538). The sovereign was in use, in virtue of his right to the guardianship of all lunatics, to appoint any fit person or persons to the office through the Court of Exchequer (Stair, i. 6. 25; M'Kenzie's *Obs.* on 1585, c. 18, p. 122). Later the appointment came to be made *periculo impetrantis* without the necessity of any preliminary inquiry into the mental state of the individual, and only in the event of the nearest agnate failing to exercise his right of serving as tutor-at-law (*Colquhoun*, 1628, Mor. 6276; 1 Br. Sup. 248; *Stewart*, 1663, Mor. 6279; note *Graham*, 1881, 8 R. 996). The service of the latter at any time superseded the prior appointment of a tutor-dative (Ersk. i. 7. 51; *Moncrieff*, 1710, Mor. 6286; see *Young*, 1839, 1 D. 1242, and *Bryce*, 1828, 6 S. 425, 3 W. & S. 323). By the Court of Exchequer Act, 1856 (19 & 20 Vict. c. 56, ss. 1, 2, 19), the duties of that Court in regard to the appointment and control of tutors-dative were to be performed by the Court of Session upon application by summary petition to either Division. The appointment must still be so applied for, and made (*Wilson*, 1857, 19 D. 286; *Urquhart*, 1860, 22 D. 932; *Simpson*, 1861, 23 D. 1292; see *Graham*, 1881, *supra*); but as tutors-dative are placed under the Pupils Act (s. 25), except in regard to appointment and caution, all incidental applications connected with their office must be made to the Junior Lord Ordinary (Distribution of Business Act, 1857, ss. 4, 10).

2. *NATURE OF THE OFFICE, AND POWERS.*—The office is, as we have seen, an interim one, and, like that of a *curator bonis*, subsists only till the service of the person legally entitled to the guardianship.

The *powers* and *duties* are identical with those of a Tutor-at-law (*q.v.*), both being under the Pupils Act; and, except as before indicated, the office *terminates* in the same way as that of tutor-at-law to an insane person.

The tutor-dative, if he is not the heir, appears to be entitled to the custody of the ward—a right denied to a *curator bonis* (Fraser, 541; *Bryce*, 1828, 6 S. 425, at p. 436; 3 W. & S. 323).

Owing to the facility with which judicial factors *loco tutoris* and *curators bonis* are now appointed, and the satisfactory way in which those appointments have worked, applications for the appointment of tutors-dative to pupils and the insane are seldom now presented.

[See Authorities under TUTOR; Fraser on *Parent and Child*, pp. 190, 537.]

See TUTOR; TUTOR-AT-LAW; JUDICIAL FACTOR *LOCO TUTORIS*; CURATOR BONIS.

Tutor-at-law.

I. TO A PUPIL.—A tutor-at-law may be appointed to a pupil when there are no tutors-nominate or guardians, or where they have declined, or failed after acceptance, or have become incapacitated (Stair, i. 6. 8; Ersk. i. 7. 4). The office is rarely demanded now; the usual modern procedure being to procure the appointment of a Judicial Factor *loco tutoris* under the Pupils Act, 1849.

1. *Appointment.*

(1) *To whom appointed.*—A tutor-at-law can only be served to lawful children,—a bastard having in law no agnates. To the latter a tutor-dative, or judicial factor must be appointed (*A.* v. *B.*, 1534, Mor. 16219).

(2) *Who may be appointed.*—The nearest male agnate, twenty-five years of age (Stat. 1474, c. 51; Stair; Ersk. *supra*), who fulfils the other requirements of the brieve of tutory, is entitled to the office; but he is, and remains, subject to the control of the Court, who may exercise it according to circumstances (see *Hadden*, 1822, 1 S. 357; Pupils Protection Act, 1849, ss. 25 to 29). Where there are several agnates in the same degree, he who is heir-apparent in heritage is preferred, even if the estate is wholly moveable; and where he is not qualified, the heir next in succession is entitled to serve (Stat. 1474, *supra*; Ersk. *supra*). Where the nearest qualified agnate declines, it is necessary to appoint a tutor-dative, or factor *loco tutoris*; the next agnate may not serve (*Bower*, 1750, Mor. 8910; Fraser, 185).

(3) *How Tutor-at-law appointed.*—A tutor-at-law is vested in his office by means of a service in Chancery, following on the procedure in a Brieve of Tutory (for an account of which see Brieve, ii. 221 and 224; Fraser, 186). After the expiry of a year from the date when a service is competent, a tutor-dative may be appointed, thus, it has been held, preventing the subsequent appointment of a tutor-at-law (*Erskine*, 1670, 1 Br. Sup. 611; *Wemyss*, 1551, Mor. 16223; but see *Ker*, 1665, Mor. 16271, and More's *Notes*, *infra*); but where the latter has not been appointed, the former may serve at any time (*Irvine*, 1632, Mor. 16260; cf. *Riddell*, 1669, Mor. 16281; see also Stair, i. 6. 11; More's *Notes*, xxxvi; and *Bell*, 1784, Mor. 16374; *Jurid. Styles*, iii. 233).

Caution must be found by the tutor. The matter is now regulated by secs. 26 *et seq.* of the Pupils Act. On the tutor-at-law's failure to find caution, a tutor-dative may be appointed (Fraser, 188). The cautioner ought to be habit and repute responsible, and subject to the jurisdiction of the Court of Session (Bell, *Prin.* s. 2079). The clerk to the service is responsible for the sufficiency of the cautioner. See Caution.

Review.—Appeal to the Court of Session appears to be competent, probably before extract (*Craik*, 1891, 19 R. 339, Ld. M'Laren; but see *Jardine*, 1825, 4 S. 158, and *Godwin*, 1842, 4 D. 1451); thereafter review must be by reduction (see *Matthew*, 1843, 6 D. 305; Mackay, *Pract.* i. 268; *Manual*, 68, 118).

2. *Powers.*—"The powers of all tutors in the administration of the minor's *estate* are the same. . . . and when there is no special power given" (to tutors-nominate in the deed of appointment), "they have no higher authority than tutors-at-law" (Fraser, 228). For a statement of the general and special powers of such tutors, reference may therefore be made to the preceding article on Tutor.

The powers over the *person* and *education* of the pupil are identical with those of a tutor-nominate (Fraser, 221),—the tutor, if apparent heir, being excluded from the custody.

3. *Diligence.*—Tutors at law and dative, unlike tutors-nominate, are liable for *culpa levis in abstracto*,—in other words, they must show that "exact diligence which prudent men employ in the discharge of their duties" (Fraser, 298); and their annual accounts must be audited on the principle of good ordinary management. They are under the same liability for omissions and intromissions as tutors-nominate, and to the same extent, viz. *in solidum*: (but see Trusts Act, 1861). See Tutor.

4. *Termination of Office.*—See Tutor.

5. *Inventories and Accounting.*—Except as to the mode of appointment and caution, the provisions of the Pupils Act, 1849, relating to Judicial Factors, were made applicable, in so far as the office admitted, to tutors-at-law served to pupils or insane persons, and to tutors-dative appointed to pupils or insane persons (s. 25).

The rules, therefore, applicable to Judicial Factors (*q.v.*) apply equally to tutors at law and dative, in regard to (1) lodging a rental, list, and inventory, (2) framing and audit of annual accounts, (3) opening up of audit of accounts, (4) lodging of moneys in bank, (5) final accounting at the close of the tutory, and (6) power of the Accountant as to reporting to the Court (Pupils Protection Act, *passim*; Guardianship of Infants Act, 1886, s. 12).

II. Tutor or Curator-at-law to an Insane Person.—1. *Appointment.*—(1) *Who appointed.*—The nearest male agnate of lawful age is by Statute 1585, c. 18, entitled to the guardianship of an insane relation, whether fatuous or furious. The early rule apparently was that the tutor must be twenty-five years old (Stair, iv. 3. 9; Ersk. i. 7. 50; Bankt. i. 7. 12; cf. More's *Notes*, xliv; Wallace's *Prin.* 395), but the Act of 1868 uses the term "of lawful age." He is sometimes called "curator" (Pupils Act, ss. 1 and 25), but the correct term appears to be that of "tutor" (1585, c. 18; Ersk. i. 7. 50; Fraser, 524, note (*d*)). Where the nearest agnate does not take office after service, the next cannot do so; a tutor-dative or *curator bonis* must be appointed (*supra*, Tutor-at-law to pupil; *Bryce*, 1828, 6 S. 425, Ld. M'Kenzie; M'Kenzie's *Observ.* on 1585, c. 18, p. 123). The nearest agnate may serve at any time, and supersedes any other who has been appointed to the office (Ersk. i. 7. 51; *Colquhoun*, 1628, Mor. 6276, 1 Br. Sup. 248; *Monerieff*, 1710, Mor. 6286; *Young*, 1839, 1 D. 1242; Fraser, 536).

A *father* is, of course, entitled to the guardianship of his minor insane child,—but after majority it appears essential that the child must at least be *cognosced* insane before the father can validly act as tutor-at-law, though *service* and *retour* to Chancery has been said to be unnecessary (Fraser, 534; Ersk. i. 7. 49 and 50; *Halliburton*, 1791, Mor. 10379; Bell, *Report*, p. 155; see *Jardine*, 1825, 4 S. 158; see *Graham*, 1881, 8 R. 996). It appears that a father cannot nominate guardians to his insane major child except in regard to a provision made by himself (see *Crawford*, 1828, 6 S. 749; Fraser, 525), and then a cognition is necessary (Ersk. i. 7. 49; Fraser, *supra*). He has, in any case, no higher powers than an ordinary tutor-at-law (see *Morton*, 11 Feb. 1813, F. C.).

Though a *husband* is *ex lege* a wife's administrator-in-law, it is competent for him to have her cognosced when insane. This gives him, as tutor, power over the person which he would not otherwise have. The procedure is the same as in the case of cognoscing his child (*Halliburton*, *supra*, and Hume's *Sess. Pap.* 1791, No. 44; *Jardine*, *supra*).

A *son*, as nearest agnate, may be served tutor to his father or mother (Fraser, 535).

(2) *Mode of appointment.*—The procedure, formerly cumbrous and expensive, is now regulated by the Court of Session Act, 1868, s. 101, and A. S., 3rd Dec. 1868. Provision is there made for the *cognition* of the alleged insane person upon a brieve from Chancery, taken out by any near relation (*Larkin*, 1874, 2 R. 170; *Bryce*, *supra*, Ld. Gillies); and *service* thereafter of his nearest agnate,—not necessarily the party taking

out the brieve. If the nearest agnate is not inclined to take the office when the brieve is retoured to Chancery, an application may be made for the appointment of a tutor-dative under the Court of Exchequer Act, 1856 (19 & 20 Vict. c. 56, s. 19), or for the appointment of a *curator bonis*. The procedure is detailed in the article on BRIEVE *of Idiotry*, and *Cognition* (*q.v.*), ii. 221–2.

Review and reduction are competent (see BRIEVE, *Review*, ii. 224; *Larkin, supra*). It has been laid down in an early case that the alleged incapax is entitled to have the oath of calumny administered to the claimant in the service to the effect that he believes all the points of the brieve (see *Dewar*, 25 Feb. 1809, F. C.). The alleged incapax, in a petition for appointment of *curator bonis*, is not entitled to demand a cognition and formal medical inquiry; the Court may take what course it considers best to obtain the necessary information (*A.* v. *B.*, 1891, 18 R. 90 (H. L.) 40).

The necessary *caution* must be found by the tutor in terms of the Pupils Act (s. 26).

2. *POWERS AND DUTIES.*—The powers and duties of a tutor-at-law to the insane in regard to the *estate* are practically identical with those of a Tutor-at-law to a pupil (*supra*), and a *Curator Bonis* (*q.v.*). He comes under the provisions of the Pupils Act (ss. 1 and 25 *et seq.*), and may apply for *special powers* on a report by the Accountant of Court.

Where the tutor is the heir-at-law, and there is heritage, it would appear, following the rule in regard to pupils, that he is not entitled to the *custody* of the ward, who passes into the care of the nearest agnate (cf. *Bryce*, 25 Jan. 1828, F. C., and *Blair*, Hume, *Sess. Pap.* 1814, No. 20; Fraser, 541; see Tutor-Nominate, *supra*). The Court, as in the case of a pupil, have the power to interfere, on application, where the guardian is removing the ward out of the country, or acting prejudicially to him in any other way.

As to the *aliment* of the ward, see TUTOR-NOMINATE, *Aliment*, and CURATOR BONIS TO INCAPAX.

3. *TERMINATION OF OFFICE.*—See CURATOR BONIS TO INSANE. The office terminates (1) by the death of the tutor or ward; (2) by the latter's radical recovery (Ersk. i. 7. 52); formerly a declarator of convalescence was necessary (see Fraser, 542, for details)—now medical certificates appear to be sufficient ("Notes by Accountant for Guidance of Factors," vii. 3, Parl. House Book); (3) by the tutor's incapacity, removal as suspect, or resignation on cause shown (Pupils Act, s. 31; see *Graham*, 1881, 8 R. 996); (4) by the marriage of a female in the case of a tutor-dative, *infra*; (5) by the existence or failure, as the case may be, of a condition on which the office is made to depend (see TUTOR); (6) by the service of a tutor-at-law, in the case of a tutor-dative (*infra*); (7) by the tutor's bankruptcy (*Dixon*, 20 Jan. 1832; Fraser, 542).

The office of tutor-at-law to pupils and insane persons has been almost entirely superseded in practice by those of Judicial Factor *loco tutoris*, and *Curator Bonis* (*q.v.*).

[See authorities under TUTOR: Fraser, *P. & C.* 183, 523.]

See TUTOR; TUTOR-DATIVE; JUDICIAL FACTOR *LOCO TUTORIS*: CURATOR BONIS; BRIEVE; COGNITION.

Twopenny Act.—See JUSTICE OF THE PEACE (*Responsibility*; vol. vii. p. 269).

Udal Law.

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Udal.—O. H. German, *uodil, uodal*; Ang.-Sax. *édel*; Old Norse, *ódal*; *prædium avitus* [Grimm's *Deutsche Alterthümer* (Dritte Ausgabe), 492]—whence Orcadian and Zetlandic *uthal, udal, odal* (Vigfusson's *Icelandic Dictionary*; Jamieson's *Scottish Dictionary*; Murray's *Hist. Eng. Dict.*); corresponding to Frankish *alod*, not by etymological affinity, but by actual significance as applied to land (Earl's *Land Charters and Saxonic Documents*, 41; Stubbs' *Constitutional Hist.* i. 273); and the equation has been judicially sanctioned (*Dundas* v. *Heritors of Orkney and Zetland*, 24 January 1777, 5 Brown's Supp. 609).

I. Norse Origins.

(*a*) *Conquest and Settlement—Norwegiæ regis jus in Orcades.*—Udal law, so far as Scotland is concerned, is foreign, and confined to the Orkneys and Zetland; but it is not there exclusive, there being a coexisting feudalism of later Scottish origin. The latter, after centuries of conflict, is the predominant element; the odals are mostly feudalised and the customs superseded or dead; but there are survivals, and these are ruled by the native law—saved and stereotyped by international treaty, by Acts of the Scottish Parliament, and by Scottish case law. Udalism came to the Orkneys and Zetland with the Northmen, in its virgin state, in the ninth century. The islands were conquest of greater Scandinavia, and it involved them in its history, subjected them to its polity, its law, and its language. In particular, the origins of udal law lie in Norway [Torfæus, *Orcades*, 33, 50, 51; Vigfusson's *Sturlunga Saga* (Prolegomena), cxcvii, ccviii; Norsæ's *Danes and Norwegians in England, Scotland, and Ireland*, 222 *et seq.*; Vigfusson's *Icelandic Dictionary* (Dasent's Introduction), xlvii *et seq.*], as its Norse history commences with Harfagar of Norway (*The Orkneyingers' Saga* (Rolls' ed.), 4). When that masterful jarl subdued his brother jarls of Norway into one monarchy under himself as king,—confiscating their freehold odals, proudly held *a Deo et Sole*—imposed a semi-feudal scat and commanded a feudal homage, many refused the yoke of feudal vassalage, and sailed "west over sea" to the freedoms (*inter alia*) of Orkney and Zetland. The expatriated colonists there founded the udallers and udalism; and the udalism was virgin—violently opposed, indeed, to Harald's embryo feudalism. What Harald sought to displace by feudalism, and these viking colonists introduced into Orkney and Zetland, was udal law, polity, tenure, and custom [*Die Nordisch-germanischen Völker*, by Munch; Laing's *Heimskringla* (ed. Anderson), Introduction, ch. iii.; K. Maurer's *Beiträge zur Rechtsgeschichte des Germanischen Nordens*, i. 20 *et seq.*; *Über die Einziehung der Norwegischen Odelsgüter durch K. Harald Harfagri*, by K. Maurer in *Germania* for 1869; Mackenzie's *Grievances and Oppressions of Orkney and Zetland*, ch. i.; Balfour's *Oppressions in Orkney and Zetland* (Maitland Club); Barry's *History of Orkney*; Hibbert's *Shetland Islands*; Gifford's *Zetland Islands*]. Udal law and Scottish feudalism early came into conflict, and the former in

the main gradually became subverted by the latter—the factors being the earl, the bishop, the Scottish Crown, and feudalism on the one hand, as against the udallers and udalism on the other.

(*b*) *Earldom.*—The earldom was created by Harald in 872. The Norse settlers making the islands a rendezvous for viking raids on their fatherland, Harald, after himself subduing them, gave the islands by way of earldom to Sigurd, the first jarl, free from tribute (scat), on condition that he ruled under Harald as sovereign and kept them in subjection [*Orkneyinga Saga* (ed. Anderson), 1, 2; *ib.* (Dasent's Translation), The Earls' *Saga*, 4; Egils' *Saga* (Green's Translation), ch. 4]. The ancient estate of the jarls (summarising Balfour—*Oppressions*, xxviii) lay scattered through every island and township in Orkney and Zetland, and consisted of (1) lands set to tenants on a three years' tack, with a gersom or fine at renewal, and an annual landskyld, landmail or rent, in addition to the king's skat, the bishop's teind, and other burdens; (2) the bordlands or mensal farms, with their böl and its enclosures, the occasional quarters of the jarl in his progresses of pastime or State service, and on that account exempt from skat; and (3) certain quoys and other lands added by odallers to their holdings, but not by odal-raed, and therefore paying no skat, but landskyld and other burdens of tenant lands. The earldom also included conquest lands, consisting (1) of lands purchased or excambed; and (2) of lands seized by the earls as *ultimi hæredes*, or confiscated for crime or skatfall. These lands, mails, gersoms, and services constituted the *jus comitatus* which Earl William (1471) conveyed to the Crown of Scotland.

(*c*) *Bishopric.*—The erection of the bishopric within the Norse period is placed in the year 1112, but the origin of the secular endowments is obscure. (Rentals of the Ancient Lordship of Zetland and of the Earldom and Bishopric of Orkney, by Goudie, in *Proceedings of the Society of Antiquaries*, xix. 214.) Bishop Graham, however, understood (1642) "that the old Bishopric of Orkney was a greate thing and lay sparsim throughout the haill parochins of Orkney and Shetland. Besyde his lands he had the teynds of auchtene Kirks. His lands grew daylie as adultries and incests increased in the country" (Peterkin's *Rentals of the Ancient Earldom and Bishoprick of Orkney*, No. iii. 21).

(*d*) *Udallers.*—The odal is the hereditary estate derived from primitive occupation, for which the odaller owes no vassalage, homage, or service to king, earl, landman, or hofding, except the personal obligation to appear in the host or Thing (Stubbs, i. 57; Balfour's *Oppressions*, xxxii). The characteristic features of tenure (odalsret) were the odal, a right of absolute property, *dominium* opposed to *feudum*, *beneficium*, stipendiary; and so absolute, indeed, as to be in a sense inalienable, being charged with a *jus retrahendi* in the odalsmen and odalsborn should they convey or pledge to a stranger [Conybear's *Iceland*, 15, 20; *Acts and Statutes of the Lawthing, Sheriff, and Justice Courts within Orkney and Zetland* (1602–1644), 156; Mackenzie's *Grievances*, 7; Hibbert's *Shetland*, 313]. The odal consisted of (*a*) the odal proper, *i.e.* the homestead, held in severalty; (*b*) the common lands, never distributed, belonging to the community and used in common, for pasture, fuel, turf, and water—Saxon, folkland; Norse, al-menning; Orcadian, commons; Shetlandic, scattald (*q.v.*) (Vigfusson's *Dict.*; Grimm's *Deutsche Alterthümer*; Earl's *Land Charters*, liii); and (*c*) there was the land let (*leigu-land*) by an odalsman to a stranger (*leig-lendinger*) for a rent (*leigu-burdr*).

(*e*) *Sovereignty.* — Christian I. of Norway (Denmark, Sweden, and Norway) (8th September 1468 and 20th May 1469) impignorated Orkney and Shetland (*sub firma hypotheca et pignore*) in security of the unpaid

balance of the Princess Margaret's dowry upon her marriage with James III. of Scotland [see Contract of Marriage in Peterkin's *Rentals*, App. p. 7; Torfæus, *Orcades*, 191; Acts of the Parliaments of Scotland (1471, c. 4.), ii. 187; Balfour's *Oppressions*, xii]. This is the title by which the sovereignty stands in Great Britain. The right of redemption is reserved by the contract. It has never been formally discharged. On the contrary, it has been repeatedly recognised: by negotiation for discharge of the claim (in 1589), renewed reservations to right of restitution (1621 and 1639), for repayment, discharge, and resumption of occupancy (1640). The right of redemption was formally asserted in 1549, 1558, 1560, 1583, 1640, 1660, and finally, at the Peace of Breda in 1667, the plenipotentiaries of Europe attested that the right of redemption was unprescribed and non-prescribable (Laurenson in *Macmillan's Magazine*, February 1875; Goudie in *Proceedings of the Society of Antiquaries*, xxi, 236; Hill Burton's *History of Scotland*, vol. iii. 162 *seq.* But see Woolsey's *International Law*, s. 55). Parliament (26th December 1567) enacted that Orkney and Shetland should enjoy their own (Norse) laws and not be subject to the common law of Scotland (1567, c. 48, Acts Parl. III. 41). In 1587 power is given "to hold the head Courts called Law-tings, to appoint Fouds under them, and to administer justice *secundum leges et consuetudines patriæ Orcadensis et Setlandiæ*" [Laurenson, *supra*; Bankt. *Inst.* II. iii. 3; Stair's *Inst.* (ed. More) ii. 3. 11, and clvii; Ersk. *Inst.* (ed. M'Laren) i. 541]. In 1471, Earl William Sinclair, the last of the Orkneyar jarls, for estates in Scotland, excambed to the Crown the earldom and others; and these were (17th February 1471) annexed to the Crown, not to be given away at any time to any person or persons excepting allenarly one of the king's sons of lawful bed (Acts Parl. II. 102).

There was thus during the Norse period (1) a Norse sovereignty with little material content—an *eminent domain*, with (2) a *pignus conventionale* in a foreign sovereign; (3) an earldom estate; (4) a bishopric estate; and (5) the Norse line of jarls having become extinct by the death of Jarl John (1231), and the earldom passing to the Scottish house of Angus, there was introduced a nascent feudal Scottish sphere of influence, along with (6) a tenantry.

II. Feudalism v. Udalism.—*A Conflict of Laws.*—After the impignoration and annexation, the Crown repeatedly leased, farmed, and feued out the islands to subjects. In the words of Balfour (*Oppressions*, xi), they were "granted, revoked, annexed, regranted, confiscated, and reannexed with wearisome monotony of torturing change. Five times they have been formally annexed to the Crown by Act of Parliament, and fourteen times committed, in defiance of such Acts and without either protection or redress, to one needy and rapacious courtier after another." The Crown charters, of which there are many, to earls and bishops are in feudal form; and the earls and bishops themselves carried out the process of infeudation by similar grants to Scottish settlers, and by inducing udallers to receive charters for the sake of having a written title. To illustrate the case law, it is necessary to refer to one or two of the later Crown grants. The old earldom estates and the old bishopric estates and rights became early and often intermixed and confused by both being held and ruled by one bishop or earl. *E.g.*, shortly after the impignoration the earldom and lordship is set (1474–85) to the bishop; and Earl Robert Stewart and his son Earl Patrick held, for fifty years (1562–1615), both estates, "consolidated into one tyrannical lordship." For the purpose of separating the estates and disentangling the rights of earldom and bishopric, Parliament passed two Acts, (1) 1612, c. 15 (Acts Parl. IV. 481), annexing Orkney and Shetland to

the Crown as superior *ad perpetuum*, thus vesting the Crown in the estates of earl and bishop; and (2) 1612, c. 16 (Acts Parl. IV. 482), appointing a commission to work out a remedy. The result was an excambion—consolidating the bishopric estate in one district of Orkney, *i.e.* excluding Shetland, and leaving the rest as earldom, including Shetland, to the Crown (Contract between King and Bishop, 1614; Crown Charter of Mortification to Bishop, 4th October 1614).

Charles I. having (15th June 1643) wadset the earldom estates, duties, casualties, service of free tenants, teinds, udal lands, jurisdictions, and others to the Earl of Morton (1644, c. 246: Acts Parl. VI. Part I. 228), these were renewed, after revocation, to Lord Grandison as trustee for the Morton family by Crown Charter of 3rd April 1662. Grandison's charter gives him power to grant feus, and while the grant subsisted (1662–1669) he (one of the great feudalisers) granted many charters to udallers and others. These redeemable wadset rights having been granted in spite of the repeated Acts of Annexations, the Court reduced them as illegal and unconstitutional (*The King's Advocate* v. *The Earl of Morton and Viscount Grandison*, 1669, M. 7857–9; see *Rendall* v. *Robertson* and *Rendall* v. *Johnston*, *infra*). The reduction and all former annexations were confirmed by Parliament and the earldom of new annexed to the Crown (1669, c. 19, Acts Parl. VII. 566). James Earl of Morton (one of the negotiators of the Treaty of Union) procures a Crown Charter, still a wadset and redeemable (12th February 1707), feuing "totam et integram prædictum comitatum de Orkney et dominium de Zetland cum omnibus et singulis terris, dominiis, regalitatibus, baroniis, insulis, castris, etc., redditibus, firmis feudifirmis, et divoriis una cum omnibus et singulis terris nuncupat *lie udal lands* jacen. infra dict. comitatum dominium et insulas earundem, cum omnibus et singulis privilegiis casualitatibus et commoditatibus quibuscunque ad easd. pertinen., cum tenen. tenan. libere tenen. servitiis, decimis, magnis et minutis, rectoriis et vicariis decimarum, divoriis, advocationibus, donationibus et juribus patronatuum ecclesiarum etc. infra dict comitat. dominium et insulas *lie udal lands* aliisque ad easdem spectan., una etiam cum hæreditariis officiis justiciariæ vicecomitatus vel senescalatus, balivatus, et *lie foudric* infra dict. comitatum dominium insulas aliaque prædict. una cum omnibus et singulis privilegiis, libertatibus feodis casualitatibus et aliis commoditatibus quibuscunque." The charter contains power to enter vassals to be holden, "in eorum optione," of king or earl, and was confirmed (1707, c. 46, Acts Parl. XI. 471). The earl possessing on this title from 1707 to 1742, his rights were made absolute and the wadset discharged by Parliament in 1742. He finally receives a Crown Charter (12th June 1742) conveying the earldom, estates, duties, and others heritably and irredeemably. This irredeemable charter contains the earldom as sold in 1766 to the ancestor of Lord Zetland, the present owner.

Upon the abolition of Episcopacy (1690, c. 57, Acts Parl. IX. 198), the Crown acquired and it still holds the bishopric estates, seats, and teinds.

III. Results of the Conflict.

(1) Supersessions.

(*a*) *The Things.*—The Udallers' Law Court and Parliament have disappeared (*Archæologia Scotica*, iii. 103; Gomme's *Primitive Folk-Moots*, 160). By vesting feudal jurisdiction in earl and bishop, the Things were gradually set aside, the law book corrupted, and ultimately (it is said) burnt. In 1669 the counties were erected into a stewartry, and finally, by the Act abolishing heritable jurisdiction (20 Geo. II. c. 43), the last vestige of the local law Courts and government was swept away in 1748.

(*b*) *Succession.*—Inheritance in Norway was not by rule of primogeniture, but by partition among all the children (Laing's *Norway*, i.; *Encycl. Brit.* xvii. 585), as among (1) the German tribes when conquered by the Romans [Maine's *Early Hist. Inst.* (4 ed.) 199; *System of Land Tenure* (Cobden Club) *Essays*, 96], and (2) that same Germanic race in England at the Norman Conquest (*ib.* 178; Cecil's *Primogeniture*, 12, 27, 30). The Norse principle of succession under St. Ola's Law ruled in Orkney and Zetland after the impignoration and annexation, and until gradually subverted by Scottish feudatories and inveterate desuetude (Peterkin's *Notes on Orkney and Zetland*, App. 92). Udallers' children all succeeded equally to the father in his whole estate, heritable and moveable, the youngest son receiving the father's dwelling-house because the elder children were commonly forisfamiliated before the father's death (Gifford's *Zetland*, 54; Hibbert's *Shetland*, 193, 305, 336). Peterkin (*Notes*, App. p. 96) quotes a document of date 1610 relating to Shetland, subscribed by the Sheriff-Depute and others, bearing witness that while from time immemorial all the children succeeded, there was this inequality, viz. "Comptand always twa sistars partis for ane brotheris pairt." (See Elton's *Origins of Eng. Hist.* (2nd ed.) 205.)

By the force and practice of feudalism primogeniture gradually superseded partition. The first infraction, says Balfour (*Oppressions*, xliii), of odal succession by clause of single primogeniture is contained in a feu-charter (1535), containing every feudal right by James v. to Sir James Sinclair [Registrum Magni Sigilli (1513–1546), p. 327]. This is followed by a long series of charters by the Crown, the earl, and the bishops, containing clauses imposing primogeniture. The Great Seal registers contain many examples, of which these suffice: A Crown charter (1545) provides for the succession of a single heir-male "absque divisione inter fratres et sorores secundum morem patrie Orchadensis sed succedendo in solidum, in hoc uno imitando modum successionis more heredum regni Scotie" (*ib.* p. 726); and another, a confirmation of a bishop's charter (1565), imposes succession "absque ulla divisione secundum modum successionis regni Scotie non obstante lege et consuetudine Orchaden." [Registrum Magni Sigilli (1546–1580), p. 418] (see also Peterkin's *Notes*, App. pp. 6, 7, 8). The prohibitions and provisions of these charters show at once what the udal law of succession originally was, and the influences which, with inveterate desuetude on the one hand, and inveterate consuetude on the other, displaced it by primogeniture. Partition on intestacy is unknown, and the Sheriff Courts of the county uniformly serve heirs by primogeniture *more heredum regni Scotie*, as the early feudatories prescribed.

(*c*) *Prescription.*—The term of prescription in udal lands was thirty years (Hibbert's *Shetland*, 312; Mackenzie's *Grievances*, xxvii; Bell's *Prin.* s. 932); but this also is superseded by the Scottish law of prescription [*Earl of Galloway and Others* v. *Earl of Morton*, *infra*, under "Scat"; and "The Pundlar Case" between same parties *infra*, under "Weights and Measures"; see Rankine's *Landownership* (3rd ed.), 48[41]].

Orkney and Shetland is a county and sheriffdom of Scotland, subject to its statute and municipal law, except where udal law is saved and not now in desuetude. Where the feod is not, there remains the alod (Stubbs, i. 5). The whole system of law in Orkney and Zetland is (per Ld. Lee in *Bruce*, 1890, 17 R. 1014) different from the common law, excepting in so far as it has been assimilated by legislative enactment or gradual adoption. Primogeniture, displacing partition, has been adopted, and the Things superseded by Parliament, the law Courts and the councils

of county and parish. The survivals are in tenure, scat, scattald, land measures and weights, and these are the remaining topics.

(2) Survivals.

(*a*) *Tenure.*—All lands in Orkney and Shetland remain udal, excepting such as have been feudalised by charter emanating directly from the Crown, or indirectly through earldom or bishopric title. These also are udal: (*a*) Church lands, under £20 Scots of old valuation, and therefore capable of being transmitted and acquired as udal (1690, c. 32), even though once feudalised (*Beaton, infra*); (*b*) Church lands designated for ecclesiastical purposes; and (*c*) lands acquired by compulsory sale. The property passes without any written title, service, conveyance, infeftment, or investiture—the right being provable by witnesses (Ersk. ii. 3. 18; Stair, ii. 3. 11). As result of the allodial character of udal property (see Allodial), it vests in the heir by survivance without service [M'Laren's *Wills and Succession* (3rd ed.), i. 99]. For the same reason Lord M'Laren thinks (*ib.* 85) that, according to the analogy of leases, udal property would be excluded from the category of conquest heritage. In practice the heir (if he completes a written title) serves as if to feudal property; and it is transferred and burdened by deeds in ordinary feudal form. But though convenient to have conveyancing writs, these are only useful *in modum probationis*, and are not essential or necessary solemnities to a udal proprietor. Service is not necessary, and the udal right may be proved in any way *prout de jure* [Sheriff (afterwards Lord) Gifford in Sheriff Court (Orkney), in case of removing, *Irvine* v. *Davidson*, 22nd December 1866, unreported]. But "naked kindness" and possession is not *per se* sufficient: there must be some lawful right and title (*Sinclair*, 1694, M. 16393; *Rendall* v. *Robertson*, 1837, 15 S. 1145). The decision in the case of *The King's Advocate* v. *The Earl of Morton* (1669, *supra*), reducing the charter granted in 1661 on the ground that annexed property could not be alienated, had a result beyond the reduction of the Morton and Grandison title. It also laid open to challenge the charters flowing from them, and granted prior to the reduction. Such charters did not feudalise lands originally udal. The reduction set aside the right of the party from whom the feudal grant (in 1665) flowed, and that grant fell along with it (*Rendall* v. *Robertson's Reps.*, 1836, 15 S. 265).

In 1776 Sir Laurence Dundas (then in right of the earldom) claimed (*a*) right to a superiority of all lands in Orkney and Shetland which were not actually held of the Crown previous to the Morton grant of 1707; (*b*) that, in any case, he had a right not only to the feu-duties (scatts) but also to casualties; and (*c*) that all the udallers who should in future choose to feudalise their lands were obliged to take their charters from him, and hold of him alone. It was held (H. L.) (*a*) that the superiorities and casualties of the Crown lands in Orkney and Shetland formed part of the Crown's patrimony annexed thereto *jure coronæ*, and could not be alienated or granted away by the Crown—such grants being illegal and unconstitutional both as regards the right of Sovereign and vassal; but (*b*) that the pursuer had right to the feu-duties; and (*c*) that such of the udallers as chose to take out written investitures had it in their option to take same from him or the Crown [*Sir Laurence Dundas* v. *Officers of State and Honeyman and Others*, 1779, M. 15103; 8 F. 116; (H. L.) 1779, 2 Pat. App. 516, 8 F. 147. See also *Dundas* v. *Heritors of Orkney and Zetland*, 1777, 5 Brown's Supp. 609]. Sasines not proceeding upon charters either from the Crown, or from a subject-superior deriving right from the Crown, are not sufficient to

establish that lands at one time held by udal tenure were feudalised so as to prevent them passing from father to son without service, or losing their character and privileges otherwise as udal lands (*Beaton*, 1832, 10 S. 286). This case was followed by the case of *Rendall* v. *Robertson's Reps.* The charter being granted (1665) by Viscount Grandison as trustee of the Earl of Morton under the Earldom Crown Charter of 1661, *ex facie* flowed from the Crown, but Grandison's and Morton's title being reduced (1669), the lands were held not to have been effectually feudalised, and to be udal. In the sequel (the case of *Rendall* v. *Robertson*) the Court hence found that the person who had been for several years in possession of these udal lands had no title to them, and consequently that the right of a disponee to whom he sold them was reduced at the instance of the heir of the last proprietor. These earlier cases have been followed in recent judgments. In *Spence*, 1894, 31 S. L. R. 904, Lord Wellwood remarks (p. 905) that no length of time can by itself convert tenure from udal to feudal. In the most recent case (in Shetland) the question arose as to the ownership of a foreshore *ex adverso* of a udal property. The udaller maintained that the Crown by force of udal tenure had no right to the foreshore. The Lerwick Harbour Trustees founded on a Crown grant and maintained that the foreshore could only be derived from the Crown as ultimate superior of all lands in the kingdom, and the latter was therefore proprietor of all lands never given out. The Lord Ordinary (Kincairney), in a note to his order for proof, did not assent (as then advised) to the argument for the Harbour Trustees that a right to the foreshore could only be acquired (as on the mainland of Scotland) by Crown grant, expressed or implied. In Orkney and Shetland the shore was nothing but a part of the islands, and must, he thought, be susceptible of being acquired in property in the same manner as other land in the islands not feudalised,—that is to say, without reverting either actually or theoretically to the Crown. He considered that the udal tenure, with its incidents, prevailed over the whole of Orkney and Shetland, except where displaced by arrangement with the Crown, and over the foreshore as part of these islands, subject to those public uses which must affect all rights in the foreshore. The proof was not proceeded with, and the case abandoned (*Smith*, 1897, 5 S. L. T. 175). Udallers are heritors in questions of parochial ecclesiastical law (*Dundas* v. *Nicolson*, 2 July 1778, M. 8511).

(*b*) *Scat* (Norse, *skattr*, tax tribute, Vigfusson) is an incident of the udal tenure payable by udallers in respect of their lands to the earl or to the Crown in right of the bishop. It is an annual payment made in *agnitionem dominii*, but not a feudal burden—the udallers holding *tanquam optimæ maximæ* (*Dundas* v. *Heritors of Orkney and Shetland*, 1777, 5 Brown's Supp. 609). Though not a feu-duty, it is *debitum fundi* (*Dundas* v. *Gifford*, 1824, 2 S. 741). Like feu-duty, arrears of scat do not bear interest *ex lege* (*Moncrieff*, 1835, 14 S. 61). It was contended for the udallers that scat ceased with the imposition of cess or land tax in 1667 upon their udal lands in common with the rest of the kingdom; that udal and allodial were synonymous terms; that out of the allodial lands no feu-duty or rent service could, in the nature of things, be exigible, as the king was not *dominus directus* or superior in allodial lands; that the duty called scat was in truth a yearly land tax or tribute imposed for the support of the State; and, consequently, that as the udal lands paid land tax according to their valuation, they ought to be exempted from the payment of scat or land tax to the earl. The Court gave effect to the earl's defence, that his right to the scat duties was secured by prescription, since these had been paid to the Crown from the year 1667 (when the assessment was introduced) down to the year 1707, and from that time without interruption

(*The Earl of Galloway and Others, Udalmen of Orkney* v. *Earl of Morton*, 1 July 1752, F. C. i. 39; M. 16393). In 1743 the question arose whether the udallers were bound to pay the scat and other duties in kind, and whether, if they failed to do so, the earl was entitled to exact penal prices, or bound to abide by the current or selling prices. He sued for the converted value of the duties according to the current or selling prices, and the questions sought to be determined were—(*a*) The amount of the *ipsa corpora* for which the udallers were liable: (*b*) Whether they were liable to penal prices on failing to deliver in kind: and (*c*) The actual amount of the selling prices. The Lord Ordinary fixed the amount of the *ipsa corpora* due, and found them not chargeable "with any addition to the current or merchant prices in way of or as a penal sum for oil or butter not delivered," but reserving damages for not "delivering" (14 June 1749, not reported). While the Crown as paramount superior *jure coronæ*, or in right of the bishopric, has, where the feudal relation has been constituted, right to the duties and scats and casualties, the earldom contains no proper superiority, and hence has no right to casualties on entries of heirs and singular successors—the superiorities and casualties in Orkney and Zetland being Crown's patrimony *jure coronæ* (*Dundas* v. *Officers of State, Honeyman, and Others, supra*). And the holding of udal lands by long progress of titles in feudal form, and subject to an annual payment under the name of feu-duty, does not render these lands liable to a casualty, in respect they are udal and never feudalised (*Spence, supra*). In the course of feudalisation, which became general about 1640, the scatts, teinds, and land mails formerly paid according to use and wont were turned into a proper feu-duty (see *Dundas* v. *Heritors of Orkney and Zetland*, 1777, 5 Brown's Supp. p. 610), which was either specified in the charter itself or left to be ascertained by the Rental of 1595 *pro Rege et Episcopo*, commonly known as the Rental of 1600, or Bishop Law's Rental. In some of the charters, and also in the Rental, the duties to be paid to the superior and titular were not, as in others, stated at a *cumulo* sum, but were specified and divided into payments under the names of scat, land mails, and teind duties, the whole amount of these different duties being payable to the Crown alone in the bishopric and to Lord Dundas in the earldom. A great part of the earldom having been feued out at a feu-duty for stock and teind, without distinguishing the proportion payable for each, it was held that the portion paid for the latter was free teind [*Dundas* v. *Baikie and Others* (*Locality of St. Andrews and Deerness*), 1793, M. 14820, 11 F. 55]. The feu-duties payable to the titulars by heritors for the teinds of their lands are to be allocated *primo loco* for the minister's stipend [*Lord Dundas* v. *Balfour and Others* (*Locality of Westray and Papa Westray*), 1802, M. 15709]. The question as between feu-duties or scats, teind-duties, and stipend was finally dealt with by the Teind Court, which laid down the following rules, viz:—

(1) That when the vassal's charters distinguished teind-duty from feu-duty, the teind-duty so ascertained should be held to be free teind in the hands of the titular (Lord Dundas), subject to be localled on *primo loco* for stipend.

(2) That where the charters did not distinguish between teind-duties and feu-duties, or did not specify the particular duties, but made general reference to a rental, then the Rental of 1600 was declared to be the rental referred to; and where that rental distinguished between feu and teind duties, it was held to be evidence of the teind-duties; and

(3) Where there was a *cumulo* duty payable both for lands and teinds, the Court ruled that all the cases in each particular parish in Orkney (in which the feu-duty for scat and land mail was kept

distinct from the teind-duty) should be taken, and an average struck of the ratio which the one holds to the other; and that such average should be taken as the rule for dividing the *cumulo* feu-duties in all the other lands in the parish [*Dundas* v. *Balfour and Others* (*Heritors of Westray and Papa Westray*), 23 May 1821, Shaw's Teind Cases, 20; F. C. 357; Peterkin's *Rentals*, 126].

See Mackenzie's *Grievances*, 99; Peterkin's *Rentals*; Peterkin's *Notes*; "Rentals of the Ancient Lordship of Shetland and of the Earldom and Bishopric of Orkney," by Goudie, in *Proceedings of Society of Antiquaries*, xix. 213.

(*c*) *Scattald.*—The term is confined to Zetland, and corresponds practically to the commons in Orkney. The scattalds are now mostly, if not all, divided and held in severalty along with the properties of which they are pertinents, though grazed in common by township or estate tenantry. This scattald is the pasture ground belonging to the arable land adjacent thereto, called a room or town, the name whereof is written in the rental, with the scat yearly payable therefrom in butter, fish, oil, and a sort of very coarse cloth called wadmill, marked in the old rentals, lispunds and marks of butter, shillings and cuttels of wadmill, and butts and cans of oil (Gifford's *Historical Description of Zetland* (reprint), 54). It is used for general pasture and to furnish turf for firing (Edmonston's *Zetland Islands*, i. 148). Originally this pasture land was alone liable to a scat duty, and hence named scattald—the arable land being distinguished as proper udal lands, and so free. The terms scattald and udal lands were thus opposed (Hibbert's *Shetland*, 180 and 181, note *, also 300–301), just as in Orkney there are traces of a distinction between udal lands on the one hand and common and runrig land on the other. In consequence of feudal innovation, division, consolidation and cultivation, these distinctions are broken down. A judicial division of the scattald is regulated by the number of merks belonging to each proprietor, according to which the taxes are paid; and objection that there was no valuation in the sense of 1695, c. 38, was repelled (*Bruce*, 1823, 2 S. 573). A udal proprietor is entitled, as if his title were feudal, to sue for a division and to an allotment in proportion to the number of merks land belonging to him and other heritors (*Spence*, 1839, 1 D. 415). One out of thirty-six commoners holding thirty-five and a half parts of a scattald is not entitled to pursue an action of removing against the other, who held the remaining half-part, and had erected thereon a fishing berth and wharf (*Bruce*, 16 November 1808, 15 F. C. 5; 1 Brown's Supp. 396). By the Ecclesiastical Buildings and Glebes (Scotland) Act, 1868, s. 1, the expression "valued rent" is interpreted, as regards Shetland, as meaning and including "number of merks land."

(*d*) *Weights and Measures.*—1. *Land Measures.*—At a very early period the whole occupied lands of Orkney and Shetland were divided by the Norsemen, and at later dates were again subdivided for the purpose of assessment. The divisions were not according to area but according to value, *i.e.* a division of good land would be smaller in area than a division of inferior land. The divisions were at first designated ounce lands and penny lands, and, later, the subdivisions were called mark lands, eyrislands or urislands, etc., according to the value of each division. Balfour (*Oppressions*, 111) says: "In the comparatively fertile and populous Orkneys more minute subdivision soon became necessary, and some Scottish Jarl divided each Norse Urisland into the Scottish denominations of 18 Pennylands, and each pennyland into 4 Farthings or Merks, or (in some districts) into 6 Uriscops or Maeliscops, and finally into 10 Yowsworths, to suit the excessive partition of odal heritage. Though the mark is still the vague denomination of land

measure in Zetland, as being sufficiently minute for its large tracts of comparatively valueless waste, even there it has been found convenient to estimate the unequal value of mark land by Pennies," etc. The Shetland mark of land originally included pasture or scattald as well as enclosed cultivated ground free from scat. The graduation of quality was fixed at an early date at so many pennies the mark, and varied from 4 to 12 pennies per mark in Shetland. In Orkney, on the other hand, the pennylands graduated from 3 to 8 merks to the penny.

The terms of land valuation in the two groups of islands are confusing. In the Orkneys an ounceland contains 72 marklands; in Shetland one markland contains 8 ouncelands. In the Orkneys a pennyland usually contains four marks; in Shetland a markland is valued at from 4 to 10 pennies. The agreement and difference may be understood from the following table abstracted from "What is a Pennyland? or, Ancient Valuation of Land in the Scottish Isles," by Capt. Thomas, in *Proceedings of Society of Antiquaries*, xviii. 284:—

Theoretical Scotch Acreage.	Orkneys.	Theoretical Scotch Acreage.	Shetland.
104	1 oz. land = 18d. lands.	104	1 oz. land = 4 lasts probably.
$5\frac{7}{9}$	1d. land = 4 average marks.	26	1 last = 18 marklands.
$1\frac{4}{9}$	1 mark = 8 oz.	$1\frac{4}{5}$	1 markland = (4d. to 12d.) = 8 oz.

These measures are frequently perpetuated in the descriptions of current land titles. The subject, however, is recondite and elusive. (Balfour's *Oppressions, supra*; "What is a Pennyland?" *supra*; *The Norsemen in Shetland*, by Goudie,—Saga Book of the Viking Club, vol. i. 314; Hibbert's *Shetland*, 177 *et seq.*, 316; *The Statistical Account of Shetland Islands* (1841); Innes' *Scotch Legal Antiquities*, 276.)

2. *Weights and Measures.*—The weights and measures, like the land rights and customs, of the islands are peculiar and of Norse origin. These were the pundlar and bysmar, the can and barrell, the cuttel and pack—the native standards and instruments of weight, capacity, and extent. The pundlar was of two kinds—the malt pundlar for weighing malt and other heavy articles, and the bere pundlar for bere only. The weights in use were as follows:—

8 ures or ounces	=	1 mark
24 marks	=	1 lispund span or lettan
6 lispunds	=	1 meil
24 meils	=	1 last

the measurements of capacity—

48 cans of oil or 15 lispunds butter	=	1 barrel
12 barrels, 180 lispunds or 576 cans	=	1 last

and the measurements of extent—

6 cuttels	=	1 gudling or gullioun
10 gullioums	=	1 pack.

The weights, instruments, and measures are dealt with in the case of *The Udallers and Heritors* v. *The Earl of Morton*, 1750, for establishing that an illegal increase had taken place in the weights and measures, and concluding that these should be fixed to a standard; and that the scats and duties should be payable to Morton according to that standard and not otherwise. The case (known as "The Pundlar Case"—not reported), after a lengthened proof upon the Norwegian origin, local custom, and increase of the weights and measures, and elaborate pleadings, terminated in 1759 by the Earl

of Morton being assoilzied on the plea of prescription. The consuetudinary weights were thus established to be the rule of settlement of the duties. These duties are now, with few exceptions, paid in Orkney in money upon a conversion according to the fiars prices. But fiars prices are not struck in Shetland. [Balfour's *Oppressions*, 114; *The Norsemen in Shetland*, by Goudie, *supra*; Peterkin's *Rentals*, 119; Barry's *History of Orkney* (2nd ed.), 219; Hibbert's *Shetland*, 319: and Mackenzie's *Grievances*, 14.]

By verdict of jury at Kirkwall on 1st August 1826 it was found, (1) with regard to measures of extent and capacity, that none existed peculiar to the county of Orkney, and, (2) with regard to measures of weight, by a plurality of votes, that

	Imperial Avoirdupois.		
	lbs.	oz.	dr.
the meil of malt on the malt pundlar =	177	12	
the meil of oatmeal =	177	12	
the meil upon the bear pundlar =	116	7	
one merk upon the bysmar =	1	3	$12\frac{1}{2}$
the lispund (consisting of 24 of these merks) =	29	10	12
the barrel of butter (exclusive of the tare) =	217		$6\frac{357}{1000}$

and, further, that the subdivisions of the meils above ascertained were six setteens to each meil, and 24 merks to each setteen (Buchanan's *Weights and Measures*, 241). The above is the table according to which the duties are at present calculated in Orkney.

By verdict of jury at Lerwick on 12th October 1826 it was found, that (1) with regard to measures of extent, all the lineal and superficial measures in use in Shetland were common in the rest of Scotland; (2) with regard to measures of weight, that the only measure peculiar to Shetland was the lispund, which was divided into 24 merks and consisted of 32 lbs. avoirdupois weight, and consequently the merk was one and one-third pound said weight; and, (3) with respect to measures of capacity, that the local measure called a can was equal to an English wine gallon of 231 cubic inches (Buchanan, 263).

See INFEFTMENT.

Ultimus hæres.—See LAST HEIR.

Umpire.—See ARBITER; ARBITRATION; OVERSMAN.

Underwriter.—See MARINE INSURANCE: FIRE INSURANCE.

Undue Influence.—See CIRCUMVENTION.

Unilateral Obligation.—See OBLIGATIONS.

Union, Clause of.—Actual delivery has always been the central feature in the legal transference of property, and the original feudal regulations for the conveyance of land presented no exception to this principle. The nature of heritable property precluded its actual corporeal delivery: but this difficulty was obviated by the device of delivering some part or emblem of the subjects, which by a legal fiction was held to represent the whole. It was essential, from the nature of this fiction, that the symbolical delivery should take place on or at the subjects in question; for the property being immoveable, delivery of it by means of its representative symbols must take place at its site. Delivery could not be given at a distance from what was to be delivered. It also obviously

followed, in accordance with the logic of the theory, that where a charter or conveyance comprised more than one distinct estate, the ceremony of giving sasine must be enacted on the site of each such estate in turn. Where the heritable subject was an office, such as a bailiary, sasine, if requisite at all, was sufficiently given at one place, even although the scope of the office extended over several distinct estates, for the reason that the sasine was not of the lands themselves but of the office, which was a *quid inseparabile* (*Bruce*, 1630, M. 16399).

There were various grounds on which estates, although comprised in one conveyance, were held to constitute separate tenements, to the effect of requiring separate acts of infeftment for their due transference. The simplest case was where the deed conveyed two or more discontiguous parcels of land. Each such parcel was by nature a separate tenement, and in taking sasine on such a deed resort required to be had to each parcel in succession, and delivery of it given by a separate ceremony. But in addition to such natural or local discontiguity, there was also legal disjunction of estates. Heritable subjects, though contiguous in point of situation, were nevertheless held to be legally separate (1) if they were held of different superiors, (2) if they were held by different tenures, or (3) if they had been acquired from different vassals on separate titles; the presence of any one of these elements was sufficient to create a feudal separation of tenements (*Bank of Scotland*, 1729, M. 16404; *Grant*, 1837, 15 S. 563). A local or a legal *unum quid* naturally only required one act of delivery, but an aggregate of heritable items locally or legally distinct required for its conveyance a separate act of delivery for each item. Although a separate ceremony of sasine was necessary for each item, separate Instruments of Sasine were not required, one Instrument which attested that sasine had been given for each separate tenement, "respectively and successively, each after the other," being sufficient. Where rights of salmon-fishing, teinds, and the like were granted, not as separate tenements, but as adjuncts of the lands, separate ceremonies of sasine were not required, although it was generally thought proper that the appropriate separate symbols should be delivered.

There resided, however, in the Crown, as the supreme head of the feudal system, the power of so far obviating the inconvenience arising from discontiguity of estates. This was done by the insertion in charters from the Crown of a clause of union and dispensation which united, for the purpose of infeftment, the discontiguous items which the charter embraced, and dispensed with a separate ceremony of sasine for each by ordaining that one sasine should include all. The power of so uniting separate estates was strictly confined to the Crown (*Aitken*, 1623, M. 16397), despite Craig's apparent opinion to the contrary (*Jus Feudale*, ii. 7. 17; and see the exceptional case of *Kincardine*, 1686, M. 16403). A clause of union in a charter by a subject-superior could, however, be validated by a subsequent confirmation by the Crown (*Borthwick*, 1636, M. 16401); and the running of the prescriptive period was held sufficient to exclude the objection that sasine had been taken in virtue of an unconfirmed clause of union in a deed granted by a subject-superior (*Scott*, 1779, M. 13519). But although, where subjects were locally discontiguous or had separate symbols appropriated to them, the Crown could authorise a single infeftment to be taken by delivery of earth and stone alone, it could not unite tenements held of different superiors, derived from different authors or possessed by different tenures; the disjunction in such cases was irremediable by a clause of union. An extreme example of the exercise of the Crown's power of dispensation in matters of sasine was the appointment of the

Castle Gate of Edinburgh as the place for taking infeftment in lands in Nova Scotia (Stair, ii. 3. 18).

The clause of union varied in its expression according to the wider or narrower extent of the dispensation which it granted. The form given in the *Juridical Styles* (3rd ed., 1826, i. p. 478) is in the widest terms, ordaining the sasine for the subjects disponed, or any part of them, to be taken at the mansion-house, or upon any other part of the ground, by the delivery of earth and stone only, and declaring such sasine to be as valid for the subjects, or any part of them, as if a particular sasine were taken on each part, and by delivery of all the symbols, although the subjects were of different denominations, lay discontiguous, and might require separate sasines and different symbols. The benefit of such a clause of union was available to a singular successor (*Stewart*, 1626, M. 10367); and was not lost by the subsequent disposition of a part of the united subjects, but remained inherent in both the part retained and the part disponed, with the result that a valid infeftment in a part of such once united subjects might be given at a spot quite outside the part in question (*Skene*, 1768, M. 8792; rev. 2 Pat. 141; *Heron*, 1771, M. 8684 *bis*, *Montgomerie*, 2 Mar. 1813, F. C.; *Dennistoun*, 1824, 3 S. 218). The benefit also extended to sub-vassals (*Stuart*, 1627, M. 6623; *Blairquhen*, 1637, M. 16401), and to infeftments on rights in security (*Wood's Trs.*, 1832, 10 S. 773; affd. 1834, 7 W. & S. 147).

When the clause of union appointed sasine to be taken at a specified place, it required to be taken there in order to gain the benefit of the dispensation; if taken elsewhere, it was only valid for the individual tenement on the ground of which the ceremony was performed (*Ednem*, 1628, M. 16398; *Lawriston*, 1636, M. 14330).

The erection of lands into a barony had the effect of uniting the subjects, for the purpose of sasine, whether the charter of erection contained a clause of union or not; and the benefit of such union was communicable to a vassal of the baron, although the right of barony was not so communicable. The form of a clause of union in a barony title will be found in the *Juridical Styles* (3rd. ed., i. p. 502).

The regulations as to the registration of writs affecting lands lying in more than one county, or as to the service of heirs to such lands, were not, or ought not to have been, affected by a clause of union (*Jur. Styles*, 3rd ed., i. p. 471; but see *Faa*, 1673, M. 16403; *Dalrymple*, 1711, 4 B. Sup. 862).

Clauses of union were rendered superfluous by the Statute 8 & 9 Vict. c. 35, which, by sec. 1, completely altered the nature of the ceremony of giving sasine, and made it no longer necessary to proceed to the lands in question, or to take infeftment by the delivery of symbols. The procedure which this Act substituted, consisting in the mere production to a notary anywhere of the warrant of infeftment, and the expeding of an Instrument of Sasine, was manifestly equally applicable to all the items which might be embraced in the warrant; and the Act specifically declares that the new form of infeftment "shall be effectual whether the lands lie contiguous or discontiguous, or are held by the same or by different titles, or of one or more superiors." The section would have been more complete, as Menzies points out (*Lects.*, 3rd. ed., p. 591), if it had also provided for the case of lands held by different tenures. The Titles to Land Consolidation Act of 1868, by sec. 15, substituted for the procedure laid down in the 1845 Act the direct registration of conveyances; and under this enactment, which regulates present practice, clauses of union are of course equally unnecessary, and they are now entirely obsolete.

[*Authorities.*—Craig, *Jus Feudale*, ii. 7. ss. 14–20; Bankton, ii. 3. 88;

Stair, ii. 3. 18 and 44–5, More's *Notes*, excii; Ersk. ii. 3. 44–7; Ross's *Lects.* ii. 199; Bell's *Prin.* s. 874; Bell on *Purchaser's Title*, pp. 191 *seq.*, 302; Duff's *Feudal Conv.* pp. 112–4: Menzies' *Lects.*, 3rd ed., pp. 575, 591; M. Bell's *Lects.*, 3rd ed., i. p. 659; *Jur. Styles*, 3rd ed., 1826, i. pp. 471–2; cases in Mor. *Dict.*, *s.v.* "Union," pp. 16397 *seq.*]

See also BARONY, RIGHT OF (in *Addenda*).

Universities. — In Scotland there are four Universities: St. Andrews, founded in 1411 by the Spanish anti-Pope Benedict XIII., at the instance of Bishop Wardlaw; Glasgow, founded in 1450 by Bishop Turnbull, under a Bull of Pope Nicholas V.; Aberdeen, founded in 1494 by Bishop Elphinstone, under a Bull obtained from Pope Alexander VI. at the instance of King James IV.; Edinburgh, founded in 1582 by King James VI., at the instance of the Town Council of the capital, under a charter which was confirmed by Act of Parliament in 1621. St. Andrews alone consisted of more than one college: St. Mary's and the United College of St. Salvator and St. Leonard remain of the older foundations, while the recently established University College, Dundee, is now a part of the University. At Aberdeen, in addition to Bishop Elphinstone's foundation, there was an independent degree-granting institution founded in 1593 by the Earl Marischall. By the Act of 1858, however, the two Universities were conjoined. All of these institutions claimed the right of granting degrees in the four Faculties of Philosophy, Medicine, Law, and Divinity. Marischall College in Aberdeen, however, confined itself for the most part to Philosophy or Arts and Medicine, while the older Aberdeen University, which consisted of King's College only, gave degrees mainly in Arts and Divinity.

The Scottish Universities were modelled on the older institutions of the Continent. St. Andrews and Aberdeen were intended to consist of colleges of learned men, and were not purely educational foundations; Glasgow, on the other hand, was expressly an imitation of Bologna, where the students were practically the governing element, where the manufacture of scholars was deemed of more importance than the pursuit of scholarship. The University of Edinburgh was intended by its practical post-Reformation founders to be purely educational, and in its beginnings was little more than a superior grammar school. Its advance to its present position as one of the largest and most successful centres of scientific education is specially remarkable.

The Scottish Universities remained as they had been constituted up to the end of the eighteenth century. The position of the Theological Faculties had been finally regulated at the Revolution, while the 25th Article of the Act of Union of 1706 preserved the Presbyterian control of the Universities and guaranteed their continuance "for ever."

During the eighteenth century the Universities shared in the distress and stagnation which fell upon Scotland—a distress specially aggravated during three periods of the century: that succeeding the Union, the years following "the Fifteen," and the most disastrous time after "the Forty-five." Not till the revival of prosperity, which began in the latter half of the century and has continued in almost unbroken progression, did the Universities begin to increase in either wealth or size. Early in the nineteenth century the condition of the Universities attracted the attention of statesmen, and during nearly the whole century Royal Commissions have been appointed at almost regular intervals. Of these, however, only two have been executive. Mention may be made of the non-executive Royal Commissions appointed in 1826, 1836, 1845, and in 1857–58. In 1858 the first great change in the constitution of the Universities was effected by its

Universities (Scotland) Act, 21 & 22 Vict. c. 83. Under this Act an Executive Commission was appointed, which framed a body of ordinances regulating the constitutions of the Universities, the course of study in each Faculty, and the powers, duties, and privileges of the members of the Universities. In 1876 a further Commission of inquiry was appointed; by it a large body of valuable evidence was gathered. In 1889 the second Universities (Scotland) Act was passed (52 & 53 Vict. c. 55).

An Executive Commission was appointed by this statute, and the present constitutions of the Universities are practically the result of its provisions and of the ordinances of the Commissioners acting under it—except in so far as the provisions of the Act of 1858 and the ordinances of its Commissioners remain unrepealed or unmodified.

Chancellor.—In each University the office of highest honour is that of the Chancellor. He is appointed by the whole body of graduates. When present he presides at meetings of the General Council. He is not a member of any other academic body, but he nominates an Assessor to the University Court.

Rector.—The Scottish students retain the ancient right, lost by the students of all other European Universities, of electing their Rector—in Glasgow and Aberdeen the students vote by nations, and Ordinance No. 7 of the Commissioners under the Act of 1889 regulates the procedure in the case when the votes of the nations are equally divided. The Rector is chairman *ex officio* of the University Court, and also nominates an Assessor to that body.

Vice-Chancellor and Principal. — The title of Principal historically belongs rather to the head of a college of a University than to the resident head of the University itself. Except St. Andrews, however, the Scottish Universities always have consisted of a single *collegium*, and the title and office have grown in importance as the Universities have increased in size and wealth. In St. Andrews there are now three Principals, viz. the Principal of the United College of St. Salvator and St. Leonard, who is also *ex officio* Principal and Vice-Chancellor of the University; the Principal of St. Mary's College, who is also Primarius Professor of Divinity; and, third, the Principal of University College, Dundee. All three are *ex officiis* members of the University Court. In each of the other Universities the Principal, who is always also Vice-Chancellor, is a member of the University Court. The Principal is also a member and chairman of the Senatus Academicus.

University Court.—The University Court was created by the Act of 1858, to be the supreme governing body in each University. The Act of 1889 increased the number of members of each Court and laid many new duties upon them. The Court is a body corporate, with perpetual succession and a common seal, and has now entire control of the financial arrangements of the University, subject to the provisions laid down by the Commissioners under the Act of 1889 in their ordinances (Nos. 4, 25, 26, 27, 46, and 137). The Court has in each University the right of appointing the Professors to certain of the chairs. Appeals may be made from the Senatus Academicus to the Court.

The University Court elects the representative of the University on the General Medical Council under the Medical Act, 1886.

The University Court of St. Andrews consists of the Rector, the Principal of the University, the Principal of St. Mary's College, the Principal of University College, Dundee, the Chancellor's Assessor, the Rector's Assessor, the Provost of St. Andrews, the Lord Provost of Dundee, four Assessors elected by the General Council, three Assessors elected by the Senatus Academicus—fifteen in all. The University Courts of Glasgow, Aberdeen, and Edinburgh each consist of fourteen members.

In the event of colleges being affiliated to a University, such affiliated college may be directly represented on the Court of the University, but in no University can the number of representatives of affiliated colleges exceed four.

Senatus Academicus.—The Senatus Academicus consists of the whole of the Professors in each University. From the earliest times, in the case of St. Andrews, Glasgow, and Aberdeen, the Senatus Academicus had practically entire control of the whole management of the University, including its finances. In the case of Edinburgh this management was subject to the control of the Town Council. In 1858 the Edinburgh Senatus was freed from what had for long been a cause of friction, irritation, and litigation (*vide* Sir Alexander Grant's *Story of the University of Edinburgh*), and from that date until 1889 the University of Edinburgh was managed by its Senatus. In that year, however, the Court in each University, as has been stated, was given many of the powers and duties formerly exercised and performed by the Senatus. Now the Senatus has (subject to appeal to the Court) the entire management of the whole educational arrangements of the University. In St. Andrews it appoints three members of the Court, in Glasgow four, in Aberdeen four, and in Edinburgh four.

The Senatus has the right of appointing two-thirds of the members of committees which in each University have the custody of the libraries and museums. The other members are appointed by the Court, and may not be members of the Senatus Academicus. The members of the Senatus are appointed to their chairs *aut vitam aut culpam.* Principals and Professors are entitled to pensions under the conditions laid down in Ordinance No. 32 of the Commissioners under the Act of 1889. These are, briefly, that the applicant for a pension on the ground of age or infirmity must be (1) sixty-five years of age, or must have completed the sixtieth year of his age and have served as Principal or Professor for at least thirty years; or (2) that by reason of infirmity he has become permanently incapable of discharging the duties of his office. The scale of the retiring allowances is set forth in the said recited ordinance. No pension can be claimed by a Principal or Professor who has served for less than ten years.

All Principals and Professors in Scottish Universities must contribute to the Ministers' and Professors' Widows' Fund. The widows of all Principals and Professors are entitled to an annuity from this fund.

[*Note.*—The liability of the Professors in University College, Dundee, to contribute to this fund is not yet settled. A special case is about to be laid before the Court of Session, that the point may be decided.]

Lecturers and Assistants.—University Lecturers are appointed by the University Court for such periods, not exceeding five years, and at such salaries as the Court may determine. Ordinance No. 17 regulates the appointment of Assistants to Professors and of Lecturers. Lecturers and Assistants are not members of the Senatus Academicus.

General Council.—In each University the whole body of graduates compose the General Council. This body was created by the Act of 1858. Its powers are not executive. It meets twice a year on appointed dates, but the meetings may be adjourned and special meetings may be summoned by the Chancellor on a requisition by a quorum of the Council. The Commissioners under the Act of 1889 have fixed the quorum in the case of each University at ten for every complete thousand or fraction of a thousand on the register of members of the General Council. The General Council, as stated, elects the Chancellor. The Councils of Edinburgh and St. Andrews together return one member to Parliament, as do the Councils of Glasgow and Aberdeen.

Graduation.—Each University admits to graduation in Arts, Law,

Medicine, Science, and Divinity. Edinburgh is also entitled to confer degrees in Music. The course of study and the regulations for each degree are prescribed in detail by ordinances of the Commissioners under the Act of 1889. Two degrees *honoris causa tantum* are conferred by each University, viz.: Doctor of Laws (LL.D.) and Doctor of Divinity (D.D.). Degrees are conferred by the Chancellor, or his deputy, in the name and by the authority of the Senatus Academicus.

Students.—Students who intend to graduate in any Faculty must pass a preliminary examination in certain specified subjects, but the Scottish Universities also admit as students those who do not purpose proceeding to a degree. Such may become members of the University by the simple act of matriculation. In each University there exists a Students' Representative Council. The constitution of this body is approved by the University Court, and no alteration in the constitution can be made without the authority of the Court. The function of the Representative Council is to act as a means of recognised communication between the students and the University authorities, and to organise the students and regulate their proceedings on public occasions.

Women.—Women are now admitted to the Scottish Universities, and may present themselves for graduation in Arts, Medicine, and Science, and in Edinburgh in Music. As, however, mixed classes are not allowed at all in Glasgow, and not in Medicine in Edinburgh, special regulations exist with regard to the education of women students. The Court may admit women to all University classes; but if that arrangement has not been made, women may obtain their education under teachers outside the University specially recognised for the purpose by the University Court. In Glasgow, women students are educated at Queen Margaret College under lecturers appointed by the University Court.

Extra-mural Lecturers.—One special feature of the Scottish Universities remains to be noted. The University Courts have power to recognise as qualifying for graduation the teaching of lecturers in Divinity, Medicine, and Science who are not otherwise connected with the University. In the University of Edinburgh, in especial, great advantage has been taken of this arrangement, and an important auxiliary medical school has been built up outside the University walls. Students of Medicine and Science, however, are not allowed to take the whole of their course of study under extra-mural teachers—two of the five years of medical study must be spent in attendance on the classes of the teachers within the University in which the candidate desires to graduate, and similar regulations apply to students of Science. In Divinity, however, a graduate in Arts may proceed to the degree of B.D. in the University of which he is already a member, even if the whole of his Divinity course has been taken in a denominational theological college "recognised for the purpose" by the University Court (*vide* Ordinance 63).

University Elections (Parliamentary), Procedure at.—In the election of Members of Parliament to represent university constituencies the voting is not by ballot, but by means of voting papers. The provisions of the Ballot Act accordingly do not apply, and are expressly exempted. The procedure is regulated by secs. 37 to 41 of the Reform Act, 1868, as amended by 44 & 45 Vict. c. 40. There are two university seats in Scotland—Edinburgh and St. Andrews, Glasgow and Aberdeen. The constituents of each university are: The Chancellor, the University Court, the Professors for the time being, and the General Council. The General Council consists of the Chancellor, Court, Professors,

all graduates of full age, and certain persons admitted by secs. 6 and 7 of the University Act, 1858, and by sec. 28 of the Reform Act, 1868. Every graduate must pay the registration fee before he is entered on the register, and it is bribery now for a political party to pay the fee for him. The register is made up on 1st December annually, and comes into operation on 1st January succeeding. Registration appeals may be taken to the University Court within ten days from 31st December, and its judgment is final (ss. 32–33 Reform Act, 1868). The returning officer for Edinburgh and St. Andrews is the Vice-Chancellor of Edinburgh, and for Glasgow and Aberdeen, the Vice-Chancellor of Glasgow. Within three days of receipt of writ the returning officer gives public intimation of the election, which must be not less than three nor more than six clear days after that on which the writ was received (s. 37, Act 1868). On the day of election, if one candidate only is proposed he is, on a show of hands, forthwith declared by the returning officer to be duly elected. If more than one is proposed and a poll demanded, he must adjourn the poll for not less than twelve nor more than twenty clear days, exclusive of Saturdays and Sundays (s. 38, Act 1868 ; s. 2 (1), 44 & 45 Vict. c. 40). Practically the same disqualifications exist in a university election as in an ordinary parliamentary election. Persons subject to any legal incapacity are not entitled to vote (s. 2 (16), 44 & 45 Vict. c. 40). Such persons are minors, women, lunatics, aliens, peers, persons guilty of bribery and undue influence. Voting papers, along with a letter of intimation and instructions, are then sent out by the registrar within six clear days, excluding Sundays, to each voter residing in the United Kingdom or the Channel Islands whose name and address is entered in the register of the General Council (s. 2 (3), Act 1881). A voter who does not appear to be resident in the United Kingdom or Channel Islands may apply to the registrar for a voting paper to be sent to him at any address in the United Kingdom or Channel Islands (s. 2 (7), *ib.*). All voting papers require to be officially marked. The voter's number on the register is marked on the counterfoil, and the register itself is marked in such a way as to show that the voter has received a voting paper (s. 2 (2), Act 1881). On receipt of the voting paper, the voter, if he desires to vote, inserts the name of the candidate he votes for, the place and date and signature, and he signs in presence of a witness who must personally know him (s. 2 (9)). It is then returned to the registrar by post, and kept by him in a secure place till the day of counting. Any person who spoils his voting paper may get another from the registrar on demand, and so also where a voter has lost his voting paper, or where it has not been delivered. In both cases the applicant requires to make a declaration before a justice of the peace (s. 2 (6), 1881). Letters returned to the registrar through the dead letter office must be opened, and a list kept and publicly exhibited of such voters who have thus failed to receive their voting papers (s. 2 (8)).

In the case of persons blind or otherwise incapacitated, the registrar on application provides a special form of voting paper, upon which the vote may be recorded for the voter by a justice of the peace (s. 2 (3)).

The polling at each university begins at 8 o'clock a.m. on the day to which the proceedings have been adjourned (not less than twelve nor more than twenty days, excluding Saturdays and Sundays, after the day on which a poll is demanded), and continues for such period, not less than four nor more than six days (exclusive of Sundays), as the returning officer may have determined and announced in the public intimation of the adjournment. The poll closes at four o'clock in the afternoon. No voting paper

is counted which does not reach the registrar before ten o'clock on the morning of the day on which the poll closes (s. 2 (1) (8)).

When the poll begins, the voting papers are opened and examined by the registrar in presence of the Vice-Chancellor, or his pro Vice-Chancellors, the candidates, and the agents.

Objections to voting papers may be taken by any candidate or his agent in attendance on any of the following grounds: that the voter has already voted, or is not qualified, or that the paper is falsified or forged, or wanting in some essential particular. The Vice-Chancellor may receive or reject such papers, and if they are received, shall record the objection thereto. If the objection is that the paper is falsified or forged, he has no option: he must receive and count it, indorsing it as *objected to as forged*, along with the name of the objector (s. 2 (10)). When the votes have been counted, the Vice-Chancellors of St. Andrews and Aberdeen send to their respective returning officers a certificate of the result of the poll in their university, and on receipt of this the returning officer casts up the votes given by each university, and declares the candidate to be elected for whom there is a majority on the whole poll (s. 2 (11)).

The returning officer, if he is a member of the General Council, may give a casting vote in the event of an equality of votes (s. 2 (12)). He could not, however, do so if he were a peer.

The voting papers and other documents are kept, and may be inspected on payment of a small fee (s. 2 (13)).

Persons who sign falsely or fraudulently a voting paper in the name of another, attest such signature knowing it to be false, or alter or deface or abstract any voting paper, are punishable by fine or imprisonment for a period not exceeding one year (s. 2 (14), Act 1881; s. 39 (4), Act 1868; s. 5, 24 & 25 Vict. c. 53).

The registrar's expenses and reasonable remuneration for his trouble are borne equally by the candidates (s. 2 (18)).

The Corrupt and Illegal Practices Act, 1883, applies to elections in universities (s. 58, Parliamentary Elect. Act, 1868, s. 63, Sched. III. Part 1.; C. I. P. Act, 1883), and regulates the scale of expenditure and other matters connected with corrupt practices at elections.

[See Corrupt and Illegal Practices. Blair's *Election Manual.*]

Usage.—In all legal systems a great part of what is known as the common law consists of usages and customs, which, themselves of more or less gradual growth, have become definite and ascertained in character, and which have ultimately been incorporated with the law by means of legislative or judicial recognition. Usage or custom has been said to be "the great source of law." There is a sense in which this is true; another, in which it is not. And the distinction is of importance if an accurate view is to be obtained of the true limits within which custom or usage may in a systematic body of law legitimately operate (see Holland, *Jurisprudence*, 8th ed., 49; Austin, *Jurisprudence*, ii. 533 *seq.*).

The expression "source of law" properly denotes the authority which confers upon certain formulated rules the force and sanction of law; in this sense the brocard is untrue. "The sole source of law, in the sense of that which impresses upon them their legal character, is their recognition by the State, which may be given either expressly, through the Legislature or the Courts, or tacitly, by allowance, followed, in the last resort, by enforcement" (Holland, *v.s.* 50; cf. Vinn. *Comm. in Inst.* 1. 2. 9. s. 2). The expression "source of law" may, on the other hand, be used merely as

descriptive of the cause or occasion which has led to the existence of these rules as rules of conduct for the community. In this sense, as expressing merely the manner in which certain courses of conduct crystallise into definite shape and attain general acceptance and observance, custom is, without doubt, a fruitful "source" of law. This is what is implied in the maxim of the civil law—*ex non scripto jus venit* (see Vinn. *ad Inst.* 1. 2. 9).

The State recognition, which, as has been stated, is the condition of the binding force of a usage, may be directly or indirectly granted. Direct recognition is well illustrated by the case of the Ulster and other customs which obtained their legal force and justification in the Irish Land Act of 1870. In the great majority of cases, however, it is through the medium of judicial decision that usages obtain legal force. Into the discussion at what point of time the custom or usage appealed to becomes transmuted into law we need not here enter (see Holland, *v.s.* 53; Austin, *v.s.* i. 101; ii. 537). It has been maintained, on the one hand, that it is the judicial recognition of the custom which for the first time stamps upon it the imprimatur of law (Austin, *v.s.*); on the other, with perhaps greater force, that in such cases the judicial decision is declaratory, amounting only to a finding in fact that the custom appealed to exists, that it is a legal custom, and binding upon the parties (Ersk. 1. 1. 44; Holland, *v.s.*; see Vinn. *Comm. in Inst.* 1. 2. 9. s. 4). It is, for practical purposes, more important to consider the conditions upon which appeal may, in any particular case, be taken to usage or custom as regulating the rights of parties.

Customary rules or laws may be divided into two classes: (1) such as are judicially noticed by legal tribunals, and will be enforced by them without proof of their existence; (2) those which must be proved before they will be recognised and enforced by the Courts.

Of the first class little need be said. The history of the development of the common law, notably of that part of it which is known as the law merchant, is really the history of the gradual and continuous absorption of usages, general or local, by means of judicial decision. When so incorporated, they become part and parcel of the law, and as such binding upon all persons. "When a general usage has been judicially ascertained and established, it becomes part of the law merchant, which Courts of justice are bound to know and recognise" (Ld. Campbell, *Brandao*, 1846, 12 Cl. & F. 787, at 805; cf. Cockburn, C.J., *Goodwin*, 1875, L. R. 10 Ex. 337, at 346). Although usages and customs are frequently classified as general or as local in character, this is a cross-division merely, which in the present connection is of no legal significance. A general custom may at one time have been purely local; and *vice versâ*. Many local customs are survivals of what were general customs in times prior to the union of all parts of the kingdom under one crown. The udal rights of Orkney and Shetland, and the English customs of Gavelkind and Borough English may be instanced as illustrations of this (see Ld. Young, *Bruce*, 1890, 17 R. 1000, at 1008; Cockburn, C.J., *Muggleton*, 1857, 27 L. J. Ex. 125, at 133). The transition stage, from customary observance to enforceable law, may be more or less rapid according to circumstances, and may be found clearly marked in the course of legal decision. Take, for example, the custom of hiring furniture, in its relation to questions of reputed ownership and as affecting the rights of creditors of the hirer. The case of *In re Matthews* (1875, 1 Ch. D. 501; 45 L. J. Bk. 100), in which judicial recognition was refused to the custom, may be contrasted with the case of *Crawcour* (1881, 18 Ch. D. 30; 51 L. J. Ch. 495), six years later, in which the custom was held to be sufficiently established to receive judicial recognition (see *Marston*, 1879, 6 R. 898).

We pass now to consider the case of usages that have not yet become incorporated with the common law. For practical purposes the question in such cases is—What are the conditions upon which the Courts give legal effect to usage or custom when appealed to by one or other of the parties at issue?

And first, of course, the usage or custom which is pleaded as governing the case must be proved, in the same way as any other fact. What shall amount to sufficient proof of usage is largely a question of circumstances, depending upon the subject-matter and the extent of the alleged custom. It is obvious that the evidence required to establish an averment of general usage must be widely different in character from that which is necessary in the case of a usage which is purely local, or confined to a particular class of persons. In general, the proof of an alleged usage or custom must stand upon an aggregation of individual instances tending to show that there is an established understanding respecting it, which has been acted upon by parties similarly situated as ruling the case (*Mackenzie*, 1856, 3 Macq. 22, Ld. Cranworth, at 40; *In re Matthews*, 1875, 1 Ch. D. 501; 45 L. J. Bk. 100; see *Cunningham*, 1833, 6 C. & P. 44; *Hall*, 1836, 7 C. & P. 711). The proof must be distinct and clear; the conduct of one shipper at a port, though followed by him for many years, will not support a plea of usage (*Clacevich*, 1887, 15 R. 11), nor will evidence of what generally happens or what is frequently done (*Fraser*, 1879, 6 R. 581; *Brown*, 1876, 3 R. 788; *Abbott*, 1874, 43 L. J. C. P. 150) amount to proof of custom, unless, perhaps, any suggestion of tolerance or acquiescence can be clearly eliminated. So also, proof of the usual course of business in a particular trade, arising originally merely from business convenience, is not sufficient to establish a usage, or the ultimate creation of a customary right (see Erle, C.J., *Meyer*, 1864, 33 L. J. C. P. 289, at 294).

Evidence of a usage similar to that appealed to, and which prevails in other places or ports, or in similar trades, is admissible, if only on the ground that it goes to show that the custom sought to be set up is reasonable (see *Noble*, 1780, 2 Dougl. 510; *Milward*, 1842, 3 Q. B. 120; *Fleet*, 1871, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49; *Falkner*, 1863, 3 B. & S. 360; 32 L. J. Q. B. 124). So it has been said that slight proof of usage in Scotland may suffice to establish a custom proved to be in full observance in England (Ld. Gifford, *Strong*, 1878, 5 R. 770, at 774). But such extraneous custom must be *in pari casu*. Thus, a custom proved to exist as between town and country solicitors in England will not avail in proof of a similar custom as between English and Scots solicitors (*Livesey*, 1894, 21 R. 911).

In considering the evidence of usage or custom adduced in any particular case, regard must be had to certain qualities that are really implicit in the legal conception of a custom. Thus, the custom alleged must be defined and certain, or capable of being rendered so (Broom, *Legal Maxims*, 872; see *Blewett*, 1835, 3 A. & E. 554, Williams, J., at 575; Watson, B., *Carlyon*, 1857, 26 L. J. Ex. 251, at 257). It must be well established. In itself antiquity has a purely relative value, which will depend upon the nature of the alleged usage (*Noble*, 1780, 2 Dougl. 510). While in the case of certain customary rights, they must be shown to have existed from what the law regards as time immemorial—so that "the mind of man runneth not to the contrary"; in other cases a comparatively short record may suffice for their establishment. "No precise time or number of facts is requisite for constituting custom; because some things require in their nature longer time, and a greater frequency of acts, to establish them than others" (Ersk. 1. 1. 44). Again, the usage relied upon must, as already indicated, be shown to stand upon right, not upon mere licence or toler-

ance (see *Mills*, 1867, 36 L. J. C. P. 210) that the usage or right has been enjoyed or exercised uninterruptedly; and that it has been universally acquiesced in by those whom it affects. It is not, however, necessary that the possession of the right in virtue of the usage should have been continuous (Broom, *v.s.* pp. 876, 877).

Proof of the existence of the alleged usage or custom will, however, not suffice (Holland, *Jurisprudence*, 53; Denman, C.J., *Clayton*, 1836, 5 A. & E. 302, at 314; Ld. J.-C. Macdonald and Ld. Ruth. Clark, *Bruce*, 1890, 17 R. 1000, at 1006, 1011). The Court requires not only that a usage shall be proved to exist, but also that, as a condition of its being binding upon the parties, it shall be in itself reasonable, or, to state the proposition in what is perhaps the more accurate form, that it shall not be unreasonable (*Tyson*, 1838, 9 A. & E. 406: see Tindal, C.J., at 421, 422; *Bruce*, 1890, 17 R. 1000; see *Gibson*, 1862, 1 H. & C. 142; 31 L. J. Ex. 304; Ld. Cranworth, *Marquis of Salisbury*, 1861, 9 H. L. Ca. 692, at 701; *Hilton*, 1844, 5 Q. B. 701; *Rogers*, 1847, 10 Q. B. 26). It is obvious that proof that a usage is certain in character, well established, and enjoyed as matter of right, will, in most cases, afford good ground for inferring that it is not unreasonable. The very fact of the existence of the usage and its universality may go far to prove its reasonableness and its accordance with public convenience (Stair, 1. 1. 16; Ld. Ruth. Clark, *Bruce*, *v.s.*, at 1012). On the other hand, apparent unreasonableness in the usage alleged may reflect back upon the evidence as to its enjoyment, so as to show that the usage, although existing from time immemorial, must have been based upon accident, or merely upon toleration, not upon right (see Ld. Cranworth, *Marquis of Salisbury*, 1861, 9 H. L. Ca. 692, at 701).

As a corollary from the above, it follows that no usage is valid which is inconsistent with legal principle. *Consuetudo rationem non vincit aut legem* (cf. *Cod.* 8. 53. 2). For this would evidence unreasonableness, the custom would be unjust, and could not therefore be presumed to be based upon the assent of the community (Ld. Ruth. Clark, *Bruce*, *v.s.*, at 1011). A usage or custom must necessarily vary in some particular from the rule of common law (Tindal, C.J., *Tyson*, 1838, 9 A. & E. 406, at 421), and is not thereby rendered void (Kenyon, C.J., *Horton*, 1796, 6 T. R. 760, at 764); but it must not run counter to a general rule of law (*Goodwin*, 1875, 1 App. Ca. 476; L. R. 10 Ex. 337, Cockburn, C.J., at 357; Erle, C.J., *Meyer*, 1864, 33 L. J. C. P. 289, at 293; see also *Crouch*, 1873, L. R. 8 Q. B. 374; 42 L. J. Q. B. 183, Blackburn, J., at 190). An illustration of this is afforded by the well-known case of *Ramsden* v. *Dyson* (1865, L. R. 1 E. & I. App. 129), in which an attempt to extend the terms of a written lease by engrafting upon it a customary and equitable tenant right was negatived by the House of Lords, as being inconsistent with the general rule of law that the terms of the contract must be confined to those expressed in the written agreement. Thus, custom will not be permitted to affect the construction of a negotiable instrument in the hands of a *bonâ fide* holder for value (Ld. Kingsdown, *Kirchner*, 1859, 12 Moo. P. C. 361, at 399; *Crouch*, *v.s.*). As to the effect of usage or custom upon the rights of persons who are not parties to the contract, see *Mitchell*, 1894, 21 R. 600, Ld. Kinnear, at 609.

It is, of course, clear that usage cannot prevail against statutory enactment (*Magistrates of Dunbar*, 1833, 15 S. 879; revd. on another point, 1 S. & M'L. 134; see *Dick*, 1827, 5 S. 268). The relative force and effect of custom as compared with express legislative enactment varies under different legal systems. While all systems seem to allow that customs may be

abrogated or restricted by express legislation, the converse is not universally true. Thus, in Scotland and Germany, the force of statute may be taken off by contrary usage. It is otherwise in England. See DESUETUDE.

It is frequently stated that knowledge of the usage or custom appealed to is in certain cases, *e.g.* when a usage is merely local, an essential condition of its binding character. This view, which has apparently been the occasion of some confusion in reported cases, results from a misconception of the true place of custom or usage in a legal system, and of the ground upon which it becomes obligatory. The fact of knowledge or ignorance of a usage or custom otherwise legal cannot add to or detract from its obligatory character as such. The effect of averments of ignorance of an alleged usage or custom truly falls to be considered under a totally different chapter of the law, namely, the interpretation of contract.

When a usage, general or local, has been incorporated with the common law, knowledge or ignorance of it has clearly no relevance. The quondam usage is now law, and knowledge of the law is conclusively presumed against everyone. *Ignorantia juris neminem excusat.*

When, however, a usage is not yet incorporated into the law, a distinction must be drawn, according as there is or is not a contract relation between the parties at issue. In the latter case, an appeal to usage is still an appeal to something which is pleaded as being the law, and which ought to be judicially recognised as such: if the usage be general, as being law for the whole community; if local, as being law for a particular part or class thereof. The judgment of the Court, if in favour of the usage, declares it to be law, and binding upon the parties. Here again, and for the reason above stated, knowledge or ignorance avails nothing.

But where, as in the vast majority of cases, there is a contract relation between the parties, and an appeal to usage or custom is made by one or both, the primary object of the Court is not the ascertainment of the law governing the community in whole or in part, but the ascertainment of "the law of the contract." *Pacta dant legem contractui.* The question, in short, is one as to the intention of parties and construction of the contract. It is here, and here only, that knowledge or ignorance of the usage in question becomes relevant.

For the principle upon which evidence of custom or usage is admitted as affecting the terms of the contract is, that the parties to contracts made in the ordinary course of trade and without special provisions are presumed to have incorporated with their contract the usages and customs of the trade to which it relates as implied conditions. The trade as exercised and its usual practice are naturally understood to be within the intention of parties in forming their bargain, and to be relied on in the execution of it. *In contractibus tacite veniunt ea quæ sunt moris et consuetudinis* (see Bell, *Com.* i. 465; *Kirchner*, 1859, 12 Moo. P. C. 361; Coleridge, J., *Brown*, 1854, 23 L. J. Q. B. 313, at 316). "When evidence of the usage of a particular place is admitted, to add to or in any manner to affect the constitution of a written contract, it is admitted only on the ground that the parties who made the contract are both cognisant of the usage, and must be presumed to have made their agreement with reference to it. But no such presumption can arise when one of the parties is ignorant of it" (Ld. Kingsdown, *Kirchner*, *v.s.*, at 399; *Holman*, 1878, 5 R. 657). It will be observed that, as stated by Ld. Kingsdown, the effect of ignorance of the usage appealed to is to affect the application of the presumption, not the obligatory character of the custom, if and when it is found to apply to the contract in question. In short, the state of knowledge of parties, while a

relevant and important fact as aiding the construction of the contract, has no bearing whatever upon the binding effect of custom as such, once it is held to be incorporated with a contract. The rule of *Kirchner* and *Holman* amounts to no more than this, that, where it is unreasonable to presume that one of the parties to a contract was in knowledge of the usage, the Court will refuse to imply it as a term of the contract (see *Buckle*, 1867, 36 L. J. Ex. 49, Kelly, C.B., at 53; Pigott, B., at 54; Brett, J., *S. S. Co. Norden*, 1876, 45 L. J. Q. B. 764, at 769). Whether there is or is not ground for a reasonable inference of knowledge or the reverse is simply a question on the evidence (Denman, C.J., *Clayton*, 1836, 5 A. & E. 302, at 314; Littledale, J., at 315). The result of the somewhat conflicting cases upon this subject seems to point to this, that where the alleged custom is merely explicative of the contract, as, *e.g.*, to translate or explain its terms, knowledge will be readily imputed (see *Robertson*, 1845, 2 C. B. 412; 15 L. J. C. P. 28; *Hudson*, 1868, L. R. 3 Q. B. 412; 36 L. J. Q. B. 273; 37 L. J. Q. B. 166; *King*, 12 L. R. Ir. 113). Where, on the other hand, custom is invoked as introducing what practically amounts to a new term into the contract, it is reasonable that the Court should require evidence of its being known to both parties before implying it as a term of the contract (*Kirchner*, *v.s.*; *S. S. Co. Norden*, 1876, L. R. 1 C. P. D. 654; 45 L. J. C. P. 764; see also *Mollett*, 1874, L. R. 7 H. L. 802; 44 L. J. C. P. 362).

It may also be noted that the presumption that parties intended to incorporate with their contract, and therefore to be bound by, trade usages and customs relating thereto, will not in all cases be successfully countered by proving want of knowledge by a party to the contract (see Blackburn, J., *Hudson*, 1868, 36 L. J. Q. B. 273, at 281; Kelly, C.B., *id.*, 37 L. J. Q. B. 166, at 167). For knowledge upon his part may not only be reasonably inferred against him: it may be imputed to him, and he may be held barred from asserting his ignorance. For a person who deals in a particular commodity, or who is engaged in a particular trade, entering into an ordinary contract relative thereto is not only presumed to know, but is bound to know the usages connected therewith (*Buckle*, 1867, 36 L. J. Ex. 49; Kelly, C.B., at 53). He is, in short, precluded from setting up against the person with whom he dealt his ignorance of that which he ought to have known (see *Mollett*, 1872, 41 L. J. C. P. 65, Blackburn, J., at 81; Channell, B., at 84; Bovill, C.J., *id.*, 39 L. J. C. P. 290, at 294; Crompton, J., *Brown*, 1854, 23 L. J. Q. B. 313, at 315). The whole question, and the limits within which it operates, is elaborately discussed in the case of *Mollett*, in the Court of Common Pleas, Exchequer Chamber, and, under a remit to the whole judges, in the House of Lords. For a general statement of the law relating to the admissibility of evidence of custom as affecting contracts, see CUSTOM OF TRADE.

See generally, Holland, *Jurisprudence*, 50 *seq.*; Austin, *Jurisprudence*, Lect. xxx.; Broom, *Legal Maxims*, 871 *seq.* See also CONSUETUDINARY LAW; COMMON LAW.

Usage of Trade.—See CUSTOM OF TRADE.

Usucapio: Prescription in Roman Law.—*Usucapio*, in Roman law, was the acquisition of property by continuous possession for the period defined by law (*Dig.* 43. 3. 3). The reason for the recognition of the principle of *usucapio* is stated by Gaius: *ne rerum dominia diutius in incerto essent* (Gaius, ii. 44). The value of *usucapio* lay in its preventing

uncertainty as to ownership, by determining the moment at which the possessor becomes legal owner, and in its making rights of ownership more easily capable of proof, by rendering what originally might have been a faulty title indefeasible after the lapse of a certain time.

History.—The *usucapio* of the *jus civile* was regulated by the XII. Tables, which provided: *usus auctoritas fundi biennium ceterarum rerum annuus esto.*

The main defects of, or limitations in, the operation of the *usucapio* of the *jus civile* were that it was not available to peregrines and did not apply to lands in the provinces. Accordingly, the peregrine prætors and provincial governors, recognising these defects, introduced by means of their edict the *præscriptio longi temporis*, available to peregrines and applicable to provincial lands. This was originally a plea in defence (*exceptio*) by which the possessor could meet the action of the former owner. In virtue of this plea a person could acquire ownership of land in the provinces by possessing it for ten years, if the party against whom he was completing his title was resident in the same province, or for twenty years, if the other party lived in a different province.

Justinian, on coming to the throne, found these two systems subsisting side by side:—*usucapio*, applicable to moveables wherever situated and to immoveables *in Italico solo*, and *præscriptio longi temporis* applicable to immoveables in the provinces. He fused the two systems together and remodelled the conditions of each, the result being a new system of *usucapio* or prescription distinct in important respects from both the earlier systems. Under this new system ownership was acquired in the case of moveables by three years' possession, and in the case of immoveables, wherever situated, by ten years' possession *inter præsentes* (*i.e.* where both parties were domiciled in the same province) and twenty years' possession *inter absentes* (*i.e.* where the parties were living in different provinces) (*Inst.* 2. 6. pr.; *Cod.* 7. 33. 12).

Conditions of *Usucapio* in Justinianian Law.—The requisites for the prescription thus remodelled by Justinian were: (1) The property must be *res habilis*, *i.e.* capable of being acquired by *usucapio*. Thus a *vitium* attached to stolen property (*res furtivæ* and *res vi possessæ*) which rendered them incapable of being usucapted till the taint was purged by the property in question being returned to the possession of the true owner. (2) The possession must be *ex justa causâ* or *ex justo titulo*. The possessor must have obtained the thing in some way which would have made him owner in ordinary circumstances (*e.g.*, *pro empto*, *pro donato*, *pro legato*, *pro herede*), though, in the particular case, owing to a defect in the transferor's title, or by reason of his being incapable of alienation, or for some similar reason, ownership was not acquired. (3) There must be *bona fides* on the part of the possessor. In other words, he must believe that his possession is legal, as, for example, that his *auctor* was in fact owner of the thing. *Bona fides* was required to exist only at the moment when the possession commenced. This principle is expressed in the maxim, which, however, is not classical, *mala fides superveniens non nocet*. It is otherwise in canon law, for there supervening *mala fides* has the effect of preventing *usucapio*. (4) The possession must be uninterrupted. The interruption of *usucapio* was termed *usurpatio*. The *usurpatio* might be (*a*) natural, where the possessor was deprived of the possession of the subject, or (*b*) civil, where it resulted from judicial proceedings taken by the owner before the period of *usucapio* was completed. The raising of a *rei vindicatio* by the owner, or the lodging of a judicial protest, duly drawn up, with the possessor, was effectual to cut off the course of the *præscriptio*. If *usurpatio* occurred, the person prescribing

could not avail himself of his possession before the date of *usurpatio*, but the whole period of *usucapio* had to commence *de novo* and run again from the date of the *usurpatio* (*Dig.* 41. 3. 15. 2; 41. 4. 7. 4). (5) The possession must continue for the time fixed by law—three years or ten or twenty years, as the case might be. The *usucapio* was not completed till the last moment of the time had expired. In the earlier law a man could not, in computing the period required for *usucapio*, add to his own time of possession the time during which his predecessor in title had possessed, except in the single case of an heir, who might add together the periods of possession by himself and the defunct in order to make up the time required. It was not till the reign of Antoninus and Severus that the principle of *accessio temporis* was admitted on a transfer of possession *inter vivos*. By an enactment of these emperors a purchaser was allowed to add to his own possession that of the vendor (*Inst.* 2. 6. 13), and in the later law the doctrine of *accessio temporis* was gradually extended to all other cases of transfer *inter vivos* (*Cod.* 7. 31. 3).

Special Kinds of *Usucapio* in pre-Justinianian Law.—(*a*) *Usucapio pro herede.*—In the time of Gaius, if a man obtained possession of property belonging to an inheritance to which he had no title, he might usucapt it by one year's possession, even though the property was immoveable (Gaius, i. 52–58). In this *usucapio*, *bona fides* had no place (Gaius, ii. 52).

(*b*) *Usureceptio*, in the time of Gaius, was another kind of *usucapio*, for which *bona fides* was unnecessary, inasmuch as the property was known to belong to another, so far at least as legal title was concerned. By it a man recovered, by possession for one year, property which had once been his own, whether it was moveable or immoveable. One instance of it was where a man conveyed a subject to a friend for the sake of safety, under a fiduciary agreement that the friend should reconvey it on demand. The former owner could recover property in the subject, without a reconveyance, by possessing it for one year (Gaius, ii. 59, 60).

Prescription as a Mode of Extinguishing a Right of Action.—In the later Roman law *praescriptio* was used to denote the *exceptio* (*q.v.*) or answer which a defender had to an action, founded on the lapse of time. In the old *jus civile* lapse of time was no defence, for the right of action was perpetual. The actions introduced by the prætors were, however, exceptions to this rule; and certain other exceptions were subsequently recognised. By a constitution, of date 424 A.D., Theodosius enacted that prescription could be pleaded as an *exceptio* to all actions, with one or two exceptions, after thirty years from the time at which the action might have been brought (*Cod.* 7. 39. 3). Justinian, by a constitution of the year 530 A.D., established the general rule of thirty years' prescription in case of all actions except the *actio hypothecaria*, for which he required forty years (*Cod.* 7. 40. 1). Actions competent to the Church were also favoured in that they did not prescribe in less than forty years. The effect of thus excluding a pursuer's right of action after thirty or forty years was practically to recognise the acquisition of right by the defender, as if by a positive prescription of thirty or forty years (*praescriptio longissimi temporis*).

[Gaius, ii. 42–51; *Inst.* ii. 6; *Dig.* 41. 3; *Cod.* 7. 30–39.]

Usufruct.—*Ususfructus* was one of the personal servitudes recognised by Roman law. It is defined as *jus alienis rebus utendi fruendi salva rerum substantia* (*Inst.* ii. 4. pr.). The person having the right is *usufructuarius* or *fructuarius*; the owner of the property subject to the right is *dominus proprietatis*; and his ownership, as long as the usufruct lasts, is

nuda proprietas (*Inst.* ii. 4. 3). Usufruct applied properly only to things *quæ usu non consumuntur*; but in the later law a *quasi-usufruct* of things *quæ usu tolluntur vel minuuntur* was recognised *per cautionem, i.e.* by means of giving security that things of a similar quantity and quality would be returned (*Inst.* ii. 4. 2; *Dig.* 7. 5. 1). As to the modes in which usufruct was constituted and extinguished, and the conditions of and limitations to the usufructuary's right, see *Inst.* ii. 4; *Dig.* 7. 1.

Usufruct corresponds generally to liferent in Scots law. See Stair, ii. 6. 1 *et seq.*; Bankt. ii. 6. 4; Ersk. ii. 9. 39; Bell's *Prin.* s. 1037; Trayner's *Latin Maxims, s.v.* "Usufruct."

Usus was one of the personal servitudes of Roman law. It is distinguished from usufruct (*q.v.*) by the *usuarius* not having the *jus fruendi* (*Dig.* 7. 8. 2). The person who had the *usus* of a house was entitled to lodge there his family, slaves, and freedmen, and apparently even a guest (*Inst.* ii. 5. 2; *Dig.* 7. 8. 2. 1). See HABITATIO.

Usury; Usury Laws.—Usury, from Latin *usus*, was originally equivalent to interest for the use of money or goods lent. Thus in the Old Testament one of the laws of the Jews reads: "Thou shalt not lend upon usury to thy brother . . . unto a stranger thou mayest lend upon usury"; and in the New Testament the taking of usury is laid down as a duty: "Thou oughtest therefore to have put my money to the exchangers, and then at my coming I should have received mine own with usury." Proceeding, however, upon the other precept, "Lend, hoping for nothing again," the canon law prohibited the taking of interest altogether.

This prohibition was evaded in a variety of ways, and, indeed, Professor Ross (*Lect.* i. 4) says that "to the devices fallen upon to defeat those laws [of the Church forbidding usury or interest] the greatest part of the deeds now in use in both England and Scotland owe their original forms." By the middle of the sixteenth century the taking of interest was gradually and tacitly recognised, and the usury laws, strictly so called, began to be passed for the purpose of regulating and restricting the rate. Thence arose the distinction between legal interest and usury or exorbitant interest, the taking of which was criminal. Since the repeal of those laws in 1854 by 17 & 18 Vict. c. 90, "usury" has become non-existent in the legal, while still retaining, with its adjective "usurious," its place in the ethical sphere.

The first of the usury laws—of which a list is appended to the repealing statute—affecting Scotland was that of the eleventh Parliament of James VI. (29th July 1587), c. 52. This Act fixed the rate of interest per annum at £10 in money or 5 bolls victual for £100 borrowed, and provided that those who took more should be "halden repute persewed and punished as ockerers and usureris and receive and incur punishment and judgment of the same." By the next Act (1594, c. 222), the usurer forfeited the principal sum lent; and three years later, by the Act 1597, c. 251, was liable to the confiscation of all his moveable goods and gear. This latter Act also struck at the indirect violation of the statutory prohibition by means of infeftments, contracts, and obligations, which were thereby declared null and void. The Act 1621, c. 28, was directed against another device for evading the prohibition by deducting a sum of money from the principal at the time of lending.

By Act 1633, c. 21, the rate of interest in Scotland was reduced to 8 per cent.; by Act 1661, c. 49, to 6 per cent.; and by the Act of 12

Queen Anne (1713), Stat. 2, c. 16, to 5 per cent. after 29th September 1714.

This last Act again provided that "all bonds, contracts, and assurances" for a higher rate should be utterly void, but this was modified by 5 & 6 Will. IV. c. 41 (1835). It also provided that the usurer should forfeit "for every such offence the treble value of the monies, wares, merchandizes, and other things so lent, bargained, exchanged, or shifted." Hume (i. 505) suggests that this provision superseded that of 1597, and points out that, in any case, confiscation of goods could only be inflicted by the Court of Justiciary, whereas the nullity of the contract could be declared and the treble penalty recovered in the Court of Session. The rate of "legal interest" remained at 5 per cent. for a hundred and forty years, although bills of exchange for a period of not more than twelve months, and contracts of loan for sums above £10, were exempted from the provisions of the usury laws by 7 Will. IV. and 1 Vict. c. 80; 2 & 3 Vict. c. 37; and 13 & 14 Vict. c. 56. This is still the presumed rate, although more may lawfully be stipulated for, and less is frequently given by the Court. (See INTEREST OF MONEY, and Ld. Young's opinion in *Grant* v. *Grant's Trs.*, 1898, 25 R. 948.)

The policy of the usury laws was the protection of the liege, and especially of the inexperienced and needy, who were most likely to fall victims to the rapacity of money-lenders. The cause of their repeal was the failure of the Acts to attain their object, and the prevalence of the economic view that in such matters liberty of contract, guided and controlled by the laws and state of the money market, was best. That that view is still prevalent is very forcibly shown in the recent (1898) Report of the Committee of the House of Commons on Money-Lending. The Commissioners, while emphasising the evils of the system as at present conducted, and the usurious and often fraudulent rate of interest imposed upon unwary victims, report that the remedy suggested of reintroducing a maximum rate of interest would not, in their opinion, be either advisable or effective.

Uterine.—A uterine brother (or sister) is a brother (or sister) by the same mother, but by a different father. See HALF-BLOOD; CONSANGUINEAN; DEGREES OF KINSHIP; SUCCESSION.

Uti possidetis.—See INTERDICT IN ROMAN LAW.

Uttering.—See COINING; FORGERY.

Vaccination.—The compulsory vaccination of infants was introduced into Scotland by the Vaccination (Scotland) Act, 1863 (26 & 27 Vict. c. 108). By that Act the older practice of smallpox inoculation was forbidden, under a penalty of £5 (s. 24).

AUTHORITIES FOR EXECUTION OF ACT.—1. *Vaccination.*—For enforcing the provisions regarding vaccination, the administrative area is the parish, and the parish council is charged with their execution, subject to the control of the Local Government Board (s. 5; L. G. Act, 1894, ss. 3, 21). The latter body has the same powers as under the Poor Law Act, and may perform any act which the parish council fails to perform (s. 27). In the

absence of a parish council, their duties devolve upon the heritors (s. 28). The expenses of enforcing the Act are defrayed out of the poor-rate (s. 6); and disputes between parishes as to allocation of expenses are determined by the Sheriff (s. 29).

2. *Registration.*—The duties in respect to registration are performed by the district registrars of births, deaths, and marriages (ss. 3, 20), and the expenses connected therewith are assessed for under the Registration Acts (s. 16). In parishes wholly or partly within burgh, where there is no parish council, the town council have the powers conferred on them by the Registration Acts (s. 28).

Appointment of Vaccinators.—It is the duty of every parish council to appoint an official vaccinator, who must be a registered medical practitioner; and such appointment must be intimated within forty-eight hours to the Local Government Board, the Registrar-General, and the district registrar (s. 4.)

Every child must be vaccinated within six months of birth. The responsibility for having the operation performed lies first upon the father; on his death, illness, or inability, upon the mother; and failing the mother, upon the person having the custody of the child. A certificate of successful vaccination must be delivered by the vaccinator to the parent in the prescribed form (Sched. A), and by him lodged with the registrar within three days. Such certificate, when registered, is sufficient proof of vaccination in any prosecution for failure to vaccinate (s. 8).

Where a child is not in a fit state for vaccination, a medical certificate (Sched. B) must be obtained: such certificate remains in force for two months, and must be renewed so long as the child remains unvaccinated. Its production is a defence against a prosecution for non-vaccination (s. 9).

Where the medical practitioner is of opinion, after three vaccinations, that a child is insusceptible of the vaccine disease, he must grant a certificate to that effect (Sched. C) (s. 10). No certificate is receivable in evidence, unless duly recorded with the registrar (s. 22).

Modification in certain Districts.—In insular and Highland districts, the Local Government Board may modify the foregoing regulations (ss. 8–11), with consent of the Lord Advocate; and on application by a parish council, may appoint vaccinators to travel through such districts, fixing and allocating their remuneration; but in no case must it exceed 3s. 6d. for each child, over and above expenses (s. 12).

Duties of Registrars.—The registrar must deliver to every person registering a birth, a notice (Sched. D) setting forth the requirements of the Act, with forms of the certificates (A) (B) (C) (s. 11). He must enter in the Register of Births the word "vaccinated," or "insusceptible," against the name of every child, with the date of the certificate; and must keep a book for recording all cases of postponed vaccination (Sched. E). He is entitled to a fee of 3d. for registering each case of vaccination, and his books must be open for purposes of search and extract, on payment of a fee (ss. 15, 16).

Penalties.—Where any such certificate is not transmitted within the prescribed period, the registrar must intimate such failure to the child's parent or other guardian; and if the latter fail to exhibit a certificate to the registrar within ten days of the notice, he is liable in a penalty of 20s., with 1s. to the registrar for the notice, or to suffer ten days' imprisonment (s. 17).

The registrar must transmit every six months to the inspector of poor a list of all persons who have failed to lodge a certificate under the Act; such list to be laid before the parish council, and an order issued by them to the

vaccinator to vaccinate the persons named in such list (*i.e.* the children of such persons). Notice must first be given, and not sooner than ten, or later than twenty days thereafter, the vaccinator must vaccinate all such children, unless previously vaccinated or certified insusceptible. The parent or guardian who refuses to allow the operation is liable in a penalty of 20s. or ten days' imprisonment (s. 18). The fee for each successful vaccination must not exceed 1s. 6d. where the operation is performed within two miles of the vaccinator's residence, and 2s. 6d. beyond that distance (s. 2). Such vaccination is not deemed parochial relief, and does not affect the settlement of the person vaccinated (s. 7).

The registrar must include in each six months' list the name of every person who has failed to comply with sec. 8, whether his name has appeared in previous lists or not, and such person may be convicted as often as his name so appears, although he has been previously convicted in respect of the same child (*Skene*, 1889, 2 Wh. 240). In an appeal against a conviction under sec. 18 for refusal to allow the appellant's child to be vaccinated, the only evidence of refusal was that of his wife, who deponed that her husband before leaving home had instructed her to refuse permission to the vaccinator, and that she had done so. The conviction was quashed (*Cockett*, 1897, 2 A. 315).

The vaccinator must enter in a book the number of persons vaccinated, and all cases of postponement and insusceptibility, and make yearly returns to the Local Government Board, such books and returns to be open to inspection by the registrars and parochial officials (s. 21). Further, he must send to the registrar within forty-eight hours the particulars contained in every certificate granted by him (Sched. F), under a penalty of 20s. (s. 23).

Procedure.—All penalties imposed by the Act may be recovered summarily at the instance of the inspector of poor, before the Sheriff of the county where the offence was committed, or the offender found. The conviction must contain a decerniture for penalty and expenses, and also a warrant of imprisonment in the event of failure to pay (s. 25).

The substitution of a warrant to poind (which the Act does not authorise) will be fatal to the conviction, at least if it be inseparable from the remainder of the sentence (*Moffat*, 1896, 2 A. 57). Proceedings may be taken at any time during the respondent's default, and the Sheriff must award the amount of the penalty to the poor of the parish where the offence was committed (s. 26). Failure to make such order will invalidate the conviction (*M'Callum*, 1896, 2 A. 197).

By the Public Health (Scotland) Act, 1897 (s. 77), the local authority thereunder are empowered to defray the cost of vaccinating or re-vaccinating such persons as to them may seem expedient. This provision applies, of course, only to such persons as may be willing to submit to vaccination. The local authority have no compulsory powers.

Vagabond.—See VAGRANT.

Vagrant; Vagrancy Laws.—The etymological meaning of vagabond and vagrant is the same, namely, one who "vaigs" or wanders, but in the manner commonly associated with tramps. One of the earliest Scots Acts (1449, c. 22) is said by the title to treat "of the away putting of . . . vagabonds," a term not used in the Act itself, but from the context evidently equivalent to masterful beggars. The late Ld. Justice-Clerk Inglis, however, while regarding "vagrant" as a *nomen juris*, doubted there

being any recognised meaning of "rogue and vagabond" (cf. the opinions in *Coyle*, 1859, 3 Irv. 452, with those in *Scott*, 1860, 3 Irv. 581).

Apparently it is no crime at common law to be either a "vagabond" or a "vagrant," and in modern Acts dealing with criminal offences both terms are generally further defined, and involve something beyond merely wandering or vaiging.

The operative Acts dealing with vagrancy may be divided into four classes: (1) The English Vagrancy Act of 1824 (5 Geo. IV. c. 83), "for the punishment of idle and disorderly persons and rogues and vagabonds," of which sec. 4 was amended and made (in its entirety) applicable to Scotland by the Prevention of Crimes Acts, 1871 (34 & 35 Vict. c. 112), s. 15 (see *M'Lean*, 1882, 5 Coup. 193, and 10 R. (J. C.) 34); (2) the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), ss. 408–411, which applies to every existing burgh, except Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock (which may, however, adopt it in whole or in part), and to every burgh created under the Act; (3) the various local Acts applicable to the above five excepted burghs; and (4) the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), which by sec. 57 empowers County Councils to make bye-laws *inter alia* for the prevention of vagrancy.

It will be observed that of these Acts the second and third classes apply to burghs, the first and fourth are general. The Acts must be referred to for a list of those who fall under the category of vagrants, but, as examples of the offences struck at, the following are taken from the Act of 1824: "every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent or in any cart or waggon, not having any visible means of subsistence and not giving a good account of himself or herself . . . every person wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind under false or fraudulent pretence . . . ." The Burgh Police Act provides for the punishment as vagrants of those who send out young children to beg or to sing in the street (cf. Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 2).

Vagrant children, although the term is not used in the Act, are defined by sec. 14 of the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), and may, under that Act, be sent to an Industrial School, or may, in virtue of sec. 9 of the Prevention of Cruelty to Children Act, be given to the custody of a relation or other person named by the Court. (See EDUCATION, vol. iv.)

There is a long series of old Scots Acts dealing with vagrants and vagabonds, the latter but not the former word being used. Their object was threefold, viz.: (1) to suppress crime, for which reason vagrants are classed with sorners, with those who feign themselves to be mad, with those who pretend to witchcraft and with Egyptians or gipsies; (2) to make the able-bodied but idle work, (*a*) by ordering them to pass to some craft under penalty of being burnt in the cheek, having their ears cut off, being banished out of the realm and, if they returned, being hanged, (*b*) by allowing (in the 17th century) those having coal-mines, salt-pits, or manufactories to impress them into their service, and (*c*) by sending them to Houses of Correction; and (3) to relieve the really poor and helpless, by allowing them to beg within their proper parishes, and for that purpose providing them with tokens or badges, by assigning their children to masters willing to take them, and by providing for direct relief by compulsory assessment.

We have already considered the Acts presently regulating vagrancy as a crime; poverty as a misfortune is now relieved under the Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83), and subsequent statutes. (See POOR, vol. ix.)

For those of antiquarian tastes who desire to look into the older laws, the following is a list of the Scots Acts dealing with the subject of vagrancy: 1424, c. 7; 1424, c. 25; 1424, c. 42; 1449, c. 22; 1457, c. 79; 1503, c. 70; 1535, c. 22; 1579, c. 74 (a codifying Act, which at once defines who are meant by idle and strong beggars and vagabonds, and is, as it has been called, "the foundation of the present poor law system in Scotland"); 1592, c. 149; 1597, c. 272; 1600, c. 19; 1606, c. 11; 1609, c. 13 (ratifying an Act of Secret Council, 1603); 1617, c. 10; 1661, c. 38; 1663, c. 16; 1672, c. 12; 1672, c. 18; 1698, c. 21 (a ratifying Act); also 9 Geo. II. (1736) c. 6 (dealing with witchcraft).

Valuation.—See RATING.

Valuation Appeal Court.—See LANDS VALUATION APPEAL COURT.

Valuation of Teinds.—See TEINDS (VALUATION OF).

Vassal.—See FEUDAL SYSTEM; SUPERIORITY.

Verbal Obligations.—See OBLIGATIONS.

Verdict (in Civil Case).—See JURY TRIAL; NEW TRIAL.

Verdict (Criminal).—A verdict is the deliverance of a jury, and, in Scotland, it may be unanimous or by a majority of the fifteen jurors who form the assize in criminal trials.

After the evidence in the case has been led, the prosecutor and the accused, or his counsel or agent, may address the jury. The judge then delivers his charge to the jury, who may return a verdict without leaving the jury-box (54 Geo. III. c. 67, s. 1), or may retire to consider their verdict. It is not necessary, as in civil cases, that the jury be enclosed for three hours before they are entitled to return a verdict by a majority They may do so at any time.

All verdicts returned before the adjournment of the Court are announced *vivâ voce* by the foreman or chancellor of the jury. If the jury are not unanimous, this circumstance must be stated by the foreman in announcing the verdict. When the jury are ready to return their verdict, they are asked by the Clerk of Court to do so, and it is then proclaimed aloud by the foreman. The Clerk of Court enters it in the record, and reads it over to the jury, after he has completed the entry. The name of the chancellor need not be recorded (*M'Kinlay*, 1819, Shaw, 58). If the verdict requires amendment or explanation, the judge asks the jury to do this before the verdict is recorded (*Alexander*, 1823, Shaw, 99; *Wilsons*, 1826, Syme, 38; *Hardie*, 1831, Bell's *Notes*, 296; *Harvey*, 1833, *ib.*; *Waiters*, 1836, 1 Swin. 273). But this must be done before the verdict is recorded. After recording, the verdict cannot be altered or explained (*Anderson*, 1830, Bell's *Notes*, 295; *Hunter*, 1838, 2 Swin. 1).

Written verdicts were only competent where the Court adjourned before

the verdict was returned. Since the Act 9 Geo. IV. c. 29, s. 15, they have been unknown in practice (see also 54 Geo. III. c. 67; 6 Geo. IV. c. 22, s. 20).

A jury in a criminal trial may return a verdict of acquittal or of condemnator.

1. VERDICT OF ACQUITTAL.—(1) *On Ground of Insanity.*—The jury may find that the accused was insane at the time of the offence. Further, they may find, at any stage of the trial, that the accused is then insane. In either of these cases the accused is ordered to be detained during royal pleasure (*Milne*, 1863, 4 Irv. 301; 20 & 21 Vict. c. 71, s. 87; 34 & 35 Vict. c. 55).

(2) *Verdict of Not Guilty or Not Proven.*—After a verdict to this effect has been returned, the judge assoilzies the accused and dismisses him from the bar; unless cause be shown for detention on a different charge. A verdict of acquittal may be returned after evidence has been led, or formally, after the prosecutor has abandoned the charge, or the Court has directed the jury to acquit. In the two latter cases the proper verdict is one of "Not Guilty" (*Galloways*, 1836, 1 Swin. 232; *Phaup*, 1846, Ark. 176; but see *Craig*, 1867, 5 Irv. 523).

2. VERDICT OF CONDEMNATOR.—When the indictment contains only one charge, or two or more stated cumulatively, the jury, in convicting a panel, returns a general verdict of "Guilty," and the clerk enters this on the record as "Guilty as libelled" (*M'Haffie*, 1827, Syme, 295).

An inconsistent addition made to a verdict may destroy its effect. Thus where the accused pleaded "not guilty," a verdict of "guilty in terms of her own confession" was held to invalidate the verdict (*Graham*, 1864, 4 Irv. 504). The same would hold if the jury appended to a finding of guilty a crime not libelled at all. But the Criminal Procedure Act of 1887 (50 & 51 Vict. c. 35) enumerates important exceptions to this rule, and, in a case of murder, it is competent to return a verdict of culpable homicide.

Verdicts which merely find facts, and which make no general finding, are now unknown in practice. Such finding of facts must be accompanied by a general finding exhausting the question or questions raised in the charge (see *Cumming*, 1848, J. Shaw, 35, Ld. J.-Cl. Hope, 61). It is necessary that the specific facts found infer guilt (*Milne*, 1874, 2 Coup. 562). A verdict, in a case of reset, finding that the accused received goods "suspecting them to be stolen," or, in a case of robbery, finding that certain property was carried off by robbery "or lost in the scuffle," would not warrant sentence (*Davilin*, 1836, 1 Swin. 41; *Duff*, 1841, 2 Swin. 615; *Mullen*, 1845, 2 Broun, 664; *M'Innes*, 1856, 2 Irv. 548; *Greig*, 1863, 4 Irv. 369). To return a verdict that the accused "misappropriated" property, when the charge is that of embezzlement, is bad (*Macmillan*, 1888, 1 Wh. 572). Under the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74, s. 62), which makes it an offence to falsely make, antedate, or alter, etc., knowing the same to be altered, etc., a verdict that the accused falsely made and uttered, without stating "knowing," etc., is bad (*Calder*, 1890, 2 Wh. 472). Where a railway bye-law made it an offence not to deliver up a ticket, unless the fare was paid from the station from which the train originally started, a verdict that the accused had "failed to deliver up his ticket," without stating that he had not paid the fare, was held bad (*Craig*, 1865, 5 Irv. 206). Where the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22, s. 4 (*a*), and article 19 of Sched. (1)), made it an offence for a trawler to do certain things when "in sight of" drift-net or line fishermen, a verdict

which only found that a certain line fisherman's boat could be seen from the trawler was set aside (*Combe*, 1886, 1 Wh. 50).

The facts found must not only infer the crime, they must also be consistent with the charge. Thus it would be incompetent to return a verdict of murder by stabbing under an indictment for murder by poisoning. But mere deviations from the charge, which do not amount to inconsistencies, will not invalidate a verdict, as where the jury finds that only part of a sum alleged to have been embezzled has been proved to have been so (*M'Gall*, 1849, J. Shaw, 194). Again, a verdict of "culpable neglect of duty," under a libel which charges "culpable and reckless neglect of duty," is good (*Henderson*, 1850, J. Shaw, 394), as is also a verdict convicting of a crime, but negativing a special averment of malicious intention (*Dougal*, 1861, 4 Irv. 101; see also *Kennedy*, 1838, 2 Swin. 213). In a charge of sedition, where it was averred that certain acts were intended and calculated to produce a certain result, a verdict that they were "calculated" to produce this result was held good (*Cumming*, 1848, J. Shaw, 17 and 35). In a charge of culpable homicide by folding up a bed in the knowledge that a child was lying in it, a verdict was held to be good which negatived the knowledge but found that the accused "did not give the thought she ought to have done before folding up the bed" (*Sutherland*, 1856, 2 Irv. 455). Where a person was indicted for lewd practices, a verdict of guilty, which specified part of the acts libelled as being found proven, was upheld (*Sneddon*, 1866, 5 Irv. 305). A verdict of guilty of malicious mischief, which negatived an averment that the act was done with intent to injure the owner, was held sufficient (*Thomson*, 1874, 2 Coup. 551). Where a person was charged with "assaulting, obstructing, and deforcing or attempting to deforce," a verdict of "guilty with the exception of the deforcement" was sustained (*Beattie*, 1842, 1 Broun, 463). Where the charge was that of mobbing and rioting and aggravated breach of the peace, but the charge of mobbing and rioting was withdrawn at the close of the case, a verdict convicting only of the charge of aggravated breach of the peace was held good (*Mackenzie*, 1882, 5 Coup. 124).

If a general verdict of guilty does not necessarily imply a crime, the verdict is bad. Thus in a charge under the Day Poaching Act (2 & 3 Will. IV. c. 68), which makes it an offence to be "upon" land in search of game, a general conviction of trespassing "in or near" a field was held to be bad (*Arthur*, 1876, 3 Coup. 300). Where the offence charged was a breach of close time, during which it was illegal to fish otherwise than by rod and line, a general conviction on a charge of fishing by "a line and leisters, or otherwise to the complainer unknown," was held bad, as it might include the legal mode (*Walker*, 1885, 5 Coup. 595).

The verdict must dispose of the whole libel, excepting any charges which have been withdrawn. If the verdict deals only with one charge of several, or with one prisoner of several, it must be held an acquittal as to those with which it does not deal. There must be an express finding as to the guilt of each accused. A verdict that "both or either" of two accused did a certain act is no warrant for any sentence. Again, the verdict must be consistent with the charge. Where the charges are alternative, a verdict of guilty will not warrant any sentence (*Watt*, 1824, Shaw, 128; *Sinclair*, 1825, Shaw, 138; *M'Nab*, 1842, 1 Broun, 41; *Reeves*, 1843, 1 Broun, 612; *Mains*, 1860, 3 Irv. 533; *Greig*, 1877, 3 Coup. 382; *Boyd*, 1879, 4 Coup. 239; *Charleson*, 1881, 4 Coup. 470; *Barr*, 1883, 5 Coup. 312; *Duncan*, 1888, 2 Wh. 104). But a verdict of "guilty" is sufficient where by statute one offence may be charged as having been done in one or other of several ways, the particular

mode being of no consequence (*Scott*, 1872, 2 Coup. 218; *O'Neills*, 1883, 5 Coup. 305; *Macnaughton*, 1884, 5 Coup. 509; *Shaw*, 1886, 1 Wh. 270; *Maxwell*, 1889, 2 Wh. 176). If a charge is made under a statute, which sets forth a number of acts which may constitute the statutory offence, a general verdict may be bad, as failing to set forth the exact offence which was found proven (*De Banzie*, 1875, 3 Coup. 89). Where two *loci* were libelled on alternatively, a general verdict of conviction against two accused, which did not specify the *locus*, was held bad (*Downes*, 1882, 4 Coup. 567). Where a charge against a seaman was that he disobeyed the order of A. or of B., a general conviction which did not state whose order had been disobeyed was set aside (*Reaney*, 1883, 5 Coup. 367). A verdict is bad which acquits of a general charge but convicts of a special, where the latter particularises the former (*Hunter*, 1838, 2 Swin. 1). The same result follows where two acts are charged as together constituting one offence, and the verdict finds that only one has been committed, or where an act is charged along with an aggravation, and the aggravation alone is found proved (*Beatson*, 1820, Shaw, 18; *Wilsons*, 1826, Syme, 38).

A verdict must be free from ambiguity. A finding that the accused intimidated two persons "or one or other of them" was held to be bad (*Sharp*, 1843, 1 Broun, 521). Where a person was charged with an offence within the meaning of the Act 13 & 14 Vict. c. 92, particularly sec. 2 thereof, a verdict finding an offence within the meaning of the Act 13 & 14 Vict. c. 92 was held bad (*Graham*, 1888, 2 Wh. 96). If the meaning of the verdict is plain it will not be disturbed. Thus a verdict of guilty of the "wilful and culpable neglect charged" was held to cover the whole charge, as if it had been "guilty as libelled" (*M'Raes*, 1842, 1 Broun, 395; see also *Macfarline*, 1843, 1 Broun, 585; *Reid*, 1844, 2 Broun, 313; *Grant*, 1854, 1 Irv. 548). A conviction of stealing "a part" of the articles libelled has been sustained (*Brodie*, 1845, 2 Broun, 559). A verdict convicting of what is not charged is bad. Thus a verdict of "guilty of the crime charged, aggravated as charged," was held to be inept, there being no aggravation set forth in the libel (*Donald*, 1892, 3 Wh. 274).

The rules of law which require that a verdict must exhaust the whole libel, that it must be logically consistent with the charge, that it must be complete and unambiguous, have been considerably modified by the provisions of the Criminal Procedure Act of 1887 (50 & 51 Vict. c. 35).

By this statute (s. 59) it is now competent, under an indictment for robbery, or for theft, or for breach of trust and embezzlement, or for falsehood, fraud, and wilful imposition, to convict an accused person 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.

Where in an indictment (s. 60) two or more crimes are charged cumulatively, it shall be lawful to convict of any one or more of them. Any part of what is charged in an indictment, constituting in itself an indictable crime, shall be deemed separable to the effect of making it lawful to convict of such crime. Where any crime is charged as having been committed with a particular intent, or with particular circumstances of aggravation, it shall be lawful to convict of the crime without such intent or aggravation.

Under an indictment (s. 61) which charges a completed crime, the

person accused may be lawfully convicted of an attempt to commit such crime. Under an indictment charging an attempt, the person accused may be convicted of such attempt, although the evidence be sufficient to prove the completion of the crime said to have been attempted. Under an indictment which charges a crime which imports personal injury inflicted by the person accused, resulting in death or serious injury to the person, the person accused may be lawfully convicted of the assault or other injurious act, and may also be lawfully convicted of the aggravation that such assault or other injurious act was committed with intent to commit such crime.

Where any act (s. 62) set forth in an indictment as contrary to any Act of Parliament is also criminal at common law, or where the facts proved under such an indictment do not amount to a contravention of the statute, but do amount to a crime at common law, it shall be lawful to convict of the common law crime.

By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), it is provided (s. 9) that under an indictment charging a person with rape or felony under sec. 4 of the Act, the jury may find that the accused is guilty of minor offences under other sections of the Act, or of an indecent assault, and the accused will be punished accordingly. This Act applies to the United Kingdom, but it is doubtful whether such a verdict is competent in Scotland, unless the statute be referred to in the indictment (see *Barbour*, 1887, 1 Wh. 466, and *Henderson*, 1888, 2 Wh. 157).

[Hume, ii. 425; Alison, ii. 631; Ersk. iv. 4. 101; Macd. 500; Anderson, *Crim. Law*, 254.]

Vergens ad inopiam.—See INSOLVENCY.

Veritas convicii.—See DEFAMATION.

Verity (Oath of).—See OATH IN BANKRUPTCY; SEQUESTRATION.

Vermin.—Under the Gun Licence Act of 1870 occupiers of land are exempt from liability for licence for a gun which is used only for scaring birds and destroying vermin. Questions have arisen as to what animals are vermin within the meaning of this provision, and under this head reference is made to the articles upon GUN LICENCE, RABBITS, and PIGEONS. The Crofters Holdings Act, 1886 (1), authorises the landlord to enter the holding for, among other purposes, the destruction of vermin.

Under the Cleansing of Persons Act, 1897, local authorities are empowered to provide buildings and apparatus for the purpose of cleansing persons from vermin. The infected person is entitled on his own petition to the use of such apparatus free of charge, and is not rendered a pauper by reason of his using it.

It is an implied covenant in house-letting in Scotland (differing from England as regards an unfurnished house) that the house is fit for habitation. Accordingly, the lessee is entitled to renounce his lease, if on entering he finds the premises to be infested with vermin to such a degree as to render residence incompatible with ordinary domestic comfort (Rankine on *Leases*, 231; *Kippen*, 1847, 10 D. 242; *Smith*, 11 M. & W. 5, 12 L. J. Ex. 223. See *Campbell*, 4 F. & F. 716; *Wilson*, 46 L. J. Ex. 489, 2 Ex. Div. 336; Woodfall, *Landlord and Tenant*, 181).

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Definition.—A right is said to vest in a person when it becomes his property and is transmissible to his representatives on his death. An interest is not vested in a beneficiary as long as his right to it depends on a contingency; it vests only when it ceases to be contingent. Accordingly, in the law of succession the term "vested interest" is used, in contradistinction to the terms "contingent interest," "expectancy," or "*spes successionis*," to denote that the beneficiary has obtained an absolute right of property independent of any contingency, as distinguished from a right which depends on a contingency, and which, therefore, is not a right of property, but merely a right under which he may some day become a proprietor. If a person has a vested interest, it passes to his representatives on his death, though he die before he has got the actual enjoyment of the right or possession of the property. On the other hand, if he has merely an expectancy or contingent interest, it lapses by his death, and does not pass to his representatives. It is no exception to this that where A. bequeaths property to B., and, failing him, to his executors, B., the beneficiary, though he die before the testator, and therefore without acquiring a vested interest, may make a will naming executors, who on A.'s death are entitled to the property (*Scott's Exrs.*, 1890, 17 R. 389). In such a case the executors of B. do not take under B.'s will, inasmuch as he, having no vested interest, had no power of disposing of the property; they take solely under the will of A. (*Lord Advocate*, 1889, 20 R. 429; affd. 1890, 21 R. (H. L.) 6). A beneficiary who holds a vested interest can effectually transfer it *mortis causâ* or *inter vivos*; it is attachable by the diligence of his creditors for debts due by him; and, on his bankruptcy, it passes to the trustee in his sequestration. A beneficiary who has a contingent interest may indeed convey or assign it, but his conveyance or assignation carries nothing until the occurrence of the event on which his right is contingent, or, in other words, until his right vests by ceasing to be contingent (*Browning*, 1837, 15 S. 999). "An expectant cannot sell the property to which he hopes to succeed, nor can he exercise any power over it. He can sell no more than a chance—his chance of becoming proprietor. He may grant a conveyance; but it conveys nothing, inasmuch as he has nothing to

convey. It becomes effectual by accretion alone. Till then it is nothing but a mere agreement to convey the subject of the expectancy when it shall vest" (per Ld. Rutherfurd Clark in *Reid*, 1893, 20 R. 510, at 514). Similarly, since an expectancy or *spes successionis* is not property, it is not attachable by the diligence of the creditors of the person in expectancy, and is not carried to the trustee in his sequestration if he should be discharged before the right of succession is vested (*Trappes*, 1871, 10 M. 38; *Kirkland*, 1886, 13 R. 798). Further, it is now settled that a *spes successionis* or contingent interest, which a bankrupt may have, is not even an "eventual right" which he can be compelled, under sec. 81 of the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), to assign to the trustee in his sequestration, though it is still an open question whether the assignation of such an expectancy may be made a condition of granting the bankrupt's discharge (*Reid*, 1893, 20 R. 510).

Other Meanings of the Term.—Although in legal language the term "vest" technically denotes that the right is one of property and is transmissible, and does not connote that the beneficiary has the actual possession or enjoyment of the estate, yet the term may be, and often is, used by testators and others in a popular sense to mean that the beneficiary has come into actual possession of the estate to which he has succeeded, or that the date has arrived at which the money is payable to him. Thus in the leading case *Young* v. *Robertson*, 1862, 4 Macq. 314, the word "vest" occurring in the will—"if any of the residuary legatees shall die without leaving lawful issue before his or her share vest in the party deceasing"—was construed to mean "come into the possession of," and to have reference solely to the period at which payment was made. In this case Ld. Chan. Westbury observed that in adopting this construction "the word 'vested' is taken in accordance to its natural meaning in the vocabulary of ordinary life, namely, when a thing is received or comes into possession" (per Ld. Chan. Westbury in *Young*, 1862, 4 Macq. 314, at 323; see also, as to the meaning of the term "vest," per Ld. Cranworth, at 331). So in several other cases, both Scots and English, in which a testator has declared that legacies or shares of residue bequeathed by him should vest at, or should not vest until, a particular period, the word "vest" has been construed by the Courts in a sense different from its technical legal meaning, as denoting, and referring to, the time at which the bequest comes into the possession of, or is payable to, the beneficiary (*Popham's Trs.*, 1883, 10 R. 888; *Croom's Trs.*, 1859, 22 D. 45; *Taylor*, 1852, 5 De G. & Sm. 191; *in re Edmondson's Estate*, 1868, L. R. 5 Eq. 389). Again, the term "vest" may, if the context of the will is in favour of that construction, be read as importing only that the interest previously vested is at a specified time to become indefeasible (*Armytage*, 1878, L. R. 3 App. Ca. 355). Even in construing a will, however, the technical meaning, which, as explained in the previous paragraph, the word bears in ordinary legal language, is attributed to it, unless it clearly appears from the context that the intention of the testator will be defeated if that meaning is affixed to the expression (*Richardson*, 1865, 19 C. B. N. S. 780; *in re Coppard's Estate*, 1887, 35 Ch. D. 350).

There are recognised in law certain intermediate rights between a vested interest and a mere expectancy. Thus a right may vest in a person or persons, subject to defeasance in whole or in part on certain events (*vide infra*, p. 94, as to *Vesting subject to Defeasance*). Again, a person who has not a vested interest may have an expectant right of succession, which is protected in the sense that it cannot be defeated by the gratuitous acts of the immediate fiar. Such protected rights of succession are common in marriage contracts, since the onerous and contractual nature of the pro-

visions therein is regarded as entitling persons having rights thereunder to the same rights against gratuitous assignees as against the cedent (*vide infra*, p. 117). In *Massy*, 1872, 11 M. 173, followed in *Gibson's Trs.*, 1877, 4 R. 1038, the principle of protected succession was extended to testamentary provisons. In *Massy* (*supra*) the Court held that a testamentary provision to a married woman in fee, whom failing to her issue, and failing issue to other legatees, constitutes a protected right of succession in the issue, so that the institute is disabled *stante matrimonio* from alienating the fee by gratuitous deeds. The extension of the principle of protected succession to testamentary gifts, which, unlike provisions in marriage contracts, are not founded on obligation, but are purely gratuitous, is not easily justifiable on principle, and the Courts in later cases have shown an unwillingness to recognise it. The principle of *Massy* (*supra*) will not be adopted where the words of the deed do not necessarily require its application (*Mitchell*, 1877, 5 R. 154; *Newall's Tr.*, 1898, 25 R. 1176), and it applies only where the testator has failed to supply adequate machinery to carry out his clearly expressed intention of protecting the succession (*Duthie's Trs.*, 1878, 5 R. 858; cf. *Mickel's Jud. Fact.*, 1892, 20 R. 172). As to protected succession, see LEGACIES, vol. vii. at p. 407.

The determination of the period of vesting is important not only in fixing the date at which the persons entitled acquire an absolute and transmissible right of property, but also, in many cases, in ascertaining the persons who are entitled to payment, and the extent and quality of the interests taken by each of these persons. In no case can an interest in succession vest in beneficiaries till all contingency is purified, so that it can be definitely ascertained (1) who the persons are to whom payment is to be made, and (2) what is the extent and quality of the interest taken by each of them. As long as there is any doubt as to the individuals who may have an interest, or as to the kind and extent of the interest which each may have, a succession cannot vest. (But see *infra*, p. 97, *Vesting in a Class.*) The period of vesting can arrive only when, by the progress of time and events, all contingency is purified, and the previously existing doubt is thereby resolved. In several cases in which declarator has been sought that a right has vested, or that a beneficiary has acquired the right to dispose of a certain interest effectually by testament, while the right or interest was still subject to contingent eventualities, the Courts have declined to speculate as to the course of events, and, further, have laid it down that, even if a judgment on the matter were prematurely pronounced, it would not conclusively determine the question or be *res judicata* if the case were again brought before the Court by parties after the event (*Harvey*, 1860, 22 D. 1310; *Ferrie*, 1849, 11 D. 704; *Provan*, 1840, 2 D. 298). In *Fleming* (1879, 6 R. 588), however, the Court held that persons in right of a residuary legatee were entitled to declarator that the fee of certain capital sums had vested in the residuary legatee, and that the pursuers were entitled to sell and dispose of their interest in the same, although the judgment might not be *res judicata* against persons who did not appear in the action, or who were not in existence. Ld. Young dissented, on the ground that such a judgment would be of no value, and that the Court ought not to pronounce it.

A right of succession in property in the strict sense of the term, whether under a will or on intestacy, cannot, it is clear, vest until the death of the former owner of the property. Rights under a marriage contract, and such provisions to children as are held to vest in the lifetime of the parent, are not properly speaking rights of succession at all, although they in most respects so closely resemble rights of succession that they are conveniently treated under the head of Succession.

I. Vesting of Rights arising *Ex lege*.

A. *Legitim.*—Legitim vests in each lawful child to the extent of his or her share by survivance of the parent (Stair, iii. 8. 50; Ersk. iii. 9. 30; Fraser, *Husband & Wife*, 2nd ed., ii. p. 997, and cases there collected). In other words, a child's share of the free moveable estate of a parent is fixed, and passes to the child, immediately on the parent's death, and is transmitted by the child, though he die before confirmation, to his heirs *in mobilibus* (*vide* per Ld. Cottenham in *Fisher*, 1843, 2 Bell's App. 63, at 73). The making of a claim for legitim on the part of the child is not necessary to complete the vesting, and the executors of a child, who has survived the parent, may claim legitim though it has not been claimed by the child, even where the child had the option of taking a testamentary provision in lieu of legitim (*M'Murray*, 1852, 14 D. 1048; *Lowson*, 1854, 16 D. 1098; but see *contra*, *Stewart's Trs.*, 1851, 14 D. 298).

B. *Jus relictæ; Jus relicti.*—Similarly, *jus relictæ* vests in the widow immediately on the death of her husband, without the necessity of confirmation (Stair, iii. 8. 50; Ersk. iii. 9. 30; Bell's *Prin.* s. 1591; Fraser, *Husband and Wife*, 2nd ed., ii. 1060). At the same time, the widow can render her right effectual only by a claim against her husband's executor, or, if he does not make up a title, by herself expeding confirmation *qua* relict, and thereby acquiring an active title to enforce the payment of debts due to her husband (*Dunduff*, 1612, M. 3843; *M'Aulay*, 1712, M. 3848). The widow, since her proprietary right emerges at the date of her husband's death, is entitled to any interest that may have accrued on the fund between the date of his death and the date of payment (*M'Intyre*, 1865, 3 M. 1074). The vesting in a husband of *jus relicti*, the share of the moveable estate of his deceased wife falling to him, is governed by the same rules as the vesting of *jus relictæ* (Married Women's Property Act, 1881, 44 & 45 Vict. c. 21, s. 6; *Poë*, 1882, 10 R. 356; affd. 10 R. (H. L.) 73; *Fotheringham's Trs.*, 1889, 16 R. 873; *Simon's Trs.*, 1890, 18 R. 135). When a husband is divorced, the wife takes her *jus relicti*, the divorce being held equivalent to a dissolution of the marriage by the husband's death (Stair, i. 4. 20; Ersk. i. 6. 46–48; Fraser, *Husband & Wife*, 2nd ed., ii. 1218; *Harvey*, 1872, 10 M. (H. L.) 26; *M'Elmail*, 1888, 16 R. 47); but it has been held that a decree of divorce pronounced against a wife is not equivalent to her death so as to confer a *jus relicti* on the husband under sec. 6 of the Married Women's Property Act (*Eddington*, 1895, 22 R. 430).

C. *Terce.*—Terce, the right which a widow has to the liferent of one-third of the heritable property in which her husband died infeft, is due to the widow from the date of her husband's death, or if the marriage be dissolved by divorce for adultery by the husband or desertion by him, from the date of the divorce (Stair, i. 4. 22; Ersk. i. 6. 46–48; *Fairlie*, 15 June 1819, F. C.; Fraser, *Husband & Wife*, 2nd ed., p. 1082). When terce is due by reason of the husband's death, the widow's right to rent commences as to her third at the same time as the heir's right to his two-thirds, and extends (with certain exceptions) to the rents of the heritage in which the husband died infeft, whether such heritage has been acquired by singular title, succession, donation, or purchase (Fraser, ii. 1086; *Rossborough's Trs.*, 1888, 16 R. 157). Although the widow's status and her husband's investiture constitute, properly speaking, her title to the terce, yet another step, consisting either of service or kenning to the terce, is necessary in order to give the widow an active title of possession (Ersk. *Prin.* ii. 9. 29; Ersk. *Inst.* ii. 9. 50; Bell's *Prin.* ss. 1601 *et seq.*). Service to the terce merely declares the widow's right, to the effect of giving her a *pro indiviso*

right of possession of the lands jointly with the proprietor, and conferring on her the right to sue the tenants for one-third of the rents (Bell's *Prin.* s. 1604; *Bell*, 1827, 6 S. 221; Ersk. ii. 9. 50; Fraser, *Husband & Wife*, 2nd ed., p. 1107). Kenning is necessary to confer on the widow a proper liferent in her third share as a separate subject (Ersk. ii. 9. 50; *Hamilton*, Hailes, 332; Fraser, 2nd ed., 1108). The question whether a widow, who has not been served or kenned to her terce, can transmit her right in it to her representatives is not settled (*Pringle's Executrices*, 1870, 8 M. 622; Fraser, ii. 1105). In *M'Leish* (1826, 4 S. 485; cf. *Macaulay*, 1636, M. 3112; Stair, ii. 6. 13; M'Laren, i. 93) it was held that the assignee of a widow who died without having served, had no right to the rents she might have exacted. This decision has, however, been doubted, and it is argued that, as the effect of service is merely to declare a right already constituted and fixed by the husband's death, the widow's right is transmissible, even before service, to her representatives or assignees (Bell's *Conveyancing*, ii. 796; Bankt. ii. 6. 15; Bell's *Prin.* s. 1602; More's *Notes on Stair*, p. cexviii; Strachan, Elchies, *voce* "Deathbed," No. 7).

D. *Courtesy.*—Courtesy, the right of a surviving husband to a liferent of the heritage in Scotland in which his wife died infeft, vests in the husband *ipso jure* upon the wife's death. Inasmuch as no partition of property is necessary in case of the courtesy, there is no need, as in the case of terce, of service, kenning, declarator, or other judicial act, in order to perfect the husband's right (Stair, ii. 6. 19; Ersk. ii. 9. 52; Fraser, *Husband & Wife*, 2nd ed., p. 1124). The right of courtesy is conditional on there having been a child of the marriage, which survived its birth, and was, for however short a time, its mother's heir; and the right is strictly personal to the husband, so that rents and fruits not levied by him cannot be demanded by his heir (Bell's *Prin.* s. 1608; Ersk. ii. 9. 55; *M'Aulay*, 1636, Mor. *Diet.* 3112).

E. *Intestate Succession to Moveable Estate.*—In intestate succession to moveable estate, confirmation was formerly necessary, not only as an active title to recover the estate, but to vest the succession in the next of kin. If one of the next of kin of an intestate died before confirmation, his representatives lost the right to all share in the moveable property of the deceased intestate except the *ipsa corpora* of moveables which he had actually reduced into possession (Ersk. *Prin.* iii. 9. 18). This was altered by the Act of 19th July 1823 (4 Geo. IV. c. 98). The effect of this enactment is that the beneficial interest in the succession vests *ipso jure*, upon the death of the intestate, in those who are next of kin at the date of the death, and consequently passes from them, though they should die before confirmation and have never acquired possession of the property, to their representatives (*Mann*, 1830, 8 S. 468; *Frith*, 1837, 15 S. 729). The right conferred by the Act on the representatives of next of kin dying before confirmation, applies not only to the immediate representatives of the next of kin, but to those whose claim arises by transmission. Where, for example, the next of kin of the deceased intestate was a married woman, and the beneficial interest had vested *jure mariti* in her husband, who predeceased her, a brother of the husband and one of his next of kin was, on the death of the wife unconfirmed, decerned as her representative to her ancestor's estate, without having made up any intermediate title to his deceased brother (*Bremner*, 2nd Feb. 1883, rep. Currie on *Executors*, 2nd ed., p. 80).

F. *Intestate Succession to Heritable Estate.*—In regard to the vesting of heritable succession, at common law the heritable property possessed by the ancestor on a personal title vested in the heir by general service only, and heritable property in which the ancestor died infeft vested in the heir only by infeftment, which might proceed either upon a special service or

upon a precept or writ of *clare constat* from the superior. Until the heir had obtained a vested right by service, the property remained *in hereditate jacente* of the deceased, and, in the event of the death of the heir without completing a title, the right to take it up by service passed to the next heir. To this general rule there were, however, exceptions in the case of certain kinds of property in which the heir-apparent acquired a vested right by mere survivance of the ancestor. The kinds of property which vested in this way without service were titles of honour and hereditary offices (Ersk. iii. 8. 77; *Cockburn*, 1747, Mor. 150), rights under a lease (Ersk. iii. 8. 77; *Campbell*, 1739, Mor. 14375; *Boyd*, 1671, Mor. 14375; *Murdoch*, 1863, 1 M. 330), udal property in Orkney and Shetland (*Beatton*, 1832, 10 S. 286). Possession and apparency were also in themselves sufficient, without any other title, to vest the right to accruing rents and interest on heritable debts as well as to arrears of such rent and interest (Ersk. iii. 8. 58; *Weir*, 1664, M. 5244; *Hamilton*, 1760, M. 5253; rev. 1767, 2 Pat. 137). Except as to these special subjects, apparency, even when coupled with possession, did not vest the heritable property of the ancestor in the heir entitled to the succession. The law on this subject has been altered by the Conveyancing (Scotland) Act, 1874, s. 9, which provides that a personal right to every estate in land descendible to heirs shall, without service or other procedure, vest in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed. The heritable estate, accordingly, now vests in the heir *ipso jure*, without his completing a title, to the effect that he transmits the right to his heir, and that the property can be attached for his debts during his life or after his death. Further, the heir can, from the date of the ancestor's death, sell the estate, though no right conveyed, or disposition made, by the heir, so far as it may prejudice his ancestor's creditors, is valid unless made and granted a full year after the ancestor's death (1661, c. 24). The enactment in sec. 9 applies to every estate descendible to heirs, and consequently applies to heirs of provision and to heirs of provision and entail as well as to heirs-at-law (*M'Adam*, 1879, 6 R. 1256). In the older law, under which the heir acquired an indefeasible title to the ancestor's estate by service, the character of heir was ascertained as at the date of the service to the deceased. Accordingly, if the person serving was entitled to the character of heir at the date of service, he could not be dispossessed, nor could his title be set aside in consequence of the subsequent birth of an heir nearer in blood to the ancestor than himself, subject only to the qualification that an heir *in utero* at the date of service was considered as already born, and thus excluded from service the person for the time being holding the character of heir. In the case of a nearer heir being *in utero* at the date of the service, the service was not indeed void, but it was voidable (*Wat*, 1706, Mor. 14901). The fact that a nearer heir, who was not *in utero* at the date of the service, was subsequently born, did not ground an action of reduction of the service of the person possessing the character of heir at the date of his service at the instance of the subsequently born nearer heir. This was settled in *Grant* (1859, 22 D. 53), where a father succeeded and served heir to his only son (there being no nearer heir *in utero*), but, after an interval of two years, a daughter was born to him, who, under the rules regulating heritable succession, was the nearest heir to her deceased brother. The Court, however, refused to sustain a reduction of the father's service at the instance of the daughter, inasmuch as she was not *in utero* at the date of the service. Under the new principle introduced by sec. 9 of the 1874 Act, under which rights of succession vest by mere survivance without service, the generally accepted view is that the doctrine followed in *Grant* (*supra*) is applicable,

and that the person possessing the character of heir at the date when the succession opened cannot be deprived of the succession by the birth of a nearer heir, who was not *in utero* at the date of the ancestor's death. The rule is different in testate succession and in the case of persons taking under tailzied destinations. There, on the principle that the will of the testator or settlor must prevail, effect is given to the order of succession which he has prescribed. Thus although an heir of entail has taken possession of an estate under the entail, if a nearer heir comes into existence, the service becomes of no effect, and the nearer heir has right to the estate from the time of his birth, and may make up title to the estate as if there had been no previous entry (*Mountstewart*, 1707, Mor. 14903; *Mackinnon*, 1765, Mor. 5279; *Logan Home*, 1880, 7 R. 1137).

II. Vesting of Rights arising under Testamentary Dispositions.

Cardinal Rule of Interpretation.—In determining whether a beneficiary has a vested right, or merely a contingent interest, under a *mortis causa* settlement, the cardinal rule is that effect is given to the intention of the testator, as disclosed by his testamentary writings. "When the question arises under a *mortis causa* settlement, whether the benefit given is, or has become, a vested right, the intentions of the testator, in so far as they can be discovered or reasonably inferred from the deed, taken as a whole, and from the circumstances legitimately collected under which the deed was made, should have effect given to them. That is the cardinal rule and guide" (per Ld. Colonsay in *Carleton*, 1867, 5 M. (H. L.) 151, at 153). Since the fundamental principle is that vesting under a testament takes place at the period meant and intended by the testator, it follows that the fixing of the date of vesting is in each case a question of construction, the testator's meaning and intention being gathered by a careful study of, and by giving effect to, the language he has used. On this ground the value of authority in questions of testamentary construction is frequently called in question, for the reason that one man's nonsense affords no clue to another man's nonsense. Nevertheless, in view of the importance of having the meaning and effect of the words and language ordinarily used in testamentary deeds settled for the guidance of conveyancers and testators in framing deeds of settlement, the Courts, in construing wills, have laid down and follow certain rules of interpretation. The effect of the rules of construction is that, where certain words have received a particular interpretation by the Courts, words not reasonably distinguishable will receive the same interpretation when they occur again (*M'Alpine*, 1883, 10 R. 837). "When rules are established and recognised, their justice or injustice in the abstract is of less importance to the community than that the rules themselves should be constant and invariable" (per Ld. Westbury in *Ralston*, 1862, 4 Macq. 397, at 405). The principles or rules of construction recognised in this branch of law are not, however, hard and fast rules. "Rules of construction are only guides to the discovery of testamentary intention" (per Ld. M'Laren in *Bowman's Trs.*, 1898, 25 R. 811, at 817). Being founded on presumed intention, they are not absolute and unbending, but are to be applied in order to give effect to, rather than to thwart, the intention of the testator (see per Ld. M'Laren in *Tristram*, 1894, 22 R. 121, at 126). While, then, authority has in many cases put a technical meaning on language, the principle that the meaning and intention of the testator are not to be sacrificed to the certainty of the law, preserves the rules of construction from being reduced to a set of technicalities. "The object is to ascertain what the testator meant from what he has said; and any general rules are not technical, but merely canons

to be applied as the words may seem to require" (per Ld. J.-Cl. Moncreiff in *Jackson*, 1876, 3 R. 627, at 629). Most questions of vesting fall to be determined upon a balance of considerations, and the rules of construction summarised in this article are, strictly speaking, little more than a collection of reasons or arguments for or against the different possible interpretations of the meaning of testators.

In the legal construction of ordinary words of the English language, and in drawing inferences as to the testator's purpose and intention from the circumstances in which the will was made, and from the exigencies which may be supposed to have led to the special form in which bequests or provisions are cast, there is no technical difference between the law of Scotland and the law of England (*Young*, 1862, 4 Macq. 314, at p. 319; *Taylor*, 1878, 5 R. (H. L.) 217, at p. 218; *Miller*, 1875, 2 R. (H. L.) 1, at p. 10). Accordingly, English decisions on questions of vesting, where they do not depend on any technical rule of English conveyancing, frequently afford valuable aid in resolving difficulties of interpretation.

Direct *Mortis causa* Disposition of Heritage or Moveables to Grantees.—A usual mode of constituting a testamentary settlement of land is by a direct disposition to the person or persons to whom the estate is to be granted, with substitutions to heirs in the order in which they are intended to take. The principles applicable to the construction of such destinations are in many respects different from, and inapplicable to, the determination of questions as to the vesting of beneficial interests under a trust (see per Ld. M'Laren in *Turner*, 1894, 21 R. 563, at 567, and in *Tristram*, 1894, 22 R. 121, at 125). In a direct testamentary conveyance of heritage the fee cannot be in suspense. "I know of no such thing as suspension of vesting under a direct heritable destination in liferent and fee, except the necessary suspension until a fiar is born" (per Ld. M'Laren in *Turner*, 1894, 21 R. 563, at p. 567). In a destination of heritable estate to A. in liferent and to B., whom failing to C. in fee, or to any number of other substitutes in succession, the liferent and fee vest concurrently in the liferenter and first named fiar who survives the testator. An effect somewhat similar to postponement of vesting is got by the doctrine of a fiduciary fee, in virtue of which, in a conveyance to a parent for his liferent use allenarly and to his children, or the heirs of his body *nascituri*, in fee, a fiduciary fee vests in the parent in trust for behoof of his children, each of the children taking a vested interest at its birth. The construction of destinations in direct *mortis causa* conveyances of heritage to strangers, or to husband and wife, or to parent and child, and other usual forms, is fully treated in separate articles. See Disposition; Succession; Heir; Substitution; Conjunct Rights; Fee and Liferent; Fiduciary Fee. Again, in a proper heritable destination the presumption is in favour of substitution; while in the case of a conveyance of moveables, and in the case of a trust destination, whether the property held in trust be heritable or moveable, the presumption is in favour of conditional institution (per Ld. Pres. Inglis in *Watson*, 1884, 11 R. 444, at 450; per Ld. M'Laren in *Turner*, 1894, 21 R. 563, at 567). The effects of this distinction are fully considered *s.v.* Substitution.

A direct *mortis causa* conveyance of moveables to the persons favoured is an unusual mode of testamentary settlement.

Ordinary Testamentary Settlement: Effect of Quality of Estate, Heritable or Moveable, on Vesting.—In the ordinary testamentary settlement, in which the estate is disponed originally to trustees or passes to an executor—who is merely a trustee for immediate distribution—the

quality of the estate, *i.e.* whether it is heritable or moveable, while it is one of the elements influencing the decision of a case of vesting, is probably the least important of these elements (per Ld. M'Laren in *Hay's Trs.*, 1890, 17 R. 961, at p. 963). In the usual case of a settlement of mixed heritable and moveable estate, it is common to include the whole in one disposition to trustees, who are directed to execute a conveyance of the heritable estate, or of the residue, after fulfilment of the primary purposes of the trust, in favour of the heir or heirs pointed out by the settlement. "In the numerous cases of trust conveyance of mixed estate, heritable and moveable, it has been generally assumed that the same principles of construction are applicable to the bequests. Whether these are charged on the aggregate estate, or are of the nature of specific bequests of money or landed estate, or even where the trust has relation to heritable estate exclusively, if the other conditions of the trust are such as are consistent with vesting, the circumstance that the trustees are directed to make a conveyance at a future period will not interfere with the right of the beneficiary to the immediate enjoyment of the estate" (per Ld. M'Laren in *Hay's Trs.*, 1890, 17 R. 961, at p. 963). Since the rules as to the vesting of beneficial interests under trust dispositions and settlements apply generally, whether these interests be heritable or moveable, the special cases in which the quality of the estate affects the question of vesting are most conveniently treated in course of dealing with the rules applicable to different sets of circumstances.

Presumption is in favour of Vesting at the earliest possible Date, *i.e. a morte testatoris.* — Where there is no provision or condition postponing payment or conveyance beyond the period of the testator's death, vesting takes place at the testator's death. Even where there is a provision or condition postponing payment of the beneficial interests until a period subsequent to the death of the testator, there is a general presumption, based on the presumed intention of the testator, that vesting occurs at the earliest possible date, *i.e.*, in general, *a morte testatoris.* "The general rule of law as to bequests is that the right of fee given vests *a morte testatoris.* That rule holds although a right of liferent is at the same time given to another, and although that is done through the instrumentality of a trust, and whether the fee be given to an individual *nominatim* or to a class. The postponement of the period of payment till the death of a liferentrix does not suspend the vesting, nor does the interposition of the machinery of a trust for carrying into effect the intentions of the testator. Indeed, the creation of a trust is a very usual mode of securing the interest of a liferenter, where the right to the fee is nevertheless intended to vest in the person, or class of persons, for whom it is destined. At one time doubts were entertained as to the case where the settlement was by trust deed to hold for a liferenter and successive persons as fiars, but the tendency of recent decisions in that class of cases, and indeed in almost all cases, has been in favour of the vesting of the fee *a morte testatoris*, unless the terms of the deed are such as to exclude that construction" (per Ld. Colonsay in *Carleton*, 1867, 5 M. (H. L.) 151, at 154).

Similarly, where a testator, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at his own death—such an expression, for example, as "my next of kin"—he is *primâ facie*, and in the absence of expressions indicating a different intention, understood to refer to the date of his death as the period at which the persons whom he means to favour are to be selected (*Gregory's Trs.*, 1889, 16 R. 10, per Ld. Watson, at p. 14, and authorities there cited).

The presumption in favour of vesting *a morte testatoris* is unusually

strong in the case of provisions to the testator's immediate children (per Ld. J.-Cl. Moncreiff in *Jackson*, 1876, 3 R. 627). The presumption holds whether the beneficiaries be individuals *nominatim* or a class (*Carleton*, 1865, 3 M. 514; affd. 1867, 5 M. (H. L.) 151; *Matthew*, 1844, 6 D. 718). Thus in *Forbes* (1838, 16 S. 374)—a case referred to as a leading authority in *Carleton* (*supra*)—the direction was, after the death of the testator's daughter to whom a liferent was given, to pay the residue to the whole children of her body, share and share alike. It was held that vesting took place in the children *a morte testatoris*, and that vesting *a morte* was not prevented by the circumstance that the bequest of the residue was conceived in favour of a class of persons, and not in favour of certain individuals *nominatim* (see per Ld. Corehouse in *Forbes*, 1838, 16 S. 374, at 378; cf. *Hickling's Trs.*, 1898, 1 F. (H. L.) 7). Even where a legacy is given, upon the expiry of a liferent, to a class of persons, excepting the one of the class who should succeed to certain lands, the right has been held to vest *a morte testatoris*, notwithstanding the uncertainty in regard to the particular person excluded (*Douglas*, 1864, 2 M. 1008; *Cunningham*, 1858, 20 D. 1214; cf. *Yeats*, 1880, 8 R. 171; *Hayward's Exrs.*, 1895, 22 R. 757; see as to vesting in a class, *infra*, p. 97). Different portions or shares of an estate may vest at different dates; and though the vesting of one portion be postponed, that does not prevent the vesting of another portion *a morte testatoris* (*Kilgour*, 1845, 7 D. 451). There is, indeed, a certain presumption against there being two periods of vesting under the same deed, but this is not an element of much weight, as a testator often has reasons for fixing different periods of vesting (see per Ld. Moncreiff in *Ross's Trs.*, 1897, 25 R. 65, at 73). In many cases legacies have been held to vest *a morte testatoris*, where the vesting of the residue has been held to be postponed (*e.g. Sanderson*, 1873, 1 R. 96; *Sterling*, 1851, 14 D. 20; *Yeats*, 1880, 8 R. 171; cf. *Ramsay's Trs.*, 1876, 4 R. 243). It may even happen that one portion of a legacy or bequest may vest at one period and another portion at another period. Thus in *Home*, 1807, Hume's Dec. 530, where one half of a bequest was made payable on the marriage or majority of the legatee, and the other half on the death of the liferenter, it was held, on the death of the legatee during minority and before marriage, that the former half, being pendent on the arrival of a *dies incertus*, lapsed by the death of the legatee before that event, while the latter half, being payable on a *dies certus*, had vested in the legatee.

Where intestacy results from the failure of a testamentary provision, the persons entitled to take are the heirs *ab intestato* of the testator at the time of his death (*Wilson's Trs.*, 1894, 22 R. 62; cf. *Campbell's Trs.*, 1891, 18 R. 992).

The Postponement of Payment to an Event Certain does not prevent Vesting *a morte testatoris*: Liferent: Annuity.—A fundamental rule in the law of vesting—a rule taken from the Roman law—is that which distinguishes between the effect on vesting of the postponement of a legacy or gift to an event certain to happen, and its postponement to an event which is contingent or uncertain. (As to this distinction, see per Ld. J.-Cl. Moncreiff in *Jackson*, 1876, 3 R. 627, at 629, and per Ld. M'Laren in *Cunningham*, 1889, 17 R. 218, at p. 225.) The postponement of the term of payment to an event certain to happen has of itself no effect in preventing vesting *a morte testatoris*, or, in other words, does not of itself import as a condition of the right that the payee shall survive the term of payment. "In every executry estate some time must elapse before the funds of the deceased can be realised, and sometimes, from the nature of the investments, the interval may be considerable. But this does not

prevent vesting from taking immediate effect. A postponed term of payment only affects vesting when it is adjected as a condition of the gift itself, and is not merely a burden or qualification of the right. When a testator postpones payment of the fee in order to provide for a temporary and intermediate interest in the income or produce of the estate, such as a liferent or an annuity, vesting takes place notwithstanding *a morte testatoris*, because the interposed interest is only a burden on the gift. The legacy is unconditional although the enjoyment of it is qualified. The legacy vests, but only under the qualification that the legatee shall not be entitled to demand payment until the specified time arrives" (per Ld. J.-Cl. Moncreiff in *Jackson*, 1876, 3 R. 627, at 629). Instances of bequests held to vest immediately, although payment was by the terms of the will postponed to a *dies certus*, are to be found in *Finlay's Trs.*, 1886, 13 R. 1052 (legacy payable "twenty years after my decease"), in *Archibald's Trs.*, 1882, 9 R. 942 (residue payable "in or about the year 1892"), and in the very numerous cases in which payment is postponed till the death of some third person who has a liferent. Inasmuch as death is certain, the postponement of the enjoyment of a bequest till the death of a person who has a liferent of, or an annuity provision from, the property bequeathed, does not by itself postpone vesting. (As regards a liferent not postponing vesting, see *Wallace*, 1807, M. *voce* "Clause," App. No. 8; *Maxwell*, 1837, 15 S. 1010, per Ld. Corehouse, p. 1016; *Forbes*, 1838, 16 S. 374, per Ld. Corehouse at p. 377; *Marchbanks*, 1836, 14 S. 521; *Cochrane*, 1854, 17 D. 103; *Douglas*, 1864, 2 M. 1008; *Nimmo*, 1864, 2 M. 1144; *Carleton*, 1865, 3 M. 514; affd. 1867, 5 M. (H. L.) 151; *Jackson*, 1876, 3 R. 627; *Hay's Trs.*, 1890, 17 R. 961; *Home's Trs.*, 1891, 18 R. 1138; *Ross' Trs.*, 1884, 12 R. 378; *Duncan's Trs.*, 1882, 9 R. 731; *Scott's Trs.*, 1891, 18 R. 1194; *Cunningham*, 1889, 17 R. 218. As to an annuity, *Pursell*, 1855, 2 Macq. 273; *Watson*, 1856, 18 D. 971; *Kerr*, 1858, 20 D. 562; *Jack*, 1874, 12 S. L. R. 42; *Waters' Trs.*, 1884, 12 R. 253.) It is presumed, where there is nothing in the settlement showing other reasons for the postponement (as to these reasons, see *infra*, pp. 81 *et seq.*), that the only object of the testator in postponing the term of payment was to secure the liferent or annuity; and, that not being a matter personal to the legatee, the presumption is strong that the legacy is not conditional, and that its enjoyment only is qualified (*vide* per Ld. J.-Cl. Moncreiff in *Jackson*, 1876, 3 R. 627, at 629). This presumption holds although a liferent be given to one person and the fee to another and his children or issue or heirs (there being no ulterior destination), for in this case the legatees of the second order are considered, so far as a question of vesting is concerned, as persons instituted in consequence of their being the natural successors of the institute, and therefore as taking a right, which is subordinated to his and is not intended to interfere with his acquisition of the fullest benefit which it was possible for the truster to give him consistently with the liferent (*vide* per Ld. M'Laren in *Hay's Trs.*, 1890, 17 R. 961, at p. 965; cf. *Carleton*, 1867, 5 M. (H. L.) 151, per Ld. Colonsay at 154. But, as to this, see opinions in *Bowman's Trs.*, 1899 (H. L.), 36 S. L. R. 959. *Vide infra*, pp. 91 *et seq.*, as to the effect of a destination over).

The principle that the postponement of the enjoyment of the fee by the interposition of a liferent does not in itself prevent vesting applies independently of the number or succession of the life-interests, general or partial, which may be interposed (*Smith*, 1834, 12 S. 646; *Richardson*, 1868, 6 M. (H. L.) 18; *Murray's Trs.*, 1887, 15 R. 233). Where there are numerous liferenters, the directions given by the testator as to the manner in which his trustees are to dispose of the income set free by the death of one liferenter

after another successively, until the period for distributing the capital among the fiars arrive, do not readily affect the question of vesting (*Duncan's Tr.*, 1882, 9 R. 731, *vide* per Ld. Young at p. 742). The principle of vesting *a morte*, though payment is postponed till the expiration of a liferent, is not affected by the circumstance that one of the liferenters has an interest in the fee (*Maxwell*, 1837, 15 S. 1005).

It requires stronger language to show an intention to suspend vesting when payment is postponed for the purpose of securing an annuity, which is a mere burden on the annual revenue, than when the purpose in view in postponing payment is the satisfaction of a liferent which exhausts the annual revenue (per Ld. Chan. Cranworth in *Pursell*, 1855, 2 Macq. 273, at p. 276; per Ld. J.-Cl. Moncreiff in *Henderson's Trs.*, 1876, 3 R. 320, at 323; *Watson*, 1856, 18 D. 971; *Kerr*, 1858, 20 D. 562; *Murray's Trs.*, 1887, 15 R. 233). In determining whether an annuity suspends vesting, it is an important consideration that the charge on the fund for the annuity exhausts the income or leaves only an inconsiderable margin. In such a case the annuity has a similar effect to a liferent in postponing the vesting (*L'Amy*, 1850, 13 D. 240; *Dickson*, 1851, 13 D. 674; *Kerr*, 1858, 20 D. 562). But if the capital is much greater than is necessary to secure the annuity, the Court will not tie up the whole capital till the death of the annuitant (*Buchanan*, 1877, 4 R. 754). Of course, if it appears from other parts of the deed that the intention of the testator was that vesting should be postponed till the death of the annuitant, effect is given to this intention (*Pearson*, 1839, M'L. & Rob. 685; *Provan*, 1840, 2 D. 298; *Scott*, 1877, 4 R. 384). As to acceleration of payment, *vide infra*, p. 101.

Where Testator explicitly fixes the Date of Vesting: Rule.—The intention of the testator as to the period at which the beneficiaries are to take a vested right may be explicitly stated in the testament. Where there is such an express testamentary provision as to the date of vesting, the Court, even where there are other clauses in the deed which in legal construction point to a different period of vesting, will give effect to the express declaration, on the principle that it is not admissible to fix a period of vesting, as a result of mere construction, different from that which the testator has fixed in precise and unambiguous language (per Ld. Trayner in *Carruthers's Tr.*, 1894, 21 R. 492, at p. 498; *Bowes' Trs.*, 1870, 42 Sc. Jur. 382; *Duthie's Trs.*, 1889, 16 R. 1002). Thus in *Carruthers's Tr.* (1894, 21 R. 492) effect was given to a clause in the will declaring that "the share of each child shall be a vested right at majority," although the result was virtually to abrogate a clause of survivorship in the will; and in *Smith's Trs.* (1894, 31 S. L. R. 538) a declaration in the will that vesting should take place on the testator's death was given effect to, in spite of the inference to be drawn from a conditional institution and clause of survivorship in favour of vesting being postponed to the date of payment (cf. *Bowes's Trs.*, 1870, 42 Sc. Jur. 382).

Similarly, effect is given to a declaration by the testator that the beneficiaries shall not have a vested interest until actual payment or conveyance. Thus in *Macdougall* (1890, 17 R. 761) a testator conveyed his estate to trustees, and directed them, on the death of himself and his wife, on his youngest child attaining the age of forty, to divide his estate among those of his children who should be then alive and the children of any who might be dead, "declaring that the provisions under these presents shall not vest in them till actual payment and conveyance, and if any one or more of my children shall die before receiving payment or conveyance of their share, and without leaving issue, such share shall be divided among

my surviving children." The youngest son survived his father and mother and attained the age of forty, but died within six months thereafter, before he had obtained actual payment of his share. It was held that the testator's express declaration must be given effect to, and as this declaration was not merely that the shares should not vest until the time when they were directed to be paid or conveyed, viz. upon the youngest child attaining forty, but that the shares should not vest until actual payment and conveyance, the son at the date of his death had no vested right. Similarly, in *Howat's Trs.* (1869, 8 M. 337) the trustees were directed, at the expiry of twelve months after the testator's decease, or as soon thereafter as they might be able to realise the estate, and upon his youngest child attaining the age of twenty-one, to divide the residue equally among his children. The share of any child who should die before receiving payment was to accrue to the survivors. All the children attained majority before the testator's death and survived him for more than twelve months, but one of his sons died two years after his father's death, before any division of the residue had been made by the trustees. The Court held that the share of this son had not vested, as he had died without receiving payment. Neither in *Macdougall* (*supra*) nor in *Howat's Trs.* (*supra*) was there any allegation that the division of the estate had been improperly postponed by the trustees, or that the estate was in a condition to be divided before the date of division (cf. *Thorburn*, 1836, 14 S. 485; *Sutherland's Trs.*, 1874, 2 R. 46; *Ferrier*, 1872, 10 Macph. 711; *Johnson*, 1879, L. R. 12 Ch. D. 639, per Jessel, M. R.).

Exceptions.—(*a*) *Where the Declaration as to Vesting is Repugnant to other Parts of Deed.*—A declaration as to the period of vesting, though most precise, will not receive literal effect where it is obviously repugnant to the other purposes of the trust. In such cases the declaration as to the time of vesting is controlled by the other provisions of the deed, or, as it is put in some cases, the declaration as to vesting is interpreted, not according to the technical legal meaning of the term "vesting," but so as to give effect to the true intention of the testator as manifested by the will as a whole. Thus in *Croom's Trs.* (1859, 22 D. 45) the trust-deed provided that the shares of residue, which was to be divided among three families, should vest when the eldest legatee should attain majority, that being the period of division. But with regard to one of the families, each member existing at the date of division was to take a share not only for himself but also for other members of the family who might subsequently be procreated; and, further, the declaration as to the period of vesting was expressly qualified by a substitution in favour of the survivors of the family in question, in case any individual member of the family should predecease the term of payment without issue. In order to give effect to these provisions, the term "vesting" in the declaration fixing the period of vesting was, as regards this particular family, construed to mean simply that the share of the estate falling to that family was to be set apart at that date for the family as a class, although no particular share then vested in any individual member of the family so as to be transmissible or assignable by him. In *Chambers' Trs.* (1898, 5 R. (H. L.) 151; 1897, 5 R. 97) the testator directed his trustees to hold the residue of his estate for behoof of his children equally among them, declaring that the shares, which were payable six months after the testator's death, were to "vest at the testator's death in those children who survived him." Power was given to the trustees, if they deemed fit, to postpone payment of the shares and to apply the interest of the shares, during the postponement, for behoof of the children, or by a deed

under their hands to retain the shares, or any of them, vested in their own persons, so as to restrict the right of the children to a liferent and settle the fee of their shares on their issue. Certain payments to account of his share were made to a son, but the balance of his share was arrested in the hands of the trustees by certain creditors of the son. Subsequently the trustees executed a deed of trust restricting the son's right to a liferent. It was held by the House of Lords that, though the fund remaining in the hands of the trustees had prior to the arrestment vested in the son, it was vested in him subject to the condition that the trustees, acting on the power conferred by the deed upon them, might divest him, and that this power of divestiture had been validly exercised by the trustees.

(*b*) *Where Term "Vest" is used in a Sense other than its usual Meaning.*—Again, the word "vest," as used by a testator in a declaration fixing the period of vesting, may be used not in its ordinary legal meaning, but in the sense of "be payable," and in such cases the Courts will construe the declaration as to vesting in accordance with the testator's intention (*Popham's Trs.*, 1883, 10 R. 888; *Young*, 1862, 4 Macq. 314). As to the different significations of the term "vest," *vide supra*, p. 66.

(*c*) *Where the Maxim* Quod fieri debet infectum valet *applies.*—When there has been unreasonable delay on the part of trustees in conveying, or making payments, to the beneficiaries, there is room for the application of the maxim *quod fieri debet infectum valet*, so that what ought to have been done according to the direction of the testator is held to have been done. Accordingly, where a testator declares that the right shall vest at the date of payment, the right is held to be vested in the beneficiary from the date at which he is entitled to payment in terms of the will, and vesting is not postponed until the actual receipt of payment. In other words, where the maxim *quod fieri debet infectum valet* applies, the expresssion "date of payment," in a declaration fixing the vesting at the date of payment, or the expression "before receiving payment," in a declaration that rights shall not vest before receiving payment, is construed not as referring to the time at which payment is actually made, but only to the time when the payment ought to be made (*Maclean's Trs.*, 1889, 16 R. 1095; *Chalmers*, 1882, 9 R. 743; *Smith's Trs.*, 1883, 10 R. 1144; *M'Elmail*, 1888, 16 R. 47; *Scott*, 1877, 4 R. 384; *Love's Trs.*, 1879, 7 R. 410; *Ferrier*, 1872, 10 M. 711; *Simpson's Trs.*, 1889, 17 R. 248; *Earl of Stair*, 1826, 2 W. & S. 414; *Dickson's Tutors*, 1853, 16 D. 1).

Where the will bears that shares shall vest only at the period of payment, and the testator has named no specific date for payment, the time at which, under the maxim, payment ought to have been made, is the time when the trustees were, or ought to have been, in a position to divide the bulk of the estate, and, accordingly, the rights of the beneficiaries vest at that date, although there has not been actual payment of any part. Thus in *Love's Trs.*, 1879, 7 R. 410, a testator directed his trustees to realise his moveable estate and ascertain the value of his heritable estate, and to divide the residue of his whole heritable and moveable property into three equal portions, to be held in trust for his three sons, declaring that the shares should not vest to the effect of being transmissible to the heirs of the beneficiaries until conveyances were granted in their favour. The three sons survived the testator and were his only surviving and acting trustees. They retained the whole estate undivided for eighteen years, when the eldest son died without having received any conveyance of the property destined to him by his father's settlement. It was held that, as the eldest son had survived the date

when division should have taken place, and when he ought to have received a conveyance of his share, a tripartite division had taken effect and the eldest son's share was vested in him. "The trustees were bound, with all convenient speed, to ascertain the amount of the debts and the values of the heritable properties, and then to convey their three shares to the three sons; and as soon as the period arrived when that could have been effected, from that period I apprehend that the three shares vested absolutely in the three sons, and that whether the conveyance was actually made or not, according to a principle long settled" (per Ld. Pres. Inglis in *Love's Trs.*, 1879, 7 R. 410, at 415). When a testator has directed a thing to be done, without specifying the time at which it is to be done, it must be done within a reasonable time, and a "reasonable time," in several cases, has been construed to mean within a year after his death (*Earl of Stair*, 1826, 2 W. & S. 414; *Dickson's Tutors*, 1853, 16 D. 1); so that where a testator has directed his trustees to pay their shares to beneficiaries, without specifying the time of payment, and, further, has fixed the date of payment as the period of vesting, the shares vest after the lapse of a year from the testator's death, irrespective of whether payment has, or has not, been made at that date (see per Ld. Deas in *Love's Trs.*, 1879, 7 R. 410, at 417). More recently, however, in cases of this sort, where a testator has fixed the date of payment as the period of vesting, the Courts, in determining whether there has been unreasonable delay on the part of the trustees in making payment, take into consideration the nature of the testator's estate, *i.e.* whether the bulk of it is easily realisable, or whether the bulk of it is of such a character that it cannot be ingathered and divided except after a long period of administration. The rights of the beneficiaries vest, in virtue of the testator's declaration, as soon as the period arrives at which the trustees might with ordinary diligence have got the bulk of the estate into a condition fit to be divided, and delay by the trustees in the performance of that duty does not postpone vesting (*Maclean's Trs.*, 1889, 16 R. 1095). "If the estate is in the hands of the trustees, fit for division and capable of division, then it is the duty of the trustees to divide; and if that duty is imposed upon them, then mere delay in the performance of that duty will make no difference in the rights of parties, because they were under an obligation to divide as soon as they could, and therefore the period of payment being fixed as the date of vesting merely means that when the period has arrived at which the trustees are in a condition to divide, then the right shall vest" (per Ld. Pres. Inglis in *Maclean's Trs.*, 1889, 16 R. 1095, at 1101).

Where, on the other hand, the testator mentions a time at which a beneficiary's share is to be paid, *e.g.* at majority or on marriage, and at the same time declares that the date of vesting is to be the date of payment, or provides that the share in question shall go to others if the beneficiary die before receiving payment, the time at which, under the maxim *quod debet fieri infectum valet*, payment ought to be made is the date of payment mentioned in the will, and that, accordingly, is the time at which vesting takes place, whether or not payment is then actually made (*Chalmers' Trs.*, 1882, 9 R. 743; *Steel's Trs.*, 1888, 16 R. 204, at p. 209; *Maclean's Trs.*, 1889, 16 R. 1095). Thus in *Chalmers' Trs.* (*supra*) a share of the residue of an estate was, under a mutual settlement of two spouses, bequeathed, on the death of the survivor, to a grandson, "payable on his attaining the age of twenty-one" years, it being further provided that in case he "should die previous to payment" the share was to be divided among certain other beneficiaries. The grandson attained the age of twenty-one, but died (eighteen days after

the survivor of the spouse) before receiving payment. It was held that the words "previous to payment" referred not to the actual payment, but to the time specified as that at which the share was payable, viz. the attainment of twenty-one years, and therefore that the share had vested.

Where the testator expressly or impliedly fixes the date of payment or division as the period of vesting, and leaves it in the discretion of his trustees to determine the date of payment or division, the same principle is applied, *i.e.* the period of vesting is not the date of the actual division, but the earliest period at which the trustees might, in the exercise of their powers, have brought about a division. Thus in *Scott* v. *Scott's Executrix*, 1877, 4 R. 384, a truster, whose estate consisted of heritage burdened with heritable debt, directed his trustees on the decease of his widow, and as soon as the whole heritable debts should be paid off, to convert the estate into money and divide it among his children, substituting the issue of children dying before the period of division to their parents, and with a survivorship clause referring to the same period. The period of division was left in the discretion of the trustees, who were given a power either to sell the heritage after the widow's death, under burden of the debts affecting it, or to accumulate funds to extinguish the said debts. On the widow's death the estate remained burdened with the debts, and the trustees for some years held the property and accumulated the revenue to clear off the debts, but before the debts were wholly cleared off they sold the property under burden of the remaining debts. It was held that vesting took place at the date of the widow's death, being the earliest period at which the trustees might, in the exercise of their discretionary powers, have fixed the division, and was not postponed till the exercise of these powers. "I am certainly not aware," observed Ld. Pres. Inglis in *Scott* (*supra*), "of any case where an absolute discretion has been given to trustees, in which vesting has been held to depend upon the period of the exercise of that discretion by the trustees." Again, where trustees were directed to pay a beneficiary his share by such instalments as they should see fit, there being a general declaration that the testamentary provisions should not vest until the respective terms of payment, it was held that the share of the beneficiary vested in him as soon as the estate was realised, though the period of the actual payment of the instalments, and the amount of each instalment, were left to the discretion of the trustees (*M'Elmail*, 1888, 16 R. 47; cf. *Hunter's Trs.*, 1888, 15 R. 399, *præsertim* per Ld. Pres. Inglis at p. 406; *Jamieson*, 1872, 10 M. 755).

The cases in which the powers of the trustees extend merely to the fixing of the period of payment, and the period of payment is declared to be the date of vesting,—these being the cases with which we are now dealing,—must be carefully distinguished from those cases in which powers are conferred on the trustees to restrict or withhold or otherwise dispose of the fund bequeathed to a beneficiary. Cases of this latter sort fall into two categories: (1) If by the terms of the settlement there is an absolute gift, the vesting of the provision in the beneficiary is not postponed. The discretionary powers granted to the trustees are valid, if consistent with the gift, but, if repugnant to the gift, are ineffectual, being regarded as attempts to cut down or derogate from a fully vested right of fee (the cases on this subject are treated *infra*, pp. 88 *et seq.*); or (2) if, by the absence of direct words of gift or from the other terms of the settlement, it is not made clear that the fee is vested in the beneficiary, the granting of discretionary powers of restriction or powers of disposal to trustees is effectual; and, in so far as vesting is concerned, the exercise or non-

exercise by the trustees of their discretionary powers is a contingency in event, the effect of which is to postpone vesting till the discretion is exercised (*Paterson's Tr.*, 1870, 8 M. 449; *Robertson*, 1858, 20 D. 989; *Muir's Trs.*, 1895, 22 R. 553; *White's Trs.*, 1896, 23 R. 836; *Russell*, 1897, 24 R. 666; *Chambers' Trs.*, 1877, 5 R. 97; 1878, 5 R. (H. L.) 151; *Haldane's Trs.*, 1890, 17 R. 385; and other cases collected *infra*, pp. 87 *et seq.*). Where trustees were directed to determine whether it was expedient to give a beneficiary command of his beneficial interest, and, if they thought it expedient to do so, to pay it unconditionally, but, if they thought it inexpedient to do so, to restrict his interest to an alimentary liferent, there being a destination over to the next of kin of the testator and his wife in the event of the beneficiary dying without issue and without receiving payment, it was held *ultra vires* of the trustees to determine that the share should be placed under restriction and then to convey it to the beneficiary. Accordingly, on the death of the beneficiary without issue, the Court held that, applying the maxim *quod fieri debet infectum valet*, the beneficiary had right to no more than an alimentary liferent, and that his share was vested in the next of kin of the testator and his wife (*M'Nicol's Executrix*, 1893, 20 R. 386).

Contingency both in Time and Event.—Where a bequest is contingent both in time and event, survivance of the term of payment is a condition of the bequest itself, and there is no right on the part of the beneficiary unless and until the condition is fulfilled. In the case, previously dealt with (*vide supra*, p. 74), where payment is postponed merely to secure the annuity or liferent interest of a third party, vesting is not thereby suspended, because, although there is a doubt as to when the fund will be set free for distribution, there is no doubt either as to the occurrence of the event or as to the person or persons who shall have a right to payment in the end; but where the right is conferred subject to a contingency personal to the legatee, there is a real uncertainty as to the event and as to the person or persons who may ultimately be in right of the bequest. Questions of conditional vesting, consequently, generally resolve into the inquiry, whether the conditions have relation only to the time or mode of payment, and so are consistent with the existence of a vested right in the person of the legatee, or whether they are intended to condition the right of the legatee, so that no right is given until the condition is purified (*vide* per Ld. M'Laren in *Mackinnon's Trs.*, 1897, 24 R. 981, at 985). Where the contingency in event is referable merely to the period of the testator's death, vesting is clearly not postponed, but takes place *a morte* (*Peacock's Trs.*, 1885, 12 R. 878; *Wood*, 1896, 24 R. 105).

A. *Majority or Marriage.*—"Where the right is made conditional on a contingency personal to the legatee, such as marriage or arrival at majority, events or dates uncertain, which may never take place, there is a presumption, though not insuperable, that vesting or right to take was intended to be suspended until the occurrence of the contingency" (per Ld. Colonsay in *Carleton*, 1867, 5 M. (H. L.) 151). In these circumstances the maxim applies, *dies incertus conditionem in testamento facit* (*Dig.* 35. 1. 75. pr.). In the older cases this maxim was applied generally, it being held that the fact that a legacy was payable at an uncertain period, which might never arrive, such as majority or marriage, created a strong presumption that vesting was suspended till the occurrence of the contingency (*Omey*, 1788, M. 6340; *Sempill*, 1792, M. 8108; *Home*, 1807, Hume's Dec. 530; *Torrie*, 1832, 10 S. 597; *Fergusson*, 1867, 6 M. 83; cf. *Grindlay*, 1 July

1814, F. C.—the case of an antenuptial marriage contract). The application of the maxim in Roman law was, however, subject to very important limitations (*vide, e.g., Dig.* 35. 1. 85; 36. 1. 46; *Cod.* 6. 53. 5). The main qualification was that where the uncertain term, *i.e.* the term which may or may not arrive, is adjected not to the testamentary gift itself, but merely to the payment or enjoyment of it, the legatee's survivance of that term was not a condition of his right. *Conditioni similis est dies incertus, nisi tantum solutionis non obligationis morandæ gratia adjectus sit* (Voet, *Comm.* bk. 28, tit. 7, s. 32). In *Alves' Trs.* (1874, 1 R. 969) this distinction was accepted as part of the law of Scotland. "It cannot be doubted that, before the uncertain term can operate as a condition of the gift, it must be attached or adjected to the gift, and that an uncertain term may be attached to the payment of a gift while the gift itself is intended to take effect and to vest at the testator's death" (per Ld. Moncreiff in *Alves' Trs.*, 1874, 1 R. 969, at 972). In *Alves' Trs.* (1874, 1 R. 969) the testator directed his trustees to hold his heritable estate in trust, and to "convey and make over the same to A., upon his attaining the years of majority, his heirs and assigns for ever." The testator further appointed A. residuary legatee, and directed the trustees, on A. attaining the age of twenty-one, to convey to him, his heirs and assigns, the whole residue of the estate not otherwise specifically disposed of. It was held that both the heritable and moveable estate vested in A. *a morte testatoris*, in respect that, on the construction of the whole deed, the uncertain term, *i.e.* the attainment of majority, was adjected for the benefit solely of A., with the object merely of delaying payment of the bequest and not of postponing vesting. Lord Moncreiff, after explaining that an uncertain term cannot operate as a condition of the gift, unless it is attached to the gift, and that an uncertain term may be attached to the payment of a gift while the gift itself is intended to take effect and to vest at the testator's death, observed:—"One main element in determining how far an uncertain term is adjected as a condition of a legacy is to consider who is burdened by the legacy, and in whose favour the condition is conceived. An ulterior destination of a specific legacy will go far to solve the question against the legatee, while a bequest of residue to a third party will have a similar, but by no means so conclusive an effect. But if no one but the heir-at-law, or the next of kin, succeeding *ab intestato*, is burdened by the legacy or benefited by the alleged condition, the presumption will be strongly the other way" (per Ld. J.-Cl. Moncreiff in *Alves' Trs.*, 1894, 1 R. 969, at 972; cf. *Ralston*, 1842, 4 D. 1496).

A distinction has been taken between the effect on vesting of a direction to pay to children when the youngest attains twenty-one years, and the effect of a direction to pay to children as each attains the age of twenty-one. A direction of the former kind is more readily construed as inferring that the arrival of the time of payment is a condition of the right; in the latter case the condition is regarded as merely administrative and as being imposed for the benefit of the children, so that it is consistent with the existence of a vested right (cf. *Adams' Trs.*, 1896, 23 R. 828, with *Mackinnon's Trs.*, 1897, 24 R. 981). In *Bowes' Tr.* (1870, 42 Sc. Jur. 382), in virtue of an express declaration in the will as to the date of vesting, it was held that, while payment was not to be made till the youngest child attained majority, vesting took place in each child on him or her attaining majority or being married. It is favourable to the view that an uncertain term is simply attached to the payment of the gift, and is not adjected to the gift itself so as to postpone vesting, where there is in the first instance an unqualified gift of the share (*Miller*, 1875, 2 R. (H. L.) 1; *Hayward's Exr.*, 1895, 22 R.

757); or where the share of the beneficiary is at once separated off from the rest of the estate (cf. *Waters' Trs.*, 1884, 12 R. 253, where the trustees were directed to "hold and divide" the estate for the children, each child's share being held from the first separately, though payable only on their attaining twenty-five years. This was effectual to bring about vesting *a morte*, though there was a destination over to the issue of a predeceasing child. *Vide præsertim*, per Ld. Moncreiff at p. 255); or, even in cases in which there is no gift apart from the direction to pay at majority or marriage, where there is a direction for the intermediate payment of interest to the beneficiaries or an authority to make advances to the beneficiaries out of capital (*Matthew*, 1844, 6 D. 718; *Kennedy*, 1841, 3 D. 1266; *Mackinnon's Trs.*, 1897, 24 R. 981; *Nolan*, 1866, 5 M. 153; *Wilson's Trs.*, 1878, 5 R. 697; *Ralston*, 1842, 4 D. 1496; but see *Fyfe's Trs.*, 1890, 17 R. 450, and *Adam's Trs.*, 1896, 23 R. 828); or where there is a destination to the heirs and assignees of the beneficiary, for the power of testing on, and assigning, his share points strongly to its having vested (*Clark's Exrs.*, 1851, 14 D. 141, per Ld. Fullerton at p. 145; *Henderson*, 1841, 3 D. 548; but see *Torrie*, 1832, 10 S. 597). On the other hand, where the direction to pay at a *dies incertus* is accompanied by a survivorship clause (*Greig*, 1833, 6 W. & S. 406; *Campbell*, 1840, 2 D. 1084; *Walker*, 1859, 21 D. 286; *M'Alpine*, 1883, 10 R. 837; see cases *infra*, p. 84), or by a destination over (see cases *infra*, pp. 91 *et seq.*), or where payment is to be made to a family, whom failing to conditional institutes (*Blackwood*, 1833, 11 S. 443; *Stewart's Trs.*, 1851, 13 D. 1386; *Mitchell*, 1865, 3 M. 721; *Peacock's Trs.*, 1885, 12 R. 878), or where it is left to the discretion of trustees whether to pay, or to withhold or limit the bequests, on the arrival of the *dies incertus* (see cases *infra*, p. 87), there is a strong presumption that the vesting is postponed.

Where a bequest is to be paid either at a *dies certus* or a *dies incertus*, as in the event either of the death or marriage of a liferenter, there is really no contingency of event, since one at least of the events must happen, and accordingly the bequest vests *a morte* (*Mackintosh*, 1872, 10 M. 933). In *Home*, 1807, Hume's Dec. 530, certain bequests were made to children of the testator, one half being due and payable at their respective majority or marriage, and the other half after the death of the testator's wife. One of the children died during minority and before marriage, survived by her mother. It was held that there was a good claim by her next of kin for the half of her bequest which depended on her mother's death, since, that event being certain, the half in question had vested *a morte*; but that the other half had lapsed, inasmuch as it was dependent on a *dies incertus*, viz. the legatee's majority or marriage, which in point of fact had never arrived. In *Reeve's Exr.* (1892, 19 R. 1013) legacies to each of the testator's daughters were to be paid "after the death of my wife and after the death or marriage of all my daughters but one," there being a provision that the issue of a predeceasing daughter should take their mother's share. The testator was survived by his widow and three daughters. After the widow's death, one of the daughters died, leaving issue, and a second daughter, H., died unmarried. The Court, in holding that H.'s legacy had not vested in her, went mainly on the grounds that the trustees could pay to no daughter but one, and that until the death of H. it was uncertain who should be that one, and that to hold that H. had a vested interest meant interpreting the will as providing that a legacy was to be paid to a daughter on that daughter's death—an interpretation to be avoided if possible.

B. *Words of Survivorship.*—Words of survivorship are primarily and

presumably referable to the period of distribution, and have the effect of postponing vesting, unless a contrary intention is expressed or implied. The word "survivor," like other terms in a testament, is construed in accordance with its literal acceptation, unless it appears from the context or from other parts of the will that the literal sense does not express the testator's meaning, and that he intended to do something different from what a literal interpretation of the term "survivor" would infer. In such exceptional cases the word "survivor" is construed as synonymous with "other" (*Ramsay's Trs.*, 1876, 4 R. 243; *Waite*, 1872, L. R. 8 Ch. App. 70; *Wake*, 1876, L. R. 2 Ch. D. 348. The principle of these English decisions was approved by Ld. Kinnear in *Ward*, 1893, 20 R. 949, at pp. 952, 953. It is an element pointing to the word "survivor" being used in the sense of "other," that the literal interpretation of the word would involve intestacy—per Ld. Shand in *Forrest's Trs.*, 1884, 12 R. 389, at p. 393; *Ward*, 1893, 20 R. 949; *Wilmot*, 1802, 8 Ves. 10; *Hairsten's Jud. Fact.*, 1891, 18 R. 1158). In the ordinary case, however, where there is a clause of survivorship, whether it be in the form of a destination to named legatees, subject to a declaration that the shares of those who may die without leaving issue shall go to the survivors, or simply in the form of a destination to the surviving individuals of a class, or where the estate is given to survivors on the failure of the institute, the event of survivance is taken primarily as referable to the period of distribution, so that vesting is postponed to that period. The reason is that before that period it is necessarily uncertain who the persons are who are to benefit by the bequest. The leading authority usually referred to as establishing this doctrine is *Young* v. *Robertson* (1860, 22 D. 1527; rev. 1862, 4 Macq. 314), and the principle has been recognised in many succeeding cases (see, *e.g.*, *Vines*, 1860, 22 D. 1436; *Melrose*, 1869, 7 Macph. 1050; *Howat's Trs.*, 1869, 8 Macph. 337; *Muirhead*, 1887, 15 R. 254; rev. 1890, 17 R. (H. L) 45; *Forbes*, 1890, 18 R. 230; *Blackburn's Trs.*, 1896, 23 R. 698; *Cuming's Tr.*, 1896, 24 R. 153; *Muir's Trs.*, 1895, 22 R. 553; *Stirling's Trs.*, 1898, 36 S. L. R. 194). In *Young* (*supra*) a testator conveyed his whole estate to trustees, directing them to pay the income to his wife if she should survive him, and on her death to account for, pay and divide or convey the residue to named grand-nephews and grand-nieces "equally, or share and share alike, and to their respective heirs or assignees, declaring that if any of said residuary legatees shall die without leaving lawful issue before his or her share vest in the party or parties so deceasing, the same shall belong to, and be divided equally, or share and share alike, among the survivors." The House of Lords held that in view of this clause of survivorship, vesting did not take place until the death of the testator's widow, *i.e.* the period of distribution, and consequently that one of the residuary legatees who survived the testator, but died in the lifetime of the liferentrix, had no vested right. "It is a settled rule of construction that words of survivorship occurring in a settlement (that is, in a will) should be referred to the period appointed by that settlement for the payment or distribution of the subject-matter of the gift. That undoubtedly is the rule now finally established in this country, and it has been ascertained from the authorities which have been cited at the bar that the rule was in existence in Scotland even before it was finally recognised in this country" (per Ld. Westbury in *Young*, 1862, 4 Macq. 314, at 319). Where the distribution of the estate is appointed to be made at the death of the testator, or, in the case of a marriage contract, at the dissolution of the marriage, a provision as to survivorship can, of course, only be intended

to provide for the event of one or more of the beneficiaries dying during the lifetime of the testator, or before the dissolution of the marriage. But, as explained by Ld. Westbury in *Young* (*supra*), "if a testator gives a life estate in a sum of money, or in the residue of his estate, and at the expiration of that life estate directs the money to be paid, or the residue to be divided among a number of objects, and then refers to the possibility of some one or more of those persons dying, without specifying the time, and directs in that event the payment or distribution to be made among the survivors, it is understood by the law that he means the contingency to extend over the whole period of time that must elapse before the payment or distribution takes place. The result, therefore, is that in such a gift the survivors are to be ascertained in like manner by a reference to the period of distribution, namely, the expiration of the life estate." In cases of this sort, clearly there is a real doubt as to the particular individuals to whom payment is to be made, and this inherent contingency remains during the whole period that elapses before the period of distribution. Where payment is postponed, a general declaration that, if any of the beneficiaries should predecease the term of payment, their provisions should lapse and become part of the residue unless in the event of the predeceaser leaving issue, applies to provisions of heritage as well as to provisions of moveables (*Muirhead*, 1890, 17 R. (H. L.) 45; following *Buchanan*, 1862, 4 Macq. 374).

Where there is a liferent and a reference to another period of division as well, *e.g.* if, subject to a liferent to A., there is a gift to a class to be paid on their attaining majority, with a clause of survivorship, the question arises whether the survivorship is to be referred to the death of the liferenter, or the attainment of majority. The only rule in such cases is that the clause of survivorship refers most naturally to the words with which it is placed in immediate connection (*M'Alpine*, 1883, 10 R. 837), or to the event upon which the devolution to survivors is to take place (*Ward*, 1893, 20 R. 949). Instances of cases in which the period to which the condition of survivance has relation is pointed out by the will itself are found in *Mitchell*, 1865, 3 M. 721; *Rogerson's Trs.*, 1865, 3 M. 684. Where a truster bequeathed the liferent of his estate to his widow, and directed that "on her decease" the estate should be conveyed in fee to his nephew A., "in case of his survivance of me," it was held that these words imported that if A. survived the truster, the estate was to vest in him, although he was not to come into beneficial enjoyment of it until the death of the liferentrix (*Campbell*, 1866, 5 M. 206). Where a liferent is given to a plurality of persons, jointly or successively, the general presumption is that a clause of survivorship has reference to the death of the longest liver of the liferenters (*Buchanan*, 1830, 8 S. 516; *Vines*, 1860, 22 D. 1436; *Robertson*, 1858, 20 D. 989, *vide* per Ld. Ivory at p. 993; cf. *re Fox's Will*, 1865, 35 Beav. 163).

If the liferenter dies in the lifetime of the testator, the survivors are of course fixed at the testator's death. Again, although, by the operation of a clause of survivorship, vesting is postponed till the period of distribution while there remain in life more than one of the persons immediately favoured, yet if all the beneficiaries but one should either die or renounce the succession before the arrival of the period of distribution, the sole surviving beneficiary takes an immediate vested interest from the time that the contingency as to the interests, which was the obstacle to vesting, is removed (*Foulis*, 1857, 19 D. 362; *Thomson*, 1835, 2 S. & M'L. 305; *Mackie*, 1876, 13 S. L. R. 368; *Lindsay*, 1885, 12 R. 964). Upon the

same principle, where the issue of such legatees as may die leaving issue are called to the succession along with the surviving original legatees, the succession vests absolutely in such issue on the death of all the original legatees, even if that event should occur before the arrival of the period of distribution (*Cattanach*, 1858, 20 D. 1206; *Maitland's Trs.*, 1861, 23 D. 732; *Lindsay's Trs.*, 1885, 12 R. 964). This does not hold where there is an ulterior destination, in addition to the clause of survivorship (*Begg's Trs.*, 1899, 36 S. L. R. 382). Further, if at any time the event to which the survivorship clause refers, or, in other words, the condition which suspends vesting, becomes impossible, vesting immediately takes place in the beneficiaries surviving at that time, though the date fixed for payment may not have arrived (*Mackie*, 1876, 13 S. L. R. 368; *Purves's Trs.*, 1898, 25 R. 1084). The rule that survivorship has reference to the period of distribution applies only to express clauses of survivorship, and does not apply to the survivorship implied by law in legacies to a class (*Douglas' Trs.*, 1864, 2 M. 1008; *Romanes*, 1865, 3 M. 348). Where a legacy is left to several persons jointly, or to a class of persons, survivorship is implied in respect that it is presumed that the testator intended that any one of them should take the subject rather than his heirs-at-law; but the implication of survivorship in this case, being merely for the purpose of avoiding a lapse by one of the joint legatees dying before the testator, ceases at the testator's death, and the legacy vests on that event (M'Laren on *Wills*, 3rd ed., i. 649).

The presumption that a clause of survivorship refers to the period of distribution is, in the absence of a liferent, excluded by slight evidence of a contrary intention in the deed. Where, for example, a testator directed his trustees, twelve months after his death, to divide and pay the residue of his estate equally to his children, their heirs and assignees respectively, with a survivorship clause and a conditional institution of the issue of a predeceaser, it was held that the children's share of the residue vested *a morte* upon the grounds that there was no liferent to be protected, that the postponement of payment for twelve months was merely for administrative purposes, *i.e.* to allow the estate to be realised, and that during the whole period for which the estate was retained by the trustees the income was to be paid to the children (*Wood*, 1896, 24 R. 105). Where the purpose for which the distribution is postponed is to secure payment of an annuity, the presumption that a condition of survivorship has reference to the date of payment, and not to the death of the testator, is not so strong as it is where the purpose for which the distribution is postponed is to secure a liferent (*Pursell*, 1855, 2 Macq. 273, per Ld. Ch. Cranworth at p. 276; *Watson*, 1856, 18 D. 971; but see *Johnston*, 1840, 2 D. 1038). Thus where a testator directed his trustees to pay an annuity to his widow, and the surplus income of his estate to his three sons, and to divide the residue equally among his three sons or the survivors of them at such times and in such a manner as his trustees might think proper, it was held that the survivorship clause applied to the date of the testator's death, and not to the date of the death of the testator's widow, because it was in the power of the trustees to make a division at any time after the death of the testator that they thought proper (*Henderon's Trs.*, 1876, 3 R. 320, per Ld. J.-Cl. Moncreiff at p. 324). Other cases in which the ordinary rule, that words of survivorship are referable to the period of distribution and have the effect of postponing vesting to that time, was held to be inconsistent with the intention of the testator, express or implied, in other parts of the will are: *Lowes' Trs.*, 1870,

42 Sc. Jur. 382 (per Ld. Kinloch at 385); *Campbell's Trs.*, 1866, 5 Macph. 206; *Sutherland's Trs.*, 1874, 2 R. 46.

C. *Exercise of Power of Disposal or of Restriction by Trustees.*—Where discretionary powers are conferred on trustees of disposing of, or restricting, the shares of beneficiaries, the exercise or non-exercise of these powers may constitute a contingency of event operating a suspension of vesting, which would otherwise have taken place. It falls to be determined in each case, by the terms of the deed and of the directions given by the testator, (1) whether the discretionary powers given to the trustees are such as to render the beneficiaries' right dependent on the exercise of the power of the trustees, so that vesting is suspended (see cases *infra*); or (2) whether, in virtue of there being an original absolute gift, the right of the beneficiaries is independent of the exercise or non-exercise of the discretionary powers by the trustees, so that the exercise or non-exercise of the powers by the trustees is not an inherent condition of the gift, and vesting is not suspended (see cases *infra*, pp. 88 *et seq.*).

(1) *Where Discretionary Powers suspend Vesting.*—It is clear that where there are no direct words of gift, so that the only right given to the beneficiaries is dependent on the exercise of their discretion by the trustees, vesting is suspended till the exercise of this discretion. Thus in *Smith's Trs.* (1883, 10 R. 1144), where trustees were directed to invest a sum for the testator's nephew, and to give it to him in such sums and ways as they thought best, it was held that no right had vested in the nephew, who survived the testator but died before having received anything from the trust estate. Similarly, where trustees were directed to "hold and retain, or pay, invest, and apply" the residue of a testator's estate for behoof of his uncles and aunts equally among them, and were given full discretionary power in regard to the disposal of the share falling to any of the legatees either to pay the capital to him or to invest the share in their own names for his behoof and apply the income for his benefit, it was held that the share of a legatee, who died while his share was still retained by the trustees in their own hands, had not vested in him (*Haldane's Trs.*, 1890, 17 R. 385; cf. *Paterson's Trs.*, 1870, 8 M. 449; *Robertson*, 1858, 20 D. 989). Further, the primary gift may be so qualified in expression as to show that no higher right is meant to be given than is more fully explained in the sequel of the testament. In such cases subsequent directions are readily construed as operating suspension of vesting. Thus in *Muir's Trs.*, 1895, 22 R. 553, a testator directed trustees to "hold and retain" the residue of his estate for behoof of his children and to divide the same among them, the respective shares of sons to be set aside and held and invested in the names of the trustees for behoof of the sons respectively in liferent, for their alimentary liferent uses allenarly, and for behoof of their respective issue in fee; but at the same time an unlimited discretionary power was given to the trustees to make advances to the sons out of the capital of their respective shares. It was held that these provisions did not import an absolute gift to the testator's children, but that the gift was qualified by the subsequent directions, and that the unlimited discretionary power given to the trustees to make advances of capital to sons did not give the executors of a son, who survived the testator but died without issue, a right to any part of the capital not so advanced. Even, however, where the words of gift are such as would confer a right on the beneficiary vesting *a morte*, the subsequent directions and restrictions on the fee, if unequivocal, may be effectual to qualify the words of gift and render the gift conditional so as to suspend vesting, or, at least, to render the fee taken by the beneficiaries subject to divestiture, if the trustees, in

the exercise of their powers, determine to withhold payment. Recent examples of powers given to trustees in subsequent parts of the deed, which were held thus to qualify the original words of direct gift in the early part of the deed, so as to subject the gift to the exercise of a discretionary power by the trustees, are found in *Chambers' Trs.*, 1878, 5 R. (H. L.) 151, narrated *supra*, p. 77; *White's Trs.*, 1896, 23 R. 836; *Russell*, 1897, 24 R. 666. In *Chambers' Trs.* (*supra*) and *White's Trs.* (*supra*) express directions were given to the trustees as to the disposal of the fee of any shares, which the trustees might decide not to pay over to the beneficiaries originally favoured, by conferring the fee of these shares on a new line of fiars. In *Russell* (*supra*) this element was absent, but in this case the discretionary powers were given to the trustees in a codicil executed some years after the will, and the Court held that the directions in the codicil, being made to meet a change of circumstances, and indicating a consequent change of mind on the part of the testatrix, modified the terms of the original will. In all these cases the subsequent directions were regarded as being not repugnant to the clause originally conferring the gift, except in the sense that without these subsequent directions the original clause would have had a meaning different from what it had with them, or, in other words, as not contradicting, but merely qualifying, the original gift, so that the whole deed imported something different from what the clause containing the original gift taken alone would have done (cf. per Ld. Young in *Stewart's Trs.*, 1897, 25 R. 302, at p. 308). Where trustees are directed to hold a fund for behoof of children, and to divide and pay the same when it can be conveniently done, and it is declared that, in the event of a child dying without issue before receiving his share under the trust, the share shall be divided among the survivors, the rule is that payment to one beneficiary fixes the period of vesting for all (*Sutherland's Trs.*, 1874, 2 R. 46).

(2) *Where Discretionary Powers do not suspend Vesting.*—The cases in which, in spite of discretionary powers of restriction or disposal given to trustees, the vesting of the shares in the beneficiaries is not suspended, are those in which the original words of gift, taken by themselves, are such as to confer an absolute fee on the objects of the gift. When there is an original absolute gift,—apart from special provisions and circumstances, such as existed in *Chambers' Trs.*, 1878, 5 R. (H. L.) 151; *White's Trs.*, 1896, 23 R. 836; *Russell*, 1897, 24 R. 666—directions following on the gift, giving powers to trustees to deal with the funds or limit the right of the fiars, are not regarded as detracting from the absolute nature of the gift, or as rendering the gift conditional upon the action of the trustees, so as to postpone vesting. On the contrary, the Courts give effect to the gift and hold the right to be vested. As regards the effect in such cases of the discretionary powers or directions given to trustees, subsequent to the clause conferring the gift, the subsequent directions may either (*a*) have effect given to them as being consistent with the gift, or (*b*) may be disregarded as being repugnant to, and inconsistent with, the fully vested right of fee.

(*a*) *Directions consistent with Gift.*—Discretionary powers and directions are consistent with the gift, and consequently are valid, if they are in their character and effect merely administrative, or for the protection of the beneficiaries, or amount merely to a postponement of payment for a trust purpose. Examples of cases in which, upon these grounds, rights have been held to vest at once subject to discretionary powers given to trustees are: *M'Elmail*, 1888, 16 R. 47; *Dalglish's Trs.*, 1889, 16 R. 559;

Lindsay's Trs., 1880, 8 R. 281; *Christie's Trs.*, 1889, 16 R. 913; *Lawson's Trs.*, 1890, 17 R. 1167; *Ritchie's Trs.*, 1894, 21 R. 679; cf. *Carleton*, 1867, 5 Macph. (H. L.) 151; *Jamieson*, 1872, 10 M. 755, per Ld. Pres. Inglis at 759. In such cases, though the fee has vested, the trust may be kept up to carry out the testator's directions. Thus in *Christie's Trs.*, 1889, 16 R. 913, the testator left his property to be divided equally among his three children, directing that the trustees were to retain the shares of two of the children and not to let them go into the hands of these children. It was held that the shares vested in each of the children at the testator's death, subject to the trustees retaining charge of the shares of the two children in question and not allowing them to go into the beneficiaries' hands, thereby affording the substantial protection to the beneficiaries desired by the testator. Where a testator begins by giving shares to the beneficiaries in unqualified terms, and then proceeds to give directions to trustees to hold certain of these shares for a time, and pay over the income to the objects of the trust, but gives no directions in regard to the disposal of the capital or reversion, the direction to the trustees to hold the property and pay the income does not derogate from the generality of the proposed gift, and the trust is really nothing more than the constitution of a system of administration of the shares for the benefit of the beneficiaries who are truly fiars. It is otherwise when the fee is given over to someone else; for that points to an intention to limit the original gift to a mere liferent (per Ld. M'Laren in *Greenlees' Trs.*, 1894, 22 R. 136, at 139; cf. *Stewart's Trs.*, 1896, 23 R. 416). It was observed by Ld. M'Laren in *Mackay's Trs.* (1897, 24 R. 904, at 907): "There is considerable body of authority regarding the effect of an original gift with a direction to hold in trust superadded. In the very well-considered cases of *Lindsay's Trs.* (1880, 8 R. 281) and *Dalglish's Trs.* (1889, 16 R. 559) the two things were held to be reconcilable. And again, in two recent cases, *Greenlees' Trs.* (1894, 22 R. 136) and *Stewart's Trs.* (1896, 23 R. 416), this principle of construction was generalised; and I think it must now be held that an original gift on partition of a residue amongst the members of a family will not be cut down to a liferent by the effect of a subsequent direction to pay the income to one or more of the objects of the gift for life. Of course there may be cases where the primary gift is so qualified in expression as to show that no higher right is meant to be given than is more fully explained in the sequel, and no rule can be laid down which will dispense with the necessity of carefully considering the effect of all the clauses and provisions bearing on the right conferred." Accordingly, in *Mackay's Trs.* (1897, 24 R. 904), in consequence of the words of original gift to the truster's children, subject to the widow's liferent, it was held that a subsequent direction to the trustees to hold each daughter's share while unmarried in trust for her behoof in liferent, for her liferent use allenarly, and, on the marriage of a daughter, to settle her share so that, if she had no children, she should have no power to test on one half of her share (it being provided that the one half should in that event not vest in her, but on her death should fall to the truster's other children), did not prevent the share of a daughter, who died unmarried, vesting in her, on the death of the liferentrix, subject only to the effect of the direction to settle her share in the event of her marriage (cf. *Dunlop's Trs.*, 1899, 36 S. L. R. 531; *Mitchell*, 1877, 5 R. 154; *Newall's Trs.*, 1898, 25 R. 1176). In regard to cases of this kind, it is to be remembered that if a full fee is given to a legatee, it is legally impossible, by directions for the annual payment of income or by a declaration as to the right being alimentary, to protect the life-interest of the fiar either against his creditors or against his own

voluntary acts (*Gibson's Trs.*, 1877, 4 R. 1038, at 1046; *Kinmond's Trs.*, 1898, 25 R. 819, at 823; *M'Kinnon's Trs.*, 1892, 19 R. 1051).

The mere existence of a power of division or apportionment, whether given to trustees (as in *Chambers' Trs.*, 1878, 5 R. (H. L.) 151) or to the parent, in the case of a bequest to a family of children (*Miller*, 1875, 2 R. (H. L.) 1), does not prevent the acquisition of a vested interest by the class of persons among whom the bequest is to be distributed. (See also *Sivright*, 1824, 2 S. 643, N. E. 543; *Romanes*, 1865, 3 M. 348.) In such circumstances the interest of each individual is liable to variation and fluctuation, being subject not only to partial defeasance by the birth of other members of the class, but being also dependent on the manner in which the power of distribution is exercised. If power is given to select from an indefinite class of persons the particular individuals to whom the benefits provided by the testator are to go, the selected beneficiaries take a vested interest from the date when the power of selection is exercised, though the power of selection has been exercised before the period prescribed for distribution (*M'Cormack*, 1861, 23 D. 398); but, in a case of this sort, as long as the power of selection is not exercised, there can obviously be no vesting of the benefits provided by the testator (*Pursell*, 1865, 3 Macph. (H. L.) 59). See APPORTIONMENT, POWERS OF.

(*b*) *Directions Repugnant to Gift.*—Where the powers given to trustees, or the directions as to the manner in which the estate is to be dealt with, are in their nature restrictions on the beneficiaries' enjoyment of a fully vested right of fee in their respective shares, and inconsistent with the original gift, the fee is held to vest at once, and the subsequent directions are disregarded as repugnant to and inconsistent with the right of fee. In neither of these two classes of cases, (*a*) and (*b*), is the effect of the subsequent directions to postpone vesting; the only distinction is that in the former class the trust is kept up to carry out the testator's directions, whereas in the latter class not only do the subsequent directions and limitations not postpone vesting, but they are absolutely disregarded. The beneficiaries are entitled to immediate payment of their shares, and the trust comes to an end, on the principle that where by the operation of a testamentary instrument the fee of an estate, whether heritable or moveable, has vested in a beneficiary, the Court will always, if possible, relieve him of any trust management that is cumbrous, unnecessary, or expensive (per Ld. Pres. Inglis in *Miller's Trs.*, 1890, 18 R. 301, at 305). Examples of the class of cases in which subsequent directions given to, and powers conferred on, trustees have been disregarded as ineffectual either to postpone vesting or to restrict the beneficiaries' vested right, are: *Miller's Trs.*, 1890, 18 R. 301; *Greenlees' Trs.*, 1894, 22 R. 136; *Lindsay's Trs.*, 1880, 8 R. 281; *Jamieson*, 1889, 16 R. 815; *Wilson's Trs.*, 1878, 5 R. 697; *Duthie's Trs.*, 1889, 16 R. 1002; *Mackinnon's Trs.*, 1892, 19 R. 1051; *Wilkie's Trs.*, 1893, 21 R. 199; *Ballantyne's Trs.*, 1898, 25 R. 621; *Stewart's Trs.*, 1897, 25 R. 302; *Kinmond's Trs.*, 1898, 25 R. 819. A very small difference of expression determines whether a direction intended for the benefit of the proprietor is operative and may be carried out though the right has vested, or whether it shall be disregarded as repugnant to the truster's intention (*vide* per Ld. Young in *Duthie's Trs.*, 1889, 16 R. 1002). The principle of repugnancy properly applies wherever an absolute right of property is given to a beneficiary, and then by the subsequent directions of the testator there are imposed prohibitions on his using the property in ways in which an absolute owner may lawfully use his property. Where a testator leaves property to beneficiaries in terms importing vesting *a morte*, and at the same time directs

that payment be postponed for a certain period, for example, till the youngest of them attains the age of twenty-one, it seems to be now settled by authority that the right vests in the beneficiaries *a morte*, and that if the postponement of payment is not required to protect a liferent or serve some other trust purpose, the direction as to the postponement of payment will be ineffectual as being repugnant to the right of fee (*Ballantyne's Trs.*, 1898, 25 R. 621; *Stewart's Trs.*, 1897, 25 R. 302; *Miller's Trs.*, 1890, 18 R. 301, and earlier cases there referred to. Ld. Young has throughout dissented from this series of decisions, and has held that effect must be given to the testator's directions as to postponement of payment though the result is to suspend the vesting till the date appointed for payment).

D. *Grant of Liferent, with Destination over of Fee: Effect of Conditional Institution of Issue or Heirs.*—Where the liferent of an estate is bequeathed to A. and the fee of the estate is destined to B, whom failing, to C, who is a stranger to, and independent of, the institute, the ulterior destination constitutes a contingency which postpones vesting until the expiry of the liferent, it being up to that time uncertain whether B. or C. may ultimately be the party benefited by the provision (*Thomson*, 1834, 12 S. 910; affd. 1835, 2 S. & M'L. 305; *Bell*, 1845, 7 D. 614; *Bryson's Trs.*, 1880, 8 R. 142; *Findlay*, 1875, 2 R. 909 (heritable estate)). Such a destination is, indeed, in substance, equivalent to a clause of survivorship. So if an estate is destined to A. in liferent and his issue in fee, and failing his leaving issue, then, on the expiry of the liferent, to B. and his heirs, executors, and assignees, no right vests in B. till the death of the liferenter without issue (per Ld. Pres. Inglis in *Haldane's Trs.*, 1881, 9 R. 269, at p. 278, as corrected in *Steel's Trs.*, 1888, 16 R. 204, at p. 209, interpreting the judgment in *Bell*, 1847, 7 D. 614; see observations on *Bell* in *Hay's Trs.*, 1890, 17 R. 961, at 965–967; cf. *Turner*, 1894, 21 R. 563). In a series of decisions in the Court of Session the view has been taken that an ulterior destination to a third person, adjected to a gift, is an important element in postponing vesting, only where the ulterior destination is a destination over in the proper sense of the term, *i.e.* where the interest of the third party contingently favoured is substantially separate from, and independent of, that of the institute, so as to indicate specific favour on the part of the testator. "A legacy to A. and his heirs, or A. and his children, is not the separate institution of a new and independent object of the testator's bounty, but the expression of a derivative interest favoured by the testator only out of regard to the legatee whose children or heirs are mentioned. They only find a place in the destination through the relation which they bear to the *persona prædilecta*, and in cases like the present, in which the gift is only inferred from the direction to divide, the instruction to the trustees to pay to the heirs of the legatee, if he predecease the period of division, may be regarded more as the natural result of the legacy having vested than as an indication of the reverse" (per Ld. J.-Cl. Moncreiff in *Jackson*, 1876, 3 R. 627, at 629, quoted and approved in *Ross's Trs.*, 1897, 25 R. 65, at p. 72). This principle was adopted and acted upon in *Hay's Trs.* (1890, 17 R. 961), where the trustees were directed to hold the estate, heritable and moveable, for the testator's widow in liferent, and on her death to convey certain heritable subjects to A. and his heirs. On A. surviving the testator, but predeceasing the liferenter, it was held that the fee vested in him *a morte testatoris*, his heirs being introduced into the destination to take only in the event of his not surviving the testator. In this case Ld. M'Laren observed that it was not doubtful that the principle by which vesting was postponed by a survivorship clause applied to a proper destination over, *i.e.* a direction to pay to A., whom failing, to B.

He explained that the decisions in *Carleton* (1865, 3 Macph. 514; affd. 1867, 5 Macph. (H. L.) 151) and other cases, in which it had been held that a destination to A. and his issue was consistent with vesting, *i.e.* was not a contingent destination, went on the ground that in a gift to a legatee and his issue, or heirs of the body, the testator only gives expression to the natural law of inheritance. "The true criterion is this, that where the legatees of the second order are either mentioned by name or by some description independent of the first, then they may be taken to be *personæ delectæ*, and their contingent interest is sufficient to suspend the vesting of the estate. But if the legatees of the second order are described as the children or issue or heirs of the institute (there being no ulterior destination), these are to be considered in this question as persons instituted in consequence of their being the natural successors of the institute, and therefore as taking a right which is subordinated to his, and is not intended to interfere with his acquisition of the fullest benefit, which it was possible for the truster to give him, consistently with the benefits previously given to liferenters or other persons" (per Ld. M'Laren in *Hay's Trs.*, 1890, 17 R. 961, at 965). This canon of construction came to this, that a destination over, in order to be effectual to postpone vesting, must be to a person named or described independently of the institute. On this principle the Court of Session, in a consistent series of cases, held that a testamentary gift to A. in liferent and to "B. and his issue" in fee, or to "B. and his children," or to "B. and his heirs," or to "B. whom failing to his issue," or to "B. and, should he predecease the date of payment, then to his issue," or to "B. and C. or their respective heirs," did not constitute a true destination over so as to import a suspension of the vesting of the fee in B., till the liferent should determine. Vesting, accordingly, was held to take place in B. *a morte testatoris*, his heirs or issue being presumed to be called not as persons independently favoured, but from favour to B. (*Ross' Trs.*, 1897, 25 R. 65; *Mellis*, 1898, 25 R. 720; *Richard's Trs.*, 1894, 22 R. 141; *Byars' Trs.*, 1887, 14 R. 1034; *Wilson's Trs.*, 1878, 5 R. 697; *Elliot*, 1873, 11 M. 735; *Bowman's Trs.*, 1898, 25 R. 819; *Ross' Trs.*, 1884, 12 R. 378).

The principle of construction sanctioned in the cases, of which *Hay's Trs.* (*supra*) is a type, has been shaken by the opinions expressed in the House of Lords in the recent case of *Bowman's Trs.* (1899, 36 S. L. R. 959). In *Bowman's Trs.* the testator, a partner in a firm, bequeathed a liferent to his widow, and, after giving his trustees power to continue the firm and make advances to his children out of their shares, directed them, on the dissolution of the firm or on his widow's death, if she then survived, to divide his estate into four parts and pay one share to each of his children A., B., C., D., "or to their respective heirs." The Court of Session, on the principle of *Hay's Trs.* (*supra*), held that the children's shares vested *a morte*. The House of Lords, while disapproving the principle which determined the decision of the Court below, affirmed the judgment on the special ground that, if vesting was held to be postponed, the effect of the power given to the trustees to postpone indefinitely the dissolution of the firm and the consequent date of payment, would be to make the rights of the beneficiaries indirectly depend on the option of the trustees—a result which it was unlikely the testator intended. In reference to the *ratio* of the decision in the Court of Session Ld. Watson said: "I fail to see why a gift-over in favour of the heirs of an instituted child should be otherwise construed or have any different effect than a gift-over in favour of another relative or of a stranger *nominatim*" (*Bowman's Trs.*, *supra*, at p. 960). Lord Davey also observed: "I find great difficulty in seeing why a different construction as regards the time

of vesting should be given to a conditional limitation in favour of persons unnamed, but described as heirs, issue or the like, of the first legatee, and to one in favour of named persons or persons described by some description independent of the first legatee, *e.g.* of the other legatees or of their children. I cannot, therefore, assent to the proposition laid down by Ld. M'Laren" (referring to the passage quoted (*supra*, p. 92) from Ld. M'Laren's opinion in *Hay's Trs.* (1890, 17 R. 965, at 961)) "as a general rule of construction or criterion to be applied in such cases. But I think the circumstance that the gift-over is not in favour of some *persona. delecta* by name may be taken into consideration together with other circumstances appearing on the will which affect the construction" (*Bowman's Trs., supra*, at p. 963).

Exceptional Cases.—The rule that an ulterior destination of a fee prevents vesting suffers exception in the class of cases where the principle of vesting subject to defeasance is applicable (*Vesting subject to Defeasance* is treated *infra*, p. 94). Also where the deed is not a disposition in trust, but a direct disposition to those intended to take beneficially, without the intervention of trustees, the fee must vest at the testator's death in someone, and that being so, an ulterior destination does not suspend vesting in the person first called in the destination who survives the testator. Thus in *Bruce's Trs.*, 1898, 25 R. 796, a testator, by *mortis causâ* disposition and settlement, disponed his whole estate, heritable and moveable, to his two sisters *nominatim*, jointly and to the longest liver of them in liferent, and to his nephew A., whom failing to his nephew B., whom failing to his niece C., in fee, whom all failing to his own nearest heirs in fee. A. predeceased the testator; B. and C. survived him, but both predeceased the survivor of the liferenters. In these circumstances it was held that under the destination the fee of the estate vested in B., the first called in the destination who survived the testator, and (as the liferent did not suspend vesting) that vesting in B. took place *a morte testatoris*. By this vesting in B., the destination to C., who was called to the succession after B., was evacuated. (See also opinions in *Tristram*, 1894, 22 R. 121—the case of a direct *mortis causâ* conveyance of heritage.) Again, in a proper heritable destination the principle of construction is substitution, and not, as in trust destinations, conditional institution (see SUBSTITUTION). "If I leave heritable estate to A. in liferent and to B., whom failing, to C. in fee, or it may be to any number of substitutes in succession, the liferent and the fee always, and necessarily, vest concurrently in the liferenter and the first named fiar; and it makes no difference in the construction what words ('whom failing' or 'on the death of A.') are used to connect the names of the different persons who are to take in succession. Accordingly, there can be no suspension of vesting in such a case" (per Ld. M'Laren in *Turner*, 1894, 21 R. 563, at 567; cf. *Fraser*, 1898, 25 R. 496). Ld. M'Laren, in his opinion in *Turner* (*supra*), also points out that a conveyance of heritage to A. for his liferent use allenarly and to his children, or the heirs of his body *nascituri* in fee, has the effect, as settled in *Newlands* (1798, 3 Ross, *L. C.* 634), of vesting a fiduciary fee in A. for behoof of his children, each child taking a vested interest on its birth, and observes: "I know of no such thing as suspension of vesting under a direct heritable destination in liferent and fee except the necessary suspension until a fiar is born." (Compare observations of Lds. Adam and M'Laren in *Tristram*, 1894, 22 R. 121.) Further, the principle explained in the previous paragraph as to the effect of an ulterior destination, must be taken subject to the rule that 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 is held

primâ facie to mean in the event of his dying before the testator, and not to refer to his death before the period of payment, so that vesting *primâ facie* takes place *a morte testatoris*, even though the period of payment is postponed (per Ld. Young in *Peacock's Trs.*, 1885, 12 R. 878, at p. 881). In *Peacock's Trs.* (*supra*) a testator in his trust disposition directed his trustees to preserve and manage his estate for behoof of his children, with power to make advances from capital, and on his youngest child reaching the age of twenty-one to convey the free residue to his children who might be alive at the date of his decease, and the issue of those who should predecease the term of payment. In a codicil, executed when he had only one son alive, the testator directed his trustees, in case of the death of his only surviving child, and any other children he might have and their issue, to convey the whole residue to a nephew. On the son surviving the testator, and dying before attaining twenty-one years, without issue, it was held, in a competition between the son's representatives and the nephew of the testator, that the residue had vested in the son and passed on his death to his heir-at-law and heirs *in mobilibus* (cf. *Wood*, 1896, 24 R. 105).

Vesting subject to Defeasance.—There are certain contingencies in event which, while they do not constitute conditions to the effect of suspending vesting, yet, as resolutive conditions, are effectual to resolve a vested right, or, in other words, to divest in whole or in part a beneficiary of the right which has vested in him. The law of Scotland had long been familiar with such conditional vesting in the case of entails, where the heir who for the time is next entitled to succeed under the destination may be excluded by the birth afterwards of a nearer heir, who for the time is only *in spe* (per Ld. Pres. Inglis in *Haldane's Trs.*, 1881, 9 R. 269, at p. 278). So it had long been settled that, in cases of provisions to a family or to a class, in which future born children were entitled to share, a right of fee in the whole provision vested in the child first born, subject to its being partially defeated by the birth of future children (see *infra*, p. 97, as to *Vesting in a Class*). But, before the decision of *Gilbert's Trs.* by the House of Lords (1878, 5 R. (H.L.) 217), the principle that a right of property in heritable or moveable estate provided by a testamentary disposition or marriage contract could vest subject to defeasance was very sparingly recognised. (Instances of rights under deeds of settlement being held to vest subject to defeasance before the date of *Gilbert's Trs.* (*supra*) are: *Balderston*, 1857, 19 D. 293; *Robertson*, 1869, 7 Macph. 1114; *Grant's Trs.*, 1859, 22 D. 53; *Bruce*, 1874, 1 R. 740; *Stewart*, 1859, 22 D. 72; *M'Lay*, 1876, 3 R. 1124; *Snell's Trs.*, 1877, 4 R. 709, an Outer House decision, in which Ld. Shand (Ordinary) gave his adhesion to the doctrine in terms frequently quoted and approved in later cases.) In *Cumming's Trs.* (1893, 20 R. 454, at 458), Ld. Young explained that the Scots Courts, prior to the decision by the House of Lords in *Gilbert's Trs.* (*supra*), had failed to distinguish between two kinds of contingencies upon which legacies or bequests are given in testamentary deeds—the kind of contingency which, if it happen at all, must happen in the lifetime of the legatee, *e.g.* his attaining a certain age or being married, and the kind of contingency which may happen after, as well as before, the legatee's death, *e.g.* the contingency of the liferenter dying without issue. In a legacy dependent on a contingency of the latter kind, the principle of vesting subject to defeasance is applicable, *i.e.* the legatee takes, and may dispose of, the legacy subject to the contingency. The reason for the adoption of this principle in interpreting deeds of settlement, as stated by Ld. Blackburn in *Gilbert's Trs.* (1898, 5 R. (H. L.) 217, at 221), is that "it is in general for the benefit of the objects of the testator's bounty

that they should be able to deal with their expectant interests at once, which they can do if their interest is vested, though subject to be divested by the happening of a subsequent event, but which they cannot do if their interests are kept in suspense and contingency until that event has happened; and therefore it is to be presumed that a testator intends the gift he gives to be vested subject to being divested, rather than to remain in suspense." (Since the decision of *Gilbert's Trs.* (1878, 5 R. (H. L.) 217), the principle of vesting subject to defeasance has been applied in many cases, *e.g. Fraser*, 1883, 11 R. 196; *Bradford*, 1884, 11 R. 1135; *Gregory's Trs.*, 1886, 14 R. 368; 1888, 16 R. (H. L.) 10; *Steel's Trs.*, 1888, 16 R. 204; *Earl of Dalhousie's Trs.*, 1889, 16 R. 681; *Dalglish's Trs.*, 1889, 16 R. 559; *Logan's Trs.*, 1890, 17 R. 425; *White's Trs.*, 1893, 20 R. 460; *Wilson's Trs.*, 1894, 22 R. 62; *Stewart's Trs.*, 1896, 23 R. 416. In *Haldane's Trs.*, 1881, 9 R. 269, a majority of seven judges held that the vesting was postponed, and that the principle of vesting subject to defeasance was inapplicable; but in *Gregory's Trs.*, 1889, 16 R. (H. L.) 10, Ld. Watson doubted the soundness of the decision, and expressed his approval of the views of the minority of the judges, that the estate vested *a morte* subject to defeasance.) In *Steel's Trs.* (1888, 16 R. 204, at p. 208) the conditions under which the principle of vesting subject to defeasance is applied are summed up by Ld. Pres. Inglis as follows: "I think the result of all the cases on this subject may be summarised thus: Where a fund is settled on daughters of the testator for their liferent use allenarly, and their children, if any, in fee, whom failing, to another person or other persons in absolute property, with no further destination, the vesting of the fee in the last named person or persons will depend on these considerations,—whether the person so called to the succession, if only one, was a known and existing individual at the death of the testator, or, if more than one, whether the persons so called were all of them known and existing at that date; or, if the destination is to a class called by description, whether the individuals who constitute the class are ascertained at that date, or whether he or they cannot be known or ascertained till the death of the liferenters or the occurrence of some other event. If the person or persons are not known, or the individuals who are to constitute the class are not ascertained at that date, the fee will not vest until the occurrence of the event which will determine who are the persons called, or the individuals composing the class are ascertained. But when the person or persons called are known, or the individuals composing the class are ascertained at the death of the testator, then the fee will vest in them *a morte testatoris*, subject to defeasance in whole or in part in the event of the liferenters or any of them leaving issue." This passage is not to be read as necessarily limiting the application of the principle (per Ld. M'Laren in *Cumming's Trs.*, 1895, 23 R. 94, at 97). Thus the principle applies equally where the destination is to a niece or grand-niece in liferent, and to her issue, whom failing, to another person or class of persons ascertained at the death of the testator, *i.e.* that person, or class of persons, take a vested fee *a morte testatoris*, subject to divestiture in the event of the liferentrix leaving issue (*Gilbert's Trs.*, 1878, 5 R. (H. L.) 217). Similarly, the principle applies in the case of a destination in a marriage contract to the surviving spouse in liferent and the children of the marriage in fee, with a destination over to ascertained persons (*Gregory's Trs.*, 1887, 14 R. 368; rev. 1889, 16 R. (H. L.) 10). Again, where a testator gives an absolute gift, say, to one of his children, and in a subsequent part of his settlement, or in a codicil, directs the bequest to be held for the child in liferent only and for the issue of the child in fee,

the fee of the bequest is held to vest *a morte* in the original legatee, and the subsequent restriction of his fee to a liferent is regarded as intended to take effect only in the event of his having and leaving issue, in other words, the bequest vests *a morte* in the original legatee subject to defeasance in the event of his having issue (*Lindsay's Trs.*, 1880, 8 R. 281; *Dalgleish's Trs.*, 1889, 16 R. 559; *Logan's Trs.*, 1890, 17 R. 425; *Dunlop's Trs.*, 1899, 36 S. L. R. 531). So a right frequently vests in existing members of a class subject, as regards each member of the class, to partial defeasance on the appearance of other members of the class (*Miller*, 1875, 2 R. (H. L.) 1; *Cunningham*, 1889, 17 R. 218. *Vide infra*, p. 97, as to *Vesting in a Class*). A share which has vested in a person, subject to defeasance in the event of the liferenter having no issue, is of course carried by that person's will, or passes to his legal representatives if he leave no will, although he dies before the liferenter, *i.e.* before receiving payment, provided the liferenter dies without issue. A destination over to the testator's nearest heirs or nearest of kin is regarded as a destination over to a class definitely ascertained by law at the date of the testator's death (*Gregory's Trs.*, 1889, 16 R. (H. L.) 10).

Limitations of the Principle.—As it is a necessary condition of vesting subject to defeasance that, if the original institution, say of issue, was absent from the deed, the persons next in order would take a vested interest *a morte testatoris*, and this can only be where they are definitely ascertained, it follows that if the persons next called are a class of persons, who are not ascertained, because there is a clause of survivorship in the last destination (as in *Cunningham's Trs.*, 1893, 20 R. 454), there is no room for vesting subject to defeasance, and the vesting is altogether suspended. Moreover, it is a condition of vesting subject to defeasance, as pointed out in the quotation (*supra*, p. 95) from Ld. Pres. Inglis' opinion in *Steel's Trs.* (1888, 16 R. 204, at 208), that the fund should be settled on the person called next in order after the original institution of issue "in absolute property, with no further destination"; accordingly, if there is an ulterior destination, though it be merely to the children of that person, if he predecease (as in *White's Trs.*, 1898, 20 R. 460; see per Ld. Trayner at p. 465), or to "the heirs of his body" (as in *Turner*, 1894, 21 R. 563; see per Ld. M'Laren at 567), the vesting is wholly suspended. In *Turner* (*supra*) it was doubted whether the doctrine of vesting subject to defeasance was applicable to the case of a direct conveyance of heritage.

Extensions of the Principle.—An important extension of the doctrine of vesting subject to defeasance was suggested and received judicial sanction in *Ross' Trs.*, 1897, 25 R. 65. There a testator directed his trustees, on the death of his widow, who had a liferent, to divide the residue of his estate into three shares, and to pay one share to A., another share to B., and the third share among eight persons named, declaring that in the event of A. predeceasing the period of division the trustees should divide "the share destined to him among the several parties to whom the third share is provided," and in like manner if B. "shall predecease the period of division or die before he attains majority," the share destined to him should be divided in like manner. A. and B. predeceased the widow. Ld. Moncreiff expressed a clear opinion that the right to the shares destined to A. and B. respectively vested *a morte testatoris* in the eight persons entitled to the third share, subject to defeasance in the event of A. and B. surviving the period fixed for division (see per Ld. Moncreiff in *Ross' Trs.*, 1897, 25 R. 65, at 74). Such an interpretation involved an important extension of the application of the doctrine of vesting subject to defeasance, inasmuch as the institutes A. and B. were not the issue of the liferentrix, but parties quite independent both of

the liferentrix and of the persons ulteriorly called to succeed. The decision of the House of Lords in *Chambers' Trs.* (1878, 5 R. (H. L.) 151, narrated *supra*, p. 77), where it was held, in spite of a direction to pay each child a share six months after the decease of the testator, and an express declaration that the shares should vest at the date of the testator's death, that the trustees could effectually exercise a power to restrict a child's right to a liferent, may be, and has been, explained on the principle that the child in question took a vested right subject to divestiture in the discretion of the trustees (see observations on *Chambers' Trs.* (*supra*) by Ld. Moncreiff in *Russell*, 1897, 24 R. 666, at pp. 670, 671).

Another example of a contingency, which, though not operating to suspend vesting, may be construed as a resolutive condition, having the effect of rendering a right of fee subject to divestiture in whole or in part, is found where a testator, who has bequeathed property to his widow, gives directions for a restriction of the widow's provisions, or for the different disposal of the property so bequeathed, in the event of the widow's marriage. Thus in *Smith's Trs.*, 1883, 10 R. 1144, a truster in his settlement directed that his widow should receive an annuity of £120, and also the household furniture and everything in his house at his death, with the occupation of his house during her life free of rent, provided she remained unmarried, but, in the event of her marriage, the annual allowance to be reduced to £50, "with neither free house nor furniture." It was held that the right of the widow in the furniture and articles in the house was a right of fee subject to forfeiture in the event of a second marriage (cf. *Robertson*, 1869, 7 M. 1114; *Sturrock*, 1875, 2 R. 850; cf. *Mackay's Trs.*, 1897, 24 R. 904).

Vesting in a Class.—A provision in favour of a class of beneficiaries, such as a family of children, is not prevented from vesting *a morte testatoris* by the possible increase in the number of the class by subsequent births, and the consequent uncertainty as to the amount of benefit which will ultimately be taken by each member of the class. Thus in *Carleton*, 1867, 5 Macph. (H. L.) 151, a testator directed the residue of his property to be vested in trustees for his daughter in liferent, and her children in fee, to be kept in trust by the trustees till they should see proper to settle it safely upon her and her children, and, in the event of her decease without issue, the trustees were directed to convey to the testator's nieces *nominatim*. At the testator's death, his daughter was married and had two children, and subsequently she had other five children. It was held by the Court of Session, and affirmed in the House of Lords, that the residue vested *a morte testatoris* in the two children of the testator's daughter, who were alive at that date, subject to partial defeasance on the birth of each of the other children of the daughter, and that, on the death of a child, its share passed to its representatives, and did not accresce to the surviving children. "My opinion is that the right vested *a morte testatoris* in the class, some of whom were in existence at that time, and that a *jus crediti* vested in each child at its birth, although the amount of the benefit was subject to the contingency of there being more children born" (per Ld. Colonsay in *Carleton*, 1867, 5 M. (H. L.) 151, at 155). In *Cunningham* (1889, 17 R. 218), on the same principle, where the testator directed his property to be settled on his daughters during their life, the share of each daughter, on her death, going to the deceaser's lawful issue, it was held, in the case of a daughter, who married after the testator's death, that her share vested in each of her children at birth. In the case of a provision to children *nascituri* as a class, a right of fee in the whole provision vests in the child first born, subject to its being partially defeated by the birth of future children, so

that, as each child comes into existence, there is a corresponding restriction of the extent of the fee which was previously vested in the first child. In *Miller* (1875, 3 R. (H. L.) 1) A. purchased heritable subjects, taking the title in the names of trustees, to hold the subjects *inter alia* for payment of the yearly income to A., and after A.'s death to A.'s wife, for their liferent use allenarly, and on the expiry of the liferents, for A.'s children in such shares as A. might fix, and failing such apportionment, share and share alike. The shares were to be paid after the expiry of the liferents, and after the whole children who should have survived A. and his wife, and who should be alive, had attained majority, or at such other times after the expiry of the liferents as should be fixed by A. It was held by the House of Lords that the children's shares of the estate vested at the execution and registration of the deed of trust in the children then born, and in the others as they came into existence (see per Ld. Cairns as to the rights of the children under this form of destination in *Miller*, 1875, 2 R. (H. L.) 1, at p. 9).

Where a bequest is given in general terms to a class of persons, *e.g.* to the family of A., the *primâ facie* construction is that it includes all the members of the class who are alive at the date of vesting, whether they were born at the date of the will or not (*Hickling's Trs.*, 1898, 1 F. (H. L.) 7). Such a bequest, especially if given to a class who are near relatives of the testator, is not narrowed so as to include only those members of the class who may be in existence at the date of the will, unless the testator's intention so to limit the gift is clear (per Lds. M'Laren and Kinnear in *Millar's Trs.*, 1891, 18 R. 989). Where a bequest is made to a class, it is sometimes difficult to determine whether the right to take is confined to those members of the class who are in existence at a certain date,—the date of the testator's death or the date when he directs the distribution to be made, as the case may be,—to the exclusion of members of the class subsequently born, or whether members of the class born subsequently to the date in question are entitled to participate. Putting aside cases of the kind dealt with in the previous paragraph, the question whether, in a testamentary provision to a family of children, children born after the testator's death are entitled to participate depends on the provisions of the will as to distribution, and if the fund is payable on the testator's death, or is declared to vest *a morte testatoris, post nati* will be excluded from participation (M'Laren on *Wills*, 3rd ed., p. 787). In a question of this sort, the period of distribution is the most important consideration (per Ld. Deas in *Ross*, 1878, 5 R. 833, at 837). "A gift to a class after a life interest or liferent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the lifetime of the life-tenant or liferenter" (per Ld. Davey in *Hickling's Trs.*, 1898, 1 F. (H. L.) 7, at p. 19). So if a testator directs that a fund should be distributed among a class of children at a particular day, only the children in existence when that day arrives receive a share. But this rule is subject to the limitation that if there is any indication of intention to admit a child who is not in existence at the time when the distribution is to take place, that will prevent the operation of the general rule (per Ld. Pres. Inglis in *Ross*, 1878, 5 R. 833, at 836, founding on *Wood*, 1861, 23 D. 338). A simple direction to divide the testator's estate among members of a class implies, in the absence of anything to the contrary, that the period of distribution and of vesting is the date of the testator's death; so that the members of the class who are entitled to participate are determined at that date (*Biggar's Trs.*, 1858, 21 D. 4). This holds although the

beneficiaries are not actually to receive payment until, for example, each of them attains twenty-one years. Thus where a testator directed that the residue of his estate should be divided among the "children lawfully begotten or who shall be lawfully begotten" of his three cousins named, share and share alike, on each of them attaining the age of twenty-one years, it was held that the residue vested *a morte testatoris* in those children of the three cousins in existence at the date of the testator's death, children born thereafter not being entitled to participate (*Hayward's Exrs.*, 1895, 22 R. 757). The rule in England is that under a will of this kind the date of distribution and of vesting is the date at which the eldest of the class reaches majority, all the members of the class in existence at that date being admitted to participate (*Mainwaring*, 1849, 8 Hare, 44; *Gimblett*, 1871, L. R. 12 Eq. 427). In *Buchanan's Trs.*, 1877, 4 R. 754, some of the judges expressed opinions in favour of the adoption of this rule, but in *Hayward's Exrs.* (*supra*) the Court refused to follow it, as being inconsistent with the words of the deed. The construction of a bequest to a class, which admits the right of members of the class born after the period of distribution—*post nati*—to participate, has the disadvantage of rendering the share of each child fluctuating in amount and subject to partial divestiture, and of possibly necessitating repeated divisions; so that, for reasons of convenience, the presumption always is that the testator contemplated only one period of division at which the share of the beneficiaries respectively should be determined (*Hayward's Exrs.*, *supra*; *Buchanan's Trs.*, 1877, 4 R. 754; *Stopford Blair's Exrs.*, 1872, 10 M. 760; *Macdougall*, 1866, 4 Macph. 372; *Wood*, 1861, 23 D. 338; *Biggar's Trs.*, 1858, 21 D. 4). Where a testator directs a fund to be distributed in portions at various periods among the children of a family, a child born after any of the distributions will be presumed, in the absence of any indication by the testator to the contrary, to be entitled to share in subsequent distributions, but in these only (*Ross*, 1878, 5 R. 833). On the other hand, if the words of the will show that the testator intended, in making a bequest to a class, that children born after the period of vesting and distribution should participate, then payment is made to the children existing at the period of distribution and vesting, subject to their finding caution to repeat so much as may be necessary to satisfy the claims of other children, if any, who may afterwards come into existence and be entitled to participate in the bequest (*Scheniman*, 1828, 6 S. 1019; *Shaw*, 1828, 6 S. 1149, recognised with approval in *Carleton*, 1865, 3 Macph. 514; 1867, 5 Macph. (H. L.) 151, and in *Blackwood*, 1833, 11 S. 443; 1833, 11 S. 699).

"When the gift to a class is made to depend on the happening of a contingency, that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency" (per L.J. Davey in *Hickling's Trs.*, 1898, 1 F. (H. L.) 7, at p. 19). In a bequest to a family of children, although, owing to a clause of survivorship as between the children, no right to an absolute share of the bequest is vested in any of the children till a certain event, yet, before this event, the children as a class may, provided no other person has an interest under the deed, have a vested interest in the bequest in the sense of sec. 7 of the Trusts (Scotland) Act, 1867 (30 & 31 Vict. c. 97), so that the Court may authorise trustees to advance part of the capital for the maintenance of the beneficiaries (*Ross' Trs.*, 1894, 21 R. 995; *Clark's Trs.*, 1895, 22 R. 706). As to effects of power of apportionment, see *supra*, p. 90, and APPORTIONMENT.

As to effects of *Conditio si sine liberis*, see CONDITIO SI SINE LIBERIS.

Effect of Unforeseen Events.—As matter of principle, the act of any person outside of, and hostile to, a trust cannot *per se* effect an alteration of the truster's dispositions with regard to the vesting of interests in his estate. But such an act may be of material importance if the testator has either expressly or by implication signified his intention that upon its occurrence the period of vesting shall shift (per Ld. Watson in *Muirhead*, 1890, 17 R. (H. L.) 45, at p. 50). Thus where a truster directed his trustees to pay to his widow an annuity and to accumulate the balance of the income till her death, and thereafter to distribute the estate among his children, declaring that if any of them should predecease the term of payment of their provisions under the deed, the said provisions should lapse and become part of the residue, unless the predeceaser left issue, in which case the children of the predeceaser were to take their parent's share, it was held by the House of Lords, on the widow repudiating the annuity provided to her and taking her legal rights, that the widow's repudiation of the annuity had no effect on the vesting of the interests under the deed, and that the declaration as to lapsing prevented the vesting of the children's provisions to which it applied till the widow's death (*Muirhead*, 1890, 17 R. (H. L.) 45, at p. 50, followed in *Ross' Trs.*, 1894, 21 R. 927). On the other hand, where (as in *Ross' Trs.*, 1884, 12 R. 378) authority is expressly given by the testator to the trustees to divide among his sons the residue liferented by the widow at any time after the testator's death and during the widow's lifetime, this is an element pointing strongly to the vesting of the estate in the sons *a morte testatoris*, and the repudiation by the widow of the income of the residue removes the obstacle to immediate division.

The effect of the dissolution of marriage by divorce upon vesting was considered in two recent cases, *Harvey's Jud. Fact.*, 1893, 20 R. 1016, and *Taylor's Trs.*, 1893, 20 R. 1032, in which cases the earlier authorities are collected. In *Harvey* the marriage contract provided that on the dissolution of the marriage by the death of either of the spouses, the trustees should pay the income of the whole fund to the surviving spouse, and, after the death of such survivor, the principal to the children of the marriage. It was also provided that on the dissolution of the marriage by the decease of the wife without issue, or leaving issue who should predecease their father, the husband should get the principal of his own contribution to the marriage fund and the income of the wife's contribution, the principal of the latter going to the wife's heirs and assignees on the husband's death, and there was a similar provision applicable to the predecease of the husband in similar circumstances. The wife obtained decree of divorce against the husband on the ground of adultery, and thereafter died before him, leaving a daughter of the marriage. It was held that the divorced husband was entitled to the liferent of the marriage-contract funds contributed by him, that he had no right to the liferent of the funds contributed by the wife, and that the capital of the funds contributed by the wife did not vest in the daughter until the death of the divorced husband, so that the annual proceeds of these latter funds meantime fell into the wife's executry (*Harvey's Jud. Fact.*, 1893, 20 R. 1016). In *Taylor's Trs.* (1893, 20 R. 1032) a testator directed his trustees to hold the share of his estate falling to his married daughter for her alimentary liferent use allenarly and for her children in fee, but that, in the event of her husband predeceasing her, the provisions of liferent and fee should cease, and payment of her share be made to her absolutely. Upon the daughter obtaining decree of divorce against her husband, after the testator's death, and claiming payment of her share, it was held that the decree of

divorce was not equivalent to the predecease of the husband, and that the daughter was entitled only to a liferent of the estate so long as he lived. (As to the effect of divorce on the rights of beneficiaries, see also *Macalister*, 1854, 26 Scot. Jur. 597; *Harvey*, 1870, 8 Macph. 971; 1872, 10 Macph. (H. L.) 26; *Harvey*, 1872, 10 Macph. (H. L.) 33; *Ferguson*, 1877, 14 S. L. R. 277; *Johnstone-Beattie*, 1867, 5 Macph. 340; *M'Elmail*, 1888, 16 R. 47).

Relief from Trust Management: Anticipation of Period of Payment.—"There is a general rule, the result of a comparison of a long series of decisions, that where by the operation of a testamentary instrument the fee of an estate or parts of an estate, whether heritable or moveable, has vested in a beneficiary, the Court will always, if possible, relieve him of any trust management that is cumbrous, unnecessary, or expensive. Where there are trust purposes to be served which cannot be secured without the retention of the vested estate or interest of the beneficiary in the hands of the trustees, the rule cannot be applied, and the right of the beneficiary must be subordinated to the will of the testator" (per Ld. Pres. Inglis in *Miller's Trs.*, 1890, 18 R. 301, at 305). Examples of cases in which the Court has refused to maintain a trust management on the ground that there were no ulterior trust purposes to be served which necessitated the retention of the estate in the hands of the trustees are: *Spens*, 1875, 3 R. 50; *Brown*, 1890, 17 R. 517; *Archibald's Trs.*, 1882, 9 R. 942; *Jamieson*, 1889, 16 R. 807; *Ramsay*, 1871, 10 Macph. 120; *Laidlaws*, 1884, 11 R. 481; *Duthie's Trs.*, 1889, 16 R. 1002; *Miller's Trs.*, 1890, 18 R. 301; *M'Kinnon's Trs.*, 1892, 19 R. 1051; *Wilkie's Trs.*, 1893, 21 R. 199; *Ritchie's Trs.*, 1894, 21 R. 679; *Greenlees' Trs.*, 1894, 22 R. 136. The trust management ceases although the fee is destined contingently, if the contingency comes to an end (as in a destination to survivors when there is only one survivor of the class) and one or more of the beneficiaries acquire an absolute right (*Lindsay's Trs.*, 1885, 12 R. 964; *Spens*, 1875, 3 R. 50. *Vide supra*, p. 86). On the other hand, where there are ulterior trust purposes to be served or other interests to be protected, the trust will be maintained, even though the shares of the beneficiaries have vested (*Christie's Trs.*, 1889, 16 R. 913; *Campbell's Trs.*, 1889, 16 R. 1007; *M'Donald*, 1893, 20 R. (H. L.) 88; *vide supra*, p. 89).

Where beneficiaries have a vested right in an estate, the existence of an annuity or liferent does not prevent the Court from authorising the trustees to accelerate the period of payment. "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 essential that the beneficiaries to whom the trustees are directed to pay or convey shall have a vested and indefeasible interest in the provisions" (per Ld. Watson in *Muirhead*, 1890, 17 R. (H. L.) 45, at p. 48, referring to *Robertson*, 1846, 9 D. 152; *Bainsford*, 1852, 14 D. 450; *Pretty*, 1854, 16 D. 667; *Lucas' Trs.*, 1881, 8 R. 502; *Finlay's Trs.*, 1886, 13 R. 1052; *Alexander's Trs.*, 1870, 8 M. 414; *Murray's Trs.*, 1887, 15 R. 233). If no right has vested in the beneficiaries, the trustees clearly cannot, as a general rule, safely pay the trust funds to them, because they, having no vested right, cannot give the trustees a valid or effectual discharge (*Forbes*, 1890, 18 R. 230). So if the right is given subject to a condition personal to the legatee, such as majority or marriage, payment cannot be made at an earlier period without breach of trust. But, on the other

hand, where the beneficiaries have a right of fee subject to a liferent, and it is clear that the postponement of the period of division was for the purpose of securing the liferent, and for that one purpose only, if the liferentrix and the beneficiaries—the parties being all in majority—have consented, the Court will authorise the immediate payment of their shares to the beneficiaries (*Louson's Trs.*, 1886, 13 R. 1003; *Craigie*, 1837, 15 S. 1157; *Rutherford*, 1821, 1 S. 37; *Brown*, 1855, 17 D. 759; *Dow*, 1877, 4 R. 403; *Kippen*, 1871, 10 Macph. 134; *Tod*, 1871, 9 Macph. 728; *Gordon*, 1866, 4 Macph. 501; *Urquhart's Trs.*, 1886, 14 R. 112; *Murray's Trs.*, 1887, 15 R. 233; *Forbes*, 1890, 18 R. 230; *M'Murdo's Trs.*, 1897, 24 R. 458).

The rule does not apply *stante matrimonio* where the liferent is conferred by a marriage contract, to which the liferentrix was a party (*Menzies*, 1875, 2 R. 507; *Ker's Trs.*, 1895, 23 R. 317), unless in such special cases as *Ramsay*, 1871, 10 Macph. 120: *Laidlaws*, 1884, 11 R. 481, where the estate of the wife was to pass to her and her heirs on the dissolution of the marriage, there being no provision for children of the marriage. Further, a liferentrix cannot effectually consent to give up her liferent where the property is held by trustees under an express declaration that the interest of the liferentrix is alimentary or non-assignable. The trustees in such a case will not be permitted to denude, though with the full consent of the liferenter, in favour of the fiar, even when all the other purposes of the trust have been performed, for the reason that by no other means can the alimentary provision be so effectually secured, especially against the voluntary deeds of the liferenter (*White's Trs.*, 1877, 4 R. 786; *Duthie's Trs.*, 1878, 5 R. 858; *Elliott's Trs.*, 1894, 21 R. 975). "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 beneficial right to the fee. A rule to the contrary has long been settled and was recently enforced in *White's Trs.* (*supra*) and *Duthie's Trs.* (*supra*). In both instances the parties entitled to the fee had a vested interest; and in *Duthie's Trs.* the alimentary liferenter and the beneficial fiar were one and the same person. Yet it was held that the combined action of all the parties interested could not defeat the settler's intention to make the annuitant's rights alimentary, a result which could not be attained except by continuing the trust" (per Ld. Watson in *Hughes*, 1892, 19 R. (H. L.) 33, at 35). When the alimentary liferenter becomes vested with the fee on which his alimentary interest is a burden, he can appoint the fee; and he may make this appointment for a present consideration, and by this means improve his financial position during his lifetime (per Ld. J.-Cl. in *Elliott's Trs.*, 1894, 21 R. 975, at p. 979). It has been held, however, that a fee burdened with an alimentary interest may be released from the trust administration, on the alimentary interest being made a real burden on the fee, and the real burden so created being held in trust for the alimentary liferenter (*Munro*, 1878, 16 S. L. R. 126).

The opinion has been expressed by Ld. Watson that, where distribution is postponed and the fee is destined contingently to the surviving members of a class, or to persons nominated in succession, the Court would be justified in directing distribution although no beneficial interest has vested, if application is 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 *Muirhead*, 1890, 17 R. (H. L.) 45, at 48, and in *Hughes*, 1892, 19 R. (H. L.) 33, at pp. 34, 35; cf. *Grant's Trs.*, 1876, 3 R. 280; *Louson's Trs.*, 1886, 13 R. 1003; *Urquhart's Trs.*, 1886, 14 R. 112). In order, however, that beneficiaries may be entitled to an acceleration of payment of a

fund, which has not yet vested in them, the circumstances must be such that the fund must in future inevitably belong to one or other of them; nor will their right to immediate payment be affirmed, notwithstanding their ultimate interest, if the terms of the trust require that it shall be kept up, or if their right is subject to defeasance by the possible existence of other beneficiaries (*Hughes*, 1892, 19 R. (H. L.) 33).

Again, although the liferenter and all the existing members of a class of beneficiaries may be willing that the trust estate should be divided, difficulty may arise owing to the possibility of the class of beneficiaries being increased by the birth of children. In such cases the Court has on several occasions authorised an immediate distribution of the property where the mother of the family of children, the increase in whose number is in question, is advanced in age (*Louson's Trs.*, 1886, 13 R. 1003, where the lady had attained the age of sixty, her husband still being alive; *Urquhart's Trs.*, 1886, 14 R. 112, where the lady was sixty-one years of age, her husband still being alive; see opinion of Ld. M'Laren in *Barron*, 1887, 24 S. L. R. 735; cf. *Haynes*, 1866, 35 L. J. Ch. 303; *Croxton*, 1878, L. R. 9 Ch. Div. 388; *Widdow's Trs.*, 1871, L. R. 11 Eq. 408). In some of the earlier cases caution was required that the fund would be replaced upon the subsequent birth of children belonging to the class of beneficiaries (*Scheniman*, 1828, 6 S. 1019; *Shaw*, 1828, 6 S. 1149; *Gordon*, 1873, 45 Scot. Jur. 272; *Blackwood*, 1833, 11 S. 443 and 699; *Fleming*, 1879, 6 R. 588). There is, however, no presumption of law that a woman is past child-bearing at any particular age (*Anderson*, 1890, 17 R. 337, in which case it was held that there was no presumption that a woman, fifty-eight years of age and unmarried, would not have issue).

As to the payment of the accumulated proceeds of a fund, see ACCUMULATIONS; THELLUSSON ACT.

CONDITIONAL DIRECTION TO PAY CONTRASTED WITH UNQUALIFIED GIFT.—It is an element—and in some cases an important element—unfavourable to immediate vesting that the benefit is conferred only by a direction to trustees to pay to the beneficiaries on the occurrence of an event; whereas it is an element favourable to immediate vesting that the benefit is conferred primarily by an unqualified gift. "When nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event, and not sooner, and failing him to certain other persons as substitutes or conditional institutes to him, then, if he does not survive the period he takes no right under the settlement" (per Ld. Pres. Inglis in *Bryson's Trs.*, 1880, 8 R. 142, at p. 145). In *Bryson's Trs.* (*supra*) the testator directed his trustees to pay the liferent of his estate to his widow as long as she remained unmarried, and within twelve months after her death, or as soon thereafter as convenient, to convey certain heritable subjects to A. and the heirs of his body, whom failing to B., whom failing to C. A. predeceased the widow, who had not married again, and it was held that no right had vested in him at the date of his death, upon the ground that, as the deed conferred no right upon A. apart from the direction to convey to him, no right vested in him prior to the date when the conveyance fell to be made (cf. *Reeve's Exrs.*, 1892, 19 R. 1013; *Forbes*, 1890, 18 R. 231; *Brodie's Trs.*, 1893, 20 R. 795; *Laing*, 1865, 3 Macph. 1143). On the other hand, where the words of gift confer an absolute fee on the objects of the gift, and do so at once, it requires very strong and unequivocal language to detract from the absolute nature of the gift, and induce the Court to hold that not an absolute but only a conditional fee is given (per Ld. Rutherfurd Clark in *Byars' Trs.*,

1887, 14 R. 1034, at 1037). As previously pointed out, the question whether there is a primary unqualified gift or merely a direction to pay on a certain event is important in determining whether a *dies incertus* operates to postpone vesting (*Fyfe's Trs.*, 1890, 17 R. 450; *Brodie's Trs.*, 1893, 20 R. 795, *vide supra*, p. 82), in determining whether a destination over to issue or heirs suspends vesting (*Byars' Trs.*, 1887, 14 R. 1034; *Hay's Trs.*, 1890, 17 R. 961; *Johnston's Trs.*, 1891, 18 R. 823, *vide supra*, p. 91), and in determining whether the granting of powers to trustees to continue to hold in trust, or subsequent directions given to trustees to limit the beneficiaries' right, suspend vesting (*Lindsay's Trs.*, 1880, 8 R. 281; *Dalglish's Trs.*, 1889, 16 R. 559; *Logan's Trs.*, 1890, 17 R. 425; *Greenlees*, 1894, 22 R. 136; *Stewart's Trs.*, 1896, 23 R. 416; *Mackay's Trs.*, 1897, 24 R. 904; *Newall's Tr.*, 1898, 25 R. 1176; *Dunlop's Trs.*, 1899, 36 S. L. R. 391; and other cases *supra*, pp. 87 *et seq.*).

Direct Gift contrasted with Intervening Trust.—An element for consideration, which in ambiguous cases may be material in determining questions of vesting, is the form of the gift, *i.e.* whether the gift is direct or through the intervention of trustees. If a testator gives a liferent of his estate to A., and bequeaths legacies by *de presenti* words of gift to certain persons on specified conditions, it is more easy to infer an intention to create an immediate vested interest in the legatees than it would be if the testator had begun by making a conveyance of his whole estate to trustees, and had then directed them, subject to the same conditions and on the death of the liferenter, to make payment of these legacies. In the case first supposed the legal estate is in an executor, but *primâ facie* an executor is only a trustee for immediate distribution, and in the absence of any continuing trust the most probable interpretation is that the legatees were intended to take vested interests, subject to the burden of the general liferent. If a continuing trust is constituted, the theoretical difficulty in holding a fee to be in suspense is removed, and the vesting is determined by the conditions of the gift. To this extent the circumstance of the gift being made in the form of a direction to trustees may come to be an important element (paraphrased from opinion of Ld. M'Laren in *Hay's Trs.*, 1890, 17 R. 961, at 964). It is, then, an element unfavourable to vesting that a continuing trust is created tying up the estate, especially for the protection of contingent interests (*e.g. Richardson's Trs.*, 1850, 12 D. 855); but, as has been pointed out, where there is an original absolute gift, directions to continue the trust, and even the granting of large administrative powers to the trustees, do not suspend vesting, if there are no contingent interests (see *supra*, pp. 89 *et seq.*). Similarly, it is an element favourable to vesting that no continuing trust or administrative machinery is created (*Clouston's Trs.*, 1889, 16 R. 937; *Hayward's Trs.*, 1895, 22 R. 757, where only executors were appointed). Where there is a clear direction to trustees to pay over the shares of beneficiaries, a declaration in a subsequent part of the deed showing an intention that a part or whole of the shares should be tied up is of no effect, unless the direction to pay is recalled; for, the trust not being continuing, there is no machinery for carrying out the testator's intention (*Clouston's Trs.*, 1889, 16 R. 937; *Allan's Trs.*, 1872, 11 Macph. 216; *MacNish*, 1879, 7 R. 96; *Douglas' Trs.*, 1879, 7 R. 295; *Jamieson*, 1889, 16 R. 807; *Murray*, 1895, 22 R. 927). Where the direction to the trustees is merely to "pay" or "convey" or "divide," there being no provision for the continuance of the trust, the mere intervention of trustees has little effect in determining a question of vesting. Even where there is a continuing trust, the presumption is in favour of immediate vesting, if there is nothing in

the way of a liferent or contingent interest to be protected, so that the only interest protected by the trust is that of the persons to whom the fee is given (*Wood*, 1896, 24 R. 105, at p. 107).

As pointed out (*infra*, p. 106), in dealing with vesting under marriage contracts a destination of moveable or immoveable property to a parent in liferent and to his children (unborn at the date of the disposition) in fee, according to the ordinary rule, vests the fee in the parent (*Frog's Crs.*, 1735, Mor. 4262; 3 Ross, *L. C.* 602); but the existence of a continuing trust in such a case is an element pointing strongly to the fee not vesting in the parent, but passing directly to the children of the marriage (*vide infra*, p. 109).

Subsidiary Elements, favourable, or unfavourable, to Vesting.—It is an element favourable to vesting if the testator authorises intermediate payment of interest, or advances of capital, to the beneficiaries (*Wilson's Trs.*, 5 R. 697; *Ross' Trs.*, 1884, 12 R. 378; *Matthew*, 1844, 6 D. 718; *Nolan*, 1866, 5 M. 133; *M'Kinnon's Trs.*, 1897, 24 R. 981). "Where a testator gives the income or usufruct of a subject to a legatee or heir, and at the same time directs that the capital shall be made over to him on his attaining majority, the inference is that the right intended to be taken by the legatee is the sum of the rights expressly given—and in other words, a vested right of fee, and that the postponement of payment is only an administrative provision with a view to the preservation and management of an estate during the legatee's minority" (per Ld. M'Laren in *Brodie*, 1893, 20 R. 795, at 802; cf. per Ld. Trayner in *Wood*, 1896, 24 R. 105, at 112). Similarly, where a testator provides facilities for dividing the estate among the beneficiaries during the survivance of the liferentrix, it points strongly to his intention being not to postpone vesting (*Ross' Trs.*, 1884, 12 R. 378, at p. 383); and a direction to at once separate off the share of a beneficiary from the rest of the estate is construed as indicating a like intention (*Waters' Trs.*, 1884, 12 R. 253). A direction for intermediate payment of interest or advances from capital, while an element in favour of vesting *a morte*, is not inconsistent with postponement of vesting (*Fyfe's Trs.*, 1888, 17 R. 450; *Adam's Trs.*, 1896, 23 R. 828; *Begg's Trs.*, 1899, 36 S. L. R. 382).

The presumption in favour of vesting *a morte testatoris* is unusually strong in the case of provisions in favour of the testator's immediate children (per Ld. J.-Cl. Moncreiff in *Jackson*, 1876, 3 R. 627).

It is also an element in favour of immediate vesting, if the provision is declared to be in lieu of legitim (per Ld. Kinnear in *Wood*, 1896, 24 R. 105, at p. 114; and, as to provisions in marriage contracts, see per Ld. Curriehill in *Napier*, 1864, 3 Macph. 57, at 64, and per Ld. Cowan in *Rogerson's Trs.*, 1865, 3 Macph. 684, at 691).

Again, the fact that there is no liferent to be protected, and that the only interest to be protected by the trust is that of the person to whom the fee is given, is a consideration pointing to immediate vesting (per Ld. Trayner in *Wood*, 1896, 24 R. 105, at p. 112).

There is a certain presumption against there being two periods of vesting under the same deed, but this is not an element of much weight (per Ld. Moncreiff in *Ross' Trs.*, 1897, 25 R. 65, at 73; *vide supra*, p. 74). Where it lies with trustees to fix the period of payment, which is also the period of vesting, the trustees cannot fix different periods of vesting in the case of different beneficiaries (*Sutherland's Trs.*, 1874, 2 R. 46).

In many cases it is laid down that a construction of a testament is to be avoided, or at least is not to be inferred, which would result in total or partial intestacy (see, *e.g.*, *White's Trs.*, 1893, 20 R. 460, per Ld. Young, at p. 464; *Ramsay's Trs.*, 1876, 4 R. 243, per Ld. Ormidale, at p. 246; *Mellis*,

1898, 25 R. 720, at pp. 727 and 728). The fact, however, that a certain construction may, in certain possible events, result in partial intestacy, is material only where the rest of the will shows a clear intention on the part of the testator to distribute the estate in all possible contingencies. Taken by itself, an argument from a possible intestacy is not of much weight; and it loses its force where under the will there may, under any construction, be intestacy in a possible contingency (as in *Ward*, 1893, 20 R. 949, see per Ld. Kinnear at p. 953). Where intestacy results from the failure of a testamentary provision, the persons entitled to take are the heirs *ab intestato* of the testator at the time of his death (*Wilson's Trs.*, 1894, 22 R. 62).

III. Vesting under Marriage Contracts.

The purpose of an antenuptial marriage contract is to regulate the rights of the spouses and the children to be procreated of the marriage, and to secure the provisions in the settlement against the future acts of the spouses and the diligence of creditors. Though there may be an ulterior destination in favour of others than the spouses and issue of the marriage, such a destination is so much outwith the purpose of the deed itself that it does not partake of the onerous character of the deed (Bank. i. 5. 15; Ersk. *Inst.* iii. 8. 39; per Ld. Young in *Wardlaw's Trs.*, 1880, 7 R. 1070, at p. 1078). The only qualification to this rule is that where the destination in the contract is "to the children of the marriage and the issue of such children," the grandchildren are in the same favoured position as children, *i.e.* the destination to them is equally onerous with the destination to children (per Ld. Watson in *M'Donald*, 1893, 20 R. (H. L.) 88, at 94). A destination to strangers in a marriage contract, *e.g.* to the next of kin of one of the spouses, can only be onerous if it is *pars contractus* between the parties (cf. *Ferguson's Curator Bonis*, 1893, 20 R. 835; *Kinsman*, 1687, M. 12980; *Yorkston*, 1693, M. 12981).

Vesting of Rights in the Spouses.—The rights of the spouses themselves respectively under the various destinations common in marriage contracts are dealt with fully under Conjunct Rights; Fee and Liferent; and Marriage Contract.

Vesting of Rights in the Children of the Marriage.—The terms of a marriage contract are always construed as favourably as possible to the vesting of provisions in the children of the marriage for whose benefit the deed was executed. The presumption for vesting in the case of marriage-contract provisions to children is strengthened by the fact that such provisions come in place of legitim (see per Ld. Curriehill in *Napier*, 1864, 3 M. 57, at p. 64; per Ld. Cowan in *Rogerson's Trs.*, 1865, 3 M. 684, at 691; and per Ld. Kinnear in *Wood*, 1896, 24 R. 105, at p. 114).

A. *Cases in which Rights vest in Children born at Date of Deed.*—A destination directly in favour of a parent in liferent and to his children *nominatim* in fee, or to children *nominatim* and such as may be born in fee (*Dykes*, 3 June 1813, F. C.), vests the fee at once in the children, subject to the parent's liferent, whether the conveyance is made by a stranger or by the parent himself (*Mackintosh*, 28 Jan. 1812, F. C.). If, however, the conveyance is made by the parent himself, the reservation of a power of disposal to the liferenter is held equivalent to a revocation of the children's fee-simple interest during the parent's life (*Cumming*, 1756, M. 15854; *Baillie*, 23 Feb. 1809, F. C.; *Stiven*, 1873, 11 M. 262).

Similarly, provisions to individual children *nominatim* made in a delivered and irrevocable deed *inter vivos*, granted in terms of an obligation

in a marriage contract, vest in the children on the delivery of the deed (*Napier*, 1864, 3 M. 57). In *Napier* (*supra*) a mother disponed *inter vivos* certain heritable property to her eldest son, under burden of his making payment to each of her daughters of a certain sum at fixed periods after the granter's death. It was held that the right of the daughters in their provisions vested on the delivery of the deed, so that the right to the provision of one of the daughters, who predeceased her mother, was carried to the said daughter's husband by the conveyance to him of *acquirenda* in her marriage contract executed seventeen years previously (cf. *Smitton*, 1839, 2 D. 225, and *Turnbull*, 1825, 1 W. & S. 80, as explained by Ld. Pres. Inglis in *Spalding*, 1874, 2 R. 237; *Greig*, 1839, 2 D. 169). In two cases a disposition by a husband "to myself and my wife, and the longest liver of us, in conjunct fee and liferent, for our alimentary use allenarly," and "to the children of the marriage *nominatim* in fee," has been construed as at once conferring a fee on the children (*Watherstone*, 1801, M. 4297; *Bryson*, 1893, 20 R. 986).

Again, where a widow with a family, before entering on a second marriage, conveyed by antenuptial contract her property to trustees for behoof of herself "for her liferent alimentary use allenarly" and for behoof of the children procreated or to be procreated of her body and their respective heirs and executors whomsoever in fee, it was held—there being no children of the second marriage, which was dissolved by the death of the wife—that the fee of the property had vested immediately in the children of her first marriage, and, that being so, that the mother could not dispose of it by testamentary deed (*Mackie*, 1884, 11 R. (H. L.) 10). So the appointment under a delivered deed of the share falling to a child under a marriage contract operates the immediate vesting of such share. Thus where a father by his marriage contract bound himself and heirs to pay to trustees a sum for behoof of the children of the marriage, in such shares as he should appoint, and, failing appointment, to be held by the trustees for the children alive at his death, it was held that a deed executed by the father in view of a son's marriage, declared to be delivered on execution and to be irrevocable, appointing to the son a certain sum as his share of the trust funds, was effectual to vest the share in the son at the date of the appointment in his favour, and that the right of the son, who predeceased his father, was not contingent on his surviving his father (*Chancellor's Trs.*, 1896, 23 R. 435).

B. *Cases in which the Provision vests in the Children of the Marriage at their Birth.*—(*a*) *Merely Fiduciary Fee in Parent.*—Where an estate is destined to parents in liferent and to children *nascituri* or unnamed (for children in life who are unnamed are regarded as being in the same position as if they were unborn—*Porterfield*, 1779, M. 4277; 1780, 2 Pat. 537; *Lindsay*, 1807, M. *voce* "Fiar," App. 1; *M'Clymont's Exrs.*, 1895, 22 R. 411), the effect is to give the fee, and not a mere liferent, to the parents (*Frog's Creds.*, 1735, M. 4262). The origin of the rule was the desire to prevent the anomaly of a fee of a feudal estate being in suspense until the birth of children. The rule of construction adopted in *Frog's Creds.* (*supra*) is now applied equally whether the property conveyed be heritable or moveable (*M'Clymont's Exrs.*, 1895, 22 R. 411). "The decisions of the Scotch Courts make no distinction between land and money in this respect, and with regard to money treat a disposition to the parent for life, remainder to the children *nascituri*, without the word 'allenarly,' as in effect a simple destination, which may be defeated by the parent who is considered the fiar" (per Ld. Chan. Campbell in *Mackintosh*, 1845, 4 Bell's App. 105).

On the other hand, if the gift of liferent is qualified by the word "allenarly" or other restricting word of similar significance, the qualification is construed as indicating an intention on the part of the granter that the parent's right is to be one of liferent only (*Newlands*, 1794, M. 4289; 3 Ross, *L. C.*, Land Rights, 634; *Harvey*, 26 May 1815, F. C.; *Miller*, 1833, 12 S. 31; per Ld. Chelmsford in *Ralston*, 1862, 4 Macq. App. 397, at 419). The right of each child to the fee vests in him on his birth, the parent being the fiduciary fiar, that is, by legal construction, trustee for the children to be born (*Dundas*, 1823, 2 S. 145; *Douglas*, 1870, 8 M. 374). In order thus to reduce the right of the parent to a mere fiduciary fee, and vest the beneficial fee in the children at their birth, it is not absolutely necessary that such formal taxative words as "allenarly" or "only" occur in the dispositive part of the deed (per Ld. Wood in *Ramsay*, 1854, 16 D. 764; approved by Ld. Mure in *Dawson*, 1877, 4 R. 597, at p. 600). The same result may be effected by any expressions clearly indicating such an intention (per Ld. J.-C. Moncreiff in *Beveridge*, 1878, 5 R. 1116, at 1119; also per Ld. M'Laren in *Fenton-Livingstone*, 1899, 36 S. L. R. 580, at 588); for example: by words excluding the parent's creditors (*Douglas*, 1811, Hume, 173); by a direction that the interest of the sum conveyed should be paid to the parent as an alimentary provision, and that the principal should be apportioned by the parent among the children (*Dawson*, 1877, 9 R. 597; cf. *Rait*, 1892, 19 R. 687); or by a gift of the liferent of the interest to the parents, followed by a declaration that the principal sum should be the property of, and divided among, the children (*Scott*, 1826, 4 S. 454 (N. E. 460); affd. 1827, 2 W. & S. 550; see per Ld. Selborne in *Studd*, 1883, 10 R. (H. L.) 53, at p. 56). The qualification of the parent's liferent by the word "alimentary," coupled with a power of apportionment among children, is also effectual to restrict the parent's right to a fiduciary fee, and vest the beneficial fee in the children on their birth (*Gerran*, 1781, M. 4402; *Kennedy*, 1826, 3 S. 554; Bell's *Prin.* s. 1956; M'Laren on *Wills*, 3rd ed., p. 611; per Ld. Wood in *Ramsay*, 1854, 16 D. 764; *Dawson*, 1877, 4 R. 597); but the qualification of the parent's liferent by the words "during all the days of his life" is not sufficient to prevent the parent having the full fee (*Lindsay*, 1807, Mor. "Fiar," App. 1). Further, it is to be observed that the rule of *Frog's Creds.* (1735, M. 4262), stated in the preceding paragraph, only applies where the destination is to a parent in liferent and the children of that parent in fee; where the destination is to A. in liferent and the children of B. in fee, A. has only a liferent (*Spence*, 1829, 3 W. & S. 380; *Ramsay*, 1854, 16 D. 764).

Where, then, in a marriage contract there is a direct conveyance of specific property to the spouses in liferent for their liferent use "allenarly" or "only" or "alimentary" or "merely," and to the heirs or the children of the marriage, *nascituri* or unnamed, in fee, or where, though the destination is simply to the spouses in liferent and the children *nascituri* in fee, there is an indication of intention, as in the cases above mentioned, that the children should have the fully vested fee, the spouses are fiduciary fiars for the children who may, or may not, come into existence. Although, the existence of children being uncertain, a fiduciary fee is held to be implied in the parents' liferent, yet the parents are really, from the first, beneficiaries only to the extent of their own liferent, and hold the fee merely in trust for the children of the marriage on the condition that each child takes a vested interest on its birth (*Grant's Trs.*, 1866, 4 M. 336; *Rogerson's Tr.*, 1865, 3 M. 684; *Fyffe*, 1841, 3 D. 1205).

The principle is not admitted that a parent can be fiduciary fiar not

only for his own children but for other persons, failing his children (*Logan's Trs.*, 1890, 17 R. 425, per Ld. Adam at p. 432, and Ld. Shand at p. 434). In destinations pointing to such a result, the Courts hold that the beneficial fee vests in the parent, subject to defeasance in the event of the parent having issue (*Logan's Trs.*, 1890, 17 R. 425, following *Lindsay's Trs.*, 1880, 8 R. 281, and *Dalgleish's Trs.*, 1889, 16 R. 559). See *supra*, p. 94, *Vesting subject to Defeasance.*

(*b*) *Effect of a Continuing Trust.*—The existence of a continuing trust, or, in other words, the fact that the granters of the provision are divested of the property during their lifetime, is always a matter of great importance in construing the rights of children under a marriage contract (per Ld. Curriehill in *Romanes*, 1865, 3 Macph. 348, at 355, and cases there referred to). Where the provisions to the children of the marriage are secured by the conveyance of estate or funds to trustees for behoof of the spouses and survivor in liferent and the heirs or children of the marriage in fee, the creation of the trust, if it is a continuing one, is construed as showing an intention that the fee should not vest in the parents, but in the children as a class (*Beattie's Trs.*, 1862, 24 D. 519, at 534, and earlier cases there cited; *Sivright*, 25 Jan. 1824, F. C.; *Falconer*, 1825, 3 S. 455).

A direction to the trustees to "hold" or "retain," whether it be expressed or implied, renders the trust a continuing one, and such a continuing trust suffices to preserve the contingent fee for unborn children, even though the word "allenarly" or other similar phrase be not used (*Seton*, 1793, M. 4219; *Ramsay*, 1854, 16 D. 764; *Watson*, 1854, 16 D. 803; per Ld. J.-Cl. Inglis in *Donaldson's Trs.*, 1864, 2 Macph. 428, at 435). Though the person or persons directed to hold, *i.e.* the trustees, be the liferenter or liferenters themselves, nevertheless the trust is effectual to limit the parents' right to a mere liferent and allow the fee to vest in the children at their birth (*Mein*, 1827, 5 S. 779 (N. E. 727); affd. 1830, 4 W. & S. 22). It is otherwise where the direction to the trustees is merely to "pay" or to "convey" the estate (*Hutton's Trs.*, 1874, 9 D. 639; *Ralston*, 1862, 4 Macq. 397). In such cases, as the trustees cannot continue the trust or hold the estate, the presumption is strong that the parents have the fee and not merely a liferent. If, through the operation of a continuing trust, the parents' right is restricted to a liferent and the contingent fee is reserved for unborn children, the children's provision is not prevented from vesting in them immediately on their birth by the parents and the survivor having a liferent, or by payment of the fund to the children being postponed until the death of the surviving spouse in order to secure his or her liferent, or by the existence of a power of apportionment among the children (see opinions in *Romanes*, 1865, 3 M. 348; *Miller*, 1875, 2 R. (H. L.) 1, at p. 10; *Mackie*, 1884, 11 R. (H. L.) 10).

Where there is a continuing trust, the difficulty generally is to determine whether the provisions to children vest at their birth or whether the vesting of such provisions is postponed till the dissolution of the marriage. The question between vesting at birth and vesting on the dissolution of the marriage is often a narrow one, and its determination is readily affected by the special terms of the contract (per Ld. Deas in *Grant's Trs.*, 1866, 4 Macph. 336, at 341, and in *Romanes*, 1865, 3 Macph. 348, at 356). On the one hand the Courts, being always desirous to favour the children and to render their provisions available to them at as early a date as possible, readily hold, where the property conveyed is specific and ascertained at the date of conveyance, expressions in the deed

providing for the payment of the interest or part of the interest of the fund, or for advance of the capital to the children; or appointing, or giving facilities for, payment to the children at a time which may happen during the survivance of the spouses (as to the effects of these elements in determining vesting, *vide supra*, p. 105); or a declaration that the provisions are in lieu of legitim; as indicating an intention that the provisions shall vest immediately (per Ld. Curriehill in *Napier*, 3 Macph. 57, at 64; per Ld. Cowan in *Rogerson's Trs.*, 1865, 3 Macph. 684, at 691).

On the other hand, where the conveyance in the marriage contract is really testamentary in its nature, as where the property conveyed to the trustees is the whole estate belonging to the granter, or the whole estate which shall belong to him at his death; or where the conveyance includes what the husband may conquest or acquire during his life, the amount and, indeed, the very existence of which is contingent; there is no immediate vesting in the children (Ersk. iii. 8. 43; *Arthur and Seymour*, 1870, 8 Macph. 928; *Grant's Trs.*, 1866, 4 Macph. 336; *Champion*, 1867, 6 Macph. 17; *Wardlaw's Trs.*, 1880, 7 R. 1070). Even where the marriage contract takes the form of a direct conveyance by the father of the whole estate he may possess at his death to his wife in liferent allenarly, and the children *nascituri* in fee, it is, though in form a present conveyance, really a testamentary deed, and the children's right is not even a *jus crediti* till the father's death (per Ld. Pres. Inglis in *Haldane*, 1885, 13 R. 179).

(*c*) *Special Cases.*—Again, even where there is no trust, the terms of the marriage contract itself may suffice to determine the question in favour of vesting of the provisions for children in the children at birth. Thus in *Walkinshaw's Trs.*, 1872, 10 M. 763, a husband, by antenuptial contract of marriage, bound himself to "provide and secure" a certain sum, if there was only one child of the marriage, and a larger sum, if there were more children of the marriage than one, payable on the death of the longest liver of the spouses, a power of apportionment being given to the father, whom failing, to the mother. It was held that each child had a vested interest in the provision from its birth. In arriving at this result, the Court were influenced principally by the considerations (1) that the father's obligation was not to "pay," but to "provide and secure," and (2) that the father undertook a present obligation to effect a policy of insurance in security of the provision.

Provision vested in Children liable to Fluctuation. — Where a provision vests on the birth of a child in the children of the marriage as a class, the whole fund vests in the eldest child on his birth, and, if other children are born, the elder children are divested, at the birth of each of the younger children, *pro tanto* of the amount necessary to make up the share of the latest born child. The share of each child is, accordingly, subject to fluctuation in amount according to the number of children. The possibility of other children being born who will have an equal right to share in the fund with those in *esse* is not a ground for withholding the distribution of the estate immediately on the arrival of the date at which payment is to be made (*Biggar's Trs.*, 1858, 21 D. 4). The vested share of each child may also be subject to increase or to diminution, or even to extinction, if a power of apportionment by the parent is exercised. At common law a father has such a power of apportionment among his children of a provision destined to them as a class in his marriage contract. Where, indeed, heritable property is destined to heirs, it goes to the eldest son, who is the heir in heritage, and the father cannot apportion it among all his children (*Stewart*, 1744, 1 Pat. App. 364;

Ormiston, 1809, Hume, 531; *Spiers*, 1778, M. 13026); but where heritable property is destined to children (*Dowie*, 1728, M. 13004; *Herries*, 1806, Hume, 528), or where moveable property is destined to heirs, or to children, or to heirs and children, the father has a power of apportionment (*Grant*, 1712, 5 Br. Sup. 86; *Edmonston*, 1706, M. 13007). Frequently a power of appointment is reserved to the father or mother in the contract, in which case the power so reserved supersedes the power at common law, and must be exercised according to the terms of the contract. A power of apportionment reserved by a parent in his marriage contract is more liberally construed than a power of distribution conferred by a third party, in which case the sole right to deal with the property is derived from the power. "When a father in his antenuptial marriage contract settles the general estate which he may leave on his children *nascituri* as a class, and reserves power to distribute, his right to distribute does not arise from the reservation, but from his right of property in the fund to be distributed, and his position as the father of the family" (per Ld. J.-Cl. Moncreiff in *Moir's Trs.*, 1871, 9 M. 850; but see per Ld. Rutherfurd Clark in *Gillon's Trs.*, 1890, 17 R. 435, at 441). The existence of such a power of apportionment or division in the parents does not postpone vesting in the children (*Sivright*, 1824, 2 S. 643; *Wood*, 1861, 23 D. 338; *Romanes*, 1865, 3 M. 348, at p. 356; *Miller*, 1875, 2 R. (H. L.) 1). See APPOINTMENT, POWER OF.

C. *Cases in which Provisions vest in the Children at the Dissolution of the Marriage.*—Where marriage-contract provisions in favour of children are not in any of the forms, described in the preceding paragraphs (*supra*, pp. 107 *et seq.*—under B.), which have the effect of bringing about an immediate vesting in the children at birth, and where the period of payment is indefinite, the presumption is strong that the provisions, whether coming from the father or mother's estate, vest in the children at the dissolution of the marriage, subject, of course, to any liferent conferred by the contract on the surviving spouse (*Romanes*, 1865, 3 M. 348; *Rogerson's Trs.*, 1865, 3 M. 684; *Wardlaw's Trs.*, 1880, 7 R. 1070). "It is settled that the rule that prevails in such cases, unless there is something conclusive to the contrary, is that you are to take the children as they existed at the dissolution of the marriage, and that is on the death of the first deceaser of the spouses" (per Ld. Young in *Wardlaw's Trs.*, 1880, 7 R. 1070, at 1078). The circumstances in which the presumption in favour of vesting at the dissolution of the marriage comes into operation are best explained by an examination of some typical cases. In *Wardlaw's Trs.*, 1880, 7 R. 1070, the husband bound himself in an antenuptial marriage contract to provide one half of all money he should conquest or acquire during the marriage to his wife in liferent and the children of the marriage in fee, and the wife conveyed her whole means and estate to trustees for behoof of her husband and herself "in conjunct fee and liferent for the liferent use allenarly" of the husband, exclusive of his *jus mariti*, and for the use and behoof of the children of the marriage in fee in such proportions as the husband should appoint. A discretionary power was given to the trustees to pay to the wife such part of the capital as they should think fit. The husband was survived by his widow and four children, and the Court—rejecting the argument that, by the terms of the deed, the widow was liar of the estate which she had conveyed to the trustees—decided that the provisions of the children, both those from the father's estate and those from the mother's estate, vested in them at the dissolution of the marriage, namely, on the death of the first deceaser of the spouses (cf. *Murray's Trs.*, 1887, 15

R. 233). In *Rogerson's Trs.*, 1865, 3 M. 684, certain funds were conveyed by the husband to trustees to be liferented by the spouses, and the only direction for payment to children was that, upon the decease of both spouses, the money in question should "be divided in equal proportions amongst the children surviving at the time." The husband died, survived by his wife and a son. On the son subsequently predeceasing his mother, —a case not contemplated in the marriage contract,—it was held that the fund had vested in him and was carried by his testamentary settlement. Again, in *Angus' Trs.*, 1880, 17 S. L. R. 536, a husband by antenuptial marriage contract provided an annuity to his intended wife in case she should survive him, directing that, on the death of his wife, if she should survive him, the capital set apart to provide the annuity of the widow should be divided among the children of the marriage in such proportions as the mother should appoint in writing. The capital was to be payable to the children only on their respectively attaining majority; nevertheless, the Court held that the capital vested in the children immediately on the dissolution of the marriage by the predecease of the father. The presumption in favour of vesting at the dissolution of the marriage holds even though the funds in question are provided by a person other than a parent. Thus in *Grant's Trs.*, 1866, 4 M. 336, the father of the intended wife, in her antenuptial contract of marriage, bound himself and his heirs to lay out at the term next after his death the sum of £2000 upon sufficient bonds, taken payable to the spouses and the survivor of them in conjunct liferent, for the liferent use of them, and the longest liver of them, allenarly, and to the child or children procreated of the marriage, whom failing to the nearest heirs or assignees of the wife's father himself in fee. It was further provided that the sum should bear interest from the date of the spouses leaving the family of the wife's father. One child was born of the marriage, but this child predeceased both its parents, as well as the wife's father. The Court held that as the only child of the marriage had predeceased the dissolution of the marriage, the fee of the £2000 never vested in it, and that on the death of both spouses it belonged to the heirs and assignees of the wife's father. Where a *jus crediti* in property vests under a marriage contract in children on the dissolution of the marriage, the surviving spouse having the power during her life to change the form and quality of the property as she pleases, the child's *jus crediti* is regarded as moveable,—though the property is in fact heritable at the date of the dissolution of the marriage,—and passes to the child's executors (*Wardlaw's Trs.*, 1880, 7 R. 1070; see *præsertim* per Ld. Young at 1084).

Effects of Provisions vesting in Children as a Class.—Where the provision has vested in the children as a class during the subsistence of the marriage, each child on coming into existence acquires a transmissible right, and the representatives, legal or testamentary, of a child who has predeceased the period of division take the predeceasing child's share (*Beattie's Trs.*, 1862, 24 D. 519; *Forbes*, 1838, 16 S. 374; cf. *Douglas*, 1870, 8 M. 374, where a mother, the liferentrix, was fiduciary fiar of certain heritable property for her children *nascituri*, and it was held that there was a vested right in the children, not as heirs, but as disponees, and that this right was transmissible to their representatives without service).

Even in cases where the vesting of a provision in the children of a marriage is postponed, for example, until the death of the longest liver of the parents or until the children attain majority, the provision vests in them as a class. A substitution of one to the other is implied, so that the children who survive the period of vesting are entitled to the whole pro-

vision, including the share of a child who has died without issue before the date of the vesting of the provision (*Burnett*, 1854, 16 D. 780). The *conditio si sine liberis* is, however, applicable to provisions to children in marriage contracts (per Ld. Watson in *Hughes*, 1892, 19 R. (H. L) 33, at 36). Accordingly, a provision by a father in an antenuptial contract "in favour of himself in liferent and to the children of the marriage in fee" does not lapse by the only child of the marriage predeceasing the father, but vests in the issue of that child who survive the granter (*Arthur & Seymour*, 1870, 8 M. 928). Similarly, where in an antenuptial contract a wife conveyed to trustees a sum, of which the husband, if he survived, was to have the liferent, and the capital of which after his death was to be paid over to the children of the marriage on attaining majority, it was held, on the dissolution of the marriage by the predecease of the wife, who was survived by one son, and who left a will bequeathing her whole estate to her husband, that the trustees could not pay over the marriage-contract funds to the husband and son, upon their joint discharge, but were bound to retain them for the eventual interest of the possible issue of the son (*Hughes*, 1892, 19 R. (H. L.) 33, at 36). While, in cases in which the vesting of provisions in the children of a marriage as a class is postponed, the issue of a child who has predeceased the date of the vesting take their parent's original share on the principle *si sine liberis*, they do not participate in the lapsed shares of other brothers or sisters of their parent, who may have predeceased the date of vesting. In other words, the shares of predeceasing brothers and sisters who have left no issue go to the brothers and sisters who survive the date of vesting, to the exclusion of the issue of deceased brothers and sisters, unless it is expressly or by clear implication provided in the deed that accrescing shares are to go in the same way as original shares (*M'Nish*, 1879, 7 R. 96; *Henderson*, 1890, 17 R. 293; and per Ld. Trayner in *Cumming's Trs.*, 1893, 20 R. 454. In *M'Culloch*, 1892, 19 R. 777, the issue of a predeceasing child were found to have a right to share in the lapsed share of another predeceasing child because the indication of such an intention was clear in the deed).

Where trustees under a marriage contract hold capital for children in fee and the spouses in liferent, the wife, with consent of her husband and children, though the capital has wholy vested in the children, cannot during the subsistence of the marriage discharge the liferent which she would have in the event of her surviving her husband, and the trustees cannot therefore denude (*Menzies*, 1875, 2 R. 507); nor may the trustees *stante matrimonio* purchase with the trust funds an annuity in their names payable to the wife, who has a liferent in the event of her surviving her husband, equal in value to her prospective liferent, and denude *quoad ultra* (*Ker's Trs.*, 1895, 23 R. 317. It is otherwise if the property was conveyed by the wife and is to pass to her and her heirs, there being no provisions for children to be protected by the trust, as in *Ramsay*, 1871, 10 Macph. 120; *Laidlaws*, 1884, 11 R. 481; 1882, 10 R. 324; 1882, 9 R. 1104). After the dissolution of the marriage, where the children have a vested interest in the provisions, the surviving spouse who is entitled to a liferent can—if the liferent is not alimentary and the terms of the contract do not show an intention that the trust should be continued to secure the liferent of the surviving spouse, or for other purposes—renounce his or her liferent, with the result that the children of the marriage, who have the fee, are in a position at once to call upon the trustees for a conveyance (*Pretty*, 1854, 16 D. 667; per Ld. Watson in *Muirhead*, 17 R. (H. L.) 45, at 48; *M'Murdo's Trs.*, 1897, 24 R. 458; see *supra*, p. 101). Where, however,

under the marriage contract, there are ulterior trust purposes to be served, as provisions applying to grandchildren (as in *M'Donald*, 1893, 20 R. (H. L.) 88), the trust must be continued for their protection and security; but the words "issue of the marriage," as used in an ordinary marriage contract, apply exclusively to the children, and do not include grandchildren (*M'Murdo's Trs.*, 1897, 24 R. 458; see further *supra*, pp. 101 *et seq.*).

D. *Postponed Vesting under Marriage Contracts*—Although the dissolution of the marriage is the natural and presumable period of vesting in the case of provisions under a marriage contract, that presumption yields to the special terms of the deed. The contingencies and considerations which have the effect of postponing vesting under a marriage contract until a date after the dissolution of the marriage are the same as those which, in a testamentary disposition, have the effect of postponing vesting to a period subsequent to the testator's death (*vide supra*, pp. 81 *et seq.*).

Rights of Children to Provisions in Questions with Creditors of Parent.—A. *Where Children have a Vested Fee.*—Where the fee of the provision is vested in the children at the date of the delivery of the deed (see cases at p. 106), or where the children take a vested interest in specified property at their birth, perfected by diligence or sasine, the parent having till then a merely fiduciary fee (pp. 107 *et seq.*) (as to the position in this case of a child whose right is not perfected by sasine, see *infra*, p. 116), or where trustees hold the property for the children in fee (*supra*, at pp. 109 *et seq.*), the parent is really divested of the fee, and the children's right is not merely a personal claim against the father's estate, but a real right which gives the children a preference against the creditors of the father. Owing to the onerous nature of an obligation in favour of children in a marriage contract, if a father afterwards conveys property to the children, in any of the modes mentioned, *e.g.* by recorded heritable bond or intimated assignation or delivered policy of insurance, in fulfilment of his marriage-contract obligation, the security will be as valid and effectual to give the children a preference against creditors as if it had formed part of the contract (*Falconer*, 1825, 3 S. 455 (N. E. 317); *Young*, 1835, 14 S. 85). Where the father is divested of the fee, it does not matter whether the children are to come into the actual beneficial enjoyment of their provisions at a time which may happen during their father's life, as at majority or marriage, or whether their beneficial enjoyment is postponed to a period which cannot happen until after the father's death. The only question which concerns them is whether the father was solvent at the date when the conveyance was made. If the father was solvent at that date, their right is absolute. (As to position where father is proved insolvent at date of conveyance, see *Morrice*, 1846, 8 D. 918; *Wood*, 1850, 12 D. 963.)

B. *Where Provisions have not Vested.*—Provisions by one of the spouses, or by the parent of one of the spouses, in favour of the other spouse and the children of the marriage are contractual and onerous, and thus are in a wholly different position from destinations to strangers and remoter heirs, which latter, being merely gratuitous, create no obligation against the granter and his heirs, and may therefore be defeated at the granter's pleasure. Further, it is now settled that where the destination in a contract is "to the children of the marriage and the issue of such children," the principle of onerosity extends to the provisions in favour of grandchildren, so that the grandchildren are in the same favoured position as children (*Macdonald*, 1893, 20 R. (H. L.) 88, see per Ld. Watson at 94). It is no exception to the rule that destinations in marriage contracts to others than children or grandchildren are gratuitous and revocable, that (as in *Mackie's Trs.*, 1884, 11

R. (H. L.) 10) children of the wife by a former marriage may acquire under a marriage contract, in the form of a *de præsenti* conveyance of certain specified estate executed by their mother prior to her second marriage, an indefeasible and absolute right, or that (as in *Ferguson's Curator Bonis*, 1893, 20 R. 835; *Kinsman*, 1687, M. 12980; *Yorkston*, 1693, M. 12981) eventual rights granted under a marriage contract to the next of kin of the spouses respectively, being *pars contractus, i.e.* matter of mutual contract between the spouses, should be irrevocable by either without the consent of the other. Moreover, a voluntary deed executed by a spouse before marriage, if adopted in a marriage contract, is as onerous and contractual as if it were part of the marriage contract (*Williamson*, 1890, 17 R. 927).

The contractual and onerous nature of the provisions for children in a marriage contract is so far effectual that, even where the terms of the destination are such as to leave the fee of the children's provisions in the father, the children's rights are more or less protected. This protection may amount (1) to a *jus crediti* in the children, in virtue of which they are, as onerous creditors, entitled to use diligence or to compete with the creditors of their father; or (2) to a *spes successionis in obligatione*, in virtue of which they are, though merely heirs *quoad* their father's creditors, creditors *quoad* the father, with the result that their rights cannot be defeated by their father's gratuitous deeds. "When a 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 parent cannot, by any gratuitous deed, create rights which will impair or defeat his *spes*" (per Ld. Watson in *Macdonald*, 1893, 20 R. (H. L.) 88, at 93).

(*a*) *Cases in which Wife and Children have a Jus crediti in Provisions.*—The onerosity of marriage-contract provisions results, as regards a provision granted by one of the spouses for the other, in the rule that a simple unilateral obligation in a marriage contract in favour of the wife gives her a *jus crediti*, which entitles her to rank with other creditors of the husband, so that in the event of her husband's bankruptcy, she may rank on his estate for the value of her provision as a contingent claim. On the other hand, an obligation by a father in a marriage contract to provide for children does not confer on the children a *jus crediti*, so as to entitle them to use diligence or to compete with the creditors of their father, unless the date at which the provision is payable may arrive before the death of the father, by whom it is undertaken, as, for example, at the dissolution of the marriage, or on the majority or marriage of the child (*Cruikshank's Trs.*, 1853, 16 D. 7; *Jolly*, 1824, 2 S. 730 (N. E. 611)); or unless the provision is made to bear interest from a date which may occur before the death of the granter, such as the marriage or majority of the children (*Mackenzie of Redcastle's Crs.*, M. 12924; 1795, 3 Pat. 409; *Bushby*, 1825, 4 S. 110; *Herries, Farquhar, & Co.*, 1838, 16 S. 948; *Goddard*, 1844, 6 D. 1018).

The principle is that if the obligation by a father in favour of children is so conceived that it cannot be made effectual by the children against the father himself during his life, it is not reasonable that it should be capable of being enforced by the children in a question with the father's creditors. The principle applies equally whether the provision is heritable or moveable.

In other words, the right of the heir of a marriage under a marriage contract destinative of heritage is determined by the same considerations as the right of children in relation to provisions of moveable funds. Unless the father binds himself to infeft the son at a period which may happen in his own lifetime (as in *Douglas*, 1724, M. 12910), the right of the son is postponed to that of creditors, and, as regards the father, is only effectual to bar gratuitous alienations (*Cunningham*, 1804, M. 13026; *M'Neil*, 1826, 4 S. 393 (N. E. 396)).

Special circumstances may, indeed, take a case out of the general rule, and confer a *jus crediti*, even though the provision is not payable during the parent's life. Thus where a father in his daughter's marriage contract bound himself and his executors to pay to his daughter a certain sum after his death, the sum to be lent on heritable bond taken to the daughter and her husband in liferent allenarly and the issue of the marriage in fee, and the daughter in consideration thereof renounced her legitim, it was held that this obligation, though not prestable till after the father's death, constituted a *jus crediti* in a question with the father's creditors so as to entitle the daughter and her children to rank on his sequestrated estate (*Gordon*, 1833, 11 S. 368).

Where the conveyance is such as to restrict the parent's right to a mere fiduciary fee and vest the beneficial fee in the heir on his birth, but the heir's right is not perfected by sasine, the conveyance is nevertheless effectual to give the heir a personal right of fee which is equivalent to a *jus crediti*, in virtue of which he can rank *pari passu* with the father's creditors (*Falconer*, 1824, 2 S. 633; 1825, 3 S. 455; 4 S. 322).

The principles which are applied to determine whether children's provisions constitute a *jus crediti* in a question with creditors, or merely a *spes successionis in obligatione* effectual to protect the children against the father's gratuitous deeds, but ineffectual against his creditors, are stated by Ld. Moncreiff in a passage frequently recognised as authoritative:—"(1) I understand the rule of 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 till after the father's death, and does not bear interest from any earlier term, and where no actual benefit or interest can be claimed or taken in his lifetime, there is no *jus crediti* vested in the children as against onerous creditors. In respect of the father and his heirs, they are no doubt creditors; but in respect of his creditors, they are merely heirs, having no more than a *spes successionis*. (3) It is also 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" (per Ld. Moncreiff in *Goddard*, 1844, 6 D. 1018, at 1023). In *Goddard* (*supra*) a father in an antenuptial

marriage contract bound himself and his heirs, as a provision for the issue of the intended marriage, to pay and secure to the issue of the marriage existing at the dissolution thereof and to their heirs or assignees, a certain sum payable twelve months after his decease. It was held that, as the time of payment could not occur till after the father's death,—the reference to the dissolution of the marriage being merely for the purpose of designating the children who were to take an interest in the provisions,—the children were not creditors of the estate of their deceased father, so as to entitle them to compete with his onerous creditors (cf. *Browning*, 1837, 15 S. 999).

(*b*) *Cases in which Children's Right to Provision is a* Spes successionis in obligatione: *Effects of such a Right.*—Where, for some of the reasons explained in the preceding paragraph, the children's right falls short of a *jus crediti*, the children are still in the position of creditors of their father, with the result that their provisions cannot be defeated by the father's gratuitous deeds. Such a right is described as a *spes successionis in obligatione*, *i.e.* it is a right of succession, which, being onerous, is so far protected. If, for example, heritable property is settled in consideration of marriage by a destination in favour of the husband and the heirs-male of the marriage, whom failing to the heirs-male of the husband's body by any subsequent marriage, the husband is undivested fiar, and the heirs-male of the intended marriage have merely a *spes successionis*, which is ineffectual against the father's onerous creditors (*Cunningham*, 17 January 1804, F. C.). Nevertheless, as regards the father himself the right is a *spes successionis in obligatione*, and so cannot be defeated by the father for gratuitous considerations (*Graham*, 1743, M. 13010; *Ewen*, 1825, 2 S. 612). If the father sells the estate, he is not bound to reinvest the price (*Cunningham*, *supra*), but the heir-male of the marriage, on the father's death, in a question with heirs, is a creditor for the price actually obtained for it (*Earl of Wemyss*, 28 February 1815, F. C.; affd. 1819, 6 Pat. App. 390). The distinction between a *spes successionis in obligatione* and a *spes successionis in destinatione* is illustrated by the different position of the heirs-male of the first marriage and the heirs-male of a second marriage respectively in the case taken; for though the heirs-male of the second marriage will succeed to the estate on the failure of heirs-male of the first marriage if the destination is unaltered, their right, being merely a *spes successionis in destinatione*, may be defeated by the father gratuitously as well as onerously (*Reid*, 1827, 6 S. 198; *Craigie*, 1837, 15 S. 1157; cf. Bankt. i. 5. 15; Ersk. iii. 8. 39; *Lang*, 1867, 5 M. 789; *MacLeod*, 1841, 3 D. 1288; affd. 5 Bell's App. 210).

The principle of protected succession applies equally to moveable property. Thus in *Arthur & Seymour* (1870, 8 M. 928) a husband by antenuptial marriage contract bound himself to settle and secure one-half of his whole estate to himself in liferent, and the children of the marriage in fee. He never made any settlement in fulfilment of this obligation. The Court held that the husband remained during his life, whether he survived the dissolution of the marriage or not, absolute owner of the whole estate, with the same power of use and disposal that any owner of property has, subject only to the condition that he could not defeat or prejudice the children's right of succession by any mere gratuitous alienation *inter vivos* or *mortis causa*. "The right of the children under the provision is not a proper *jus crediti* on the one hand nor a bare hope of succession on the other. It does not make the children creditors of the father during his lifetime, or creditors at all, at any time in competition with his creditors in onerous debts, but makes them creditors against the estate of their father after

his death for performance of the obligation contained in the marriage contract" (*per curiam* in *Arthur & Seymour*, 1870, 8 M. 928, at 931). Similarly, in *Gillon's Trs.*, 1890, 17 R. 435, where a husband by antenuptial marriage contract bound himself to provide and secure his whole estate, real and personal, to the children of the marriage in fee, reserving to himself only a power of apportionment, Ld. Rutherfurd Clark explained that, though the children had a right of succession only, it was a protected right of succession which the father could not defeat by any merely gratuitous alienation, whether by deed *inter vivos* or by testament. Accordingly, as the only deed left by the father affecting his estate was a *mortis causâ* trust disposition and settlement, it was held (1) that this deed could have no effect except in so far as it was a valid exercise of the reserved power of appointment, and (2) that the deed was invalid as an exercise of the power, inasmuch as it conferred benefits on persons who were not objects of the power, and altered the quality of the right taken by two of the objects of the power, by limiting an estate of fee to an estate of liferent (*Gillon's Trs.*, 1890, 17 R. 435; see *præsertim* per Ld. Rutherfurd Clark at p. 441). In several recent cases the question has been raised between a parent and children who have a protected right of succession under a marriage contract, as to how far the children's right was protected against gratuitous deeds of the parent *inter vivos*. (In these cases much necessarily depends on the terms of the contract, see *Buchanan's Trs.*, 1890, 17 R. (H. L.) 53; *Hagart's Trs.*, 1895, 22 R. 625; *Murray*, 1895, 22 R. 927; *Champion*, 1867, 6 M. 17, per Ld. Curriehill at p. 22; *Fenton-Livingstone*, 1899, 36 S. L. R. 580.)

Power of Father in a Second Marriage Contract to encroach on Provisions to Children of First Marriage.—Where a father has by antenuptial marriage contract settled the whole estate of which he might die possessed on the children of the marriage, he is nevertheless at liberty, in view of a second marriage, to make a reasonable provision for the children of that marriage, which will be effectual against the children of the first marriage (Ersk. iii. 8. 42; *Haldane*, 1885, 13 R. 179; *Lowden's Trs.*, 1881, 8 R. 741; *Dalrymple*, 1748, M. 13035, Kilkerran's report). In determining the extent to which the rights of the children of the first marriage may thus be encroached upon, regard must be had to the amount of the father's estate, and to any other provisions which the children of either of the two marriages may have. (On this subject, see *Dykes*, 9 Feb. 1811, F. C.; *Cunningham*, 20 Dec. 1810, F. C.; *Bell's Trs.*, 1846, 9 D. 124; *Cumming*, 1858, 20 D. 1280; *Guthrie*, 1846, 9 D. 124; *Harvie*, 1847, 9 D. 1420; *Wilson's Trs.*, 1856, 18 D. 1096. The result of the authorities seems to be that, though the father's right to encroach on the right of the children of the first marriage for this purpose exists even where these children's right amounts to a *jus crediti*, entitling them to rank *pari passu* with the father's other creditors, it is doubtful whether it exists in cases where the children's right amounts to an actual right of fee, perfected by diligence or sasine so as to confer on them a preference against all posterior deeds of the father, even onerous.) Similarly, a father, who by antenuptial marriage contract has destined his estate to the heir of the marriage, is entitled to subsequently grant reasonable provisions to his wife and younger children in the form of a burden on the heir's estate (*Miller*, 1822, 1 Sh. App. 308; *Dykes*, 9 Feb. 1811, F. C.).

Postnuptial Contract.—A postnuptial contract, so far as the vesting of provisions in the children is concerned, is subject to the same rules of construction as an antenuptial contract. The difference between the effect of a postnuptial and of an antenuptial contract arises in a question with

creditors. "Though a contract is postnuptial, it is not the less a contract intended to subserve the interests of the spouses and the children of an existing marriage. 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 it has. Marriage contracts, whether antenuptial or postnuptial, are entered into for the same purposes and ends, and should have the same legal effect, when the interest of third parties is not involved" (per Ld. Rutherfurd Clark in *Peddie*, 1891, 18 R. 491, at 495). As to the differences between the effects of antenuptial and postnuptial contracts respectively in a question with creditors, see MARRIAGE CONTRACT.

As to vesting under mutual settlements, see REVOCATION; MUTUAL WILLS *s.v.* SUCCESSION (vol. xii. p. 96).

Vexatious Action.—(1) It may be pleaded that an action is vexatious, and such a plea will fall to be considered like any other, but it has no significance beyond the action in which it is pleaded.

(2) If one admitted to the Poor's Roll satisfies the Inner House at the time of his admission that opposition thereto has been "unreasonable or vexatious," he may be allowed the expenses incurred in his application which are not otherwise regarded as expenses of process (A. S., 21st Dec. 1842).

(3) An Act (61 & 62 Vict, c. 35) called the Vexatious Actions (Scotland) Act, 1898, "to prevent vexatious legal proceedings in Scotland," gives the Lord Advocate power to apply to either Division of the Inner House for an order; and "if he satisfies the Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the Court of Session or in any inferior Court, and whether against the same person or against different persons, the Court may order that no legal proceedings shall be instituted by that person in the Court of Session or any other Court unless he obtains the leave of the Lord Ordinary on the Bills in the Court of Session, having satisfied the Lord Ordinary that such legal proceeding is not vexatious, and that there is *primâ facie* ground for such proceeding. A copy of such order shall be published in the *Edinburgh Gazette*."

In the English case *The Attorney-General* v. *Chaffers*, decided in Q. B. Div. Jan. 25, 1897, and reported in 76 L. T. 351, which was an application under the corresponding English "Vexatious Actions Act, 1896," it was held that vexatious actions before the passing of the Act could be founded upon in applying for an order under the Act. In that case a schedule was produced tabulating the nature of the actions, the parties against whom they had been brought, and their results.

Via was one of the recognised rural servitudes in Roman law. It implied a regularly made roadway, and so differed from, and included, the other two servitudes of way, *iter* and *actus* (*Dig.* 8. 3. 1. 7). The minimum width of a *via* was fixed at eight feet where it was straight, and sixteen feet where it turned (*Dig.* 8. 3. 8).

[Ersk. ii. 9. 12; Rankine, *Law of Landownership*, 3rd. ed., at p. 393.]

See ACTUS; ITER.

Vice, Succeeding in the.—Where a person entered into possession in the place of a tenant warned to remove, such entry being made in collusion with the outgoing tenant and without the landlord's consent, a special form of possessory action known as the action of succeed-

ing in the vice was at one time in use (Stair, ii. 9. 45). It has long been obsolete. The tenant's liability was the same "as if he violently possessed, because, in obedience to the warning, he ought to have left the possession void and offered it to the heritor; and he who succeeds in the vice is likewise subjected as an intruder, unless he has a colourable title to protect him" (Bank. i. 10. 149). See EJECTION AND INTRUSION; POSSESSORY ACTION; VIOLENT PROFITS.

Vicennial Prescription.—I. HOLOGRAPH WRITINGS.—The Statute 1669, c. 9, enacts that—

"Holograph missive letters, and holograph bonds, and subscriptions in compt-books without witnesses, not being pursued for within twenty years, shall prescrive in all time thereafter, except the pursuer offer to prove by the defender's oath the verity of the saids holograph bonds and letters and subscriptions in the compt-books. It is always hereby declared that prescriptions shall not run in any of the cases foresaid against minors during the years of their minority."

This Act has not been the subject of much controversy. In the case of the *Bank of Scotland*, 1747, 5 Br. Sup. 748, it was decided that a holograph writing founded on after the lapse of twenty years can prove nothing unless its "verity" be established by the pursuer in the statutory manner. This principle was reasserted in *Mowat*, 1856, 18 D. 1093; and its soundness has not since been questioned. By the "verity" of the holograph writing is understood the genuineness of the whole deed, and not merely of the subscription. But when the pursuer has discharged the onus thrown upon him by the statute, the defender will be obliged to prove the extinction of the obligation established by his oath; and the writing so set up will be extinguished only by the long negative PRESCRIPTION (*q.v.*) (*Muir*, 1695, 4 Br. Sup. 269; *Earl of Leven*, 1715, M. 10991). The prescription runs from the date of the document (*Home*, 1773, M. 10992); and any statement made by the defender as to resting-owing, when the verity of the writing is referred to his oath, will be held extrinsic to the reference (*Grant*, 1705, M. 13235).

The operation of the statute (which, being a privilege of party, must be pleaded: *Wyse*, 1847, 9 D. 1405) will be excluded if an action be raised upon the holograph document within the twenty years, even if it be not produced in process (*Simpson*, 1791, Bell's Oct. Cases, 380), and a plea of compensation proponed within the same period will probably have the same effect (Dickson on *Evidence*, s. 425 (416)). Diligence done upon the document will be as efficacious as action, but mere registration, or the suspension of a threatened charge, will not (*Wright*, 1717, M. 11268). It is not settled what effect payment of interest on the bond or similar *rei interventus* will have upon the prescription (More *apud* Stair, cclxxi).

The oath of the heir will suffice to prove the verity of his ancestor's writing (*Brown*, 1741, M. 9417; *Walkingshaw*, 1737, Elch. "Prescr." 15). As a rule, it must be an oath of knowledge, not of mere belief (but see *Dalziel*, 1784, M. 10994). In terms of the statute, the years of minority are not to be counted in reckoning the prescriptive period. An action raised on a holograph writing would appear not to be affected by the previous clause in the Statute 1669, c. 9, or by the Statute 1685, c. 14 (*Stein*, 1825, 4 S. 107).

II. RETOURS.—A vicennial prescription of retours was established by the Statute 1617, c. 13. See SERVICE.

III. CRIMES.—While there is no statutory or common law rule as to lapse of time exempting an alleged criminal from prosecution, Hume thinks

that there are strong arguments in support of "that equitable rule of the Roman law which gives the accused his *quictus* at the end of twenty years." He mentions that "this humane defence" was sustained, "in respect it does not appear that any sentence of fugitation was passed against the pannel," in the case of *Macgregor*, 1773.

[*Authorities.*—I. Ersk. *Inst.* iii. 7. 26; Bell, *Prin.* ss. 590–592; *Com.* i. 346; Dickson on *Evidence*, ss. 421–432 (412–423); More *apud* Stair, i. cclxx; Napier on *Prescription*, pp. 866, 867; Millar on *Prescription*, pp. 193–195.

II. Bell, *Prin.* s. 2024; More *apud* Stair, i. cclxxi; Napier on *Prescription*, pp. 857–866; Millar on *Prescription*, pp. 189–192.

III. Hume on *Crimes*, ii. 136; *Macdonald*, pp. 279, 280; Napier on *Prescription*, pp. 867–869; Millar on *Prescription*, p. 188.]

View, Proof on.—I. *View by Judge.*—In all cases in which questions of fact as to places are involved, the judge may, if he deem it desirable, visit and view the premises concerned. This procedure is appropriate where the judge is discharging the function of a jury, and is called upon to give his opinion upon evidence. The judicial visitation and inspection of the *locus* must take place before any evidence in the case is led, the purpose being to assist the judge in understanding the evidence afterwards to be led before him, not to enable him to criticise evidence which has been already led; were it otherwise, the judge would practically convert himself into a witness, and expose his mind to the influence of evidence extraneous to that which was legally before him in the case (*Hattie*, 1889, 16 R. 1128). It was held, however, in a criminal case, although in that class of cases the rules of procedure are observed with special stringency, that a merely casual visit by the judge, after evidence had been led, to the *locus* in question, which could not be shown to have had any influence in determining his mind, did not amount to such an irregularity as to justify the setting aside of his decision (*Sime*, 1897, 24 R. (J. C.) 70).

The intention of the judge to visit the *locus* is intimated to both parties or their agents, and the visit generally takes place in their presence, although their attendance is not essential. The Clerk of Court attends the judge, and a man of skill, should the judge think it advisable, may also be present. A record of the visit is drawn up in the form of a minute, which usually merely states that it has taken place.

A judicial view is not intended to supersede testimony, and a final judgment disposing of the case cannot competently be pronounced as a result of the visit alone; where, however, it is in the discretion of the judge to regulate interim possession, he may do so on the strength of his own inspection of the premises. This procedure is not uncommon in the inferior Courts, but is now practically in desuetude in the Court of Session.

[*Authorities.*—Stair, iv. 41. 7. 7; A. S., 10th July 1839, s. 88; M'Glashan's *Sheriff Court Practice*, 4th ed., pp. 274–5; Wilson's *Sheriff Court Practice*, 4th ed., pp. 266–7.]

II. *View by Jury.*—The Act constituting a separate Jury Court in Scotland provided for the jurors viewing the houses, lands, or places which were in question in the issues before them when it appeared proper and necessary that they should do so "in order to their better understanding the evidence" to be led before them at the trial, and this provision is still in force although the old Jury Court has been abolished (55 Geo. III. c. 42, s. 29; 11 Geo. IV. and 1 Will. IV. c. 69, s. 16). The order for a view is

granted by the Court on the application of either party to the Division of the Court of Session to which the cause belongs, by the special interlocutor by which the issues in the case are directed. Notice of motion for a view must be given to the opposite party at least ten days previous to the trial, and served thirty-six hours before the motion is moved in Court (A. S., 16th February 1841, s. 16). The order is granted as a matter of course unless the opposite party object, in which case parties are heard on the question. (See Coldstream's *Procedure in the Court of Session*, 4th ed., p. 65, for form of Notice of Application for a View.)

The Viewers consist of six or more of the jurors named in the jury list or summoned as special jurors, mutually consented to by the parties or their agents; in the event of disagreement, six or more of the first twelve on the list of jurors are selected by the Clerk of Court. A precept is issued to the Sheriff to whom it falls to summon the jury for the trial, requiring him to have the Viewers in attendance at the place in question on a convenient date before the trial, and the matters in question are then and there pointed out to them by two persons appointed by the Court, usually one on the suggestion of each agent, who are known as Showers. The view takes place in the presence of the Sheriff or Sheriff-Substitute, who is required to sign a certificate on the precept that the view has been duly carried out. (For Forms of Rule for a View and Precept to Sheriff, see Russell's *Form of Process before the Jury Court*, Appx. pp. 46 and 80.) The Showers may be examined as witnesses at the subsequent trial. The Viewers, or such of them as appear, are sworn in first upon the jury.

Neither parties nor agents ought to be present at a view, and no discussion is permitted, the purpose of a view being merely "to present to the mind of the jurors the thing in reality, that they may understand the witnesses when they describe it" (*Brown*, 1824, 3 Murray, 444, at p. 448; *Arrott*, 1826, 4 Murray, 149; charge for attendance of law agent and counsel at a view disallowed, *Henderson*, 1821, 2 Murray, 339). The Showers alone ought to speak to the Viewers, and no evidence can be led. The expense of the view is borne equally by both parties in the first instance. Objections on the ground of no view having taken place after an order for a view has been granted, or of jurors on the list other than those specially selected for the purpose having taken part in the view, or of a proper certificate of the view having taken place not being forthcoming will not be sustained or prevent the trial from proceeding.

The Act 59 Geo. III. c. 35, by sec. 35, makes special provision for cases where the *locus* lies in the counties of Sutherland, Caithness, and Orkney (see *M'Kenzie*, 1818, 2 Murray, 11; 1822, 1 Sh. App. 99).

A motion for a view, though still competent, is now rarely made. There is always the danger of an inspection of the *locus* causing prepossessions as to the case to affect the Viewers' minds when they are subsequently serving on the jury, and this danger probably more than counterbalances the assistance which a view may give them in understanding the evidence.

It is only by a formal view that members of the jury can competently inspect the *locus*; and it is highly irregular, and will afford ground for the granting of a new trial, if any of the jurymen visit the *locus* during the trial, so as to make an inquiry into the facts independent of, and necessarily superseding, the inquiry in Court. In such a case the jury cannot be said to return a verdict according to the evidence, on which alone they are entitled to proceed, but are inevitably influenced by impressions made upon their minds by the visit (*Sutherland*, 1888, 15 R. 494). In the case of *Hope*, however (1898, 36 S. L. R. 81), in which a juryman visited the *locus*

during the progress of a right-of-way case, with a view to forming an opinion upon the subject-matter of dispute, a motion for a new trial was refused, on the ground that the impression produced upon the mind of the juryman who visited the road, on the merits of the historical question of the prescriptive possession, was far too remote to approach a cause essential to the justice of the case.

In the English case of *Reg.* v. *Martin*, 1872, L. R. 1 C. C. R. 381, it was held that there was no irregularity in the judge permitting the jury to view the *locus* after the summing up, it being always entirely in the discretion of the Court to allow a view or not, though such precautions as may seem to the Court necessary ought to be taken to secure that the jury shall not improperly receive evidence out of Court.

[*Authorities.*—Bankton, iv. 26. 4; Russell's *Form of Process before the Jury Court*, pp. 40–3; Macfarlane's *Jury Practice*, pp. 97–9; Ivory's *Form of Process*, ii. pp. 351–3; Beveridge's *Forms of Process*, pp. 680–3, 690; Mackay's *Practice of the Court of Session*, ii. p. 44; Mackay's *Manual*, p. 345.]

Vindicatio; Vindicatio rei.—Actions were divided in Roman law into *actiones in rem*, *i.e.* actions about the title to ownership, and *actiones in personam*, *i.e.* actions for the enforcement of obligations. The former class of actions were spoken of as *vindicationes*, as the latter class were called *condictiones*. In this wide sense a *vindicatio* includes not merely an action respecting a right of property in the strict sense, but also an action respecting a right of status (*e.g.*, *vindicatio in ingenuitatem*, *etc.*). The term *vindicatio* is, however, generally used in a narrower sense to signify simply an *actio in rem* by which *dominium* of a corporeal thing is claimed.

[Stair, iv. 3. 43; Bankt. iv. 24. 36.]

See Actions in Roman Law.

Violating Sepulchres.—It is a crime to disinter a body from its last resting-place. It is not necessary, for the commission of the crime, that the body should be removed from grave or mortuary. Any interference with the corpse after it has been buried or finally placed in a mortuary constitutes the *crimen violati sepulchri*. The offence is not regarded as a theft, but as an indecency, and a crime *sucæ naturæ* (*Soutar*, 1882, 5 Coup. 65). Hume points out (i. 85) that in England, if the shroud is carried off with the body, the crime is theft; but the carrying-away of the body itself is not held to be theft either in England or Scotland.

The crime is punished by imprisonment or penal servitude.

[Alison, i. 461; Macdonald, 24, 70.]

Violence.—See Extortion; Robbery; etc.

Violent Profits.—Violent profits are so called because they are such profits as are due by and for the violent or illegal possession of property (Stair, ii. 9. 44). Thus the profits derived from things spulzied from land, in the possession of an intruder against whom an action of ejection, intrusion, or succeeding in the vice has been raised (Stair, iv. 28. 8; iv. 26. 16), or from land or other subjects in the possession of a person duly warned to remove, or against whom an action of ejection has been raised (Ersk. ii. 6. 54), are violent. They are opposed to ordinary profits, such as the rent derived from land in the occupation of a tenant. They could either be sued for in a separate action (Stair, iv. 29), or the

defender in the action of removing, or whatever it was, could be asked to find caution for them before he was allowed to defend (Stat. 1555, c. 39; 1594, c. 221).

In modern practice, questions as to violent profits are only met with in connection with actions of removing and ejection, and in this more restricted sense they are the profits that become due in respect of the tenant's or occupier's possession after he ought to have removed (Ersk. ii. 6. 54).

As to the quantity: by immemorial custom in burghs violent profits amount to the double mail tack duty or rent.

In lands, minerals, or quarries, they are the greatest profit that the landlord can prove he could have made by letting the subjects, or which he could have made if they had been in his own possession, as well as compensation for all the damage which they may suffer at the hands of the wrongful possessor (Stair, ii. 9. 44; Ersk. ii. 6. 54; *Gardner*, 1877, 4 R. 1091).

In order to secure that the landlord shall receive the violent profits, if ultimately found due, it is provided that the defender, in actions of removing and ejection, shall come prepared with a cautioner for violent profits at giving in his defence or answers, unless he instantly verify a defence excluding the action (A. S., 10th July 1839, s. 34). This rule simply states briefly the rule first introduced in the Statute 1555, c. 39. A form of a bond applicable to this matter is given in *Juridical Styles*, ii. 397.

A defence that instantly verifies itself or excludes the action is comparatively rare, and, as a rule, caution must be found in all cases. Thus where the defence was that no warning had been given, caution had to be found (*Johnstone*, 1845, 7 D. 1066; cf. *Robb*, 1859, 21 D. 277; *Cossar*, 1847, 9 D. 617). But as the right to demand caution rests on the fact that the lease is at an end, caution need not necessarily be found in actions founded on an irritancy in a lease, at least not at the first stage of the case (per Ld. Cowan in *Olliver*, 1870, 8 M. 786; cf. *MacKenzie*, 1848, 10 D. 1009). Again, if caution be not found at the proper stage when defences are lodged, the Court will not, except on cause shown, ordain the tenant to find it at a subsequent stage (*King*, 1858, 20 D. 960). When caution is found, the action of removing or ejection proceeds, but decree in it against the tenant or occupier does not of itself render him liable for the violent profits, as liability for them depends on the question whether or not the occupier has been acting in good or bad faith. If he has been acting in bad faith, he will be liable for them, at least from the time when *mala fides* is held to have commenced. But if he has been acting in good faith, he is not liable for more than the rent. This holds even though the landlord actually suffer loss from having to compensate a new tenant owing to the old tenant refusing to flit and remove (*Brisbane*, 1828, 7 S. 65). The rules regulating *bona fides* on the part of a tenant are thus stated: "First, when the possession has commenced in good faith, it lies with the true owner to show when it ceased to be so, before the right to demand violent profits can prevail; secondly, when possession has been continued during a litigation regarding the title of the possessor, it is sufficient to support the possessor's plea of *bona fides* that he had *probabilis causa litigandi*; and third, that the principle is equally applicable whether the possession be challenged in respect of want of title in the possessor's author, or in respect of the nature and conditions of his own right" (per Ld. J.-Cl. in *Houldsworth*, 1876, 3 R. 304).

A tenant, however, who has begun his defence in good faith, may after an adverse decision be put in bad faith, and liable for violent profits after that date (*Carnegy*, 1830, 4 W. & S. 431; cf. *D. Buccleuch*, 1824, 2 S. App. 43; *D. Gordon's Trs.*, 1828, 4 W. & S. 305).

Violent profits, when due, go to the heir, not to the executor of the landlord (Ersk. ii. 6. 48).

Finally, the triennial prescription applies to claims for violent profits (Ersk. iii. 7. 16; Rankine on *Leases*, 508).

Vitiating Deeds.—It is a crime to vitiate a deed with fraudulent intent (*Fraser*, 1857, 3 Irv. 567). No uttering is necessary in the case of vitiation of a deed, as is the case in the crime of forgery. The crime is complete when vitiation takes place. Thus it is criminal fraudulently to increase the amount of a money obligation, as by changing an obligation for £20 into one for £200 by the addition of an 0, or to make an alteration on a material date (*Hutchison*, 1872, 2 Coup. 351). To put a false date in a testing clause is a crime (*Stalker and Cuthbert*, 1844, 2 Broun, 70). To make fraudulent erasures of portions of a deed, or to insert unauthorised provisions in a deed, is criminal. It is a crime to make false entries in business books in order to conceal defalcations (*Gray*, 1827, Syme, 254). It is criminal to vitiate, mutilate, or destroy documents or books in order to suppress evidence (*Murray and Scott*, Bell, *Notes*, 66; *Reids*, 1835, *id.*; *Dunipace*, 1842, 1 Broun, 506; *Rattray*, 1848, Ark. 406; *Malcolm*, 1843, 1 Broun, 620).

[Hume, i. 160; Alison, i. 163; Macdonald, 85.]

Vitious Intromission.—"Every person who intromits without title with the effects of a person deceased is a vitious intromitter according to the legal acceptation of the term" (per Ld. Cowan in *Wilson*, 1865, 3 M. 1060). The moveable property of a deceased person is peculiarly exposed to the risk of unauthorised removal and embezzlement, and the law accordingly requires, in order to the protection of creditors and others having interest, that no person shall intromit with a deceased's personal estate without first obtaining a legal warrant or confirmation authorising such intromission, which is only granted upon the giving up of an inventory of the estate upon oath. An executor duly confirmed enjoys the *beneficium inventarii*, and his liability is limited to the amount of the estate which he has undertaken to administer. On the other hand, any person intromitting with a deceased's moveable estate without first taking out confirmation is penalised by being subjected to a general liability for all the debts of the deceased. He incurs the passive title of a vitious intromitter; and having usurped to himself without authority the representation of the deceased in the assets or part of the assets of his estate, he is compelled to represent him also in the liabilities thereof, whether they exceed the assets or not. He is treated as *eadem persona cum defuncto*, so far as the deceased's moveable debts and obligations are concerned, just as the heir *in mobilibus* used to be under the old law, before his liability was limited to the amount of the estate to which he had succeeded, and of which he had given up an inventory (see *Gray's Trs.*, 1895, 23 R. 199, per Ld. Trayner, p. 207). Unlike the passive titles in heritage, the personal passive title of vitious intromission may be incurred by anyone who intermeddles unauthorisedly with the moveable effects of a deceased person, whether the intromitter be in any way entitled to succeed to the deceased or not. (See *Kerr*, 1839, 1 D. 618; rev. 1842, 1 Bell's App. 280, as to whether a minor can be a vitious intromitter.)

The essential feature of vitious intromission is not so much the presence of fraudulent intentions, which was apparently the earlier view, as the absence of legal title to intromit (*Forbes*, 1823, 2 S. 395). The proof or disproof

of fraud is, however, an important element, which will weigh with the Court in deciding whether the full penalty for vitious intromission shall be exacted (*Adam*, 1854, 16 D. 964; *Wilson*, 1865, 3 M. 1060). The series of reported cases on the subject indicate a tendency towards relaxation of the strict rule, especially where considerations of equity, such as the trifling extent of the intromission or the *bona fides* of the intromitters, are involved, and it may perhaps be said that universal liability would not now be incurred by a vitious intromitter unless fraud were proved, or the circumstances were such that there was "no apology for not having a title." Except in such cases, decree would now probably be given against a vitious intromitter only for restitution to the extent of his intromissions. At the same time, it is the character rather than the amount of the intromission which has to be regarded (*Simpson*, 1854–5, 17 D. 33, 478). Any act clearly indicating an intention to usurp without authority the privileges of an executor, as, for example, opening and removing the contents of the deceased's repositories, or issuing circulars to his debtors demanding payment, are sufficient to affix to the party so acting without warrant the character and penalties of a vitious intromitter. Mere innocent retention, however, of articles belonging to a deceased person, *custodiæ causa*, as where a widow continues in possession of her husband's furniture while steps are being taken for obtaining confirmation, will not infer universal liability (*Urquhart*, 1680, M. 9875; *Thomson*, 1834, 13 S. 143).

Liability under this passive title may be elided by a subsequent confirmation. A certain reasonable amount of time must be given to an executor to obtain his legal title, and in the meantime he may require to take steps for the preservation of the deceased's estate such as would otherwise be sufficient to expose him to liability as a vitious intromitter. An unconfirmed intromitter who is a stranger to the deceased and has no antecedent title to the administration of his estate, must take out confirmation within a year and a day after the deceased's death, in order thereby to purge his former intromission, and he may do so although he has been meantime cited by a creditor of the deceased (*Thomson*, 1629, M. 9869; see, however, Stair, iii. 9. 10; Ersk. iii. 9. 52). On the other hand, an executor-nominate, next of kin, or other person with a similar antecedent title, may purge the vitiosity of his intromissions by confirmation *post litem motam* even after the expiry of more than a year and a day from the deceased's death (*Lindsay*, 1628, M. 9868).

It is a sufficient answer to an action seeking to make a party universally liable as a vitious intromitter for the debts of a deceased person, that another party has been confirmed as executor to the estate before the raising of the suit. The existence of a duly confirmed executor excludes the possibility of the simultaneous existence of a vitious intromitter. The theory is that confirmation vests the deceased's estate entirely in the executor, and that any subsequent intermeddling therewith by an unauthorised third party cannot be a case of vitious intromission, seeing that it is an intromission with what is no longer *in bonis* of the defunct. Even although the unauthorised intromission take place before the confirmation of another party as executor, if the confirmation of the latter precede the raising of an action by a creditor of the deceased against the intromitter, he will apparently escape universal liability (*Douglas*, 1629, M. 9849). The confirmation even of a man of straw is sufficient (*Tenant*, 1626, M. 9866), but not of a mere executor-creditor, his confirmation being a "bare step of diligence" (1696, c. 20). In order to constitute vitious intromission, the goods intermeddled with must be really *in bonis* of the deceased: thus where a deceased died after he had

been put to the horn and had thereby forfeited his moveable estate, a party who had obtained declarator of the gift of his escheat could not be sued as a vitious intromitter with his estate (Stair, iii. 9. 12).

Where intromission by an executor with effects not included by him in the inventory on which he obtained confirmation is proved, such super-intromission, as it is termed, will subject him to universal liability if the super-intromission be prior to the giving up of the inventory, unless the presumption of fraudulent concealment be rebutted. It is not clear whether super-intromission subsequent to confirmation entails the same consequences or only restitution *in valorem*, but this would probably depend upon the special circumstances of each case (*Johnson*, 1616, M. 9848; *Drummond*, 1709, M. 14414; *Gardener*, 1802, M. 9840). It is not necessary to take out confirmation *ad omissa* in order to have a title to sue an executor for super-intromissions (*Kneeland*, 1627, M. 9848; *Smith*, 1880, 7 R. 1013).

The passive title of vitious intromission will not be incurred where the party alleged to have vitiously intromitted can show that he had any colourable title to act as he did, as, for example, a disposition from the deceased, even although the disposition should be subsequently proved to be null (*Bowers*, 1671, M. 2734), or letters of administration taken out in England (*Bell*, 1686, M. 9860), the law being willing to entertain any equitable defence owing to the severity of the penalty. It is also a sufficient defence that the deceased's creditors have approved the proceedings of the intromitter, and accepted a dividend from him (*French*, 1797, Hume, 435). Intromission, without a Scotch confirmation, with moveables abroad belonging to a Scotsman who has died in Scotland, does not render the intromitter universally liable for the deceased's debts, but only accountable *in valorem*, such foreign estate not properly falling within a Scotch confirmation (*Archbishop of Glasgow*, 1683, M. 4449).

The plea of vitious intromission is only competent by way of action to creditors holding the deceased's *inter vivos* obligation, the remedy of legatees or other claimants through the death of the deceased being restricted to a calling of the intromitter to account for his intromissions. The universal liability incurred by a vitious intromitter being of a penal nature, does not transmit against his representatives, who are liable in restitution only (*Cranston*, 1666, M. 10339; *Penman*, 1775, M. 9836). The plea of vitious intromission has, however, been held competent by way of action to an heir of a person deceased, and by way of exception against not only the intromitter himself, but also his representatives, and to be accordingly so far transmissible (*Simpson*, 1854–5, 17 D. 33, 478).

Where there are several vitious intromitters, if only one be sued, decree may be given against him *in solidum*; if more than one are sued, decree is given against them all equally, irrespective of the several amounts of their vitious intromissions (*Wilson*, 1865, 3 M. 1060).

The universal liability of a vitious intromitter only extends to the deceased's moveable debts, and the title of a vitious intromitter to pursue the heir in heritage for relief of heritable debts paid by him was sustained in the case of *Houston* (1715, M. 9863).

The Act 48 Geo. III. c. 149, s. 38, requires all persons who intromit with the moveable estate in Scotland of any person dying after 10th October 1808, to exhibit a full and true inventory thereof before disposing of or distributing any part of such estate, or uplifting any debt due to the

deceased, and at all events within six calendar months of assuming possession or management of such estate, and before confirmation. If other effects belonging to the deceased be subsequently discovered, an additional inventory must be exhibited within two calendar months after such discovery.

The Act 44 Vict. c. 12, s. 40, provides that if any person who ought to exhibit an inventory shall neglect to do so within the period prescribed by law, he shall be liable to pay to the Crown a penalty of double the amount of duty chargeable. The Finance Act of 1894 requires, by sec. 8, subsec. 5, every person accountable for estate duty, and every person whom the Inland Revenue Commissioners believe to have taken possession of or administered any part of the estate of a deceased in respect of which duty is leviable, or of the income of any part of such estate, to give up a statement thereof, if required by the Commissioners; the immediately following subsection imposes a penalty of £100, or double the amount of the estate duty due, on any person wilfully failing to comply with this requirement.

In English law a vitious intromitter is designated an executor *de son tort*, but his liability is restricted to simple restitution. In a recent English test case, the principle of which is equally applicable in Scotland, it was held that a company having its registered office in London which transferred certain of its shares belonging to the estate of a deceased domiciled American to his American executors in the knowledge that these executors had not taken out probate in England, and without requiring them to produce an English probate, thereby constituted themselves executors *de son tort* as regards the deceased's moveable estate, and were liable to pay the probate duty upon the estate so administered by them, and probably also the penalties imposed by the Revenue Acts for neglecting to take out probate (*Att.-Gen.* v. *New York Breweries Co.*, [1898] 1 Q. B. 205).

[*Authorities.*—Stair, iii. 9, with More's *Note*, p. ccclxiv; Ersk. iii. 9. 49–56; cases in Morison's *Dictionary*, pp. 9824–9876; Bell, *Prin.* s. 1921; Bell, *Com.* i. 705, ii. 81; Currie on *Confirmation of Executors*, 2nd ed., p. 190.]

Vitium reale.—The owner of moveable property which has been stolen, or appropriated by some person in whose hands it had been left for custody (but not for sale in course of business), may follow the property and recover possession out of the hands of an innocent third party who has acquired the property from or through the thief for valuable consideration. The property is tainted by the theft. This is *vitium reale* (Bell, *Prin.* s. 527; 1 Bell, *Com.* 281; *Bishop of Caithness*, 1629, M. 9112; *Ramsey*, 1666, M. 9113). The doctrine of "open market" has not been adopted into the law of Scotland. But if property be stolen in England or Ireland and there sold in open market to a Scotsman, the Courts of Scotland will recognise his title (*Armour*, 1882, 9 R. 901). No *vitium reale* attaches to stolen money, bank-notes, or negotiable instruments (*Sturrock*, 1897, 25 S. L. R. 26; *Crawford*, 1749, M. 875; *Scott*, 27th February 1812, F. C.; *London Joint Stock Bank* [1892], A. C. 201).

See Open Market; Negotiable Instruments.

Vivisection.—See Cruelty to Animals.

Voluntary Churches of Scotland.—Under this title are grouped, for convenience, all ecclesiastical bodies other than the two already

treated of in this work, viz. the Established Church of Scotland and the Episcopal Church in Scotland. The definition is, of course, not quite accurate. The Episcopal Church in Scotland (which it excludes), though long the subject of special legislation, is now a Voluntary Church in the eye of the law. So, again, is the Roman Catholic Church, which we include. But this body, though now in the view of law the most ancient of Voluntary Churches in Scotland, has never acquiesced in that description. It claimed jurisdiction over all Scotsmen, certainly over all baptised Scotsmen, whether they were "willing" to be under it or not, and it exacted tithes from them as from its own members. Such claims can of course only be enforced by the alliance and assistance of the State. But the Church of Rome has always maintained that alliance, and the modern Syllabus of 1864, s. 55, has apparently made it a point of faith. It is, therefore, only after explanations that we can group it with Churches which found their authority upon, or derive it through, the consent of their members.[1] And, even so, it will be convenient to deal with the Scottish Church in communion with Rome, in the first place, and separately.

The *Catholic Church* in Scotland was always more closely connected with Rome than some other European branches, and it shared much less than they in the development of Nationalism during the two centuries before the Reformation. Still, it held Provincial Councils, and was sometimes called the Scottish Church. But it is doubtful whether "Haly Kirk," in whose favour so many statutes were passed by successive Stuart kings, meant the national, or the European institute; though it was, of course, only within the bounds of Scotland that these Acts took effect. But we are not to look to any one statute for the compulsory establishment of a Church in Scotland. That was part of the general law of Catholic Europe from A.D. 381, when Theodosius, with the sanction of St. Ambrose, finally overturned the toleration of Constantine. For many centuries in Scotland the penalty for refusing to be a member of the Church had been death, and shortly before the Reformation the same penalty was enacted for arguing against the Pope's authority. In A.D. 1560 all this was reversed. The Parliament of that year adopted a Confession with the clause, that "to kings, princes, rulers, and magistrates, we affirm that, chiefly and most principally, the conservation and purgation of the religion appertains," including the suppressing of both "idolatry and superstition." And accordingly, a week later, it not only annulled previous Catholic legislation and penalties, but abolished the Pope's jurisdiction in Scotland, even over his own co-religionists, and made celebrating the Mass punishable on the third lapse with death. The extreme penalty was scarcely ever exacted; but other persecuting Acts followed, and Catholics were henceforth exposed to endless annoyances and restrictions; their religion (and that of all other Dissenters) being illegal under the general principle laid down in the Act 1579, c. 69. That Act not only "declares and grants jurisdiction to the Kirk," but also "declares that there is no other face of Kirk, nor other face of religion, than is presently, by the favour of God, established within this realm, and that there be no other jurisdiction ecclesiastical acknowledged within this realm." This intolerance put an end for three centuries to the regular succession of Scottish bishops; but Catholics were

[1] The Protestant theory is that the Church is a voluntary society, but not a mere voluntary society. As Gisbert Voetius puts it in his *Politica Ecclesiastica*, it is founded: 1. Ultimately, on the institution of the Church by God (with jurisdiction from Him). 2. Proximately (each Church is founded), on the voluntary consent of its members (contract or *mutuus consensus*).

enabled to cling to papal jurisdiction, even more directly than before, by the administration of Prefects and Vicars-Apostolic. The relief from their civil disabilities, postponed by the attempts of James II. and his family down to 1745, began in last century; and it is now complete, with the exception of a clause, by accident unrepealed, which might still frustrate bequests of real property to monasteries or the regular clergy. And in 1878 the Hierarchy was at last restored by the Pope, whose power, however, over the modern Scottish Church and its bishops is (since the Vatican Decrees) greatly more despotic than that of Paul IV. was in 1560. Indeed, the Letters Apostolic of 1878 expressly take away the "particular privileges and customs" of the ancient Scottish branch, and bring it under the "common and general discipline of the Catholic Church." The statutes abolishing Catholic jurisdiction have never been repealed, but no one doubts that this Church is carried on in Scotland by submission to a jurisdiction more or less parallel to what is found in the Presbyterian and Episcopal bodies, and more ancient. Catholic jurisdiction, indeed, in its full development, added on some startling incidents—such as the claim that certain crimes by ecclesiastics should not be tried by the secular power, and the claim of the Pope to be *arbiter gentium*—incidents which would be absolutely rejected by our law even if it admitted an ecclesiastical jurisdiction founded on contract *inter se* of Scottish Catholics. But hitherto questions of this communion have very rarely come before our Courts at all. For many generations the attempt to raise them there would have been both futile and dangerous; and the habit thus formed has persisted. On the religious side too, the appeal to Rome is now far more controlling than it was in the days of Hildebrand or Cardinal Beaton. And on the secular side, the Scottish property of the Church, understood to have been transmitted through centuries from one trustee to another, at a time when it was unsafe to put upon record any expression of the trust, seems to be now so far regularised in tenure that at least no question is raised when it might be possible to raise it.

The twofold intolerance of the Pre-Reformation and Post-Reformation statutes furnishes the starting-point for the long history of the dealing of the law of Scotland with the *Presbyterian Churches*. Up to last century that law had never been invoked to deal with men outside the Establishment, except (as in the case of the Quakers) in the way of cruel punishment. By that time, however, a special statute had been passed tolerating the Episcopalians (10 Anne, c. 7), and not only Reformed Presbyterians (Cameronians) who had remained outside the Revolution Settlement of 1690, but the first *Secession*, which had left it in 1733, presented the aspect of numerous congregations grouped under an independent Presbyterian government. But the first decision of the Court, so late as the middle of last century, was that not even the congregations could be legally recognised. In the case of *Bristo*, and Adam Gib, their minister (reported by Elchies, "Title to Pursue," under the name *Bryson*, of date 30th June 1752), trustees elected by the congregation sued upon a back-bond, and the only defence was that such a congregation could not authorise a suit. "The Lords found that the pursuers had no legal title to pursue, their constituents being no legal congregation." And on 8th July of the same year "the like was found" in the case of "the Associate Congregation of Eaglesham" (Elchies, *Pollock*). It was twenty years before the principle of these decisions was reversed, in the case of *Wilson* (Mor. 14555), and then only after the Court had struck out the designation of the pursuers as suing "in the name of the Associate Congregation of Dundee, *subject to the Associate*

Synod" (as they erased, so late as 6th July 1809 (*Farquhar*, Fac. Coll.), the designation of "Bishop of the Episcopal Communion in Scotland"). The title to sue was sustained in a quite similar case in 1791, *Allan* (Berean Society), Mor. 14583; and in the same year a much more important step was taken in the case of *Auchincloss* (Hume's *Decisions*, 595). In this case a minister brought an action of damages against the members of the "Associate (Burgher)" Presbytery, which had deposed him for immorality, but, as he alleged, maliciously and by conspiracy. The Ld. Justice-Clerk Braxfield, who was the Ordinary, held it incompetent "to review the proceedings of associate congregations, commonly called Burghers, when sentences are pronounced by them in their ecclesiastical character," and the Court dismissed the action on the ground that it required to be based on malice, which had been alleged, but not relevantly. (In a later case of damages in 1808, *Grieve*, also reported in Hume, 637, "the Lords thought that everything must be laid aside which had passed, judicially in some measure, at the meetings of the congregation, and according to the rules and usages of the Berean Society"; and Ld. Braxfield's judgment of the competency was long after repeated by another Ordinary, Ld. Moncreiff, in the unreported case of *Osborne*, 5th July 1831.) Meantime the existing law on the subject was elaborately discussed in the Aberdeen case of *Dunn*, 13th May 1801 (Mor. *voce* "Society," App. i. p. 10). This case turned, more obviously than some which had preceded, on the disputes and divisions of the Secession; and the Court, now holding unanimously that the spirit of the law gives the Secession "toleration and protection," admitted the necessity of finding some principle of doing justice as between its members. The question here was between the majority of a congregation, claiming their meeting-house against the minister and a minority, whose counter-claim to it was sanctioned by the Synod. The judgment retains somewhat of the old intolerance in the view that the minister "cannot be *allowed* to represent his office as flowing in any shape, or deriving permanency, from the proceedings of what may be called a Synod or other ecclesiastical Court of his sect"; but the general ground on which it was based was that "the Court can enter into no investigation as to the religious grounds of the schism here, and if they did, they must presume the majority to be in the right." The tone of it, however, resembles that of the Roman who said so summarily to the Jews, "If it be a question of words and names and of your law, I will be no judge of such matters"; and both sides of the twofold ground of decision were overthrown in the very next case. This was the great litigation of *Davidson* or *Craigdallie* (Mor. 14584, and F. C. xiv. 481; and in H. of L. Dow, i. 1; Bligh, ii. 529; Paton in Craigie and Stewart's Appeals, vi. 626), an extraordinary case, were it only as having been selected to try the general point "more deliberately," and accordingly lasting more than twenty years (1800–1820). The rubric again broadly raises the question of Church toleration, "*Is it lawful* to bestow property on a seceding congregation, subject to the discipline of a self-constituted, but tolerated, ecclesiastical body?" And the argument that, according to its modern principles, the law must tolerate and recognise not only particular congregations, but also "a voluntary association of a great body of men, possessing unity of sentiment in doctrine and discipline, and subjecting themselves to the control of certain ecclesiastical bodies, whose authority they acknowledge in all spiritual matters," was ultimately successful in the Court of Session, was not questioned when the case went to the House of Lords, and may be said to have been in this case finally settled. What

divided the Court for so many years was the application of this general toleration to the question of Church property, on this occasion a chapel in Perth. By its first judgment the Court of Session declined to look at the superior judicatories in this matter of property, and gave the chapel to the majority (not the numerical, as before, but the pecuniary, majority) of the congregation. But by its second judgment it went the other way, and found that the chapel must be held for persons who had contributed their money, such persons "always forming a congregation of Christians continuing in communion with and subject to the ecclesiastical discipline of a body" including this and other congregations. Both judgments wholly declined to go into the questions of doctrine or discipline which had divided the litigants; and this was the ground on which both were unexpectedly and completely overturned in the House of Lords. Ld. Eldon, on 18th June 1813, pointed out that the monies must have been contributed by men having certain common religious principles or persuasions, and proposing to adhere to them; and that consequently the real question was not which party was the majority, or which party was approved by the superior Synod, but which party retained those *original principles and persuasions*. This judgment has fixed the law ever since; but in the only case which occurred after it during a long series of years, that of *Campbeltown*, 1839 (*Galbraith*, 14 F. 879, and 5 D. 605), the Court held that no case was proved against the "Relief Church" of deviation from essential or fundamental principles, though its persuasions (on Church and State) had largely changed. And in this case one judge, Ld. Meadowbank, elaborately construed Ld. Eldon's judgment as leaving room for proving an "original principle" of a Presbyterian Church by which it may reserve to itself the power of reforming its own persuasions and regulations, and to its regulative body the power of authoritatively determining that they ought to be and shall be changed. Such authority, in Ld. Meadowbank's view (which has not yet been followed), would in law bind the members of the body; and it should even be held as *probatio probata* by the civil Courts (a view which has since been emphatically denied).

But this leisurely development was broken by a sudden crisis on another side, and by the great series of decisions—the most important, perhaps, of the Courts of Scotland since their origin—in which they dealt with the pretensions of the Church of Scotland itself before 1843. With these decisions and definitions, cumulative and solemn as they were (Robertson's *Auchterarder Case*, 2 vols. 1838, with *H. L. Supplement*, 1839; Robertson's *Lethendy* case, 1839; *Strathbogie* cases, 2 D. 585, 3 D. 282, 382; *Second Auchterarder* case, 3 D. 778, and 6 Bell's App. 662; *Culsalmond* case, 4 D. 957; *Stewarton* case, separate volume, 1843; *Strathbogie* Reduction case, 5 D. 909; and *Third Auchterarder* case, 5 D. 1010—this last being the only case of the series not very fully reported, while in it even the opinions of the consulted judges are found only in the Session Papers), we are not here concerned except in so far as the Court held the Church's claims admissible only on the condition of its becoming a Voluntary body. In the *Lethendy* case, the Ld. President, addressing a Presbytery which had obeyed the Assembly against the Court, said: "In the view that you are a branch—and a most numerous and most respectable one—of the universal Church of Christ, you are on the same footing—but on no better footing—with all the other bodies adhering to the Presbyterian form of Church government throughout the country. Taking you in your character as merely members of the Church of Christ, the Synod of Burghers and the Synod of Anti-Burghers, or any other Synod, have the same powers

and privileges as you have; and you have no greater powers than they have." And again, in the more solemn decision of the second *Auchterarder* case: "If these gentlemen wish to maintain the situation of what they call a Christian Church, they would be no better off than the Catholic Church or the Episcopal Church, or the Burghers or Anti-Burghers; but when they come to call themselves the Established Church, the Church of Scotland—what makes the Church of Scotland but the law?" Or, as Ld. Campbell summed it up when the same case was appealed to the House of Lords: "It is only a Voluntary body, such as the Relief or Burgher Church in Scotland, self-founded and self-supported, that can say they will be entirely governed by their own rules." The self-government thus claimed and disallowed was twofold. 1. As to *Legislation*, both a positive and a negative restriction were declared. On the one hand, the inability of the Church to legislate in any important or constitutional matter was ascertained in regard to what were supposed to be the two chief duties of the time, Church expansion and Church union. The Church having by its own authority admitted to its Presbyteries not only the pastors of the two hundred new congregations which it had raised, but also the Original Secession and other ministers who had returned to the Establishment, both acts were disallowed. And on the other hand, the absolute obligation of civil statute, even in matters "strictly ecclesiastical," was declared in the case of Queen Anne's Patronage Act, whose enforcement the Assembly had represented as violating the "fundamental law" of the Church itself—a plea which in the House of Lords the Ld. Chancellor held to be, even if true, "perfectly immaterial," while the five judges who concurred in the leading Opinion in the closing case put it that civil statute "leaves the Church Courts no longer independent and free to act like a voluntary association." 2. As to *Jurisdiction*, the recognition of Parliament as the Church Legislature, though the most important as well as the earliest finding in this great body of law, fell into the background during the prolonged attempt of the Church to defend itself, on the ground of its jurisdiction, against the enforcement of the law so declared. The ordinary findings of the Church Courts in Scotland have always been final and beyond review; and the General Assembly, passing a resolution that this admitted jurisdiction was an "independent jurisdiction," recognised but not granted by the State, urged that, in the meantime, while they negotiated with Parliament, their sentences should not be reversed. The deliberate refusal of the Courts was based in case after case on the ground stated by the Ld. President: "The Church Courts say that they have an independent jurisdiction; but who gave them any jurisdiction? The law, and that alone, gave it; and the law defines what it has so given." The definitions already enounced were accordingly enforced by interdicts and reductions of some Church acts, by decrees upon the Church Courts ordering them to perform others, and finally by findings forbidding Church majorities to vote, and authorising the minorities to do the required Church acts in their place. This of course brought a crisis; and in accordance with the view already indicated in the House of Lords, the Queen's Letter proclaimed that though individuals may renounce the Establishment for themselves, "the union of the Church of Scotland with the State is indissoluble, while the statutes remain unrepealed." The large majorities which had pledged recent General Assemblies to independence, even in view of the loss of establishment, were diminished as the crisis drew near, but a considerable proportion of the Assembly cited to meet on May 18, 1843, left the place of meeting with a protest; and, holding that they now represented the

original Kirk not less but more than formerly, took the name of the Free Church of Scotland. In their Protest, however, they frankly acknowledged that the State was entitled to fix for the future its own conditions of establishment, and that it had now deliberately done so. As to its own future, the Free Church early arranged that its officials should be taken bound, not to all its pleadings or claims, but to its general principle of Church freedom, making provision also in a model Trust Deed for future amalgamation with other bodies and possible change of name. And while in its "Catechism" it protested its right to revise its Confession, it contented itself in the meantime with abjuring the old principles of persecution, and making a slight change in its "formula." From the past of Scottish history, however, the new body welcomed into its constitution all the aspirations after freedom which the Kirk had recorded in past centuries, rejecting, of course, at the same time, the restrictions to which it had often unwillingly submitted. In this it had the full sympathy of the Presbyterian Voluntaries outside, who had all from their origin cherished Church independence to at least the same extent, and had indeed in many cases seceded mainly from a desire to realise it. Their divisions and subdivisions, which had perplexed the Courts early in the century, had now been succeeded by an era of reconciliation and union; and on 13th May 1847 the two largest bodies became one under the name of the United Presbyterian Church. In bulk as well as in their historical relations the Presbyterians outside Establishment now challenged the attention of the law, which had been recently too acutely absorbed in the crisis within.

The first body outside, however, which was dealt with was the Episcopal Church, in the case of *Dunbar* (1849), 11 D. 945, where it was held not only that a bishop of that Church has no jurisdiction even over its members (inasmuch as all jurisdiction flows only from the Crown), but that the office of "Bishop of the Protestant Episcopal Church in Scotland" could not be recognised. It may be true that, as stated already in this work, "*Prorogated* jurisdiction was not disputed in this case to be possible" (*Encycl.* vol. v. p. 63), but its existence has not been formally acknowledged by the Court in this or any other case; and the anxious avoidance in so many ecclesiastical cases of an ecclesiastical word so familiar as jurisdiction has more or less delayed the progress of the law in this region. This came out especially in the *Cardross* case, 1859–1862 (*Macmillan*, 22 D. 290, 23 D. 1314, 24 D. 1282), where a minister was deposed on the spot by the Free Church Assembly for having asked the civil Court for an interdict (which was refused) against their previous sentence upon him for misconduct. He brought an action of reduction of both sentences and for damages: the substantial allegation being that the Assembly had in the first instance judged upon evidence not regularly brought before it. The Assembly pleaded against the reduction that "spiritual acts done in the ordinary course of discipline by a Christian Church, tolerated and protected by law," cannot be reviewed—a ground nearly identical with that since laid down by the Supreme Court of the United States (*Watson*, Wallace's Sup. Court Rep. 679) as the law of that commonwealth. This plea was at once repelled, in accordance with the cases of 1843 and that of 1849; but other pleas that the pursuer had in his contract with his Church "submitted to its authority in spiritual matters as final" were reserved, and the order to "satisfy production" was made easy to the Free Church by explanations from the Bench that the Court would not "repone" their minister, but at the most give damages. This view, that damages are the proper remedy in cases of ecclesiastical wrong, was emphasised by the collapse of the *Cardross* case, which the Court, very

much *proprio motu*, threw out altogether in its fourth year on the ground that the claim of damages included in it was inept, being directed against the unincorporated General Assembly of the Free Church. Ld. Deas dissented, on the ground that in the case of an ecclesiastical wrong a mere reduction is competent; but this view has been finally rejected in the recent case of *Skerret*, 1896 (23 R. 468). It was again laid down there that reduction of the resolutions of Churches and such voluntary associations (in this case the United Presbyterian Church) is a competent form of process, but only "on the way" and "in so far as it may be necessary" to a specified remedy for alleged invasion of patrimonial rights. And Mr. Skerret having merely reserved his claim to damages, and not preferred it in the same action, his reduction was thrown out like the other. (In both these cases, interdict against the Church sentences had been promptly refused.) The chief difference between the two Churches as defenders seemed to be that the United Presbyterian Church took its officials bound, not merely, like the Free Church, to hold its Church sentences as final, but to bring no action even for the civil claims which those sentences bar. In both cases, however, no proof was led, and the pursuer was thrown out, not on his submission to the Church judgment, but on the prior question of the unfortunate form of action. The result is, that even with regard to future actions claiming the proper remedy of damages, numerous important points have not been formally decided (though some have been raised, as by Ld. Kincairney, Ordinary, in the *Skerret* case, and by individual judges in the Inner House). One is, whether submission to the Church arbitration as final does not altogether bar such actions. Another is, whether at least it does not bar claiming damages except upon the averment of "malice" (*Sturrock*, 11 D. 1220; *Edwards*, 12 D. 1134; *Macmillan*, 24 D. 1282; *Lang*, 2 R. 823). A third is, whether the submission of the parties to the authority (and, in their own view, the jurisdiction) of Churches and their Courts does not ordinarily imply (1) the right of such Courts not only to decide on the merits, but also to regulate matters of form and method in arriving at the decision; and (2) the right of such Churches to modify their own doctrine as well as discipline and worship by legislation from time to time. And a fourth may be whether, even if the former points are conceded, it is necessary to go as far in recognising the contract as the Privy Council in 1863 (*Long*, Moore, P. C. R. (N. S.)), where it was held (as in the American leading case of *Watson* already quoted) that "where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, then the decision of such tribunal will be binding" in every ordinary case.

Some of these questions came up more in cases as to disposal of Church property in the event of separation or union, which also were brought into Court during the period after 1843. The two leading cases were Presbyterian. In the *Kirkintilloch* case in 1850 (*Craigie*, 12 D. 523), the Ld. Justice-Clerk Hope elaborately reviewed all the early cases with a view to overthrowing the construction put by Ld. Meadowbank in 1839 on the leading judgment of Ld. Eldon in 1813. The chief principle of that ruling by the House of Lords, it was pointed out, was that in the ordinary case of property held in trust for a congregation, the property belongs to the congregation, and that when it divides, the question is, what were *its* original principles? In such a question it is not necessary to take into account the views, or the changed views, of the body of which the congregation is part; least of all is

the decision of the congregational dispute by that body itself to be taken as *probatio probata* of those principles. And in a case like this (which was the union of the Secession and Relief into the present United Presbyterian Church) the congregation is not bound in law to follow the body with which it is connected into union with another. In this *Kirkintilloch* case, this decision protected the *majority* of a congregation which declined to go into a union, and claimed to retain its congregational property. But its weight has been greatly increased by the unanimous judgment of the Second Division in 1859, that even the minority of a congregation, adhering to its original principles, is in like manner entitled to refuse to follow the body with which it has been connected, and to retain the property against the congregational majority. This was the *Thurso* case (*Couper*, 22 D. 120), in which the minority of an Original Secession congregation claimed its church buildings against the majority both of the congregation and of the body, which as a whole was joining the Free Church. The authority of these two judgments was impaired, in the estimate of Presbyterians, by the additional and perhaps unnecessary opinion, put more emphatically in the former of the two, that in cases of Church union the congregation (or its minority) is entitled to refuse and to claim the property, without proving, or even alleging, that union would involve any change of their original principles. "For separation, when such union is to be entered into, no reasons, in my opinion, need be assigned." The congregation is "not bound even to inquire" into the principles of the Church body outside it, or of the proposed union: "the right to refuse is absolute." The tendency of these findings to bar all reconstruction in Scotland, serious as it was, was not so important to the law as their ignoring of the Presbyterian principle obliging members to unity. For while both judgments went on to show that in point of fact there were differences of principle, or at least differences of previously held tenets or "testimonies," between the bodies proposing to unite, the question was naturally not raised, as it had been in the *Campbeltown* case, how far these testimonies were essential and unchangeable, and how far the fundamental principles of the Church (and of the congregation when originally joining it) bound it to sacrifice doubtful tenets for the sake of truth, and superfluous tenets for the sake of unity. Strictly, indeed, the *Kirkintilloch* and *Thurso* cases relate only to property held in trust exclusively for a congregation, and most of the congregations of the Churches concerned had already, or have now, adopted other "Model Deeds" providing more equitably for cases of separation and union. (For effect given to such a deed, see *Kennedy*, 6 R. 879.) But even with regard to congregational property, the Ld. Justice-Clerk's powerful opinion in the *Kirkintilloch* case probably gives the general Presbyterian "body" too little right and interest, as that of Ld. Meadowbank in the *Campbeltown* case gave it too much. And these two last Presbyterian cases were followed by an Episcopalian one in 1867 (*Forbes*, 4 M. 143, and H. L. 5 M. 36), which makes reference to some of the questions latterly ignored. The ground on which the House of Lords decided against Bishop Forbes was that "the civil Courts cannot entertain questions between the members of non-established Churches and other voluntary associations, regarding alleged violations of the constitutions or rules thereof," in this case by erecting a new Code of Canons, "except in so far as is necessary for determining questions of civil right," which was held to mean present patrimonial interest. But the H. L. judges also pointed out that every such Church must have something in the nature of a legislature, with a power to make changes on canons and constitutions which the Court will respect, reserving,

however, the question whether there are "civil rights already acquired under existing canons or rules."

There have been few cases in the Courts of Scotland dealing with "*Congregationalist*" societies or with isolated congregations. In *Connell* (1861, 23 D. 683) the members of such a body having contributed funds to erect a church, and afterwards having divided and separated, the minority claimed that their subscriptions should be returned. It was held that the majority was entitled to apply the whole fund to the building of the church. In *Thomson*, 1887 (14 R. 1026), it was held that there was no failure of trust objects such as to warrant diverting congregational funds; and in *Burnett* (15 R. 723), that property left to an ancient Episcopal congregation did not pass with most of its members when they joined a Relief (Presbyterian) Church, but should be given to a modern Episcopal Church which had arisen in the same town. Two "Ferguson Bequest" cases were peculiar, in respect that Mr. Ferguson, at his death in 1856, gave his trustees large discretion in selecting from five religious denominations needy congregations and schools to be from year to year subsidised. In the more recent case, *Ferguson Bequest Fund*, 6 Dec. 1898, it was held by the First Division that in using as the name of one of these denominations, "The Congregational or Independent Church in Scotland," the testator must be supposed to have intended the group of (autonomous or independent) congregations usually known collectively by that name at the date of the will, to the exclusion of a group then known as "The Evangelical Union," though this latter body was proved to have been also congregational or independent in its constitution. Accordingly, though the latter body in the year 1892 joined the loose federal "union" of the former group, and so became nominally as well as in fact congregational, it was found to have thereby gained no rights to the Ferguson funds; and those who had broken off from the same congregational group or "union" because they resented the reception into it in 1892 of the Evangelical Union, were found not to have thereby lost their previous interest in the same trust funds. The previous *Ferguson Bequest* case (1879), 6 R. 486, resulted similarly, though it was found impossible to settle it on the same obvious ground. Here the Reformed Presbyterian Church, after enjoying its share of the funds for many years, joined the Free Church by a large majority. A minority remained outside; and each party, maintaining that its action was what the principles of their Church called for, claimed the whole of the Church's share. It was held that both should continue to receive it proportionally. In this case too, a curious preliminary point was settled. It was held that the "contract" of the minority, which, in addition to claims to jurisdiction common to them with other Presbyterians, provided that no member should take the oath of allegiance to a successor of the Stuart kings on the British throne, was not *pactum illicitum* so as not to disentitle it to sue.

Volenti non fit injuria.—See Reparation; Negligence.

Volunteers.—"The volunteers of Great Britain consist of corps raised voluntarily, whose services have been offered to and accepted by Her Majesty" (*Manual of Military Law* (War Office, 1894), p. 283). There are no volunteers in Ireland, and the Honourable Artillery Company of London is regulated by special Royal Warrant (*id.*, p. 283, note (*o*)), though subject to the provisions of the Army Act (44 & 45 Vict. c. 58, s. 190).

The principal Acts regulating the volunteers are: The Volunteer Act, 1863 (26 & 27 Vict. c. 65); the Volunteer Act, 1869 (32 & 33 Vict. c.

81); and the Regulation of the Forces Act, 1881 (44 & 45 Vict. c. 57), which repeals certain portions of the Act 1863 (Schedule).

Part I. of the Act of 1863 deals with *Organisation*. Sec. 2 provides that "It shall be lawful for Her Majesty to accept the services of any persons desiring to be formed under this Act into a volunteer corps, and offering their services to Her Majesty through the Lieutenant of a county." Sec. 3 gives power to the Crown to provide a permanent staff for any volunteer corps. The permanent staff are all subject to the Army Act, and belong to the territorial regiment within whose district the head-quarters of the corps are situate. The officers of the volunteers are commissioned by Her Majesty in the same manner as officers of the regular forces (s. 4, as amended by 34 & 35 Vict. c. 86, s. 6), and rank with officers of the regular forces and the militia as youngest of their rank, and with officers of the yeomanry according to the dates of their commissions (s. 5). The exercise of command by volunteers over the regular forces, and by regular officers over volunteers, is subject to regulations made by Her Majesty from time to time (s. 5; Army Act, 1881 (44 & 45 Vict. c. 58), s. 71). The acceptance of a commission in the volunteers by a member of the House of Commons does not render his seat vacant (s. 5). Every volunteer must take the following oath, prescribed in Schedule 1 of the Act: "I, *A. B.*, do sincerely promise and swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, and that I will faithfully serve Her Majesty in Great Britain for the defence of the same against all her enemies and opposers whatsoever, according to the conditions of my service." The oath may be administered by the Lieutenant of the county, a Deputy Lieutenant or Justice of the Peace, or by an officer of the corps who has already himself taken the oath (s. 6; Sched. (1)).

Sec. 7 provides that "Any volunteer may, except when on actual military service, quit his corps on complying with the following conditions, namely,—

"(1) giving to the commanding officer of his corps fourteen days' notice in writing of his intention to quit the corps:

"(2) delivering up in good order, fair wear and tear only excepted, all arms, clothing, appointments, being public property or property of his corps, issued to him:

"(3) paying all money due or becoming due by him, under the rules of his corps, either before or at the time or by reason of his quitting it."

If any volunteer gives such notice, and the commanding officer refuses to strike him off the muster roll, he may appeal to two Justices of the Peace for the county to which the corps belongs, not being members of the corps, who shall hear and determine the appeal. If satisfied that the regulations have been complied with, they may order the commanding officer to strike such volunteer off the roll of his corps, and their determination shall be binding on all persons. A volunteer taking service in the army or militia is thereby discharged from the volunteer force, but he must deliver up in good order his clothing, arms, and appointments, and pay all money due under the rules of the corps; and on his failing to do so, "he may, under an order from one of Her Majesty's Principal Secretaries of State, if it seems fit, be put under stoppages out of any bounty or pay receivable by him, or both, until the value of such arms, clothing, or appointments not so delivered up, or such money (as the case may be) is fully paid" (s. 8). An annual inspection of every volunteer corps shall be held by a general or field officer of Her Majesty's army (s. 10); and the requisites of efficiency

may be declared from time to time by an Order in Council (s. 11). "Her Majesty may disband or discontinue the services of any volunteer corps, or any part thereof, whenever it seems to Her Majesty expedient to do so" (s. 12). One of Her Majesty's Principal Secretaries of State may make regulations from time to time for the government of the volunteer force (s. 16).

Secs. 17–20, as amended by the Volunteer Act, 1895 (58 & 59 Vict. c. 23), deal with *Actual Military Service* of volunteers. Sec. 17 gives power to Her Majesty, in case of actual or apprehended invasion of any part of the United Kingdom (the occasion being first communicated to Parliament, if Parliament is sitting, or declared in Council and notified by Proclamation, if Parliament is not sitting), to call out the volunteers for actual military service. When so called out, any volunteer not incapacitated by infirmity who refuses to assemble or march according to orders, within Great Britain, shall be deemed a deserter. Sec. 18 provides for the allowances to volunteers when so called out. A sum of two guineas is to be issued to every officer, volunteer, and non-commissioned officer of the permanent staff, to be expended in providing necessaries under the direction of the commanding officer, "and within one month after receipt thereof, an account shall be settled with each such officer, volunteer, and non-commissioned officer, respecting the application thereof, and any unapplied residue thereof shall be paid to him." While so called out, volunteers are entitled to receive pay. On release from actual military service, each officer and man is entitled to payment of one guinea in addition to his pay. Before a volunteer corps is so released, it must be brought back to the county to which it belongs (s. 19). Sec. 20 provides: "An officer of the volunteer force disabled on actual military service shall be entitled to half pay, according to his rank; and the widow of such an officer killed on actual military service shall be entitled to the like pension for life as the widow of an officer of Her Majesty's army. A volunteer or non-commissioned officer of the volunteer permanent staff, disabled on actual military service, shall according to his rank be entitled to the like pension and other benefits, if any, as a soldier of Her Majesty's army."

Part III. provides the regulations as to *Discipline*. The commanding officer of a volunteer corps may discharge from the corps either for disobedience of orders by him while doing any military duty with his corps,—or for neglect of duty, or misconduct by him, as a member of the corps,—or for other sufficient cause, the existence and sufficiency of such causes respectively to be judged of by the commanding officer. The volunteer so discharged must deliver up all arms, clothing, and appointments, being public property or property of the corps, in good order, and pay all money due by him under the rules of the corps. But nothing herein shall prevent Her Majesty from signifying her pleasure in such manner, and giving such directions with respect to any such case of discharge, as to Her Majesty may appear just and proper (s. 21 (1)). If any officer or volunteer, "while under arms or on march or duty with the corps or administrative regiment to which he belongs, or any portion thereof, or while engaged in any military exercise or drill with such corps or regiment, or any portion thereof, or while wearing the clothing or accoutrements of such corps or regiment, and going to or returning from any place of exercise or assembly of such corps or regiment, disobeys any lawful order of any officer under whose command he then is, or is guilty of misconduct, the officer then in command of the corps or regiment, or any superior officer under whose command the corps or regiment then is, may order the offender, if an officer,

into arrest, and if not an officer, into the custody of any volunteer belonging to the corps or regiment, or of any non-commissioned officer of the volunteer permanent staff, but so that the offender be not kept in such arrest or custody longer than during the time of the corps, or regiment, or such portion thereof as aforesaid, then remaining under arms or on march or duty, or assembled, or continuing engaged in any such military exercise or drill, as aforesaid" (s. 21 (2)); *Marks*, [1898] 1 Q. B. 888; *Dews*, 1851, 11 C. B. 434; *Warden*, 1811, 4 Taunt. 67).

The Army Act, 1881 (44 & 45 Vict. c. 58, s. 176), provides for the application of military law in the volunteer force.

"The persons in this section mentioned are persons subject to military law as soldiers, and this Act shall apply, accordingly, to all the persons so specified; that is to say,—

"(8) All non-commissioned officers and men belonging to the volunteer forces of the United Kingdom,—

"(*a*) When they are being trained or exercised with any portion of the regular forces, or with any portion of the militia when subject to military law; and

"(*b*) When they are attached to or otherwise acting as part of or with any regular force; and

"(*c*) When their corps is on actual military service:

Provided that it shall be the duty of the commanding officer of any part of the volunteer force not on actual military service, when he knows that any non-commissioned officer or men belonging to the force are about to enter upon any service which will render them subject to military law, to provide for their being informed that they will become so subject, and for their having an opportunity of abstaining from entering on that service."

Volunteers subject to military law are subject thereto as part of the regular forces (*ib.*, s. 178; see ARMY; *Marks*, [1898] 1 Q. B. 888). "Where an offence under this Act has been committed by any person while subject to military law, such person may be taken into and kept in military custody, and tried and punished for such offence, although he, or the corps or battalion to which he belongs, has ceased to be subject to military law, in like manner as he might have been taken into and kept in military custody, tried or punished, if he or such corps or battalion had continued so subject:

"Provided that when a person has since the commission of an offence ceased to be subject to military law, he shall not be tried for such offence, except in the case of the offence of mutiny, desertion, or fraudulent enlistment, unless his trial commences within three months after he has ceased to be subject to military law; but this section shall not affect the jurisdiction of a civil Court in the case of an offence triable by such Court as well as by court-martial" (s. 158; *Marks, supra*). Sec. 181 (6) provides that dismissal may be awarded to any volunteer, non-commissioned officer or private, when subject to military law, for any offence triable by court-martial or punishable by a commanding officer under the Acts. When a volunteer is tried by court-martial, one member of the Court is, if practicable, to belong to the volunteers (Rules of Procedure, 1893, Rule 20 (B); see *Manual of Military Law*, p. 46). Sec. 181 extends the provisions of the Act with regard to billeting and the impressment of carriages, to volunteers when subject to military law.

Part IV. of the Act 1863 deals with *Rules and Property of Corps*. Officers and volunteers belonging to a volunteer corps may from time to time make rules for the management of the property, finances, and civil affairs of the corps, and may alter or repeal any such rules; but such rules, in

order to have any effect, must be approved by Her Majesty through one of the Principal Secretaries of State. A copy of the rules, certified by the commanding officer, is conclusive evidence of the rules of the corps (s. 24). Sec. 25 provides that "All money subscribed by or to or for the use of a volunteer corps or administrative regiment, and all effects belonging to any such corps or regiment, or lawfully used by it, not being the property of any individual officer or volunteer or non-commissioned officer of the volunteer permanent staff belonging to the corps or regiment, and the exclusive right to sue for and recover current subscriptions, and arrears of subscriptions, and other money due to the corps or regiment, and all lands acquired by the corps or regiment, shall vest in the commanding officer of the corps or regiment for the time being, and his successors in office, with power for him and his successors to sue, to make contracts and conveyances, and to do all other lawful things relating thereto; and any civil or criminal proceeding taken by virtue of the present section by the commanding officer of a corps or regiment shall not be discontinued or abated by his death, resignation, or removal from office, but may be carried on by and in the name of his successor in office" (see also 44 & 45 Vict. c. 57, s. 9). Storehouses must be appointed by the commanding officer for the depositing and safekeeping of arms, ammunition, and other stores supplied at the public expense, and every such storehouse shall be free from all county, parochial, or other local rates and assessments (s. 26; *Pearson*, [1893] 1 Q. B. 389). The Explosives Act, 1875, does not apply to such storehouses (38 & 39 Vict. c. 17, s. 97 (4)). Secs. 27 and 48 provide for the recovery of subscriptions and fines by summary proceedings before the Sheriff or two Justices. Subscriptions and fines, when recovered, shall be applied as part of the general fund of the corps or regiment. This applies to fines inflicted on volunteers under the rules of their corps for not rendering themselves efficient (60 & 61 Vict. c. 47). The value of articles issued to volunteers, which have been wrongfully sold, pawned, damaged, destroyed, or negligently lost, may be recovered in the same way, and a penalty not exceeding £5 may be inflicted for every such offence on prosecution by the commanding officer (s. 28; *Kerswill*, [1895] 1 Q. B. 1; see also 32 & 33 Vict. c. 81, s. 3). The commanding officer of any corps or administrative regiment may appear in any County Court, or before any Justice, Sheriff, or Magistrate, by the adjutant or sergeant-major of such corps or regiment, or any member of the staff of the corps or regiment authorised in writing under the hand of such commanding officer (32 & 33 Vict. c. 81, s. 6). If any person knowingly buys or takes in exchange from any volunteer, or any person acting on his behalf,—or solicits or entices any volunteer to sell,—or knowingly assists or acts for any volunteer in selling,—or has in his possession or keeping, without satisfactorily accounting for,—any arms, clothing, or appointments being public property or property of any volunteer corps or administrative regiment, or any public stores or ammunition issued for the use of any such corps or regiment, he is liable on conviction to a fine of £20 for the first offence, and for the second or any subsequent offence to a similar fine with or without imprisonment for any term not exceeding six months, with or without hard labour (s. 29; and 32 & 33 Vict. c. 81, s. 5). Wilful injury to butts or targets is prohibited by sec. 30. Volunteers are exempt from liability to serve or to provide a substitute in the militia (s. 41). They are also exempt from paying tolls (s. 45). The acquisition of lands for military purposes is provided for by 55 & 56 Vict. c. 43. (See MILITARY LAND ACT, 1892.)

The Uniform Act, 1894, applies to the volunteers (57 & 58 Vict. c. 45, s. 4).

[See *Manual of Military Law* (War Office, 1894).]

See Army; Billeting; Commission; Court-Martial; Desertion; Enlistment; Furlough; Impressment of Carriages; Military Lands Act; Yeomanry.

Vote.—See Ballot; Parliamentary Election, etc.; Meeting; Sequestration; Joint Stock Companies.

Voucher.—See Discharge.

Voyage.—See Marine Insurance; Charter-Party; Deviation.

Wadset.—The wadset—a deed now quite obsolete in practice—was the earliest form devised in the law of Scotland for the conveyance of lands in security of debt. In this form of security the creditor was known as the wadsetter, the debtor as the reverser. The form of a wadset has passed through several stages. Originally a pledge of the lands, it seems to have become at an early period an *ex facie* absolute transfer, through the development of the practice of engrossing the reversion, or right of the debtor to a reconveyance, in a separate deed, instead of in a clause of the original conveyance. In a statute (Act 1469, c. 27) designed to prevent wadsetters from taking advantage of the new form by conveying the lands to third parties, the practice of inserting the reversion in a separate deed is stated to be of recent growth. By the Act the right of reversion is declared to be good against singular successors of the wadsetter; and registration of reversions in the King's Register is enjoined, though not declared to be necessary to their validity. By a later Act (1617, c. 16) the registration of reversions within sixty days of the sasine taken upon them was declared to be necessary, "otherwise the same to make no faith in judgement by way of action or exception or prejudice of a third party who hath acquired a perfect and lawful right to the saids lands and heritages." The result of this Act was to change the form of the wadset. The practice of engrossing the reversion in a separate deed was very generally abandoned, and the wadset became in form a mutual contract, whereby the debtor or reverser disponed the lands under reversion, and the wadsetter declared and consented to the reversion.

Historically, wadsets were distinguished as proper and improper. By a proper wadset the lands were transferred to the creditor, who, in theory at least, entered into possession thereof, and took the fruits or produce by way of interest for his advances. He was therefore not bound to account for the produce, and was not entitled to claim interest, if the lands failed to make any return. The deed, however, contained a clause entitling the creditor to repayment "in case the said B. (the creditor) and his foresaids shall hereafter rather incline to have the said sum of £ repaid to them than to retain this wadset right to the said lands and others, then, and in that case, the said A. (the debtor) binds and obliges himself to make payment to the said B. and his foresaids of the said sum of £ ." By an improper wadset a regular rate of interest was stipulated, and the wadsetter, if he received the produce of the subjects, was bound to account. The Act 1661, c. 62, reduced all such deeds to the character of improper wadsets by providing that proper wadsetters should be bound to relinquish

their possession, on security being found for payment of the annualrent during the non-redemption of the wadset; and also that a wadsetter, if he remained in possession of the lands, was bound to account for all proceeds exceeding six per cent. on the capital sum advanced. When, however, the form of proper wadset was adopted, the creditor was recognised as invested with the property in the lands, and was entitled to vote as a freeholder (Menzies, *Conveyancing*, p. 849; *Mackintosh*, 1878, 8 Macph. 772).

A wadset might be used as a security for debts afterwards incurred. This was effected by a deed known as an eik to the reversion, whereby it was declared that the lands shall remain in wadset until both the old and the new advance were repaid.

A wadset was discharged, if the holding was base, by a deed known as a discharge and renunciation; if the holding was of the reverser's superior, it took the form of a discharge, renunciation, and reconveyance.

[Stair, ii. 10; Ersk. ii. 1. 8; Ross, *Lectures*, vol. i. 4–48; ii. 320–384; *Juridical Styles*, vol. i. (3rd ed.) pp. 274 *seq.* and 638 *seq.*]

Wager.—See Gaming and Betting.

Wages.—See Hiring (vi. 211); Master and Servant (viii. 306); Truck Acts; Arrestment (i. 314).

Waifs and Strays.—According to English law, waifs are stolen moveables which the thief has waived or thrown away in his flight when pursued or in apprehension of pursuit. They are restored to the owner if he at once prosecute the thief, but are otherwise forfeited to the Crown as a penalty for his remissness. Strays, on the other hand, are animals, not *ferœ naturæ*, found wandering without an owner, and are likewise forfeited to the Crown or the Crown's donatory, after certain formalities have been observed, if the true owner does not claim them within a year and a day (Burn's *Justice of the Peace*, 30th ed., *s.v.* "Estrays"; Kerr's Blackstone's *Com.*, 4th ed., i. 270–2).

The Scottish institutional writers, however, do not distinguish waifs or waiths from strays or estrays, and apparently regard these as interchangeable terms. They are chiefly applied to cattle and other domesticated animals of value, including probably swans, which are found straying without anyone in charge of them. The finder of such is under the primary duty of restoring them to their true owner, although it is stated by Hume that concealment of waifs and strays is not a crime (i. 62). If the owner were not known and did not immediately claim his property, proclamation of the finding thereof was made on a market-day at the market cross of the head burgh of the shire, and on three several Sundays at the church of the parish in which the strays were found (Bankt. i. 8. 2, p. 208). If the owner appeared, the stray was delivered to him on payment of the expenses incurred in keeping it; but if, on the expiry of a year and a day after the public notice, the owner had not claimed his property, it was forfeited to the Crown or the Crown's grantee (Stair, i. 7. 3; ii. 1. 5; iii. 3. 27). The Sheriff-Depute of the county was in general the Crown's donatory in that part (see *Napier*, 1749, 3 Pat. 649). Apparently lost goods might be regarded as waifs and be forfeited to the Crown in the same manner as straying cattle, although it has been pointed out that as the keeping of inanimate waifs entails no expense, they ought to be reclaimable by the true owner at any time within the prescriptive period (Bankton, *cit.*, and Ersk. ii. 1. 12).

The foregoing observations may be regarded as applying to a state of the law now obsolete. The custody and disposal of waifs and strays found within burghs are regulated at the present day by the Burgh Police Act, 1892, which applies to all burghs in Scotland except Edinburgh, Glasgow, Dundee, Aberdeen, and Greenock, which have special Police Acts of their own, and to these towns also in so far as they may have adopted the General Act.

Sec. 386 gives the police power to seize and impound any cattle found at large in any street of a burgh without any person in charge thereof, if the owner cannot be readily found, and to detain the same until the owner pays to the commissioners a penalty not exceeding forty shillings, besides the reasonable expenses of impounding and keeping the cattle. The next section provides that if the penalty and expenses be not paid within three days after the impounding, the cattle may be sold, provided seven days' notice of the sale be given to the owner if known, or otherwise by advertisement, and the balance of the price obtained after deduction of expenses is directed to be paid to the owner on demand if claimed within six months of the sale, failing which it is to be applied to the purposes of the Act. Cattle found straying in places not within any burgh should, if the owner be unknown, be advertised, and may thereafter, if not claimed within a reasonable time, be sold under a warrant obtained from a Justice of the Peace or other magistrate, and the proceeds applied in payment of their keep and the expenses of detention. Waifs and strays must not be used or in any way injured by the finder. The English cases of *Morris*, 1866, 13 L. T. N. S. 629, and *Lawrence*, 1868, 18 L. T. N. S. 366, may be referred to as illustrative cases under similar English statutes.

By sec. 390 of the Burgh Police Act, stray dogs are to be detained by the police for five clear days, and thereafter, unless they are claimed and the expenses of detention paid, are to be sold or destroyed. If a stray dog wears a collar with an address thereon, notice of its having been taken possession of is to be forthwith sent to that address.

Lost articles such as the old law would presumably have classed as waif goods must, under sec. 412 of the Burgh Police Act, be reported by the finders, under a penalty for failure, to the chief constable and deposited with him within forty-eight hours. They are then claimable by the true owner on payment of expenses and such reward to the finder as the magistrate may determine. If they are not claimed within six months, they may be awarded to the finder on payment of the expenses of advertising. If neither owner nor finder be subsequently forthcoming, the find, if it consists of money, or the proceeds of the sale thereof if it consists of goods, may be applied to the purposes of the Act.

The right to the possession of inanimate moveables, found under circumstances or in places to which the Burgh Police Act does not apply, is with the finder. Intimation of the find ought, however, in all cases to be given to the local police, and advertisement thereof made in the best manner possible. The true owner may, it is thought, reclaim his property from the finder at any time within the prescriptive period (*Hogg*, 1874, 1 Guthrie's *Select Sheriff Court Cases*, 438). See article on TREASURE TROVE.

Wakening.—An action is said, in legal phraseology, to be "asleep" when no proceedings have been taken in it for a year and day. While an action is in this position, no motion, incidental or other, can be made nor step of any kind taken in the process itself. Further, nothing can be proceeded with which is based upon the existence of the action as a process

before the Court. No inhibition, for example, nor arrestment can be raised upon a sleeping process (Shand, *Practice*, vol. ii. p. 545). "Wakening" is the expression used to describe the preliminary steps which are required to place such action once more in position for further procedure.

Outer House actions in the Court of Session and actions in the Inferior Courts fall asleep. Inner House actions do not do so, and consequently no "wakening" is necessary although no steps have been taken in them for the period of a year and day. The reason given by Erskine (*Inst.* iv. 1. 62) is that the pursuer, by taking his case to the Inner House Roll, has done all in his power to bring it to a decision. Cases remitted to the Outer from the Inner House are, for this purpose, still looked upon as Inner House actions (*Gillies*, 1829, 7 S. 839); so also are summary petitions, although enrolled before the Junior Lord Ordinary (*Wemyss*, 1860, 22 D. 556). Actions when taken to avizandum do not apparently sleep (*Logan*, 1775, Mor. 12171; Mackay, *Manual*, p. 256. See, however, *contra*, Ivory's *Forms of Process*, vol. ii. 59), nor do sequestrations (Bankruptcy (Scotland) Act, 19 & 20 Vict. c. 79, s. 43), nor Exchequer causes (19 & 20 Vict. c. 56, s. 9). With regard to the latter, however, the same section provides that after an interval in proceedings of year and day no such cause shall be moved in by the Lord Ordinary or the Court until the expiration of ten days from the date of written notice being given by the pursuer or defender to the opposite party that the cause is to be further proceeded with. A jury cause does not fall asleep after the issues have been formally adjusted (A. S., 16th Feb. 1841, s. 47).

A process against several defenders, where there are distinct conclusions in the summons, may sleep as to one defender although it is awake as to the rest, and insisting against one does not keep it awake against all (*Earl of Lauderdale*, 1710, Mor. 12170). It is different, however, in the case of competitions, multiplepoindings, rankings and sale (Mackay, *Manual*, p. 256).

The year and day run from the last order of the judge, or last step of procedure (*e.g.* lodging a minute) of the party. In the case of *Her Majesty's Advocate* v. *Heddle*, 1840, 111 D. 264, the year and day expired upon a public holiday, but the process, although enrolled on the preceding day, was held to have fallen asleep, no motion having been made in it within the necessary time.

An action may fall asleep, and consequently may be wakened, at any period while it is in dependence (as to this, note the rules of the law of prescription (Ersk. bk. iv. tit. i. 62; Shand, *Practice*, vol. ii. p. 552); see PRESCRIPTION), *i.e.* at any time between the date of the execution of the summons and the pronouncing of a final interlocutor disposing alike of the merits of the case and of the expenses (*Aitken*, 1 M. 1038; *Alston*, 1887, 15 R. 78). After such final interlocutor the decree may be extracted at any time without the necessity of wakening (even apparently after the prescriptive period—Fountainhall's *Decisions*, vol. i. p. 279, *Bishop of Murray*). If, however, such interlocutor is not really final, and something still remains to be done by one or other of the parties, *e.g.* the making up of a progress of titles, the action may be wakened (*White*, 1709, Mor. 12170). In *Walker*, 1827, 5 S. 224, it appears to have been held incidentally that, in the circumstances of the case, the lapse of forty years after the execution of the summons did not prevent wakening. An opinion is expressed in Mr. Mackay's *Manual*, p. 256, that, as reference to oath is competent at any time before extract, an action, even after final decree, might be wakened for the purpose of making such reference.

If a summons is not called within a year and day, it *ipso facto* falls, and cannot, of course, be wakened.

A process in the Court of Session might formerly be wakened in either of two ways: (1) by a joint minute of consent of parties, (2) by summons of wakening. In the former case a joint minute was lodged craving the judge to waken the cause, and he pronounced the necessary interlocutor. Where the parties did not concur, it was formerly necessary for the party moving in the cause to raise a summons of wakening. This, however, was rendered unnecessary by the Court of Session Act, 1850 (13 & 14 Vict. c. 36, s. 30), which has in turn been superseded by the Act of 1868 (31 & 32 Vict. c. 100), sec. 95 of which regulates the existing procedure, and is as follows:—

"Where, according to the existing practice, a cause would require to be wakened in order to its being proceeded with, it shall be competent for any of the parties to enrol such cause before the Lord Ordinary, and to lodge a minute craving a wakening of the cause; and the Lord Ordinary may thereupon direct intimation of such minute to be made to the known agents of the other parties in the cause, or to such parties themselves, and shall direct intimation to be made in the Minute-Book of the Court of Session; and where said parties have no known agents, or are themselves furth of Scotland, the Lord Ordinary shall also appoint edictal intimation thereof to be made by publication in the Record of Edictal Citations; and on the expiration of eight days from the date of such intimation, or from the latest date thereof, and on a certificate being lodged in process under the hand of the agent of the party applying for the wakening, certifying that he has duly intimated the minute in terms of the Lord Ordinary's interlocutor, the Lord Ordinary may pronounce an Interlocutor holding the cause as wakened, and the same may thereafter be proceeded with as wakened accordingly."

When it is desired at the same time both to waken and transfer a cause, this may be accomplished by a minute of wakening and transference (s. 97). Probably also there may be wakening by procedure on both sides without challenge, but it would be bad practice to rely on such (*Ferrier*, 1833, 11 S. 531).

In the Sheriff Court the procedure is closely analogous. If all the parties to the action consent, a minute to that effect is subscribed by the parties' agents on the interlocutor sheet, and thereupon the Sheriff pronounces an interlocutor wakening the cause. Where such consent cannot be obtained, procedure is by minute, as in the Court of Session (The Sheriff Courts (Scotland) Act, 1876, 39 & 40 Vict. c. 70, s. 49).

[Erskine, *Institutes*, iv. 1. 62; Shand, *Practice of Court of Session*, vol. ii. p. 545; Mackay, *Manual of Practice*, p. 255; Dove Wilson, *Sheriff Court Practice*, p. 283.]

War is a relation between States or communities of men organised as States, in which all peaceful intercourse is suspended, and acts of hostility by the public forces of such States or communities, according to certain rules, become lawful. "Lawful" implies that the acts in question are approved of or at least tolerated by the parties immediately concerned, as well as by public opinion outside. A state of war does not necessarily imply active hostilities, *e.g.* during a truce.

2. *Definition.*—Field (*Code*, s. 704) defines war as "a hostile contest at arms between two or more nations or communities claiming sovereign rights." The definitions discussed by Twiss (*Law of Nations* (*War*), 43)

all imply that war is a quasi-judicial process, like trial by combat. And the theoretical views of Grotius (*De J. B. et P.* I. iii. 1), who treats public and private wars as *species* of one *genus*, are logically explained by early European practice (Merlin, *Rép. de Jur., s.v.* "Guerre").

3. The classifications of wars (Halleck (Baker's 3rd ed.), i. 501) are irrelevant. The legal aspects of war are the same, whether States are fighting for religion, trade, territory, or honour.

All wars are now public, that is to say, the parties must be States, including "any . . prince, colony, province or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any . . country, colony, province or part of any province or people" (Foreign Enlistment Act, 1870, s. 30).

4. *Belligerent Rights.*—For the purposes of a war a body of insurgents may be recognised by neutral States as belligerents, and so far they may possess some of the characteristics of a State (F. E. Act, *ut supra*).

By the constitution of a State the power of declaring war may be intrusted to a particular body, or may be altogether absent, as in the case of semi-sovereign States; but this does not affect other States, who may, either as belligerents or neutrals, consider that a state of war in point of fact exists, and act accordingly. (See below as to date of commencement of war.)

5. In Great Britain, the power of declaring war is part of the prerogative of the Crown; but Parliament may stop a war by refusing to vote supplies (Blackstone, Christian's ed., i. 257). The Courts will take judicial notice that war exists (*R.* v. *De Berenger*, 3 M. & S. 67).

6. All persons who commit acts of hostility without public authority are pirates and filibusterers; and the preparing or fitting out of naval or military expeditions, as well as the building and equipping of ships for service with belligerents, while Great Britain is neutral, is a punishable offence. (See PIRACY; FOREIGN, and cases there cited; FOREIGN ENLISTMENT; ADMIRALTY.)

The levying of war against the Queen is high treason (Stephen's *Digest*, 43; Macdonald, *Crim. Law*, 228).

7. While States are technically at peace, certain measures of a hostile nature may be adopted for the settlement of disputes,—the chief of these are: (i.) Retorsion, (ii.) Reprisals, and (iii.) Pacific Blockade. Retorsion consists in treating the subjects of the offending State as nearly as possible in the same way as this State treats the subjects of the complaining State, *e.g.* by imposing hostile tariffs. Reprisals "consist in the seizure and confiscation of property belonging to the offending State or its subjects by way of compensation in value for the wrong" alleged to be committed; "or in seizure of property, or acts of violence directed against individuals with the object of compelling the State to grant redress; or, finally, in the suspension of the operation of treaties" (Hall, *Int. Law*, 381). Embargo (*q.v.*) is the most common form of reprisals. War includes general reprisals.

8. Pacific Blockade is a recent invention, dating from the blockade of the coast of Greece in 1827. It is useful as a means of bringing pressure by means of blockade to bear on a small or weak State, which has maritime commerce. The subjects of the State or States instituting the blockade will be bound by the terms of the notice; but the general tendency of opinion seems to be that such blockade does not affect the subjects of third States (Holland, *Studies*, 130, *Annuaire de l'Institut*, 9me ann. p. 300; State Papers, Greece, No. 3 (1886), p. 126, etc.; Wharton's *Digest*, s. 364; *Revue de droit international*, xix. 245, 377; xxix. 474; xxx. 606).

9. Formal declarations of war are not now in use (Maurice, *Hostilities without Declaration of War*), though it is usual to issue manifestoes, of which examples will be found in Hertslet's *Map of Europe by Treaty*; State Papers, Turkey, No. 11 (1897), pp. 190, 203. The definition of a solemn war and the view that a formal declaration is necessary are derived from the Roman law, and particularly the *Jus Feciale* (*q.v.*). Cicero attributed the military success of the Romans to their observance of these scrupulous forms (*De Off.* i. 11); while Polybius states that the Romans generally contrived to throw the odium of attack on their adversaries. An example of pedantic chivalry is given by Polybius (*Hist.* xiii. 3), where he speaks of the ancients having the custom of giving intimation of their intention to fight a battle.

10. *Date of Commencement of War.*—(1) As between belligerents and *à fortiori* as between neutrals, this is conveniently fixed by a formal declaration.

(2) "I think there can be no doubt that war may exist *de facto* so as to affect at least the subjects of the belligerent State, either without a declaration on either side, or before a declaration, or with a unilateral declaration only," per Sir R. Phillimore, in *The Teutonia*, 1871, L. R. 3 A. & E. 409. But the Privy Council added that "this can only be effected by an actual commencement of hostilities" (L. R. 4 P. C. p. 179; Cobbett, *L. C.* pp. 152, 162). In this case war was declared on 19th July 1870; and it was held that the fact of its being imminent justified delay for the purpose of making inquiries. So in *U. S. A.* v. *Pelly* 1899, 15 T. L. R. 166, a neutral was held to be justified in refusing delivery of vessels intended for belligerent purposes after hostilities had commenced, but before formal proclamation.

(3) "A civil war is never solemnly declared: it becomes such by its accidents—the number, power, and organisations of the persons who carry it on" (Black, *Reports, Prize Cases*, ii. p. 666). In regard to the American Civil War, the Court held (*ib.* p. 670): "The proclamation of blockade [by the President] is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorised recourse to such a measure, under the circumstances peculiar to the case."

(4) As a general rule, "if no manifesto is issued, neutral obligations and liabilities will attach as from the time when the neutral has actual notice of the war" (Cobbett, *L. C.* p. 153). In proclamation of a blockade, it is usual to allow a term of grace to neutrals to withdraw from the belligerent territory (Wharton's *Digest*, iii. p. 364; Owen, *Declaration of War*, 110).

(5) But this rule must give way to the exigencies of the right of self-defence; as in the sinking of the *Kow-Shing* transport, a neutral British ship, before the actual declaration of war by Japan against China in July 1894 (Holland, *Studies*, 126; *Law Mag. and Rev.* 21, 109; Takahashi, *Cases*, 24).

(6) The effect of war may be postponed by declaration for a fixed term, to allow the withdrawal of enemy's ships and goods, as in the Russian War (Hazlitt and Roche, *Maritime Warfare*, 12).

11. An enemy or a neutral, as a general rule, is a person domiciled in the territory of the hostile or the neutral State, irrespective of his nationality. Thus a British subject may occupy either of these positions; and his property may be liable to or exempt from capture accordingly. The *animus* and *factum* necessary to constitute domicil may differ in prize cases from that required in cases of succession and private right, *e.g.* preparation to leave a territory might exempt property from capture, but would not change a domicil of succession (*v.* DOMICIL; Wheaton, Boyd's ed., p. 436; Dicey, *Conflict of Laws*, 735; Holland, *Prize Law*, 10; cf. definition of

"enemy" in the Army Act, s. 190 (20)). At the commencement of the Russian War, a period of six weeks was allowed to British subjects to withdraw from Russia (Hazlitt and Roche, *Maritime Warfare*, 12).

12. In modern practice it is usual to allow alien enemies, if otherwise unobjectionable, to remain in the territory of the other belligerent. But each State must be the final judge whether, in its own interests and as a measure of self-defence, it is necessary to expel aliens. This right exists in time of peace, and *à fortiori* in time of war (Wharton, s. 206; *Mil. Law*, 304; State Papers, Franco-German War, No. 1, 1871, p. 10; Turkey, No. 11, 1897, p. 193).

13. The conduct of war by British forces is regulated by the laws or customs of war. These are enforced partly through the articles of war. (See ARMY; NAVY.)

(1) The use of poison or poisoned weapons is absolutely forbidden. So is assassination—the murder of individuals by treachery. The ordinary weapons of destruction are lawful; but by the Declaration of St. Petersburg, dated 11th December 1868, the chief civilised Powers agreed to renounce the use by their forces on land or sea of any explosive projectile of a weight below 400 grammes (a little more than 16 ounces), charged with fulminating or inflammable matter. (As to the Dum-Dum bullet, see *The Times*, 13th June 1899.)

(2) Quarter is given to men who surrender when they become prisoners of war. But it may be necessary in self-defence "to refuse quarter to enemies, who, though wounded, commit acts of hostility" (cf. *Manual of Military Law*, p. 306). Under the Army Act, s. 5, etc., it is an offence to be taken prisoner "through want of due precaution," etc. (As to Postliminy (*q.v.*), see Baker's Halleck, ii. 500. See PRISONER OF WAR.)

(3) Wounded prisoners are tended with care second only to the care taken of the captors' own wounded. By the Geneva Convention of 1864, ambulances, hospitals, and persons employed in connection therewith enjoy the privilege of neutrality (*Mil. Law*, 316, 879).

(4) It is lawful to employ spies: "A spy in a military sense is a person who is found in a district occupied by the enemy collecting, *secretly and in disguise*, information respecting his condition and designs, with the view of communicating such information to the opposing force" (*Mil. Law*, p. 313). If caught, he may be hanged after trial by court-martial (*ib.*; Hall, 559).

(5) Old men, women, and children are protected from outrage. Other non-combatants, if they do not resist, are not exposed to violence. They cannot be required to assist an invader in direct acts of hostility, but they may be compelled, on reasonable payment, to act as guides, drivers, or workmen (*Mil. Law*, 308).

(6) Arms, warlike implements, stores, and moveable property belonging to the State may be taken by an invader. The modern practice is to spare the property of private individuals. But it is usual to make requisitions on the inhabitants of a district for forage, provisions, carriages, or money. These may be made either with or without payment, in the discretion of the general commanding. Contributions of money may be levied in the same way; and authorised pillage may be resorted to in case of last necessity. Property of the enemy taken in battle, or in a camp taken by assault, or in a town pillaged, is booty (see PRIZE). This is the property of the Crown, but is generally distributed by the Court of Admiralty amongst the army engaged in the particular expedition (*Mil. Law*, 310–312; Naval Prize Act, 1864, s. 34; *Banda and Kirwee Booty*, L. R. 1 A. & E. 109).

(7) An invader is said to be in military occupation of a territory

abandoned by the forces of the enemy. The law is imposed by the general in command, for the securing of the safety of his army and maintaining order in the country. It is usual to allow the native tribunals to deal with ordinary crimes committed by the inhabitants; but these Courts and the native law may be superseded if the general considers the step necessary (*Mil. Law*, 315; cf. State Papers Turkey, No. 3, 1898, p. 140, as to tribunals set up by the admirals in Crete. M. Nagao Ariga (*La Guerre sino-japonaise*, pp. 180–195) shows how the Japanese invaders dealt with territories where the local functionaries had fled. He gives texts of proclamations and orders).

(8) Communication between enemies may be made by means of a flag of truce. This can only be legitimately used for the purpose of entering into some arrangement. Firing during a battle does not necessarily cease on the appearance of such a flag, and it is no ground of complaint that the bearer is killed by such firing. The commanders on both sides may conclude armistices or truces, which must be strictly within their powers; a cartel is an agreement for the exchange of prisoners (*Mil. Law*, 316–320).

14. (1) Maritime war differs from land war, principally in the capture of the property (ships and goods) of private individuals at sea. By the Declaration of Paris, Privateering (*q.v.*) was abolished, and neutral goods in enemy's ships, and enemy's goods in neutral ships, were exempted from capture, always excepting Contraband (*q.v.*). Nearly all civilised States except the United States of America and Spain formally acceded to this declaration; but these two States adopted the principles in the conduct of the late war. (*Times*, 22nd April 1898, p. 6; 25th April, p. 5: Proclamations, etc., Washington, 1899.) The modern practice is to commission volunteer navies, or arm and commission merchant ships temporarily, for belligerent purposes.

(2) The capture by a commissioned vessel, and the regular condemnation by a Prize Court, transfers the property in ships and goods (M'Lachlan on *Shipping*, 3rd ed., p. 18, etc. See MARINE INSURANCE, vol. viii. p. 231).

(3) The rules as to transfer of property applied by the Prize Courts differ considerably from those applied in the ordinary Courts. Thus contracts made in time of war for the purpose of laying the risk on a neutral until they are delivered to an enemy are invalid. Goods consigned by or to an enemy are in general liable to capture, unless consigned before the outbreak of war. Transfers of ships or goods from an enemy *in transitu* are ignored (Halleck, ii. 82 *et seq.*). British practice recognises similar laws of foreign States (State Papers, Franco-German War, No. 5 (1871)).

(4) The Naval Prize Act, 1864, s. 38, confers on the Admiralty a right of pre-emption of naval or victualling stores on board foreign ships passing the seas intended for an enemy of Her Majesty.

(5) The Submarine Telegraph Cables Convention, signed at Paris 14th March 1884, reserves in Article XV. the freedom of action of belligerents (State Papers, Commercial, No. 15, 1884; cf. *Annuaire de l'Institut*, 3me et 4me ann. i. pp. 351–394).

(6) It is a matter of dispute whether a belligerent is entitled to bombard open and unprotected coast towns, or hold them to ransom. There is a certain amount of public opinion against the practice, and it was expressly condemned by the Brussels Project (*infra*), but it has occurred in modern warfare, as well as in recent naval manœuvres, and the acts have been theoretically justified. If such acts are committed, the only remedy is reprisals (see above), or, if the injured Power is ultimately victorious, an indemnity in money. The danger is real, because navies and individual commanders, and the nations behind them, may be momentarily carried

away with a gust of passion, when theoretical rules have no restraining force. (Holland, *Studies*, p. 96.)

(7) By Art. 25 of the Berlin Act, 1885, the navigation of the Congo is free in time of war (Hertslet, *Africa*, p. 38). By a Convention of Oct. 29, 1888, provision was made for the free navigation of the Suez Canal. It was agreed that no hostilities should take place therein or in the territorial waters of Egypt even if Turkey were one of the belligerents. The canal was not "neutralised" (State Papers, Egypt, No. 19, 1885; No. 1, 1888; Lawrence, *Int. Law*, 180; *Essays*, ii.). By the Clayton-Bulwer Treaty the proposed Nicaragua Canal was neutralised, in the sense of being put under the joint protection of Great Britain and the United States of America (Wharton, *Digest*, s. 150 f.).

15. British subjects resident in a foreign State, while it is at war with a third State, are "not entitled to any special protection for their property, or to exemption from military contributions to which they will be liable in common with the inhabitants of that place in which they reside, or in which their property may be situated," but they cannot be compelled to serve in the foreign army; they will always be permitted to withdraw from the territory (State Papers, Franco-German War, No 4, 1871; Wharton, *Digest*, s. 202). They may, however, be called upon to serve in the local police.

16. (1) The effect of war is to put an end to all non-hostile intercourse between the subjects of the belligerent States. Existing contracts are extinguished or suspended according to their nature: contracts made during the war are void (Tudor's *L. C. Mercantile*, 523). Thus a contract of co-partnery would be dissolved by war; a new contract would be void. An alien enemy cannot sue or defend in Scottish Courts, but a decree against him is a decree in absence (Mackay, *Practice*, i. 302, 342). It is thought he might take steps in security of his debt, with the view of recovering it after peace was re-established (Bell, *Com.* i. 326; Cobbett, *L. C.* 166).

(2) Trading with the enemy, though generally forbidden, may be permitted by licence, which must be used with perfect good faith, and is strictly construed by the Courts (Bell, *Com.* i. 324; Cobbett, *L. C.* 166–180; Tudor, *L. C. Merc.* 944).

(3) Ransom of prizes taken by an enemy is illegal at common law, but may be permitted under regulations by H.M. in Council (Naval Prize Act, 1864, s. 45; Boyd's Wheaton, 538).

17. (1) The trade of neutrals with blockaded ports, and in contraband goods, is interrupted (see BLOCKADE; CONTRABAND OF WAR; CONTINUOUS VOYAGES).

(2) If Great Britain is neutral during a war between two friendly Powers, certain shipbuilding and other contracts cannot be fulfilled until the termination of the war (*U. S. A.* v. *Pilly, supra*; *The International*, L. R. 3 A. & E. 321; *The Gauntlet*, L. R. 4 P. C. 184). See FOREIGN ENLISTMENT.

(3) Prizes illegally taken during a war in which H.M. is neutral, either within the territorial jurisdiction of H.M. or in violation of British neutrality laws, may, if brought into a Scottish port, be detained and restored on an application to the Court of Session (F. E. Act, 1870, ss. 14 and 30). See ADMIRALTY; FOREIGN ENLISTMENT; PRIZE.

18. Bibliography:—

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Elements of Politics, 2nd ed.; Holland's *Studies in International Law*; T. J. Lawrence, *Essays in International Law*; W. B. Laurence, *Commentaire sur Wheaton*; Oman, *History of the Art of War* (Middle Ages) (in course of publication); State Papers as to the Brussels Conference, Misc., Nos. 1 and 2, 1874; Nos. 1 and 2, 1875. The Project of Declaration will be found at p. 320 of No. 1, 1875. Lorimer, ii. 337; Boyd's Wheaton, p. 541; *Bulletin International des Sociétés de la Croix-Rouge*, Geneva (published quarterly). Report of the Congress now sitting at the Hague (June 1899).

Ward, Casualty of; Ward-holding.—See Superiority.

Warding, Act of.—See Act of Warding.

Ware, Sea.—See Sea; Seashore.

Warehousing.—Under the warehousing system, goods when imported into this country, whether for use at home or for exportation, may be stored in certain warehouses without payment of duty. If the goods are exported, such duty is never paid; if they are passed into the country for home consumption, the duty must be paid before they leave the warehouse. The object of the system is to increase importation and encourage the carrying trade of the country. The system was originally devised by Sir Robert Walpole, and proposed as a general measure of revenue by Dean Tucker. The first statute which dealt with it was 43 Geo. III. c. 132. Under that Act, when goods were bonded in a warehouse the importer had to enter into a bond that the duties would be paid; but the Customs Consolidation Act, 1853, 16 & 17 Vict. c. 107, s. 12, enacted that no bond should be required from the importer, and in lieu thereof various provisions have been made, which have now been consolidated in the Customs Laws Consolidation Act, 1876, 39 & 40 Vict. c. 36.

The Commissioners of the Treasury are empowered to appoint ports and inland bonding places in the United Kingdom as warehousing ports or places for the purposes of the Customs Acts; and the Commissioners of Customs may appoint warehouses in such places, and draw regulations as to the description of goods and manner in which they may be kept, and rent payable, in any of the Queen's warehouses (s. 12). The proprietor or occupier of every warehouse (except existing warehouses of special security, in respect of which security by bond has hitherto been dispensed with), or someone on his behalf, must give security for payment of the full duties on goods to be warehoused at any time, or for their due exportation (s. 13). The distinction between warehouses of special security for goods prohibited to be sold or used in this country, and warehouses of general security for goods not so prohibited, is not specifically repeated in the existing Act. The goods are received into the warehouse by a bill of entry, and after being duly marked and located, they are considered as warehoused, and cannot be moved except under authority of the customs officers. Goods may be removed from one bonded warehouse to another, but the owner or person requiring the removal must give security that the goods will be rewarehoused (ss. 88, 89). Formerly all warehoused goods had to be cleared either for home use or exportation within five years, or else they might then be rewarehoused after examination and payment of duty on any deficiency (ss. 92, 93); but these sections of the Act of 1876 which rendered such clearance within five years necessary have been repealed by the Revenue Act, 1883, 46 & 47 Vict. c. 55, s. 19.

The Act of 1876 contains detailed regulations as to the re-sorting and repacking of bonded goods (ss. 95, 96).

The Spirits Act, 1880, 43 & 44 Vict. c. 24, allows distillers, subject to the approval of the Customs Commissioners, to provide warehouses on their own premises for warehousing spirits, distilled on the same premises, without payment of duty. The Commissioners may also approve excise warehouses for the same purpose, designed for the general accommodation of persons desiring to warehouse spirits. The proprietor or occupier must, as in the case of dock warehouses, find security. The Commissioners, if they think fit, may themselves provide Crown warehouses.

The property in goods lying in a bonded warehouse may be transferred by means of delivery-orders and dock warrants (see DELIVERY-ORDER; DOCK WARRANT). The question as to the legal effect of the transfer of these documents is discussed under Delivery-Order, Document of Title, Factors Acts (*q.v.*). Generally speaking, however, it may be said that, prior to the Factors Acts, the transfer of a delivery-order or dock warrant relating to goods lying in a bonded warehouse did not pass the property in the goods until notice had been given to the keeper of the warehouse (*M'Ewan*, 1847, 9 D. 434; *Melrose*, 1850, 12 D. 665; *Farina*, 1846, 16 M. & W. 119). The law as to the necessity for such notice has, however, probably been altered by the fact that by the Factors Acts, 1889 and 1890, 52 & 53 Vict. c. 45, and 53 & 54 Vict. c. 40, and the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, delivery-orders and dock warrants are expressly stated to be "documents of title," and as such, therefore, affected by the provisions of these Acts.

[See M'Culloch, *Dictionary of Commerce*, under "Warehousing System," "Importation and Exportation"; *Chronological Index to Statutes*, under Customs, 2 (*c*); Excise, 7; Spirits, 3; Tobacco, 2; Wine, 1; Bell, *Prin.* 1368, etc.; Bell, *Commentaries*, i. 194, etc.]

Warrandice is "the obligation of the granter of any conveyance or other deed, that the deed and the right thereby granted shall be good and effectual to the grantee; implying, or expressing, that—in case of reduction of the deed, or of eviction of the subject contained in it, in whole or in part, on account of any fact or deed of the granter or of his predecessors, or any defect in the granter's title, or, it may be, on any ground not attributable to the grantee—the granter shall make good the loss or damage thence arising to the grantee" (Bell, *Lect.* vol. i. p. 214). The obligation may be in its nature either *Real*, when one subject is made available to the grantee in security against eviction from another; or *Personal*, when the obligee has merely a personal claim on eviction. Real warrandice is of comparatively rare occurrence, being implied in only one class of transaction. Personal warrandice is, on the contrary, an ordinary incident of a contract for the transfer of property. The extent of the obligation may, in any case, be defined by the parties by express agreement embodied in their contract. But in the absence of special agreement, the law in every case in which property is transferred under contract implies an obligation of warrandice, which varies, however, with the nature of the contract according to the rules to be explained. Even where the obligation is expressed in words, if it be merely in the general form "I grant warrandice," its extent will fall to be interpreted according to the rules regulating implied warrandice. Accordingly, it is proper in the first instance to consider these.

PERSONAL WARRANDICE is of three kinds.

1st. *Simple Warrandice*, which infers recourse only against loss resulting

from the granter's future voluntary deeds. Simple warrandice is implied in all cases of donation—the granter being understood to give just what he himself has. While it is frequently said that there is no warrandice against mere consenters, Professor Bell suggests that at least in some cases simple warrandice will be implied against them (Bell, *Lect.* 216).

2nd. *Warrandice from Fact and Deed*, which infers recourse upon loss arising from the acts, past or future, of the granter; but not in respect of eviction due to reduction of the granter's title on grounds not personal to himself. This warrandice is generally implied in the case of assignation of a debt, in which case, too, there is a further implied warrandice *debitum subesse, i.e.* that the debt is a valid and subsisting obligation. The solvency of the debtor is, however, not warranted. And it has been held that even where there is a general clause binding the assignor of a debt in *absolute warrandice*, this does not extend to solvency, but merely warrants that the document of debt is valid and not subject to reduction upon any ground (*Barclay*, 1671, Mor. 16591—a judgment of the whole Court,—and *Liddell*, *ibid.* p. 16594). In the case of *Reid* (1879, 6 R. 1007) it was held that in an assignation of a bond by the debtor and cautioners to a nominee of the debtor, the assignor's implied warrandice *debitum subesse* extended not merely to the obligation of the principal debtor but also to that of the cautioners; and, they having turned out to be discharged, the creditor was held liable to repay to his assignee the sum paid by the latter. It is said by Erskine (ii. 3. 25), that when a right with a doubtful title or of doubtful value is conveyed for a compounded sum, or where the cause of granting a deed, though onerous, is *ex facie* not adequate, the warrandice implied is only from facts and deeds done or to be done. In general, this will no doubt be the appropriate warrandice to express; but Professor Bell seems to entertain doubt whether, when not expressed, the restricted warrandice will in such a case be implied (*Lect.* vol. i. p. 216).

3rd. *Absolute Warrandice*, which permits of recourse upon eviction on the ground of any want of right, or defect in title of the granter to convey the subjects, whether due to his own act or deed or to imperfections in his own title. Even absolute warrandice does not, however, protect against every possible ground of eviction; *e.g.* eviction arising from supervenient laws will not ground recourse (Bell, *Prin.* 8915); nor from burdens inherent to the right (*M'Ritchies' Trs.*, 1836, 14 S. 578). And it has been held that a purchaser was not entitled to require the record to be cleared of an old right of real warrandice upon which no action had ever been threatened (*Durham's Trs.*, 1800, Mor. 16641). This decision seems to have turned entirely upon the circumstances of the case, and should not be taken as authority for the proposition that the existence of a modern right of this nature would not warrant a claim on the part of a purchaser (Bell, *Lect.* pp. 218 and 718). For the extent of this claim in different circumstances, and especially in the case of excambion, see Bell, *ibid.*

Absolute warrandice is *implied* in sales for a full price, and in onerous transactions generally. It is also implied in the case of lease (*Middleton*, 1828, 7 S. 76). But in the case of a let by one who was himself lessee of a water right which both granter and grantee should have known to be doubtful, it was held that no claim emerged on the assignee being deprived of the use of the water (*Reid*, 1822, 1 S. 334; N. E. 311).

The warrandice implied in sale of moveables is now regulated by the Sale of Goods Act, 1893, s. 12, which provides (practically affirming the common law rule):—

"*Implied Undertaking as to Title, etc.*—In a contract of sale, unless the

circumstances of the contract are such as to show a different intention, there is—

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

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

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

Express Warrandice.—The warrandice appropriate to any transaction may be freely varied and its terms defined by the express agreement of parties. As already indicated, however, although an express obligation of warrandice be inserted, if it be merely in general terms it will fall to be interpreted according to the foregoing rules. This, however, is subject to the two following exceptions:—(1st) The 8th section of the Titles to Land Consolidation Act, 1868, provides, under reference to the forms of Conveyance of Land in the schedules, that the clause of warrandice in these forms ("I grant warrandice") "shall, *unless specially qualified*, be held to imply absolute warrandice as regards the lands and writs and evidents, and warrandice from fact and deed as regards the rents. (2nd) Under the Registration of Leases Act, 1857, the like words, occurring in an assignation of a lease registered under the Act, have the same import (sec. 20). In the case of assignation of a lease not so registered, the warrandice expressed is usually from fact and deed as regards the landlord's power to grant the lease (which the cedent does not warrant) and absolute warrandice as regards his own title. It rather seems that the practice to this effect is so well established that in the absence of expression such will be the warrandice implied in the case of leases of ordinary duration. Professor Bell, however, inclines to the view that in leases for an extraordinary period there is no reason why the assignor should not be taken to warrant the subjects conveyed as absolutely as in the case of a feu-right (*Lect.* 1208).

Apart, however, from the mere general expression of an obligation of warrandice, the warrandice implied from the nature of the transaction may be varied by expression either in the direction of increased stringency or of relaxation. Thus, even in a gratuitous conveyance, if the granter binds himself in absolute warrandice, his undertaking will receive its full effect. A striking instance of this is found in the case of *Coventry* (1834, 12 S. 895; and see also *Strong*, 1851, 13 D. 548). In the former case, lands having been disponed to a younger son by *mortis causâ* disposition with clause of absolute warrandice, and the whole other estate to the elder son under burden of paying all debts due by the granter at the time of his decease, and the father having subsequently contracted debt partly on the security of the lands conveyed to his younger son, the elder son was found liable to relieve the younger of the whole debt in respect of the clause of absolute warrandice. The modern case of *Stirling Crawford's Tr.* (1886, 14 R. 131; reported also as *Duchess of Montrose*, 1887, 15 R. (H. L.) 19) does not seem to be inconsistent with the principle of *Coventry's* case, although here the Duchess of Montrose, to whom certain lands had been disponed *mortis causâ* with absolute warrandice, was held not entitled to relief of debt charged upon these lands from the heir of the testator;

this being, however, upon the ground that the warrandice was a *personal obligation* ultimately enforceable against the personal representative, who in the particular case was the Duchess herself, as residuary legatee of the personal estate. It must be borne in mind that where lands are conveyed or a registered lease is assigned by gratuitous disposition, the general words "I grant warrandice" will be read under the statutes as if there were an express extension of the warrandice to the effect above stated.

As the obligation may be extended by stipulation, so also it may be restricted, either by substitution of warrandice different in kind, or by the adjection of stipulations qualifying that which would be ordinarily implied. Wherever restriction is of the former kind (as, for example, where, in a transaction ordinarily inferring "absolute" warrandice, the granter grants warrandice "from fact and deed," or "simple" warrandice), this in general points to special agreement, and will by implication exclude the more stringent warrandice appropriate to the transaction, upon the principle of the maxim *expressio facit tacitum cessare* (cf. Bell, *Lect.* 216, and *Craig*, 1732, Mor. 16623; *Ogilvie*, 1715, Mor. 4154).

The following are instances in which it is appropriate in some degree to qualify the ordinary warrandice. In a disposition of lands which are partially feued, it is proper to except existing feu-rights (without prejudice, however, to the grantee challenging these on any ground not inferring warrandice against the granter); and where there are leases, these too may be excepted, although this is perhaps not in strictness necessary. In the case of *Ceres School Board* (1895, 23 R. 279), the exception of existing feu-rights was held to cover only such as had been made real by infeftment at the date of conveyance—the holders of an unfeudalised feu-grant being held not entitled to recognition of it by the defenders whose title contained a warrandice clause so qualified. In the case of mineral leases the clause is commonly qualified to the effect that the existence or quality of the minerals in the lands, or the success of the trials, is not guaranteed, but merely that, if the minerals are there, they are let in terms of the lease (Bell, *Lect.* 1206).

In the case of trustees, or parties acting merely as administrators for others, it is especially necessary to qualify the warrandice. The clause should generally bind the trust or factory estate and the beneficiaries entitled thereto (Craigie, *Her. Rights*, 113) in absolute warrandice, and the trustees, etc., in warrandice from fact and deed only. In the case of *Horsburgh's Tr.* (1886, 14 R. 67) a clause running "I, as trustee foresaid, grant warrandice," was held to bind the trustee personally in warrandice from fact and deed, and it was questioned whether it did not also bind him in absolute warrandice.

Effect of Warrandice.—Personal warrandice is not an obligation to maintain in possession, but merely to recompense upon eviction (cf. *Welsh Russell*, 1894, 21 R. 769, and authorities there cited, especially Ld. M'Laren's opinion). On eviction, however, if it be on a ground covered by the warrandice, and if the grantee has not forfeited his claim as hereinafter explained by neglecting competent defences, he is entitled to full reparation for the damage caused him by the loss of the subjects, including any expense which he may have been put to in defending the action. In the case of a lease, the extent of the claim is the estimated loss and damage to arise to the tenant in respect of the whole term of the lease (*Middleton*, 1828, 7 S. 76). It is sufficient eviction if, although the grantee be not actually extruded from the subjects, they be found to be burdened with a liability which diminishes their value. Thus where the price of teinds

purchased from the Crown was unpaid and remained a burden upon the lands, of which the Crown claimed payment from a purchaser, the seller was, under a clause of absolute warrandice, held bound to relieve the purchaser thereof, although he himself was no party to the decree of sale under which the burden arose (*Brigg's Trs.*, 1851, 14 D. 173). So also where a party having granted a bond over subjects, sold them, while the bond was still unrecorded, to a purchaser for a full price who was ignorant of the existence of the bond. The latter, while uninfeft, resold the subject, granting disposition with absolute warrandice. Before the second purchaser became infeft, the bondholder obtained infeftment, thereby making his security effectual against the lands, out of which he recovered payment. The intermediate purchaser was held bound to relieve his disponee from the loss (*Dewar*, 1780, Mor. 16637). While partial eviction of this sort will found action on the warrandice, it follows from the nature of the obligation that it will not entitle the buyer to rescind the contract—all he is entitled to being indemnity (*Welsh, supra*). The warrandice clause, moreover, merely warrants what is conveyed by the dispositive clause and the assignation of writs for the purpose for which they are assigned, *i.e.* as titles; but not their efficiency for any specific result in law (*Brownlie*, 1878, 5 R. 1076; 1880, 7 R. (H. L.) 66; *e.g.* also *Murray*, 1776, Mor. 16636, where purpose defeated as a nuisance; and Bell, *Prin.* 895). Accordingly, a purchaser having here been called upon to pay a casualty to a subject-superior in subjects which the parties had taken to be held of the Crown, was found not to be entitled to relief under the warrandice. In the case of *Cairns* (1870, 9 M. 284) the question was raised but not decided whether, when the value of a heritable subject at the time of eviction is less than at the time of purchase, the measure of the warrandice is the value at the former or the latter date. The trend of Ld. M'Laren's *dicta* in *Welsh's* case (*supra*) favours the view that the value at the time of eviction is the standard (21 R. 774; but cf. Stair, ii. 3. 46). Where the property is found to be burdened with a servitude, it has been frequently said that where the servitude is light it will not infer recourse (Bell, *Lect.* 218; *Prin.* s. 895, and cases there cited); but in the recent case of *Welsh* (cited *supra*) it was held by the Lord Ordinary (Stormonth Darling) (p. 771), after full argument in which the whole authorities were cited, that there was no sufficient ground for this qualification, and that the purchaser was entitled to relief in respect of the servitude; and although in the Inner House his interlocutor was recalled on other grounds, the judgments do not conflict with his views, but rather the reverse (cf. per Ld. Kinnear, p. 775).

In the case of the *Leith Heritages Co.* (1876, 3 R. 789) it was held that, in considering the claim for damages for breach of warrandice, the Court is entitled to look beyond mere conveyancing technicalities, to what the parties understood and intended. It is doubtful, however, how far this case is reconcilable with the judgment of the House of Lords in the later case of *Lee* (10 R. (H. L.) 91).

Emergence of Claim.—It follows from the nature of warrandice as an obligation to indemnify rather than to protect, that no claim in general arises under it until eviction. This rule, however, is only applicable where the ground of eviction arises from some cause other than the deed of the author. If it is due to his act, an immediate action of recourse will be sustained against him without waiting for eviction (*Smith*, 1672, Mor. 16596; Bell, *Prin.* 895).

So too where the granter disputes liability to relieve, immediate recourse

is competent (*Melville*, 1842, 4 D. 385; *Leith Heritages Co., supra*). In the case of *Christie* (1898, 25 R. 824) it was held by the Second Division, reversing the Sheriff (*diss.* Ld. Moncreiff), that where a purchaser had resold and assigned the first seller's obligation of warrandice, he had still a claim on the seller, and a title to sue him. But it is not very clear whether the judgment rested on his right to found on the obligation which he had assigned, or on some quality implied in the transaction of sale independently of the clause (cf. per Ld. Trayner).

Grantee's Course on Threat of Eviction.—It further follows from the nature of the obligation, that if the grantee, on being threatened with eviction, successfully defends his right, he will not be entitled, in the absence of express stipulation, to be reimbursed the expense of the defence (Bell, *Lect.* 218). If, however, he defends unsuccessfully, then, upon eviction, he is entitled to the expense caused him by his defence; unless, indeed, he omit some clearly competent defence which, if stated, would have been successful, in which case he may entirely forfeit his claim. It is accordingly prudent—even where the grantee is himself defending—that he should give notice to the party liable in relief, so that the latter may, if so advised, take over the burden of the defence. It rather seems that, upon giving such notice, it is not actually incumbent upon the grantee to litigate at all in defence of the right,—at least where it is plainly bad (Stair, ii. 3. 46; Ersk. ii. 3. 32; *Downie*, 31 Jan. 1815, F. C.; 2 Bell, *Illustrations*; cf. per Ld. Kinnear in *Welsh, supra*, p. 775).

(For the personal obligations arising out of undertakings of relief of casualties, burdens, etc., see Feu-Charter and Obligation to Free and Relieve: and for those arising out of defective quality of the subjects, see Sale of Goods; Warranty.)

Real Warrandice.—This differs from that just considered, in respect that the grantee of one set of subjects actually gets these with a conveyance of other subjects in security against eviction from those to which the warrandice applies; and to these he acquires right of entry upon eviction. Real warrandice is only implied in the case of the contract of Excambion (*quod vide*). It may be doubted whether even in excambion it will be effectual against singular successors unless it is expressed and enters the record. It may be, although it seldom is, expressly stipulated for,—one subject being disponed to the purchaser of another in security and real warrandice against eviction therefrom, "so that in case of eviction the said A. shall have immediate access to the said warrandice lands" (see form in *Smith Sligo*, 1885, 12 R. 907). Infeftment is taken in the warrandice lands, the right thereby acquired being merely provisional (Ersk. ii. 3. 28; *Blair*, 1741, Mor. 16624; Elch. "Warrandice," No. 5; Kilkerran, 592; Bell, *Prin.* 894).

Whether the real warrandice be expressed or be implied, as in excambion, it is made effectual upon eviction by a declaratory action upon the conveyance and eviction, concluding for immediate entry to, and payment of the mails and duties from, the warrandice lands.

It is incompetent by real warrandice to secure a grantee against an unascertained loss arising not from eviction but only by way of damage, as, *e.g.*, from mineral workings by the granter or his representatives (*Smith Sligo, supra*).

Authorities.—For fuller treatment, see those referred to in the text, especially Stair, Erskine, and Bell, as cited.

Warranty.—See Sale.

Warrant (in Criminal Cases).—1. Warrant to Arrest.—As a general rule a person suspected of crime may be apprehended only upon a warrant to arrest granted by a magistrate. (As to arrest without a warrant, see Apprehension; also *Peggie* v. *Clark*, 1868, 7 Macph. 89.) A magistrate may issue a warrant to arrest on information of any crime. A baron-bailie has power to grant warrant to apprehend and detain until information as to the charge can be communicated to a higher magistrate (see 20 Geo. II. c. 43).

It is unnecessary, unless required by Act of Parliament (*Blythe*, 1853, 1 Irv. 235), to accompany the request for a warrant with an oath or declaration, although the magistrate may require this. A petition may be presented to the magistrate from whom the warrant is craved, and, when this is done, the charge may be set forth in the petition according to the forms of the Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35, s. 16). Where the diet of a complaint, on which a warrant has been obtained, is deserted *pro loco et tempore*, it is incompetent to issue another warrant on that complaint (*Collins*, 1887, 1 Wh. 482). A proviso in an Act of Parliament that the warrant to apprehend must proceed upon sworn information was held not to apply to a warrant granted at the instance of a procurator-fiscal, there being a clause authorising the public prosecutor to prosecute, without its being said that he must give information on oath (6 Geo. IV. c. 129, ss. 7, 11; *Neil*, 1834, Bell, *Notes*, 120). But where a statute prescribed an oath of verity to be the initial step in criminal proceedings, the fact that such oath had not been administered and taken was held to vitiate subsequent proceedings (2 & 3 Will. IV. c. 65, s. 11; 25 & 26 Vict. c. 114, s. 3; Statute Law Revision Act, 1891, 54 & 55 Vict. c. 67, s. 1; *Trainer*, 1863, 4 Irv. 264; *Logan*, 1864, 4 Irv. 453; *Morris*, 1867, 5 Irv. 559; *Murray*, 1872, 11 Macph. 147; *M'Donald*, 1897, 2 Adam, 457; *Watson*, 1898, 2 Adam, 501).

The warrant should be dated, and, when granted by a justice or justices of the peace, should bear their style, quality, and county, and the place where granted. The crime alleged to have been committed is also usually set forth. The omission of such solemnities, however, will not invalidate a warrant, provided that it is signed by a magistrate and that it contains a fairly accurate designation of the person to be arrested. A warrant issued on an undated petition has been held valid, the relative oath and the warrant being dated (*Crawford*, 1838, 2 Swin. 200). If the petition and oath had no date, this circumstance would vitiate the warrant (*M'Leod*, 1835, 13 Sh. 1153). The signature of one justice of the peace to a warrant is sufficient (*M'Cradie*, 1862, 4 Irv. 176) unless two signatures are required by statute (*M'Leod*, *supra*). The warrant may ordain the officer executing it to bring the offender before the granter of the warrant or before any other magistrate of the bounds. It may be addressed to the proper officers of the granter of the warrant, or to any officer named, or to a private citizen.

If an officer wishes to make an arrest beyond the bounds for which the warrant runs, it must be indorsed by a magistrate of the bounds within which it is proposed to make the arrest. A Sheriff's warrant to arrest may be executed outwith the Sheriff's own county, provided it is executed by an officer of the Court from which it was issued, or by a messenger-at-arms (1 & 2 Vict. c. 119, s. 25). Where the offender is out of Scotland, the warrant must be indorsed by a magistrate of the place where it is to be executed (11 & 12 Vict. c. 42, s. 15; 12 & 13 Vict. c. 69, s. 15). If required, the bearer of the warrant must make oath of verity. In a colony a warrant

must be indorsed by a judge of Her Majesty's Superior Court in the colony (6 & 7 Vict. c. 34, s. 2, as amended by 16 & 17 Vict. c. 118). If the offender has escaped to a foreign country, his arrest can only be accomplished under extradition treaties, or by the goodwill of the foreign State. If an offender is extradited and taken in charge by an officer holding a regular warrant, the accused cannot suspend the proceedings against him on account of alleged irregularities on the part of the foreign authorities before he was handed over (*Sinclair*, 1890, 2 Wh. 481). When an officer is bringing to Scotland a prisoner from abroad, he does not, in passing through England, require to have his warrant indorsed in that country (*Sinclair, supra*).

A warrant which has been indorsed may be executed either by the bearer, or by any officer to whom it was originally directed, or by officers of the place of indorsation (11 & 12 Vict. c. 42, s. 15; 12 & 13 Vict. c. 69, s. 15). Indorsation applies only to warrants for arrest for examination, and not to arrest made for the purpose of having the person arrested bound over to keep the peace, or of having him punished under a sentence already imposed (*Beattie*, 1846, Ark. 14).

When making an arrest, the officer should state the substance of the warrant. He should also show it, if asked to do so, especially if he is only acting as an officer *pro hac vice*, or is beyond his ordinary bounds. He should not break open doors without first having asked and been refused admission.

When a person has been arrested, he is entitled to have intimation sent at once to a law agent that he has been arrested, and where he is to be judicially examined (50 & 51 Vict. c. 35, s. 17). The person arrested must be brought before a magistrate without delay. He may be detained for one night if this is unavoidable (*Crawford*, 1856, 2 Irv. 511). This rule, which has reference to arrest on warrant, applies with greater force where there is no warrant (*Macdonald*, 1851, J. Shaw, 516). Under Burgh statutes the provision generally is that the person arrested must be brought before a magistrate in no case later than the first lawful day after arrest. When a person has been arrested under an indorsed warrant, he must be taken before a magistrate of the bounds to which the indorsation applies, in order that the question of bail may be disposed of. If the magistrate is not prepared to accept bail, or if the prisoner cannot find it, he is remanded by the magistrate to the custody of the officer, to be conveyed to the place whence the warrant originally issued. Where an arrest is made in England of a Scottish offender, the officer, on receiving the prisoner from the magistrate, should convey him before a magistrate of a county adjacent to England (11 & 12 Vict. c. 42, s. 15; 12 & 13 Vict. c. 69, s. 15). But where a railway can be readily reached in England, there is no need for the observance of this rule (*Sinclair*, 1890, 2 Wh. 481). Where, however, a prisoner was conveyed by sea to a county not adjacent to England, this was held to be illegal (*Matthews*, 1836, 1 Swin. 393).

If an offender has escaped from one to another part of the British dominions, he may be arrested and brought to the jurisdiction within which the offence was committed (44 & 45 Vict. c. 69).

Foreign criminals taking refuge in this country may be arrested in order to be extradited (33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60). The arrest must take place on a warrant issued by a magistrate on an order from the Home Secretary, following upon a requisition for the surrender of the person accused made by a diplomatic representative of the foreign State (33 & 34 Vict. c. 52, s. 7). But a State is entitled to refuse to another State the surrender of a person: (1) where he is charged with an offence of a political

nature; (2) where his surrender is required in order to committal for a political offence; (3) where the real object of the extradition is to make the person amenable to a civil action. A crime for which extradition may be demanded is one which, if committed in this country, would be regarded as an offence of a serious nature. A foreign State, demanding extradition of an offender, must guarantee that he will be allowed to return if acquitted, or not brought to trial for the extradition offence, and will not be detained or tried for any other offence (*ib.*, s. 3). If a person whose extradition is demanded by a foreign State is undergoing a sentence of punishment in this country, he must be discharged before he can be handed over to the foreign State (*ib.*, s. 3). He may not be surrendered for fifteen days after he has been committed to prison in the place of arrest (*ib.*, s. 3). The magistrate before whom he is brought after arrest must inform him of this privilege, and that he may apply for a writ of *habeas corpus* (*ib.*, s. 11). A fugitive committed is entitled to be discharged unless conveyed out of the United Kingdom within two months (*ib.*, s. 12). An officer holding a warrant for the arrest of a foreign offender can execute it anywhere within the United Kingdom, without indorsation (*ib.*, s. 19).

2. Warrant to Search.—See Search-Warrant.

3. Warrant of Commitment.—After the arrestment of a suspected person, he is judicially examined before a magistrate. Thereafter he may be committed to prison until liberation "in due course of law," or he may be committed for further examination. In the latter case, it must be for a reasonable time (*Fife*, 1762, M. 11750; *Andrew*, 1806, 13 F. C. 569), it being a question of circumstances what amounts to a reasonable time (*Arbuckle*, 1815, 3 Dow's Ap. 160). The duration of commitment for further examination is now of small moment, as the accused can now apply for bail after he has been brought before a magistrate for examination (50 & 51 Vict. c. 35, s. 18).

When a prisoner has been duly committed for trial, he need not be separately committed for all the offences with which he may be charged at the trial (*Thompson*, 1875, 3 Coup. 104). It is the proper procedure, however, to commit him for all the charges which are to be made against him at the trial (*Keith*, 1875, 3 Coup. 125).

Three things are essential to commitment for trial:

(1) A signed warrant, which either contains the accused's name and designation in the body of the warrant, or makes plain reference to the petition or information annexed to the warrant (1701, c. 6; *Philip*, 1748, M. 13953).

(2) A specification of the crime in the warrant, giving the time, *locus*, and *modus* of the offence (50 & 51 Vict. c. 35, s. 16; *Mure*, 1811, 16 F. C. 328).

(3) A signed information, which need not be a formal document, a letter being held to be sufficient.

If a warrant is defective in any of these three essentials, it will be suspended, and the accused will be liberated, if, on intimation, a proper warrant is not obtained and served upon him.

These rules do not apply to the case of magistrates taking security for keeping the peace, or dealing with petty cases of riot, etc., the accused in such cases having the benefit of the Act 1701, c. 6, as regards bail, and the right to demand a trial. There may also be cases where a warrant to arrest may at once order commitment, as where a judge orders immediate imprisonment for prevarication (*Baxter*, 1867, 5 Irv. 351), or for contempt of Court, or for perjury committed in a judicial proceeding (*Mackay*, 1831, Bell, *Notes*, 157). The Privy Council, or any five of them, may order commitment in case of invasion, insurrection, or rebellion.

Commitment is not a necessary preliminary to indictment if the accused is not actually in custody (*Keith*, 1875, 3 Coup. 125; *Thomson*, 1875, 3 Coup. 104). Even if the person is arrested, such commitment is not necessary, if he is admitted to bail after being committed for further examination (50 & 51 Vict. c. 35, s. 18).

There must be served upon the accused, either before or immediately on imprisonment, a double of the warrant under the hand of the officer intrusted with it, or of the prison-keeper. Where there has been a petition, it is usual to serve a double of it also; but the accused is entitled to nothing more than a double of the warrant.

A warrant of commitment till liberated in due course of law remains in force until final sentence where the accused pleads guilty (50 & 51 Vict. c. 35, ss. 31, 34), or where a diet is deserted *pro loco et tempore*, or is postponed or adjourned, or an order issued for the trial to be held at a different place from that first fixed upon (*ib.*, s. 52).

4. Warrant of Citation.—(*a*) *Of Witnesses.*—Witnesses in Scotland may be cited on the warrant of any Scottish Court (11 Geo. IV. and 1 Will. IV. c. 37, s. 8). Witnesses in other parts of the kingdom may be cited to attend (45 Geo. III. c. 92, s. 3), and, if they fail to do so, they may be apprehended on letters of second diligence, indorsed by a superior judge of that part of the kingdom in which the apprehension of the witness is proposed to be made (54 Geo. III. c. 186, s. 3).

Citation of witnesses, whether for precognition or the second diet, may be made by any macer, messenger-at-arms, sheriff-officer, or officer of police at any place (50 & 51 Vict. c. 35, s. 24).

An officer, in citing witnesses, need not be in possession of the warrant (9 Geo. IV. c. 29, s. 7), and the citation does not require a witness (11 Geo. IV. and 1 Will. IV. c. 37, s. 7). The Criminal Procedure Act, 1887 (50 & 51 Vict. c. 35, s. 23), prescribes a form of execution of citation of witnesses (Sched. D), which may be founded on if witnesses do not appear. The Court may, on consideration of the circumstances, either fine the defaulting witness, or grant warrant for his arrest and committal to prison, where he will be detained until the trial, unless he is liberated on caution. The Court may grant warrant for the apprehension of a witness suspected of being about to abscond. The application for such a warrant must be supported by an oath to the effect that in the belief of the applicant the witness is about to abscond. A witness in a criminal trial, who is threatened with arrest on warrant issued in a civil cause or the like, will, on application to the Court, supported by oath, be granted a protection to appear as a witness.

(*b*) *Of Jurors.*—See Jury. For warrants in Summary Procedure, Jedge Warrants, warrants of Arrestment and Inhibition, warrant to register an irregular Marriage, see *sub vocibus*.

[Hume, ii. 77; Alison, ii. 120; Macdonald, 260.]

Warrant of Registration.—See Registration; Disposition; Feu-Charter.

Warren.—In England the right of warren is the privilege of keeping and killing certain wild animals (in particular, hares and rabbits) upon the ground over which the right extends. The right of warren (sometimes called free warren) is a franchise which may be acquired either by presumption or by royal grant, and it may exist either in the person of the owner of the soil or of a stranger. The person in the enjoyment of the right has a

qualified property in the animals upon it; so that no other person can acquire property in them, either by capturing them upon the warren, or by chasing them from it and then taking them. The right of warren *eo nomine* is hardly known in Scotland. The right of taking game may certainly, to a qualified extent at all events, be erected into a *separatum tenementum*, apart from the ownership or the occupiership of the soil, for a right of shooting may be let for a term of years. The right may also exist as a servitude enjoyed by the owner of adjoining land. It appears, however, to be more doubtful whether a bare right of sport can be erected into an absolute proprietary right, apart from ownership of any lands or hereditaments.

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

Water.—The legal rules which govern rights in and to water form an important chapter in the general law of landownership. The principles upon which these rights depend are, however, diverse in character, according to the particular character of the subject. Thus a sharp distinction is made between water which has assumed the form of a stream and is flowing in a definite channel, and water which is spread over the surface or percolating through strata of land; between water which is flowing in a natural channel and water flowing in an artificial channel. And these divisions again require in many cases further subdivision, in order to arrive at the legal principles which regulate rights of parties therein. Many of the questions relative to water rights have been elsewhere treated. The rights in and to water which is flowing in a natural stream or watercourse, and the rights of parties in large bodies of water, having a permanent source of supply and a definite outlet, are considered under River and Loch. Rights in water, further, so far as they depend not upon natural rights but upon servitude, have already been treated, so far as illustrative of the general law of servitude (see Servitude), and in more detail, in the articles dealing with particular servitudes in water. See Aquæductus; Aquæhaustus; Eavesdrop; Flumen. In the present article, questions of water rights are considered with especial reference to—

A. Surface water and drainage.
B. Stagna.
C. Underground water, including water in wells.
D. Servitude rights and artificial channels.

This division is not to be taken as necessarily marking a distinction of legal principle; it has, however, been generally adopted for convenience, and is therefore here followed.

A. Surface Water and Drainage.

1. *Surface Water is* pars soli; *the Property of the Owner of the Land.*—As already stated, a broad distinction must be drawn between water produced by natural causes, such as ordinary rain water, which stands upon or is spread over the surface of land, and water which is running in a defined course. Running water is a *res communis*, like air or light, the property of which belongs to no one, but which is adapted to the common use of mankind, so that no individual can acquire exclusive property in them, or deprive others of their use (Ersk. ii. 1. 5). Such water is *ex natura* incapable of appropriation, and is therefore to be distinguished from water which is "standing, and capable of bounds" (Stair, ii. 1. 5). The same, within limits, is true of water issuing from a spring (Campbell, C. J.,

Race, 1855, 4 El. & B. 702, at 709; but cf. *Dudden*, 1857, 1 H. & N. 627). Accordingly, water not confined in any definite channel, but distributed over the surface or through the strata of soil, is regarded as *pars soli*; like minerals and everything else *a cœlo usque ad centrum*, it is the property of the proprietor upon whose land it is found (see Tindal, C. J., *Acton*, 1843, 12 M. & W. 324, at 354). He can do as he pleases with it; his exclusive right of ownership enabling him to bar access to it and to prevent its enjoyment by others (see Ld. J.-Cl. Hope, *Irving*, 1856, 18 D. 833, at 841; Campbell, C. J., *Race*, *v.s.*, at 710). The same principle governs the case of a stream which rises, has its course, and falls into the sea, all within the lands of a single proprietor. See RIVER, s. 3. Such water, therefore, belongs in property to the owner of the saturated soil.

2. *Natural Right to immit upon Neighbouring Lands.*—In general the questions which have arisen with regard to surface water have been as to the right to get rid of the same by sending it upon the neighbouring lands. Such a right is a natural right, or "natural servitude," conferred by the situation of the ground. The law is compendiously stated by Erskine (ii. 9. 2): "Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude upon the inferior tenement, by which it is obliged to receive the water which falls from the superior tenement. If the water which falls from the higher ground insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property, for draining his lands or otherwise improving them, the owner of the inferior tenement is, without the constitution of any positive servitude, bound to receive that body of water upon his property, though it should be endamaged by it. But as this right may be overstretched in the use of it without necessity, how far it may be extended under particular circumstances must be arbitrary" (see *infra*, s. 3). So, where surface water which had been in use to drain naturally into the lower ground was collected by means of furrow-drains, and thus discharged on to the inferior proprietor's land, interdict at the instance of the latter was refused, because the operations were in the respondent's own lands, and no material damage, or excessive or unreasonable exercise of the defender's right of property was shown. The result, in short, was the natural consequence of the legitimate agricultural uses of the subject (*Campbell*, 1864, 3 M. 254; see Ld. Gifford, *Chalmers*, 1876, 3 R. 461, at 467). The inferior heritor cannot, of course, by *opus manufactum* or otherwise, do anything to prevent the water from having access to his ground, or cause it to regorge upon the superior owner's land (see *Hope*, 1779, Mor. 14538; Ld. Ivory, *Montgomerie*, 1853, 15 D. 853, at 859).

3. *Limits of the Right.*—The burden upon the lower heritor extends only to the reception of such water as would in natural course flow down upon his lands. He is not bound to suffer the discharge of water which has been artificially brought upon the superior lands (*Montgomerie*, 1853, 15 D. 853; Ld. Cowan, *Campbell*, 1864, 3 M. 254, at 261; see *Turner*, 1832, 10 S. 415; *Bankier Distillery Co.*, 1892, 19 R. 1083, Ld. Pres. Robertson, at 1088). Even the natural servitude, if unduly pressed or nimiously used, may be regulated by the Court in the exercise of their equitable jurisdiction. The superior heritor must consider the convenience of the lower heritor, and to this extent the law stated by Erskine in an earlier passage (ii. 1. 2) must be taken as qualified by the later statement (*supra*, s. 2). "A party is not entitled to cut a drain, and lead the end of it into his neighbour's field" (Ld. Pres. M'Neill, *Montgomerie*, *v.s.*, at 859). "He must study the

convenience of the lower heritor" (see Ld. J.-Cl. Inglis and Ld. Neaves, *Campbell, v.s.*, at 260, 263). The same considerations apply to the case of drainage of mines (see *infra*, s. 9; MINES AND MINERALS).

Again, although the superior heritor is under no obligation to transmit the water to the inferior heritor (*infra*, s. 4), he must take care, if he elects to do so, that he transmits it in an unpolluted condition (Blackburn, J., *Hodgkinson*, 1863, 4 B. & S. 229, at 241; Ld. J.-Cl. Hope, *Irving*, 1856, 18 D. 833, at 837), unless he has by prescription or otherwise acquired a right to pollute (see *infra*, s. 15). The cases which have arisen have been cases of pollution by surface water finding its way into a stream in which the complainer had riparian rights (*Montgomerie*, 1853, 15 D. 853; *Caledonian Railway*, 1876, 3 R. 839; *Hodgkinson, v.s.*; *Womersley*, 1867, 17 L. T. N. S. 190—pollution of a well by percolating water); but the proposition is a clear deduction from the law of neighbourhood (see *infra*, s. 14).

For the statutory provisions as to outfalls for water, see DRAINAGE.

4. *Rights of the Inferior Heritor in Water immitted.*—The superior heritor, as already stated (*supra*, s. 2), has the right to send down such water upon the lower lands; he is, however, under no obligation to do so. The inferior heritor has no right to insist upon the continuance of the flow, although he may have turned it to some useful purpose, and have been advantaged thereby. So, where surface water arising from surface drainage, but flowing in no definite channel, contributed to work a mill belonging to the lower heritor, the latter was held not entitled to maintain an action against the superior heritor for diverting and wholly appropriating the flow (*Rawstron*, 1855, 11 Ex. 369, see Parke, B., at 382; see Alderson, B., *Broadbent*, 1856, 11 Ex. 602, at 615; Ld. J.-Cl. Hope, *Irving*, 1856, 18 D. 833, at 841; *infra*, ss. 7, 10: cf. s. 18).

Nor will enjoyment of the flow of surface water for the prescriptive period improve the inferior heritor's position, so as to give him right to demand its continuance, or enable him to prevent the superior heritor from altering the *status quo* (see *Mags. of Linlithgow*, 1768, Mor. 12805, 5 Br. Sup. 935; Ld. Medwyn, *Ld. Blantyre*, 1848, 10 D. 509, at 532). "The flow of water for twenty years from the caves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain for the purpose of agricultural improvements, though for twenty years, could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains for the greater improvement of his land" (*per curiam*, *Wood*, 1849, 3 Ex. 748, at 778). The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the flow as a matter of right (*Wood, v.s.*; *Greatrex*, 1853, 8 Ex. 291). The discharge of the water is, in short, in such cases, *res meræ facultatis*; the superior heritor's land is the quasi-dominant tenement. To place him under obligation to continue the flow would be to invert the real state of matters, and make the servient the dominant tenement (see *infra*, ss. 10, 18).

B. STAGNA.

5. *Definition.*—By *stagnum* is meant a body of water lying upon land which has no permanent stream of water flowing into it, nor, except in time of rain, any distinct outlet, thus distinguishing it from a lake or loch. See LOCUS. It is in popular language what is known as a bog, morass, or marsh. The element which here distinguishes what is *publici juris* from

what is *privati juris* is the presence or absence of a constant flow (*Mags. of Linlithgow*, 1768, Mor. 12805, 5 Br. Sup. 935). "We cannot divert from a river or rill or runnel that has a perennial course, but we may use freedom with all other water within our bounds. And this distinction is sensible; for nothing properly can be considered as a part or branch of a river but what, like it itself, has a constant flow . . . It appearing from the proof that there was not a constant run of water from the lakes into the river, nor any run except in a wet season," the proprietor of the *stagnum* was found to be unrestricted in his use of the water therein (*Mags. of Linlithgow, v.s.*, at 12807). If, however, a stream running in a definite channel be practically constant, and only dry in extraordinary droughts, it will be held as subject to the rules which govern ordinary streams or rivers (*Cruikshanks*, 1791, Hume, 506; see Ld. J.-Cl. Hope, *Ld. Blantyre*, 1848, 10 D. 509, at 524, 525).

6. *Rights of Owner; and Limitations.*—Where the element of constancy of flow is absent, the proprietor of the land upon which the *stagnum* is situated has the exclusive ownership and control of the water therein. The same principles which apply to the case of drainage of surface water (*supra*, ss. 2, 3) apply, and under similar limits, to the drainage of marshes, even where these are fed by natural springs of a more or less constant character. The proprietor of the land may drain these; may divert the water for agricultural or domestic purposes, without fear of challenge (*Rawstron*, 1855, 11 Ex. 369, Parke, B., at 382; *Broadbent*, 1856, 11 Ex. 602, Alderson, B., at 615). But a constant spring, which on rising to the surface takes a definite natural course, is governed by the same rules which apply to the stream itself, and cannot be appropriated or diverted (*Dudden*, 1857, 1 H. & N. 627), any more than a stream which loses itself and again appears upon the surface in a defined channel (*Holker*, 1875, 10 Ex. 59).

It should be noted, however, that while in regard to the disposal of such water the owner of the land upon which it is found is master of the situation, he may, if he alter the natural condition of things by *opera manufacta*, *e.g.* by impounding the water in artificial works, become subject to a liability beyond that which is ordinarily incident to negligence, and become in effect an insurer of his neighbour against any injury resulting from such works, except such as arises from *damnum fatale* (see *Tennent*, 1864, 2 M. (H. L.) 22, 1 M. 133; *Pirie*, 1871, 9 M. 412; *Chalmers*, 1876, 3 R. 461; *Countess of Rothes*, 1882, 9 R. (H. L.) 108; see also, *Kerr*, 1857, 20 D. 298; *Rylands*, 1868, L. R. 3 E. & I. App. 330, L. R. 1 Ex. 265, per Blackburn, J., 279; *Nichols*, 1876, 2 Ex. D. 1, 10 Ex. 255; *Smith*, 1877, 2 App. Ca. 781, 9 Ex. 64, 7 Ex. 305; and cases in Rankine, *Landownership*, pp. 334 *seq.*; see *infra*, s. 9).

If the owner of the land upon which a *stagnum* or marsh is situated, and who is therefore under no obligation to do so, nevertheless chooses to drain it into a stream, this has been held to give him no enlarged rights of user in the water of the stream. He does not thereby become entitled to withdraw from the stream an amount equal to that of the alien water introduced by him (*Cowan*, 1865, 4 M. 236; *Stevenson*, 1892, 30 S. L. R. 86; River, s. 11). "The upper heritor may have been under no obligation to increase the stream by draining his marshy lands; but having done so, and allowed it to become part of the stream, he has parted with his private control over it. The effect is to increase that volume of water in the stream which every lower heritor is entitled to have sent down to him without diversion or diminution. . . . The drainage water has become a part of the stream, and the right to have the running water transmitted to them

undiminished for use attaches to the stream thus increased" (Ld. Cowan, *Cowan*, *v.s.*, at 243). Once the alien water becomes a part of the current, no distinction can be made between the water of the original stream and accessions to it, whether from springs, surface water, or by artificial means, and whether arising from drainage or otherwise (*per curiam*, *Wood*, 1849, 3 Ex. 748, at 779; Ld. J.-Cl. Hope, *Ld. Blantyre*, 1848, 10 D. 509, at 523).

7. *Rights of the Inferior Heritor.*—The position of the inferior heritor with regard to water which is discharged upon his lands by the draining of a *stagnum* or marsh are similar to those which arise in the case of ordinary drainage of surface water. His land, as the quasi-servient tenement, is, within certain limits, bound to receive the water so discharged; and though it should be turned by him to some useful purpose, no obligation is therefore imposed upon the superior heritor to continue to send down the flow (see *supra*, s. 4; *infra*, ss. 10, 18).

C. Underground Water including Water in Wells.

8. *Underground Water in Definite Channel.*—A distinction must be taken between underground water which has a known and definite channel, and water which is discrete and dispersed over the strata of land in which it is lying, or through which it is percolating subject to gravitation. The first of these cases falls under the same principles which regulate the rights of parties in surface streams. If the water have a known or definite course, the specialty that this course is underground, not upon the surface, is of no importance (*Wood*, 1849, 3 Ex. 748; *Dudden*, 1857, 1 H. & N. 627; *Chasemore*, 1859, 7 H. L. Ca. 349).

9. *Underground Water; Drainage of Mines.*—The drainage of underground water is, of course, chiefly illustrated in the law applicable to mines, but is governed by the same principles as the drainage of surface water (*supra*, s. 2). The general rule is that the mineral proprietor or tenant is entitled to work out every ounce of mineral in his own estate, and for this purpose to drain off the water in his workings through the strata lying to the dip, without the least reference to the interests of his neighbour (Ld. J.-Cl. Inglis, *Baird*, 1862, 24 D. 1418, at 1425; *Baird*, 1863, 15 C. B. N. S. 376; *Harvey*, 1824, 3 S. 322); but this general rule is subject to similar restrictions as the right to immit surface water (Ld. J.-Cl. Inglis, *Baird*, *v.s.*). Where the result of the legitimate working out of minerals by a mine-owner is to throw water down upon his neighbour to the dip, "that is just the natural servitude which the lower heritor below ground must submit to, as the lower heritor above ground does (Ld. Pres. Inglis, *Durham*, 1871, 9 M. 474, at 479). The heritor lying to the dip who is afraid of being drowned or incommoded by the water of the mineral owner or tenant who lies to the rise, must look to it that in working out his minerals he leaves a barrier sufficient for the purpose of keeping out the water. Subjection to the law of gravitation is an incident attached to the natural position of his estate, to which the lower heritor must submit (*Durham*, *v.s.*; see Ld. Gifford, *ib.*, at 476).

This, at least, is the rule where the operations of the superior heritor have been carried out in the fair and ordinary course of working out his minerals (see Ld. J.-Cl. Moncreiff, *Blair*, 1870, 9 M. 204, at 207; *Smith*, 1849, 7 C. B. 515, 18 L. J. C. P. 172; Ld. Chan. Cairns, *Rylands*, 1868, L. R. 3 E. & I. App. 330, at 338). It would be different, and interdict might be obtained, where it could not be shown that such unusual methods of working might not be attended with danger to the property of the inferior

heritor. And the onus lies upon the party adopting extraordinary methods of working (Ld. Pres. Inglis, *Durham, v.s.*, at 480).

In accordance with these principles, the superior heritor may work out his minerals to the extreme edge of his property in the ordinary course of his workings, though this should damage the inferior heritor, and he will not be held barred from doing so though he know that his neighbour has left no barrier, and that the result of his working will be to let in water upon the latter (*Harvey*, 1824, 3 S. 322; *Smith*, 1849, 7 C. B. 515, Cresswell, J., at 564). And where the ordinary workings of the owner of the minerals to the rise caused an increase of surface drainage into his coal wastes and thence into the workings of the owner to the dip, rendering additional pumping necessary, this is *damnum absque injuria*, and gives no right of action, for the owner to the rise is under no obligation to keep the roof of his mineral workings watertight for the benefit of the owner to the dip (*Wilsons*, 1876, 4 R. (H. L.) 29; Ld. Chan. Cairns, *Rylands*, 1868, L. R. 3 E. & I. App. 330, at 338; cf. *Smith, v.s.*). It may be different where the operations of the defender have resulted in the alteration of the natural conditions of things, *e.g.* by interference with the bed of a natural stream (see *Smith*, 1872, L. R. 7 Ex. 305; 1874, 9 Ex. 64; 1877, 2 App. Ca. 781; *Crompton*, 1874, 19 Eq. 115; Ld. Chan. Cairns, *Rylands, v.s.*, at 339; *supra*, s. 6; see, further, MINES AND MINERALS).

The natural servitude will not, of course, warrant the superior owner in throwing upon the lower proprietor, by pumping or other artificial means, water which would not have reached him in natural course (*Laird*, 1863, 15 C. B. N. S. 376; Ld. Gifford, *Blair*, 1870, 9 M. 204, at 207; *Turner*, 1832, 10 S. 415; *Bankier Distillery Co.*, 1892, 19 R. 1083; see *supra*, s. 3). On the other hand, the inferior heritor is not entitled to interpose such artificial obstructions as he pleases to the natural drainage of water, and prevent it from obtaining access to his workings (see *Hope*, 1779, Mor. 14538).

10. *Water percolating Underground; Rights in.*—It has been already stated that the principles which regulate the rights of owners of lands in respect of water flowing in known and definite channels, whether upon or below the surface of the ground, have no application to underground water which merely percolates through the strata. It is settled law that, in the latter case, no action will lie for diversion. So, where an owner of land sinks a well within his property, this gives him no right or interest in the water which flows thereto in a subterranean course, so as to enable him to maintain an action against another landowner, who in the course of ordinary mining operations *in suo* drains away the water, and lays the well dry (*Acton*, 1843, 12 M. & W. 324). It was the same in the civil law (*Dig.* 39. 3. 1. 12; 39. 3. 21; 39. 2. 24. 12). In such cases the governing principle (*supra*, s. 1) is that "which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of an action" (Tindal, C. J., *Acton, v.s.*, at 354; see Ld. Gifford, *Chalmers*, 1876, 3 R. 461, at 467). The law here laid down was, after a contrary judgment (*Dickinson*, 1852, 7 Ex. 282), finally affirmed and settled by the House of Lords (*Chasemore*, 1859,

7 H. L. Ca. 349), in which underground water, which found its way by percolation into a natural stream that worked the complainer's mill, was intercepted to the material prejudice of the latter (see, for same principle, *Mags. of Linlithgow*, 1768, Mor. 12805, at 12806; see also *Blair*, 1870, 9 M. 204; *infra*, s. 12). "Percolating water below the surface of the earth is a common reservoir or source in which nobody has any property, but of which everybody has, so far as he can, the right of appropriating the whole" (Brett, M. R., *Ballard*, 1885, 29 Ch. D. 115, at 121; see *Milton*, 1898, 6 S. L. T. Nos. 6, 263). Accordingly, a landowner is not entitled to compensation for the abstraction of such water, caused by the formation of a sewer under statutory powers (*Reg.* v. *Metropolitan Board of Works*, 1863, 3 B. & S. 710). The motive which leads to the interception of such water, whether it be to apply it to some useful purpose, or be malicious, is immaterial (see *Mayor of Bradford*, [1895] App. Ca. 587).

The principle of these decisions applies, of course, not only to cases in which percolating water is intercepted *before* reaching a well, but also to cases of abstraction of water which is already collected therein (*New River Co.*, 1860, 2 El. & E. 435).

Nor does enjoyment of the flow of the percolating water for the prescriptive period make any difference. For the presumption of right upon which prescription is based cannot arise where the person against whom it is pleaded was throughout helpless to prevent the exercise of the right or enjoyment of the subject (see opinions of judges, *Chasemore*, *v.s.*).

11. *Percolating Water; Limitation of Rights in.*—The doctrine of *Chasemore* must not, however, be taken as subject to no limitations. Thus a landowner cannot, under cover of this principle, intercept or appropriate a *perennial* spring of water which rises in his lands, and assumes a definite channel (*Dudden*, 1857, 1 H. & N. 627). Again, it has been held that, in certain circumstances, a landowner may be prevented from exercising his right to underground water percolating through his property, as being truly *pars soli*, where the exercise of the right necessarily conflicts with the rights of other parties (*Grand Junction Canal*, 1871, 6 Ch. 483; *Dickinson*, 1852, 7 Ex. 282, not apparently overruled as to this point by *Chasemore*, *v.s.*; see *Black*, 1886, 17 L. R. Ir. Ch. D. 459). In the case of the *Grand Junction Canal* it was held by Ld. Chan. Hatherley, overruling a judgment of Jessel, M. R., that where the operations of a landowner *in suo* had the effect of tapping and draining off water which was flowing in a natural stream, such operations were not protected by the principle of *Chasemore's* case. "If you cannot get at underground water without touching the water in a defined surface channel, you cannot get it at all" (Ld. Chan. Hatherley, *Grand Junction Canal*, *v.s.*, at 488). For a similar result in the case of the right to support from subjacent land, see SUPPORT, s. 2. The decision in the *Grand Junction Canal* has, however, been questioned upon broad and forcible grounds; at least, in so far as it can be held to cover not only cases of "water flowing in a defined surface channel," but also cases in which water, which has at one time flowed in such a channel, but which has percolated through the banks or bed of a stream into neighbouring lands, is intercepted. "In the first place, the doctrine is not, in my judgment, a workable doctrine. Not to mention extreme cases (as, for instance, the artesian well mentioned by Ld. Brougham in *Chasemore's* case, which drew its supplies from a distance of forty miles), there is hardly, I should think, a coal or iron pit in this country which does not to some extent drain from the neighbouring strata and pump to the surface water which has at some time flowed in some neighbouring stream. Indeed, I

should think that the instances must be numerous in which mining operations quite sensibly affect the level of neighbouring watercourses. Similarly, there are, I should think, few systems of agricultural drainage, especially in low ground, or in gravelly soil, which do not more or less have a like result. The proof might, in certain cases, be more difficult, but that would depend upon circumstances; and a principle cannot, it appears to me, depend for its soundness on its application being limited by the mere difficulty of proof. In truth, I am not myself able to accept as substantial the distinction suggested between the interception of underground water percolating into a stream, and the abstraction from the strata of similar water which has passed through the stream. The effect on the stream is, of course, the same; and, altogether, it would seem to be a better and sounder principle that a river or other watercourse must take its chance, on the one hand, of what it may gain by percolation into it through its banks or bed; and, on the other hand, of what it may lose by percolation out of it in the same way. If it flows over and through rock and clay, it will, of course, gain less and also lose less. If, on the other hand, it flows over and through sand and gravel, it will gain more and also lose more. I prefer, if I must choose between them, the view of the Master of the Rolls to that of Ld. Hatherley" (Ld. Kyllachy, *Milton*, 1898, 6 S. L. T. No. 6). In this case the Court refused to interdict a distillery company from taking water from a well sunk within their own ground upon the bank of a river, and within a few feet of the stream; it being proved that the water entered the well by percolation from the bottom of the well only, and that this was several feet below the level of the bed of the stream. The complainer, however, failed to prove that the water so percolating into the well was *de facto* river water withdrawn from the stream.

12. *Percolating Water; Right to, as between Surface Owner and Mine-Owner, on Severance of Ownership.*—The same principles apply as between the owner of mines and the owner of the surface, where the surface has been granted out and the mines have been retained. The surface owner, who is a limited proprietor, cannot claim a greater protection than if he were the unlimited and absolute proprietor of the whole subject. "Percolation of water into mines is an almost necessary incident of mining. And if the grant of the surface carries with it a right to be protected from any loss of surface water by percolation, the owner of the surface would hold the owner of the mines at his mercy, for he would be entitled by injunction to prevent the working of the mines at all" (*Ballacorkish Mining Co.*, 1873, 5 P. C. 49, at 63). Water which accumulates in mines in the ordinary working of the minerals is the property of the mineral tenant. He may do with it and convey it where he pleases, and neighbouring tenants have no right to insist that if it be pumped to the surface, it shall be sent in its natural direction (*Blair*, 1870, 9 M. 204; cf. Ld. J.-Cl. Hope, *Irving*, 1856, 18 D. 833, at 841).

13. *Percolating Water; Variation of Common Law Rights by Contract.*—The common law principles above stated as to water which percolates underground may, of course, be displaced, and a person may be protected against deprivation of such water, by virtue of some contract right. Thus there may be in a lease or other contract an express grant of right to underground water (see *Whitehead*, 1858, 2 H. & N. 870; *Rawstron*, 1855, 11 Ex. 369), or the water from springs may be impliedly protected from disturbance or injury by the terms of the contract (see Ld. J.-Cl. Moncreiff, *Blair*, 1870, 9 M. 204, at 207). For cases of construction of grants involving such

questions, see *Whitehead, v.s.*; *Macnab*, 1896, 24 R. (H. L.) 34; *Taylor*, 1877, 6 Ch. D. 264, per Jessel, M. R., at 272.

14. *Percolating Water; Right to Pollute; Right to continue to Receive.*—The rules applying to surface drainage (*supra*, ss. 3, 4) hold with equal force with regard to water percolating underground. Here, also, a proprietor is under no obligation to allow underground water to gravitate into the land of another; but if he does so allow it, he must take care that he does not pollute it (*Wood*, 1849, 3 Ex. 748; *Hodgkinson*, 1863, 4 B. & S. 229; *Womersley*, 1867, 17 L. T. N. S. 190; *Ballard*, 1885, 29 Ch. D. 115, 54 L. J. Ch. 454), unless, of course, he has acquired a servitude right (see *infra*, s. 15). We have already seen that the person into whose lands such water percolates cannot even by possession for the prescriptive period establish a right to continue to receive it (*supra*, s. 10; see cases in s. 4).

D. Servitude Rights and Artificial Channels.

15. *Servitude Rights in Water.*—In many cases servitude rights relating to water are merely extensions of rights which, in a more limited form, are naturally incident to ownership (see Cresswell, J., *Sampson*, 1857, 1 C. B. N. S. 590, at 611). No necessity for recourse to servitude right arises until the limits of the natural right are exceeded. Thus the limits of a riparian owner's rights in a natural stream may be extended by the acquisition of a servitude right to divert it by artificial cut (*Wallace*, 1761, Mor. 14511; see *Bealey*, 1805, 6 East, 209), or to pollute its waters (see *Moore*, 1857, 1 C. B. N. S. 673; *Carlyon*, 1857, 1 H. & N. 797; *Murgatroyd*, 1857, 7 El. & Bl. 391). Similarly, the natural right of a proprietor to drain his land and discharge the water upon the lower ground of his neighbour (*supra*, s. 2) may by the acquisition of a servitude right be justified to an extent, or in a manner not permitted by natural right. A right to discharge polluted water may be thus acquired (*Wright*, 1836, 1 M. & W. 77). Again, just as the natural right of support to land may by virtue of a servitude be constituted in favour of buildings (see Support, s. 12), so the natural right of water drainage may be similarly extended. This is the servitude of stillicide or eavesdrop. Servitude rights of drawing water from wells situated *in alieno* have also frequently received recognition (*Waddell*, 1781, 2 Pat. App. 579; *Mackenzie*, 1849, 12 D. 132; cf *Durham*, 1793, Hume, 735; *Berridge*, 18 Nov. 1808, F. C.; see also *Smith*, 1880, 7 R. (H. L.) 28; *Hood*, 1884, 12 R. 362; *Macnab*, 1890, 17 R. 397). Most of the particular servitudes are considered under their several titles. But before proceeding to the consideration of water flowing in artificial channels, which will be found to depend upon the law of servitude, two servitude rights having a material bearing upon this question may here be briefly resumed. These are the servitude of aqueduct or watergang (Ersk. ii. 9. 13), the right to lead water through the lands of a neighbouring proprietor by pipe, open cut, or other means; and the *servitus aquæ eluendæ*, that is, the right to immit water upon a neighbouring land to an extent greater or in a manner other than is authorised by natural right (see *supra*, s. 2). These are positive servitudes, and do not differ from other servitudes of a like nature in regard to their constitution and the rules which regulate their enjoyment (see Servitude). They may be constituted by grant, express (*Tennent*, 1831, 9 S. 586; *Nuttall*, 1866, L. R. 2 Ex. 1; *Tennant*, 1888, 15 R. 671; *Lord Blantyre*, 1888, 15 R. (H. L.) 56), or implied upon severance of ownership (see *Ewart*, 1861, 4 Macq. 117; *Preston's Trs.*, 7 March 1844, reported 22 D. 366), or, most frequently of all, by prescription (*Wallace*, 1761, Mor. 14511; *Pringle*, 1767, 2 Pat. App. 134; see Stair, ii. 7. 12; Ersk. ii. 9. 13;

Bell, *Prin.* s. 1012; see *Commissioners of French Hoek*, 1885, 10 App. Ca. 336). It is quite settled law that long-continued submission by the servient owner to the discharge of water upon his tenement, or to the conducting of it through his land, will confer the right to continue the discharge, or to continue to receive the supply through the land of the servient owner (*Prestoun*, 1714, Mor. 10919; *Sutcliffe*, 1863, 32 L. J. Q. B. 136; *Gaved*, 1865, 19 C. B. N. S. 732, 34 L. J. C. P. 353; *Ivimey*, 1865, 1 Ch. 396; *Holker*, 1875, 10 Ex. 59; and other cases *infra*, s. 19).

16. *Artificial and Natural Streams; Distinction between.*—The rules of law which apply to natural streams are widely different from those which apply to the case of water flowing in artificial channels. In the former case, the rights of parties are governed by the law of natural right incident to ownership, and are elsewhere considered (see RIVER); in the latter, the rights of parties fall to be determined by the law applicable to servitude rights. Although it was formerly thought that the legal rules applicable to the two cases were identical (see Denman, C. J., *Magor*, 1840, 11 A. & E. 571, at 586), it is now settled that the principles applicable to each are quite distinct. "The plea that there is no distinction between the relative rights and interests of adjoining proprietors in the natural runs of water above ground and in artificial cuts for underground water from mines is wholly untenable. The origin, character, object, and use of the latter at once create a broad distinction, and require the application of totally different considerations" (Ld. J.-Cl. Hope, *Irving*, 1856, 18 D. 833, at 837; see *Heggie*, 1882, 9 R. 704). In the case of water flowing through artificial watercourses "any right to the flow of the water must rest upon some grant or arrangement, either proved or presumed, from or with the owners of the land from which the water is artificially brought, or on some other legal origin" (*Rameshur Pershad Singh*, 1878, 4 App. Ca. 121, at 126).

17. *Artificial Stream; quid?*—It is sometimes a matter of difficulty to determine the question of fact, whether, in any particular case, a stream is to be dealt with as being a natural or an artificial one. Natural streams, diverted from their old channels, built in, or otherwise changed to suit the exigencies of a manufacturing community, may lose their original character, and become practically indistinguishable from artificial courses; on the other hand, streams, originally artificial, may come for all intents and purposes to so closely resemble natural streams that the law will apply to such the rules that govern the latter. Where a stream rises from a natural source and flows in a natural channel, or, *per contra*, derives its supply from some operation dependent upon the agency of man and flows in an artificial channel, no difficulty arises. But between these two extremes, cases may occur calling for decision. It may perhaps be taken as a general proposition that *in dubio* a natural source overrules an artificial channel, and *vice versa*; and that the source of the flow is to be regarded as the most important factor in determining what principles are to regulate rights of parties in the stream (see Pollock, C. B., and Channell, B., *Nuttall*, 1866, L. R. 2 Ex. 1, at 14; *Sutcliffe*, 1863, 32 L. J. Q. B. 136). A reserved right in granting out lands to make an artificial watercourse may be construed as including right to divert and use water from natural streams in the lands so granted (*Remfry*, [1896] App. Ca. 558).

18. *Artificial Streams; Temporary.*—A further distinction, also involving an answer to a question of fact, must be made, according as the artificial stream is of a permanent or a temporary character. The factors chiefly to be considered in judging whether a stream is to be held to be of a permanent or merely of a temporary character, are, first, the nature of the source, and

second, the object and intention of the originator of the flow. The use had of the stream by those through whose lands it flows, and the period of its existence, are of secondary importance (Campbell, C. J., *Leeston*, 1856, 5 E. & B. 986, at 997; see *Briscoe*, 1859, 11 Ir. C. L. N. S. 250, at 263, 273; see Ld. J.-Cl. Hope, *Irving*, 1856, 18 D. 833, at 838).

Where clearly temporary in character, the question as to the rights of parties therein presents a different aspect, according as it does or does not arise with the person who, or whose author, created the flow.

(1) The general rule is, that as against the creator or originator of the flow, or one deriving right from him, no right to its continuance can be acquired by another party, even with the aid of prescriptive possession. Thus where a stream takes its rise from water pumped from a mine, no right to continue to receive the flow can be raised up against the mine-owner (*Arkwright*, 1837, 5 M. & W. 203; *Wood*, 1849, 3 Ex. 748; *Irving*, 1856, 18 D. 833; *Heggie*, 1882, 9 R. 704; see *Gaved*, 1865, 19 C. B. N. S. 732, 34 L. J. C. P. 353). The latter's act in pumping out or discharging the water is *res meræ facultatis*, and it is immaterial to what uses, if any, the water so discharged has been applied by the persons through whose lands it thereafter passes (see Ld. Medwyn, *Lord Blantyre*, 1848, 10 D. 509, at 532). "The notion that every use or disposition of a man's property from the continuance of which any incidental advantage should arise to a neighbour, should therefore entitle that neighbour to insist upon its being perpetuated, and justify him in interdicting the owner from turning it to any other use, however legal in itself, however much for his benefit, appears to me too extravagant to be dealt with in argument (Ld. Jeffrey, *Munro*, 1846, 8 D. 1029, at 1036). Accordingly, where an artificial watercourse is formed, the sole object of which is to enable the proprietor to work out the minerals within the field drained by it, and the flow of water through such channel is temporary, having its continuance only whilst the convenience of the mine-owner requires it, it is clear that the facts of the case *sua natura* exclude the notion of the acquisition of permanent rights of servitude in such a stream (see Abinger, C. B., *Arkwright*, *v.s.*, at 231: Ld. J.-Cl. Hope, *Irving*, 1856, 18 D. 833, at 838). No action for diverting or discontinuing the discharge will lie against the mine-owner at the instance of mill-owners upon the artificial stream who are prejudiced thereby (*Arkwright*, *v.s.*), or at the instance of riparian proprietors on a natural stream into which the artificial run discharges, alleging injury to riparian rights (*Irving*, *v.s.*; see *Heggie*, 1882, 9 R. 704). The contrary view might in certain cases amount to a prohibition upon the mine-owner not to work, or only partially work, his property (Ld. J.-Cl. Hope, *Irving*, *v.s.*, at 838). Nor, in such cases, can the mine-owner be interdicted at the instance of an inferior heritor who has enjoyed an artificial flow in a pure state for the prescriptive period, if, in the course of resuming his mineral workings, the former again begins to pollute the water discharged (*Magor*, 1840, 11 A. & E. 571). It is, of course, different where the result of the mine-owner's operation is to throw polluted water, whether by surface or underground channel, into a burn or stream. Such a right, to be effectual, must be fortified by prescriptive possession (see *Wood*, 1849, 3 Ex. 748; Ld. J.-Cl. Hope, *Irving*, *v.s.*, at 837; see Ld. J.-Cl. Moncreiff, *Heggie*, 1882, 9 R. 704, at 709; *supra*, ss. 3, 14, 15). Two points upon which opinions were reserved in *Irving's* case, as to whether if the diversion had not been in the ordinary course of the working of the mine but *in emulationem*, and as to whether the appropriation of the water to the use of a mill, would have affected the complainer's title, apparently both fall to be answered in the negative. For

if the mine-owner had a legal title to divert, his motive in doing so is immaterial (*Mayor of Bradford*, [1895] App. Ca. 587 ; see ÆMULATIO VICINI), and the latter point arose and was negatived in *Arkwright's* case.

Nor will possession during the prescriptive period in such cases avail to support the right claimed as against the originator of the flow; for it has throughout been precarious and entirely at the will of the mine-owner (*Irving, v.s.*; *Arkwright, v.s.*; cf. *Chamber Colliery Co.*, 1886, 36 Ch. D. 549 —enjoyment under a terminable right). The legal situation, in short, is that a *servitus aquæ educendæ* has been constituted; the person discharging the water being the dominant owner, the person receiving the same upon his land being the servient owner. To give effect to the claim at the latter's instance to continue to receive the discharge, would be to invert the original legal position of the parties, and convert the true dominant into the servient tenement. "No servitude is constituted in favour of the latter, his use being only casual and precarious, entirely at the will or convenience of the party who made it for his own purpose. In such an exercise of the right of property, the law looks upon it as a burden on the inferior heritor to receive the water when it is made to flow down upon him, and never as a privilege. It commences as a burden, and *nemo potest mutare sibi causam possessionis*. By the accidental as well as occasional use which he continues to make of it, he cannot invert the possession, and impose a burden upon the superior heritor in his own favour" (Ld. Medwyn, *Lord Blantyre*, 1848, 10 D. 509, at 532; see Ersk. ii. 9. 35 ; *Mason*, 1871, L.R. 6 Q. B. 578, 40 L. J. Q. B. 293). "The right to continue the enjoyment upon his land of the discharge on to his land of an artificial flow of water from a watercourse made by somebody else above . . . is a very difficult kind of right to establish. The mere discharge of water by an upper proprietor upon a lower may easily establish a right on the part of the upper proprietor to go on discharging, because as long as the discharge continues, there is submission on the part of the lower proprietor to proceedings which indicate a claim of right on the part of the proprietor above ; but it is difficult for the lower proprietor to establish a right to have the flow continued, just as it would be very difficult to make out that because for twenty years my pump has dripped on to a neighbour's ground, therefore he has a right at the end of twenty years to say that my pump must go on leaking" (Bowen, L. J., *Chamber Colliery Co.*, 1886, 36 Ch. D. 549, at 558).

There may, of course, be cases in which a right to continue to receive the supply can stand upon express grant (see *Wardle*, 1859, 1 El. & E. 1058, 1065); but the temporary and precarious character of the flow will respectively prevent the establishment of a servitude right in favour of the receiver upon the grounds either of implied grant or of prescriptive possession.

(2) Different considerations may apply as between parties neither of whom is the quasi-dominus of the stream. Thus it may well be that one appropriating or using the water in the artificial channel might be entitled to vindicate his rights as against another appropriating or diverting it to his prejudice, although no such action would lie at his instance against the originator of the flow (Abinger, C. B., *Arkwright, v.s.*, at 233 ; see *Wood*, 1849, 3 Ex. 748; cf. *Heggie*, 1882, 9 R. 704, Ld. Rutherfurd Clark, at 710). For questions as to pollution in such cases, see *Whaley*, 1857, 2 H. & N. 476 ; 1858, 3 H. & N. 675, 901 ; *Wood, v.s.*; cf. *Magor*, 1840, 11 A. & E. 571). For cases of servitude right in intermittent streams, *e.g.* such as only exist in times of flood, see *Drewett*, 1836, 7 C. & P. 465 ; *Trafford*, 1832, 8 Bing. 204.

19. *Artificial Streams; Permanent.*—On the other hand, where a stream of water, albeit flowing in an artificial channel, is of a permanent character, a right to the uninterrupted flow of the water therein may be acquired, both as against the person to whose act the flow is originally due, and as against other parties, through or over whose lands the stream flows. "The proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to the use of the water, if proved to have been originally artificial, seems to be quite indefensible" (Denman, C. J., *Mayor*, 1840, 11 A. & E. 571, at 586; approved in *Wood*, 1849, 3 Ex. 748). In the case of a temporary stream, as already stated (*supra*, s. 18), the nature of the flow precludes a presumption of a grant of permanent rights of servitude rights either upon severance of ownership or subsequently thereto (cf. Ld. J.-Cl. Hope, *Irving*, 1856, 18 D. 833, at 838; and Ld. Moncreiff, *Ld. Blantyre*, 1848, 10 D. 509, at 540); but where the flow is of a permanent character, a presumption of a grant may be readily made; for it is reasonable to suppose that a proprietor consenting to the formation of a permanent artificial watercourse through his lands, should stipulate that he should receive in return the benefit of the use of the water (see Lds. Medwyn and Cockburn, *Ld. Blantyre*, *v.s.*, at 531, 547). It becomes, therefore, largely a question of circumstances whether or not such rights will be held acquired as against the originator of the flow (see *Wood*, *v.s.*; *Greatrex*, 1853, 8 Ex. 291, Parke, B., at 293); but where the facts proved are favourable, or a presumption of grant may be made, a right to the continuance of the supply may be effectually established, either on the ground of implied grant, or other presumption of right, such as prescriptive possession. For a case of possession following upon express grant, see *Commissioners of French Hock*, 1885, 10 App. Ca. 336.

The most ordinary example of an artificial stream of a permanent character is a mill-lade taking its rise from a natural stream or other constant source of supply. There is ample authority as to such cases. Thus where a mill-race, supplied from natural sources, was carried through the defender's land to drive the complainer's mill, and prescriptive possession by the latter was proved, not only of the right to water-power, but also of the right of casting feal and divot upon adjoining land for repair of the artificial channel, the Court upheld the right to a continuance of the flow. The facts, in short, showed that the lower mill, as a dominant tenement, had a good servitude of aqueduct, and negatived the contention that this was a case of a constitution of *servitus aquæ eduecndæ* in favour of the superior owner (*Prestoun*, 1714, Mor. 10919.) In point of extent, the servitude right was held to cover the quantity necessary for serving the complainer's works (see interlocutors, 10 D. pp. 526, 527; *Pringle*, 1767, 2 Pat. App. 134; cf. *Kincaid*, 1752, Mor. 12796; explained by Ld. Medwyn, *Ld. Blantyre*, 1848, 10 D. 509, at 533; but cf. Ld. Moncreiff, *ib.*, at 544). In a more recent case, where a mill-race, taken off a natural stream, had from time immemorial served successively the mills of the defender and, after its junction with a natural stream, the mills of the pursuer, the latter was held entitled to prevent diversion of any part of the water discharged by the artificial cut (*Ld. Blantyre*, 1848, 10 D. 509; see *Heggie*, 1882, 9 R. 704; *Mackenzie*, 1854, 16 D. 381); and the pursuer's rights in the water were held to extend to all the water which had been so discharged, including an augmented supply introduced within the prescriptive period. "The possession indicated a right not merely to the amount of water sent down for forty years, but to all the water which the defender made use of for his

own purposes; the rule *tantum prsæcriptum quantum possessum* was therefore not transgressed" (Rankine, *Landownership*, p. 506). But this seems a very doubtful position (see Ld. Medwyn, *ib.*, at 536; cf. Ersk. ii. 9. 4, Ld. Ivory's note; Bell, *Prin.* s. 988; *Ecaley*, 1805, 6 East, 208). It will be noticed, also, that this sets up as the measure of the extent of the right not the possession of the dominant, but the use had by the servient tenement (cf. *Prestoun*, *v.s.*). The legal result upon the pursuer's interest if and when the superior mills came to be discontinued was not determined, and it has been thought that in such a case the pursuer would only be entitled to maintain the artificial supply up to the quantity prescriptively enjoyed (Rankine, *Landownership*, *v.s.*). But if the decision is maintainable at all upon this point, it seems to necessarily follow from it that the pursuer's rights in and to the water could not be in any way prejudiced by the defender's cesser of use, whether in whole or in part, for this would simply amount to a negation of the legal right which he was found to have; and that, even in such circumstances, the pursuer could under this decision vindicate a right to the whole water sent down.

The *ratio* of this decision has been explained to be the acquisition of a servitude right by prescriptive possession (Rankine, *Landownership*, *v.s.*). Whether this is or is not the true ground upon which to rest the claim, as being in effect a servitude right of aqueduct, it is clear that the Court, rightly or wrongly, did not view the question as being of this nature (see Lds. Medwyn and Cockburn, *ib.*, at 534, 546); but, on the contrary, expressly assimilated the case to that of a natural stream (see pp. 523, 534, 538, 547). In this view, the decision is in harmony with some English cases, in which it has been held that an artificial watercourse with a permanent source of supply may, in certain circumstances, give rise to similar rights as are enjoyed by riparian proprietors in a natural stream (*Suteliffe*, 1863, 32 L. J. Q. B. 136; *Nuttall*, 1866, L. R. 2 Ex. 1; see *Gavel*, 1865, 34 L. J. C. P. 353; Ld. J.-Cl. Hope, *Ld. Blantyre*, *v.s.*, at 518, 524, 528). So, where the water of a natural stream, originally diverted artificially from the main body, and which, after supplying a watering-trough, lost itself in the ground, was collected by the owner of the ground in a reservoir and led in an underground drain to supply a mill, the Court held the owners of the land through which this artificial drain passed to have the rights of riparian proprietors in the water therein contained, so as to enable them to challenge diversion by an upper heritor upon the main stream (*Holker*, 1873, 8 Ex. 107; 1875, 10 Ex. 59). So also, in a more recent case, where a small watercourse originating in a spring in the plaintiff's land, passed in a channel, partly natural, partly artificial, successively through the defendant's lands and lower lands belonging to the plaintiff, and the latter had for more than the prescriptive period had the exclusive use and enjoyment of it, it was held that the latter, the lower heritor, was not entitled to prevent user by the defendant, the superior heritor, for domestic purposes; because as no one could tell when the artificial part of the channel was made, the presumption was that it was either natural, or that, if artificial, that it had been formed under circumstances such as to give the defender the ordinary rights of a riparian owner therein (*Roberts*, 1881, 50 L. J. Ch. 297; see *Sutcliffe*, *v.s.*). Here the plaintiff really claimed a servitude right of exclusive enjoyment, acquired by the operation of prescriptive possession, but the Court held the defender's right of user could not be held to have been destroyed by non-exercise.

Although these cases show that once rights have been acquired in artificial streams, such rights may be attended by rights similar to those

incidental to ownership upon a natural stream (see *Rochdale Canal Co.*, 1849, 14 Q. B. 122; *Northam*, 1853, 1 E. & Bl. 665; Martin, B., *Rawstron*, 1855, 11 Ex. 369, at 384), it will be observed that the former are distinct in origin, and must be based upon a servitude right in some way acquired (*Rameshur Pershad Singh*, 1878, 4 App. Ca. 121). For there are no natural rights incident to ownership of land abutting upon an artificial stream (see Parke, B., *Rawstron*, 1855, 11 Ex. 369, at 382; Cresswell, J., *Sampson*, 1857, 1 C. B. N. S. 590, at 606, 607). The cases of *Ld. Blantyre* and *Roberts*, above referred to, may both be resolved into cases of the constitution of cross servitudes, of aqueduct and *aquæ eduendæ*, the rights of parties being mutually restricted in favour of each other (see, for a similar case of cross servitude, *Pyer*, 1857, 1 H. & N. 916, 26 L. J. Ex. 258); while the case of *Holker* merely decided that, in the circumstances of that case, the pursuer, who enjoyed the flow of the artificial cut, had a title to sue and challenge the abuse of his riparian rights by an upper heritor.

It follows that if rights in a permanent artificial stream can be established as against the originator of the flow, they are *à fortiori* pleadable against third parties who divert or alter the same to the complainer's prejudice.

Waterworks Clauses Act.—The general code is contained in the Waterworks Clauses Acts of 1847 and 1863 (10 & 11 Vict. c. 17; 26 & 27 Vict. c. 93), which, after the manner of the Lands and Railway Clauses Consolidation Statutes, consolidate certain provisions generally contained in Acts authorising the construction of such works for supplying towns with water. These provisions may be incorporated by reference into any subsequent "special Act" (see 1847, s. 2) authorising the making of waterworks.

Application of Acts.

The application of these statutes is limited to the case of such waterworks as are subsequently authorised by Act of Parliament which shall declare these statutes to be incorporated therewith; and, even in such cases, only in so far as their provisions are applicable to the "undertaking" (1847, s. 2), and are not expressly varied or excepted in the special Act (1847, s. 1; 1863, s. 2; see *Clippens Oil Co.*, 1897, 25 R. 370; *Glasgow District Subway Co.*, 1895, 22 R. 790). The mode in which any particular provisions of these Acts may be incorporated is pointed out (1847, s. 5).

Construction and Supply.

Construction of Waterworks.—Where "the undertakers" (1847, s. 1) are by the special Act empowered to take or use "lands" or "streams" (see 1847, ss. 2, 3) for the purpose of constructing waterworks otherwise than by agreement, the provisions of the Lands Clauses Consolidation (Scotland) Act of 1845 (8 Vict. c. 19) apply as regards the payment of compensation to the owners and occupiers or others interested in the lands and streams taken or injuriously affected (*Caledonian Railway Co.*, 1882, 7 App. Ca. 259; *Clowes*, 1872, 8 Ch. App. 125), and the mode of ascertaining its amount (1847, s. 6; see Lands Clauses Acts). The expression "lands" includes mines (*Holliday*, [1891] A. C. 81; 1888, 20 Q. B. D. 699; *Smith*, 1877, 3 App. Ca. 165). As to how far compensation for prospective injury to mines can be claimed hereunder, see *Holliday*, *v.s.*

The mere abstraction of water from a stream by the undertakers does not entitle a lower riparian proprietor to insist upon the latter purchasing up

his riparian interest under this section. His remedy is for compensation under sec. 12, to the extent to which he is injuriously affected (*Bush*, 1875, 10 Ch. 459; 44 L. J. Ch. 645). On the other hand, if notice be given by the undertakers, in terms of powers conferred by their special Act, of their intention to take the whole of a stream, this constitutes a permanent injury which is capable of being assessed once for all under this section, and does not ground merely a right to compensation from time to time as the partial abstractions take place (*Stone*, 1876, 2 C. P. D. 99; *Ferrand*, 1856, 21 Beav. 412).

The general powers for the execution of the works are contained in sec. 12 of the Act of 1847, and include power to enter upon and work the lands scheduled: to sink wells, shafts, to make and erect reservoirs and other works therein and upon the streams, authority to take which is conferred; to divert and impound the water of such streams, and alter their course, if not navigable. A power to take and use underground water is also granted. Compensation for all damage occasioned by the exercise of these powers is to be made; and, where any watering-places, drains, or channels are taken away in the course of executing the works, substitutes are to be provided.

To entitle to compensation the injury must in general be such as would have conferred a right of action had the works not been sanctioned by authority of statute. Accordingly, no compensation is claimable in respect that the works of the undertakers have resulted in the intercepting of water which otherwise would have percolated underground to the claimant's property, or that they have had the effect of draining off water accumulated in his well (*New River Co.*, 1860, 2 E. & E. 435; for converse cases governed by the same principle, see *South Shields Waterworks Co.*, 1845, 15 L. J. Ex. 315; *Mayor of Bradford*, [1895] A. C. 587; see WATER).

The limits of deviation are prescribed in sec. 11. Before commencing the works, any alterations upon the original plans and sections which shall have been approved of by Parliament must be shown upon plans deposited with the sheriff clerk of the county and the town clerk of any royal burgh in which the waterworks are situated (1847, s. 8). Provision is made for the correction of errors or omissions in the deposited plans, upon application to the Sheriff (1847, s. 7). No substantial variation in the construction of the works from that shown on the deposited plans is permissible (*Simpson*, 1865, 34 L. J. Ch. 380). Existing rights in and to the use of streams taken are reserved to the owners and occupiers of the riparian lands to the extent to which such streams were previously used by them, if such owners and occupiers have not been compensated in respect of such rights of user (1847, s. 15; see *Lord Blantyre*, 1888, 15 R. H. L. 56). Subsequent to the taking over of the streams and supplies of water authorised to be taken by the special Act, any illegal diversion of water flowing thereinto is visited with severe penalties, to be recovered before the Sheriff (1847, s. 14); reserving also to the undertakers any claims for damages so sustained (1847, s. 14).

Accommodation Works.—Any differences regarding the construction of such works are to be determined by the Sheriff, who shall appoint the time for the execution of these (1847, s. 16). Failing execution by the undertakers, they may be carried out by the persons aggrieved by such default, and the expenses recovered from the undertakers (1847, s. 17).

Mines and Minerals.—Unless expressly named and conveyed, mines and minerals under the lands purchased are deemed to be excepted (*Consett Waterworks Co.*, 1889, 22 Q. B. D. 318), and the undertakers' rights therein only extend to such parts of these as are necessarily dug, carried away, or used in the construction of the works authorised (1847, s. 18; see Railway

Clauses (Scotland) Act, 1845, 8 & 9 Vict. c. 33, ss. 70–78; *Corporation of Huddersfield*, 1874, 10 Ch. 92, 17 Eq. 476; see also RAILWAYS; SUPPORT). The expression "the lands purchased" is to be read as including not merely the upper soil, but also the subsoil (Ld. Watson, *Magistrates of Glasgow*, 1888, 15 R. H. L. 94, at 101), and the exclusion of "mines of coal, ironstone, slate, or other minerals" under the lands purchased does not apply to a seam of clay forming the subsoil of the lands conveyed to the undertakers (*Magistrates of Glasgow*, 1888, 15 R. H. L. 94). Maps and plans of pipes and other underground works must be made (1847, s. 19), and copies deposited with the proper officials (1847, ss. 20, 21). The deposit of plans of the underground workings in terms of these sections is a condition precedent to the right of the undertakers to recover for injuries caused to their pipes by the ordinary and usual working of the subjacent minerals (*South Staffordshire Waterworks Co.*, 1886, 56 L. J. Q. B. 255).

In the absence of special contract between them and the undertakers, written notice must be given by mineral owners or tenants of their intention to work mines under or within the prescribed distance of the reservoirs, buildings, or other works of the undertakers. The prescribed distance, in default of definition in the special Act, is stated at forty yards. This giving of notice is an inhibitory, and not a resolutive condition. An owner or lessee of minerals lying under such works who has contravened the enactment by working within the prohibited area before giving notice, is not thereby debarred from subsequently giving the notice required by the statute (*Edin. & Dist. Water Trs.*, 1898, 25 R. 504). The contrary view would involve a forfeiture by the mine-owner of his minerals, which is not warranted by the statute. The remedy of the undertakers is, in the meantime, interdict, and recovery of what damage may have been caused by the illegal workings of the mine-owner (Ld. M'Laren, *ib.*, at 517). The undertakers, if satisfied that the working of the minerals will cause damage to the works, to which end a power of entry to and inspection of the mines is conferred (1847, s. 26), may, upon paying compensation to the mineral owner or tenant, veto the working of the mines (1847, s. 22). The definition of the area to be so protected upon payment of compensation thus rests with the undertakers, who decide how much is necessary for the stability of their works. If the undertakers refuse to make compensation, the mine-owner may work and drain his mines, provided that no wilful damage be done to the undertakers' works, and that the mines be not worked in an unusual manner (1847, s. 23; cf. 8 & 9 Vict. c. 33, s. 72). What shall constitute an unusual method of working is a pure question of fact. It means, at least, something different from what may be feasible, proper, or profitable. For a question arising upon the attempted removal of stoops of limestone from workings which had been previously worked by stoop and room, see *Edin. & Dist. Water Trs.*, 1898, 25 R. 504. The onus of proving that the method adopted is "unusual" lies, of course, upon the undertakers (Ld. Pres. Robertson, *Edin. & Dist. Water Trs.*, *c.s.*, at 515).

Communication levels and other works rendered necessary by the interposition of this protected area and the consequent break of continuity may be made by the mine-owner or mineral tenant (1847, s. 24), a provision which is obviously inapplicable to cases in which the minerals have been acquired by the undertakers. The price of the minerals left unworked (1847, s. 22), the additional expenses of working thus caused, and, in general, any "intersectional damage" caused by the interruption of the continuous working of the mines, is to be paid by the undertakers (1847, s. 25). Compensation for prospective injury to mines is not claimable hereunder. The

remedy of the mine-owner is to be found under secs. 22 and 24 (*Holliday*, 1888, 20 Q. B. D. 699; [1891] A. C. 81). The amount of such compensation is to be settled, in the event of any dispute, by arbitration, in the manner provided by the Lands Clauses Consolidation (Scotland) Act. The undertakers are not exempt from ordinary proceedings for any injury done to mines by means of or in consequence of the construction of their works (1847, s. 27). For the construction of this section, see Lds. Bramwell and Watson, *Holliday*, [1891] A. C. 81, at 87, 101.

Security of Reservoirs.—Where any reservoir constructed by the undertakers is in a dangerous condition, two justices or the Sheriff, *ex proprio motu*, or upon complaint by any person interested, may order inquiry (1847, s. 87; 1863, ss. 3, 11); order repair by the undertakers or otherwise (1863, ss. 4, 5, 6, Sched.), and payment by them of the costs and expenses (1863, s. 8). Appeal against such order lies from the Sheriff-Substitute to the Sheriff (1863, s. 11; see 8 & 9 Vict. c. 33, ss. 151, 152), whose judgment is final. The undertakers are relieved from liability for damages in respect of any diminution of supply of water or other consequences occasioned by the execution of any such order (1863, s. 10). As regards the liability of undertakers for damage caused to neighbouring lands by discharges of water from reservoirs or other *opera manufacta* in times of extraordinary rainfall and floods, see *Countess of Rothes*, 1882, 9 R. H. L. 108. See also WATER. As to the rateable value of reservoirs and other works for assessment purposes, see *Mayor of Liverpool*, [1899] 2 Q. B. 14; 1898, 14 T. L. R. 509; *Reg.* v. *W. Middlesex Waterworks Co.*, 1859, 28 L. J. M. C. 135; *Reg.* v. *S. Staffordshire Waterworks Co.*, 16 Q. B. D. 359.

Breaking up Streets and Laying of Pipes.—Power is given to the undertakers, on making due compensation for damage thus caused, to break up the soil and pavements of streets (defined 1847, s. 3), open and break up sewers and drains, and lay down pipes, conduits, service pipes, and other works (for the true construction of these various powers, see Ld. Chan. Herschell and Ld. Watson (*Magistrates of Glasgow*, 1895, 22 R. H. L. 29, at 30, 31)) within the limits of the special Act (see *Clippens Oil Co.*, 1897, 25 R. 370); and, generally, to do all other acts necessary for supplying water to the district included within the said limits (1847, s. 28). The mere incorporation of this section with a special Act will not be construed as authorising operations outwith the limits of the works specifically authorised by the special Act. The special Act is the leading enactment, and the general clause so incorporated is to be taken as applicable to facilitating distribution within these limits (Ld. Pres. Robertson, *Clippens Oil Co.*, 1897, 25 R. 370, at 378). The powers conferred by this section will not enable the undertakers to pierce and to carry pipes through the abutments, or to sling them from the girders of a bridge belonging to a railway company, which carried the road in which the undertakers were authorised to lay the pipes (*Magistrates of Glasgow*, 1895, 22 R. H. L. 29). These powers, also, can be exercised only in property dedicated to public uses (1847, s. 29; see *Magistrates of Glasgow*, *v.s.*). Unless in cases of emergency, notice must be given to the persons having the control and management of the streets or drains (1847, s. 30), and the work must be carried out under the superintendence of an officer appointed by the latter, according to a plan approved by them, or, in case of difference, adjusted by two justices or the Sheriff (1847, ss. 31, 87; see *Glasgow & South-West. Railway*, 21 R. 1033, at 1035). The plan exhibited must show not only the extent of the breaking-up proposed but also the underground works and the proposed method of execution. The road authority, if they are to insist upon modification, must intimate this to the undertakers; for if, while receiving

the undertakers' plan and disapproving of it, they yet propose no counter-plan, and thus take steps to create a "difference" in the sense of the section, the undertakers will be justified in proceeding to carry out the work independently of the road authority (*East Molesey Local Board*, [1892] 3 Ch. 289). But where the undertakers are duly apprised of the non-approval of the road authority, it lies with them to apply to the justices or the Sheriff for the determination of the difference thus created (*Edgware Highway Board*, 1877, 46 L. J. Ch. 889). The justices or the Sheriff may, upon the application of the persons vested with the management of the drains, order such temporary works to be executed as are necessary to guard against interruption of drainage (1847, s. 31). For the position of a company having no parliamentary powers, claiming right to enter upon and break up streets, see *Mayor of Preston*, 1885, 53 L. T. 318.

The works are to be executed with all despatch, and the road, pavement, sewers, or drains broken up or opened must be reinstated and made good (see *East London Waterworks Co.*, 1886, 17 Q. B. D. 475, Esher, M. R., at 480). Measures must also be taken to ensure the safety of the public during the execution of the works (1847, s. 32). Penalties are provided in the event of failure by the undertakers in any of these duties (1847, s. 33); and, upon default of execution by the undertakers, the necessary works may be carried out and completed at their expense (1847, s. 34). As to the liability for damage caused to members of the public through the negligent execution of these duties, see *Chapman*, [1894] 2 Q. B. 599; *Strute*, 1889, 53 J. P. 424; cf. 1847, ss. 48, 52 *infra*.

Water Supply.—A sufficient supply of pure and wholesome water for domestic purposes (see 1863, s. 12; *Weaver*, 1883, 48 L. T. 906) at a constant and sufficient pressure, unless otherwise provided in the special Act (see *Parnell*, 1861, 10 C. B. N. S. 576; *Mayor of Liverpool*, 1897, 14 T. L. R. 11; cf. 60 & 61 Vict. c. 38, s. 132 (c)), is to be maintained within the limits of the district. As regards the undertakers' liability for damages where water, originally pure and wholesome, becomes contaminated in its passage through the consumer's pipes, see *Milnes*, 1886, 11 App. Ca. 511. Pipes for supplying the water to any part of the district must be laid by the undertakers upon the requisition of owners or occupiers whose water-rates amount to a certain part of the initial cost of laying these (1847, s. 35). As to supply by meters, and the incidence of expenses in providing these, see 1863, ss. 14, 15; *Sheffield Waterworks Co.* v. *Carter*, 1882, 24 Q. B. D. 632; *Sheffield Waterworks Co.* v. *Bingham*, 1883, 25 Ch. D. 443. Suitable penalties for breach of these duties, payable to the aggrieved owners and occupiers, are provided. The undertakers are, however, excused for failure to supply water where the failure arises from frost, unusual drought, or other unavoidable cause or accident (1847, s. 36; 1863, s. 13; *Blyth*, 1856, 11 Ex. 781; *Industrial Dwellings Co.*, 1894, 58 J. P. 430; see also *Green*, 1894, 70 L. T. 547; *Dunn*, 1872, 8 Q. B. 42). Reasonable precautions, however, must be taken to guard against such contingencies (*Steggles*, 1863, 11 W. R. 234; 13 W. R. 413).

The undertakers must also maintain a sufficient supply of water for cleansing sewers, watering the streets, and other public purposes; the quantity to be so taken, the amount payable therefor, and the other terms and conditions to be fixed by agreement, or, in case of dispute, by the inspector to be appointed under any local Act relating to the town or district to be supplied with water under the special Act (1847, s. 37; 1847, s. 3). Prior to the appointment of such officer, the Sheriff is to adjust any such differences (1847, s. 37). A supply to a workhouse is not within this section, as being for a "public purpose" (*Liskeard Union*, 1881, 7 Q. B. D. 505).

Fire-Plugs.—The undertakers, under sanction of certain penalties (1847, s. 43), must, at the request of the town authorities, affix fire-plugs for the purpose of extinguishing fires at proper and convenient places in the water mains (1847, ss. 38, 39), and maintain them in an efficient state of repair. These must also be provided, at the request of owners and occupiers of works and manufactories, in any street in which a water pipe belonging to the undertakers is laid (1847, s. 41). For the incidence of the expenses where the existing pipe is of insufficient capacity to carry the necessary fire-plugs, see *Reg.* v. *Wells Water Co.*, 1886, 55 L. T. 188. No charge is exigible for the use of water taken for the purpose of extinguishing fires (1847, s. 42). The cost of fixing and repairing the fire-plugs is to be defrayed by the town authorities, or the owners and occupiers making the request (1847, ss. 40, 41). The obligation to pay these expenses attaches only to those who made the request. Accordingly, liability for these may in certain cases be avoided, where sought to be enforced against statutory successors (see *Grand Junction Waterworks Co.*, [1894] 2 Q. B. 735). A breach of duty under these sections, though it may render the undertakers liable to the penalties provided by sec. 43, does not necessarily carry with it liability for damages consequent upon such breach. So, where a person brought an action of damages against the undertakers for not keeping their pipes charged with water as required by the Act, whereby his premises, which were situated within the limits of the undertakers' Act, were burnt down, it was held that the mere fact that the breach of the statutory duty by the undertakers had caused damage vested no right of action against the undertakers in the person suffering (*Atkinson*, 1877, 2 Ex. D. 441; see also *Campbell*, 1872, 26 L. T. 475). As to the liability of the undertakers for personal injuries to a member of the public caused by tripping over a fire-plug, which, owing to the wearing away of the road surface, was not standing flush with the road, see *Moore*, 1886, 17 Q. B. D. 462; see also *Bayley*, 1860, 6 H. & N. 241.

Communication Pipes; Laid by Undertakers.—In the case of houses under a certain value, and upon payment or tender of the water-rate, communication pipes shall be laid down and kept in repair by the undertakers at the request of the owner, or of the occupier with such owner's consent (see 54 & 55 Vict. c. 52, s. 3; 60 & 61 Vict. c. 38, s. 132), and the occupier shall thereupon be entitled to have a sufficient supply of water for domestic purposes (1847, s. 44). Penalties upon failure to supply a person entitled are provided by sec. 43 (see *Kyffin*, [1896] 1 Q. B. 446). The company cannot refuse to supply water to a tenant in respect that arrears due by a former tenant are still unpaid (*Sheffield Waterworks Co.*, 1879, 4 C. P. D. 410). The undertakers are entitled to charge reasonable annual rent for such communication pipes, to be settled by the inspector (see 1847, s. 3), or, prior to the appointment of such officer, by the Sheriff (1847, s. 44). This rent is to be additional to, and recoverable in the same manner as the ordinary water-rates (see 1847, ss. 68 *seq.*). Power is conferred upon the undertakers, in the event of the occupier refusing to pay for the water supplied, or, if the house be unoccupied for a year, to demand from the owner payment of the principal sum invested by them in providing and laying down communication pipes, and, in default of payment, to remove these; the balance due after deduction of the value of the pipes, the arrears of the annual rent, and costs, being recoverable from the owner or occupier, but being limited in the case of the latter to the amount of rent due by the occupier to the owner (1847, s. 46). On the other hand, power is given to the owner to purchase up the undertakers' interest, and to redeem the annual payment in respect of such pipes, by

paying to them the initial cost of providing the pipes, together with any arrears of rent that may be due (1847, s. 47).

Communication Pipes; Laid by Inhabitants.—Owners or occupiers within the district may, upon giving notice, themselves lay service pipes of a certain bore (1847, s. 50) to the pipes of the undertakers upon payment or tendering payment of the water-rate (1847, s. 48); the work to be executed under the superintendence of the surveyor or other officer appointed by the undertakers (1847, s. 49). Such pipes may after due notice be removed, compensation being made for any injury or damage so caused to the works (1847, s. 51). Power is given to the inhabitants to break up pavements and open drains for the purpose of laying service pipes (1847, s. 52), under similar restrictions and conditions as are applicable to the exercise of such powers by the undertakers themselves (see 1847, ss. 28 *seq.*). No liability attaches to the undertakers in connection with the execution of these works by an occupier. As to the latter's liability for damage resulting from non-reinstatement of the road and pavement, see *Glover*, 1868, 17 L. T. 475. On the other hand, these sections seem only to give the householder powers to break up for the purpose of laying down and removing communication pipes, but no power to break up for the purpose of repairing. In the case of damage resulting from the execution of repair works, liability would appear to lie upon the undertakers, as being the persons vested with the statutory powers (*Chapman*, [1894] 2 Q. B. 599; *Strute*, 1889, 53 J. P. 424). Upon such pipes being laid, and the water-rate paid or tendered, the undertakers are bound to supply the owners or occupiers with a sufficient supply for domestic purposes (1847, s. 53; see *Sheffield Waterworks Co.*, 1879, 4 C. P. D. 410). This does not include a supply for cattle, or for horses, or the washing of carriages kept for sale or hire (*Busby*, 1858, E. B. & E. 176), or a supply for any trade or manufacture, watering of gardens (see *Bristol Waterworks Co.*, 1885, 15 Q. B. D. 637), and so forth (1863, s. 12; see also s. 18).

Protection against Waste or Misuse of Water.—There are a number of minute provisions against waste. Where the water is not under constant pressure, cistern and ball-cocks are to be provided and kept in repair by the parties supplied (1847, ss. 54, 55, 56; 1863, s. 17; see *Ward*, 1890, 24 Q. B. D. 334; for the construction of the latter section, see Kay, J., *Chapman*, [1894] 2 Q. B. 599, at 606). As to supply by meters, see 1863, ss. 14, 15.

The application of water supplied to other than domestic purposes, or to purposes other than those authorised, is prohibited (1863, ss. 18, 19; *Williams*, 1897, 14 T. L. R. 18). Third parties are not to be supplied by householders (1847, s. 58), nor is water to be taken or abstracted by third parties from the undertakers' works (1847, s. 59; 1863, s. 20; see *Piercy*, 1881, 45 L. T. 477; *Hildreth*, 1860, 8 C. B. N. S. 587). Penalties are provided in such cases, or for wilful or negligent injury to pipes, or waste of water (1847, ss. 58, 59, 60; 1863, s. 18).

Fouling of Water.—This is strictly prohibited under penalties. Bathing, washing, throwing polluting matter, washing of clothes, wool, skins (see *Dumfries Waterworks Commissioners*, 1874, 1 R. 975), or the emitting of sewage, drain, or other foul water into any stream, reservoir, aqueduct, or other waterworks belonging to the undertakers are specially inhibited (1847, s. 61). Special provision is also made against the discharge of substances produced in gas works (see 1847, ss. 62 *seq.*).

Administration.

Administrative Body.—The administrative body is the undertakers as defined in 1847, s. 2.

Profits.—The profits of the undertaking are subject to certain limitations (1847, s. 75), the excess of profits being applied to the formation of a reserve fund (1847, s. 76), and, subsequent to the satisfaction of this purpose, to any general purpose of the undertaking (1847, s. 78). The Sheriff may, upon the petition of two or more ratepayers, order inquiry into the condition of the concern, and where the purposes above mentioned have been satisfied, any excess of profits is to be applied in a rateable reduction of the water rates (1847, s. 80).

The reserve fund may be drawn upon (1) to make up any deficiency in the annual profits (1847, s. 79), or (2) to meet any extraordinary claim, certified as such by the Sheriff (1847, s. 77).

These provisions as to profits are excepted in the clause incorporating the Waterworks Act of 1847 with the Public Health Acts (see 54 & 55 Vict. c. 52, s. 3; 60 & 61 Vict. c. 38, s. 132).

Accounts.—Annual accounts in abstract of the receipts and expenditure are to be made up by the undertakers, and a copy sent to the Sheriff of the county in which the waterworks are situated, in whose office it shall lie for inspection (1847, s. 73).

Payment and Recovery of Water-Rates.—These are payable quarterly in advance (1847, s. 70), and are payable and recoverable from the party requiring, receiving, or using the water, according to the annual value of the premises (1847, s. 68). The liability is a personal liability, and the undertakers have no lien for arrears (*Sheffield Waterworks Co.*, 1879, 4 C. P. D. 410). Any dispute arising as to the annual value is to be determined by two justices. This determination is a condition precedent to action for the rates at the instance of the undertakers (*New River Co*, 1875, 10 C. P. 442; see also *Lea*, 1885, 16 Q. B. D. 18; *Colne Valley Water Co.*, 1884, 50 L. T. 617), or to the right of the occupier to sue the undertakers for cutting off the water and for repayment of excess rates paid (*Whiting*, 1884, 1 Ca. & E. 331). But the absence of such determination does not in all cases prevent the exercise of the jurisdiction of the Court (*Hayward*, 1884, 28 Ch. D. 138). For cases upon the construction of "annual value," "rateable value," and "rent" contained in this statute or in special Acts, and as to what deductions are permissible in estimating these, see *Sheffield Waterworks Co.*, 1872, L. R. 7 Ex. 409, 8 Ex. 196; *Warrington Waterworks Co.*, 1882, 9 Q. B. D. 145; 1883, 9 App. Ca. 49; *Dobbs*, 1882, 9 Q. B. D. 151, 10 Q. B. D. 337; see also *Smith*, 1883, 11 Q. B. D. 195. For the treatment of an incidental increase of value owing to the licensing of the premises, see *West Middlesex Waterworks Co.*, 1885, 14 Q. B. D. 529.

A person removing or giving notice of discontinuance of use must nevertheless pay the rate up to the next quarter-day (1847, s. 71). This provision, however, does not warrant the undertakers in charging a full quarter's rates in respect of an occupation commencing between two quarter-days. They can in such cases only charge for an amount proportioned to the period of occupation (*East London Waterworks Co.*, [1894] 1 Q. B. 819).

The owners or receivers of the rents of houses not exceeding £10 in rent are liable for the payment of the rate instead of the occupiers (1847, s. 72; see *Rook*, 1859, 7 C. B. N. S. 240). But this gives the undertakers no greater rights against the owner than they would have had against the occupier. So, where a house is unoccupied, the owner's liability for rates ceases upon the quarterly day of payment next after the house becoming vacant (*British Empire Mutual Association Co.*, 1888, 59 L. T. 321).

The remedies open to the undertakers in the event of non-payment are cutting off the water (1847, s. 74; see *Sheffield Waterworks Co.*, 1879, 4 C. P. D. 410; see also 1847, ss. 54–57; 1863, s. 16), or recovery of the

rates and expenses by action before any Court of competent jurisdiction (1847, s. 74; 1863, s. 21). Where such rates and expenses are below £20, the provisions of the Railways Clauses Consolidation (Scotland) Act (8 & 9 Vict. c. 33, ss. 132 *seq.*) are incorporated for the purpose of their recovery. As to how far a demand for the rates is necessary before application to the justices, see *East London Waterworks Co.*, [1895] 1 Q. B 55.

The recovery of damages is regulated by the same statute (1847, s. 85; 1867, s. 2).

In addition to the general code contained in the foregoing statutes, further provision has been made for facilitating the obtaining of powers for the construction of waterworks and the supply of water by the Gas and Water Works Facilities Act, 1870 (33 & 34 Vict. c. 70; see also the amending Act of 1873, 36 & 37 Vict. c. 89).

Application of the Act of 1870.—The Act applies where powers are required to construct or maintain and continue waterworks and to supply water in any "district" (1870, s. 2) in which there is not an existing company, corporation, body of commissioners, or person empowered by Act of Parliament to construct such works and to supply water (1870, s. 3 (2)); to raise additional capital for such purposes (1870, s. 3 (3)); or to enable two or more existing water companies to amalgamate (1870, s. 3 (5)).

The facilities afforded by the Act may be taken advantage of by any existing company deriving its powers from Act of Parliament (1870, s. 3).

Provisional Orders and Procedure.—The machinery provided by the statute is the obtaining of a provisional order authorising the "undertaking" within a certain district by any company, companies, or person (1870, s. 4). The consent of the local authority (1870, s. 2; see Sched. A) to the construction of the works is necessary, unless the Board of Trade, such consent having been refused, expressly dispense with its absence (1870, s. 4).

The procedure to be followed in obtaining the provisional order is minutely detailed (1870, s. 5; Sched. B, Part i. ii. iii.; see also 1873, s. 14), and it provides for notice of the intended application to the existing water companies within the district to which the proposed application refers, and for notice to the owners and occupiers of mills or other works situated upon any stream from which it is proposed to abstract water. The Board of Trade considers the application and any objections lodged within a time to be by them appointed (1870, s. 6). As regards inquiries to be held by the Board for this purpose, see 1873, s. 13. If satisfied of the expediency of so doing, and the regularity of the procedure, the Board may settle and make a provisional order (1870, s. 7), which, however, shall not contain any provision empowering the acquisition of lands by the undertakers otherwise than by agreement, or, even under agreement, beyond a limited extent (1870, s. 7). The costs connected with the application and the preparation and making of the provisional order are payable by the undertakers.

After being settled by the Board of Trade, the provisional order must be published (1870, s. 8; Sched. B, Part iv.), and thereafter be introduced to Parliament by the Board for an Act of confirmation (1870, s. 9). Provision is made for the compearance of objectors at this stage. Until so confirmed, the provisional order has no operation (1870, s. 9). The order may be from time to time revoked, amended, or varied by subsequent order, to be similarly applied for, made, and confirmed (1873, s. 12).

Except in so far as expressly varied, the provisions of the Waterworks Clauses Acts of 1847 and 1863, and also of the Lands Clauses Act (see 1870, s. 2), excluding, however, those provisions of the latter Act which relate to

compulsory purchase and entry upon lands, are to be held as incorporated in such provisional order.

The powers conferred by the provisional order shall cease to be exercised at the expiration of certain prescribed times if the works have not then been commenced or completed; unless these times shall be prorogated by the direction of the Board of Trade (1870, s. 11); and such powers are to be read as subject to the provisions of any general Act subsequently passed (1870, s. 13).

The provisions of the Waterworks Clauses Acts of 1847 and 1863 are with certain limitations incorporated with the Public Health (Scotland) Act, 1891 (54 & 55 Vict. c. 52, s. 3), and Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38, s. 132). See PUBLIC HEALTH.

As to loans of public money to sanitary or local authorities for the purpose of constructing and carrying on waterworks, see Public Works Loans Act, 1875 (38 & 39 Vict. c. 89, s. 9, Sched. I).

Weights and Measures.

A. STANDARD WEIGHTS AND MEASURES.

The Weights and Measures Acts, 1878 (41 & 42 Vict. c. 49), and 1889 (52 & 53 Vict. c. 21), and the Weights and Measures (Metric System) Act, 1897 (60 & 61 Vict. c. 46), constitute the existing law on this subject. These statutes supersede the previous statutes—in particular, the Statute 5 Geo. IV. c. 74, which first introduced a uniform system in 1824.

Apart from metric weights and measures, which we shall mention later on, there are two imperial standards from which all weights and measures are derived, namely, the yard, or standard of length, and the pound, or standard of weight.

The yard, or unit or standard measure of extension, is the distance, measured under certain conditions, between two marked points on a bronze bar deposited in the Standards Department of the Board of Trade. From it all other measures of extension, whether linear, superficial, or solid,—and whether multiples or aliquot parts,—are ascertained, such as the inch, the acre, a cubic foot, etc. (Act 1878, ss. 10, 11, 12).

The pound, or unit or standard measure of weight, is the weight *in vacuo* of a platinum weight, also deposited at the Board of Trade. All weights legally in use, whether multiples or aliquot parts, are derived from it. Thus one-seven-thousandth part of a pound is one grain. One hundred and twelve pounds are one hundredweight (Act 1878, ss. 13, 14). Again, all weights derived from the standard pound are avoirdupois, and, with the two following exceptions, no other weights can be used, namely, (1) Troy weight can be used for the sale of gold and silver and articles made thereof; (2) Apothecaries' weight may be used for the sale of drugs when sold by retail (Act 1878, s. 20).

The gallon, or unit or standard measure of capacity, is derived from the pound. It is a vessel containing ten imperial pounds weight of distilled water, weighed under certain conditions. The gallon is thus not an independent standard, but is derived from the standard of weight. It is declared to be the measure of capacity as well for liquids as for dry goods, and all other measures of capacity are either multiples or aliquot parts of it. Thus, in liquids, a fourth part of a gallon is a quart; an eighth part is a pint. In dry measure, two gallons are a peck, eight gallons are a bushel, eight bushels are a quarter, and thirty-six bushels are a chaldron (Act 1878, s. 15). Again, fiars prices are to be struck by the imperial quarter (*ib.*, s. 71).

The bushel for goods formerly sold by "heaped" measure is defined, and provision is made regarding "heaping" (*ib.*, ss. 16, 17).

Weights and measures made from these standards are called imperial weights and measures (Act 1878, s. 1). The statute further declared that a uniform system was to be introduced (*ib.*, s. 3); that the use of all local and customary weights and measures is prohibited; that every contract in which weights and measures are referred to shall mean imperial weights and measures, otherwise it shall be void—in addition to which the parties so contracting shall be fined (*ib.*, s. 19). The actual weights and measures that can be used cannot be stated here. They are those set forth in the Schedules I. and II. of the Act, and such others as the Board of Trade has from time to time sanctioned (*ib.*, s. 8). It should be borne in mind that though all contracts have to be made in terms of multiples or aliquot parts of the standards, yet the actual subject of the contract—for instance, the thing sold—can only be weighed or measured in weights or measures mentioned in the Act or made by the Board of Trade: for no one is allowed to make a weight or measure. A vessel, however, not intended to be a measure can be lawfully used (*ib.*, s. 22). Again, although this Act did not sanction the use of the metric system of weights and measures in making contracts, or allow metric weights and measures to be used, it yet provided that a contract should not be void if expressed in terms of the metric system, or decimal divisions of the standards, and gave in Sched. III. a list of metric weights and measures, and their equivalents in imperial weights and measures (*ib.*, s. 21).

The remaining clauses of this statute deal chiefly with the rules regulating the administration of the Act.

The Weights and Measures Act, 1889, besides, among other things, regulating the sale of coal (ss. 20–31) and bread (s. 32), empowered the Board of Trade to make new denominations of standards, derived either from the imperial standards or other standards, for the measurement of electricity, temperature, pressure, or gravities (s. 6).

Finally, the Weights and Measures (Metric System) Act, 1897, introduced an important change. It sanctioned the use of the metric system (s. 1); and in order that there should be metric weights and measures in use, it provided that metric standards should be made from the iridio platinum linear standard metre and the iridio platinum standard kilogram in the possession of the Board of Trade (s. 2).

The weights and measures, accordingly, which can now be used are—

(1) Those derived from the pound, yard, and gallon, which are given in Schedule II. of the Act of 1878.

(2) Such others as are made from time to time by the Board of Trade in terms of the powers conferred upon them by sec. 8.

(3) Troy and apothecaries' weights, to the extent permitted in sec. 20.

(4) Measures for the measurement of electricity, temperature, pressure, or gravities made under the powers contained in Act of 1889, s. 6.

(5) Metric weights and measures made under the authority of the Act of 1897.

All contracts in which something is to be performed, sold, or done by weight or measure must be in terms of one of the above-mentioned weights or measures; and the possession even of false weights and measures, if kept for use, is a punishable offence (s. 24; cf. *Hood*, 15 R. (J. C.) 4). But when there is no reference to weights or measures, the statutes do not apply—as, for instance, in the case of things sold by price. Thus it has been held that the sale of a glass of whisky was a sale not by measure but by price (*Craig*, 1883, 10 R. (J. C.) 51), and the use of an unstamped

measure for measuring it did not render the sale illegal (*Ross*, 1886, 13 R. (J. C.) 73). The statutes apply to contracts in which something is to be performed, sold, or done, and not to all contracts. Accordingly, a clause in a lease whereby the rent was to be paid at so much a cheese weighed by a local weight was sustained (*Miller*, 1860, 22 D. 660).

Again, these statutes apply to the United Kingdom. In the case of contracts made in foreign countries and our colonies, or in this country when they are to be performed abroad, the presumption is that the weights and measures are intended to be those in use at the place where the contract is to be performed (B. *P.* 91).

B. Scottish Weights and Measures.

Article XVII. of the Treaty of Union in 1707 enacted that the same weights and measures shall be used throughout the United Kingdom as are now established in England, etc. Copies of the English standards were directed to be sent to Scotland. This was done, but for a long time Scottish weights and measures continued to be used. These weights and measures have, however, almost now disappeared from use; and as they were different in weight, capacity, or length, even when they had the same names as the English equivalents, it is probably a great advantage. Lists of them, with the British equivalent, are given in Swinton, *Weights and Measures in Scotland*; and there are said to be forty Scots Acts on this subject. The "Act anent Setting of Measures and Weights, 19th Feb. 1618," gives the ancient standards—

(1) The unit of linear measure was the elne or ell, thirty-seven inches in length. The Standard ell was committed for safe keeping to the city of Edinburgh.

(2) The unit of weight was the French Troye stone in the possession of the burgh of Lanark. One-sixteenth part of it was a pound. One-sixteenth part of a pound was an ounce.

(3) The unit of the measure of capacity for liquids was the Stirling jug, or pint, in the possession of that town. It was found to contain three pounds and seven ounces of French Troye weight of clear running water of the Water of Leith. One-fourth part was a mutchkin. Two pints were a quart. Four quarts were a gallon. This gallon was slightly more than three times the size of an imperial gallon.

(4) The unit of capacity for dry goods was the Linlithgow firlot in the possession of that town. It was of two sizes—

(*a*) Firlot for wheat, containing twenty-one pints and one mutchkin as measured from the Stirling jug.

(*b*) Firlot for malt, barley, and oats, containing thirty-one pints.

Of this measure, four firlots made one boll, and sixteen bolls made one chalder. Converting a chalder, we find that a chalder raised from the wheat firlot scale equals eight imperial quarters, and a chalder raised from the barley firlot scale equals 11·65 imperial quarters (see Swinton, *supra*).

Whales.—Strictly, whales cast ashore which exceed six-power draught belong to the Crown (*Leges Forestarum*, s. 17). In practice, however, it is only when they are of much larger size that they become the property of the Crown, or of the Admiral, who is Her Majesty's donatory. Whales of smaller size which are cast ashore appear to belong to the person who first secures them. In the Shetland Islands smaller whales belong half to the proprietor of the lands on which they are thrown, and half to those who are instrumental in catching them (*Stove*, 1831, 9 S. 633; see also *Bruce*,

1890, 17 R. 1000). As to the ownership of whales captured in whale-fishing, see Ld. Westbury in *Sutter*, 1862, 4 Macq. 355.

[Stair, ii. 1, s. 5; Ersk. ii. 1, s. 10; Bell, *Prin.* s. 1289.]

Wharfinger.—See HIRING (vi. 217).

Whipping.—1. *At Common Law.*—A father has, at common law, power to punish his child, with the object of maintaining his parental authority. This chastisement, however, must be moderate in character, and must be such as is "conducive to the well-being of the child, and corrective of its faults" (Fraser, *P. & C.* 72; Stair, i. 5. 6; Ersk. i. 6. 53).

At common law a master is entitled to inflict personal chastisement on his apprentice (Ersk. i. 7. 62; *Forbes*, 1708, 4 Br. Sup. 708; Fraser, *Master and Servant*, 125, 363). But he must do so with moderation. Any gross excess on the part of the master in chastising his apprentice would justify the latter in leaving his master's service, and the master would be subjected in damages (*Aikman*, 1665, M. 12311; *Anonymous*, 2 Br. Sup. 520; *Watson*, 1698, 4 Br. Sup. 420; *Smart*, 1794, Hume's *Dec.* 18; *The Agincourt*, 1824, 1 Hag. Adm. 273 (Ld. Stowell); *Gunn*, 1835, 13 S. 1143 (Ld. Meadowbank); *Cherrie*, 1837, 1 Jur. 191; *Halliwell*, 1878, 38 L. T. N. S. 176).

The master of a ship is, at common law, entitled to inflict personal chastisement on seamen who are guilty of gross breach of duty (*Lamb*, 1831, 1 Cr. & J. 291); but he must do so with moderation (*The Ruckers*, 1801, 4 Rob. 73; *The Frederick*, 1823, 1 Hag. 216; *The Agincourt*, 1824, 1 Hag. 271; *Reekie*, 1842, 5 D. 368; Fraser, *Master and Servant*, 476).

It was at one time competent, at common law, for judges both of the supreme and inferior Courts to sentence persons of all ages who had been convicted of crime to be whipped or scourged (Hume, ii. 149–152). This common law power, so far as adults are concerned, has been greatly curtailed if not entirely abrogated by the Act 25 Vict. c. 18, s. 2, which provides that in Scotland no offender above sixteen years of age shall be whipped for theft, or for crime committed against person or property (see *Stevenson*, 1878, 4 Coup. 76).

2. *By Statute.*—By the Act 5 & 6 Vict. c. 61, s. 2, it is provided that any person convicted of discharging firearms at, or throwing or using any offensive matter or weapon with intent to injure or alarm the Queen, may be sentenced to penal servitude or imprisonment, and during the imprisonment to be publicly or privately whipped, as often and in the manner and form which the Court shall direct, not exceeding thrice.

By the Prisons (Scotland) Act, 1860, 23 & 24 Vict. c. 105, it is provided (s. 74) that in every case where it is competent for any judge or magistrate to award sentence of imprisonment, or of fine with the alternative of imprisonment, it shall be lawful for such judge or magistrate, in the case of any juvenile offender, being a male, whose age in the opinion of such judge or magistrate shall not exceed fourteen years, to adjudge such offender, instead of imprisonment, or of imprisonment and hard labour, or in addition to imprisonment, or imprisonment and hard labour, to be punished by private whipping, in such manner and according to such regulations as have been or shall be made by the Lord Advocate of Scotland in that behalf, and approved by one of Her Majesty's Principal Secretaries of State.

By the Act 25 Vict. c. 18, it is provided (s. 1) that where the punishment of whipping is awarded for any offence by order of one or more justice or justices, made in exercise of his or their power of summary conviction, or in Scotland by the Court of Justiciary, or by any Sheriff or magistrate, the order, sentence, or conviction awarding such punishment shall specify the

number of strokes to be inflicted, and the instrument to be used in the infliction of them, and, in the case of an offender whose age does not exceed fourteen years, the number of strokes inflicted shall not exceed twelve, and the instrument used shall be a birch rod. No offender (s. 2) shall be whipped more than once for the same offence.

The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), provides (s. 4) that, if the age of a person convicted of defilement of a girl under thirteen years does not exceed sixteen years, the Court may, instead of sentencing him to any term of imprisonment, order him to be whipped as prescribed by the Act 25 Vict. c. 18, and the said Act shall apply, so far as circumstances admit, as if the offender had been convicted in manner in that Act mentioned; and if, having regard to his age and all the circumstances of the case, it should appear expedient, the Court may, in addition to the sentence of whipping, order him to be sent to a certified reformatory school, and to be there detained for a period of not less than two years and not more than five years.

Flogging is permitted in the Navy, except in the case of officers, under sec. 53 (11) of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109). Petty or non-commissioned officers can be flogged only for mutiny, and the maximum sentence is forty-eight lashes.

Flogging of persons under military law for breaches of discipline is now prohibited (44 & 45 Vict. c. 58, s. 44), except when such persons are in a military prison under sentence (44 & 45 Vict. c. 58, s. 133 (2); Military Prison Rules, 1880 and 1881, St. R. & O., Rev., I. 52).

Whitebonnet.—See Puffer.

Widow.—See Jus relictæ; Terce.

Wife.—See Married Woman.

Wild Birds.—See Birds (Wild) Protection Act.

Wild Duck.—These are mentioned as objects of protection in some of the old Scottish statutes, as, for example, 1474, c. 15 or c. 59, which prohibit the taking of their eggs. They are not covered by either the Night Poaching Act or the Poaching Prevention Act; but they come under the Day Trespass Act and the Wild Birds Protection Acts of 1880 and 1894.

Will.—The word "Will" is not, properly speaking, a technical law term in Scotland, but it is popularly and conveniently employed, and is used in various statutes, to denote all those writings or documents which a man executes in anticipation of death for regulating the disposal and administration of his means and estate, or of part of his means and estate, and for appointing tutors and curators to such of his beneficiaries or of his children as may be left in pupillarity or in minority.

A person has a right to dispose of all his property, and to say how it shall be dealt with after his death, within the rules of law. A more technical generic term for these written expressions of will, in the law of Scotland, is a settlement or "deed of settlement," which just means the way in which a man settles the disposition of his property after his death.

It is proper to notice here an important alteration made in the law regarding *mortis causa* deeds by the Titles to Land Consolidation Act of

1868 (31 & 32 Vict. c. 101), which applies to the testamentary writings of every testator who survived the 31st of December 1868.

By the law of Scotland before that date, it was not possible to bequeath Scottish heritage in a will or testament. Heritage could only be transferred by a deed containing words of *de præsenti* disposition, and the use of the word "dispone" was essential (*Kirkpatrick*, 1873, 11 M. 551; 1874, 1 R. (H. L.) 37). Even a deed executed abroad, and professing to deal with Scottish heritage, failed of its object unless it contained a *de præsenti* disposition.

This was altered by the 20th section of the Act above referred to, which enacts that from and after the 31st of December 1868 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 præsenti* 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 *de præsenti* words have not been used. Where such deed contains, with reference to 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 grantor, or upon the grantee or legatee of such moveables, a right to claim and receive the same, it is to be taken to be equivalent to a general disposition of the lands, and creates an obligation upon the heir to make up titles to the lands, and convey the same to the grantee; or the grantee may make up his title as if the deed had been a general disposition in his favour. By sec. 46 of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), provision is made for trustees or executors completing titles when there is no direct conveyance to them.

The effect of this enactment is that it is no longer a question of technicality, but of common construction, whether a *mortis causa* deed embraces heritage or not. A bequest of heritage and a bequest of moveables are now in precisely the same position as regards formality of conveyance. No particular words are needed; and if the deed, taken as a whole, clearly imports an intention to convey heritage, when neutral or equivocal words are used the intention will be determined from the context (*Wallace's Exrs.*, 1895, 23 R. 142; *Grant*, 1893, 20 R. 404; *Hardy's Trs.*, 1871, 9 M. 736; *Pitcairn*, 1870, 8 M. 604; *Edmond*, 1873, 11 M. 348; *M'Leod's Trs.*, 1875, 2 R. 481; *Urquhart*, 1879, 6 R. 1026; *Connel's Trs.*, 1872, 10 M. 627; *Robb's Trs.*, 1872, 10 M. 692; *Studd*, 1883, 10 R. (H. L.) 53; *Oag's Curator*, 1885, 12 R. 1162; *Aim's Tr.*, 1880, 8 R. 294; *Forsyth*, 1887, 15 R. 172; *Campbell*, 1887, 15 R. 103). Any probative writing which expresses a person's concluded intention with regard to the disposal of his estate will accordingly now be sufficient to regulate the succession both to heritage and to moveables.

A will executed abroad according to the forms of the country where it is made will convey Scotch heritage (*Connel's Trs.*, 1872, 10 M. 627; 1868, s. 20; 1874, s. 51).

Another distinction which used to exist between *mortis causa* dispositions of heritage and testamentary dispositions of moveables, was that in the case of heritage a deed was liable to be reduced *ex capite lecti* at the instance of the heir. Reductions on the head of "deathbed" (*q.v.*) were abolished by 34 & 35 Vict. c. 81, as far as regards the estates of persons dying after 16th August 1871, but deathbed may still be a good ground

of reduction of dispositions granted by persons who died before that date (see *Gray*, 1872, 10 M. 854; *Thain*, 1891, 18 R. 1196).

Who can make a Will.

The law of Scotland allows perfect freedom of bequest. Any person of full age, and not subject to legal or natural incapacity, can dispose as he likes of his property, subject to the rights which the law confers upon spouses and children over the estates of the parents, and subject, of course, to any obligation which the grantor enters into during life, and which has raised up claims of debt against the estate.

It is needless in this article to do more than refer to these restrictions in the interest of the family, which are fully treated of elsewhere. They are, in the case of the husband's estate, terce, and *jus relictæ* and legitim; in the case of a wife's estate, Courtesy, and the rights analogous to *jus relictæ* and legitim, introduced by the Married Women's Property Act of 1881.

A married woman of full age can make a settlement of her property, whether heritable or moveable, without the consent of her husband, whether the right of administration is excluded or not (Ersk. i. 6. 28).

Pupils, that is to say, males under fourteen years of age, or females under twelve, are incapable of acting or even of consenting (Ersk. i. 7. 14), and consequently cannot make wills.

Minors, that is, males under twenty-one but above fourteen, or females under twenty-one but above twelve, can dispose by will of moveable estate, and that without any consent. They may dispose of moveable property belonging to them as a *surrogatum* for heritage (*Brown's Tr.*, 1897, 24 R. 962). They cannot grant a *mortis causa* deed relating to heritage, though if they sell heritage they can dispose of the price by will. It has been said that the inability to dispose of heritage does not extend to things which are heritable merely *destinatione*, *e.g.* to stones prepared for building a house, because presumption in such cases must yield to proof (*Brand's Trs.*, 1874, 2 R. 258). This case was reversed in the House of Lords, 1876, 3 R. (H. L.) 16, but on grounds which do not seem to affect Ld. Gifford's remarks.

An interdicted person can dispose of his estate by *mortis causa* deed without the consent of his interdictors (*Mansfield*, 1841, 3 D. 1103; *Gray*, 1751, 5 Bro. Supp. 790).

Insane persons cannot grant valid deeds except during lucid intervals. The presumption of law is in favour of sanity, unless the person whose deed is in question has been cognosced insane, in which case the presumption is shifted (*Lindsay*, 1843, 5 D. 1194). 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. The reasonable nature of the deed is an important element (*Nisbet's Trs.*, 1871, 9 M. 937; *Ballantyne*, 1886, 13 R. 652; see *Hope's Trs.*, 1898, L. R., 1899, A. C. 1).

To make a good will a man must be a free agent. Pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made (Sir J. P. Wilde in *Hall*, 1868, L. R. 1 P. & D. 481).

Until the Act 6 Will. IV. c. 22 was passed, an illegitimate person, unless he had lawful issue, could not dispose of his estate by testament, but by that Act this disability was removed.

Form of *Mortis causa* Deeds.

The forms prescribed by the law of Scotland for the attestation of wills are the forms prescribed for the attestation of all written instruments. We have no statutory rules peculiar to wills. All the rules regarding the attestation of written instruments with us are equally applicable to testamentary writings and to deeds *inter vivos*.

If additional formalities are prescribed for himself by a testator, they have to be attended to. Thus, in *Nasmyth*, 1821, 1 S. App. 65, where a testator made a holograph will and concluded it with the words, "In testimony of this being my last will and testament I hereto set my hand and seal," it was held that cutting off the seal operated revocation of the will.

A will must be in writing. Though a nuncupative legacy is good up to one hundred pounds Scots, a verbal will is inadmissible, either as the nomination of an executor or to recall a former will.

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.

Testamentary effect has been given to writings which to all appearance were in their inception mere drafts or memoranda, 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 intention 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 (*Lowson*, 1866, 4 M. 631; *Colvin*, 1885, 12 R. 947; *Waddell's Trs.*, 1896, 24 R. 189). The requisites, as regards form, of a testamentary gift were thus summed up by Ld. Pres. Inglis in *Colvin*:—

"The Lord Ordinary says that a testator 'must declare his will in writing, and it is implied in this statement of the law that he must use significant words disposing of his estate.' In another part of his note his Lordship says, 'I think that the testator's intention, if such exists, must take the form of a proposition of some kind.' If the first statement which I have quoted means that words of gift must contain a verb expressing conveyance or transference or bequest, I am not prepared to agree with him: and if by the second statement the Lord Ordinary intends to lay down that a gift or legacy must take the form of a proposition, or, in other words, of a completed sentence, I am also not prepared to agree with that statement. 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."

"Nothing can receive probate which was not intended to be a testamentary act by the testator. He must in a sufficient way manifest his purpose that it should be a testamentary act. When you have an instrument, in all points of form, and in all points of substance, on the face of it, testamentary, and nothing more is needed to obtain confirmation of it than proof of the mere act; yet if on the face of the instrument there is something to suggest a doubt or a question whether it was in point of fact intended by the testator to be a testamentary act, it is not enough, in order to obtain probate or

confirmation, to establish the mere *factum* of the handwriting or the signature in a case where attestation is not required, but you must do something more: you must put the Court in possession of some extrinsic circumstances which will enable the Court to judge whether it was in point of fact a testamentary deed or not" (Ld. Chan. Selborne in *Hamilton*, 1882, 9 R. (H. L.) 53). In *Ritchie*, 1880, 8 R. 101, a letter addressed to a beneficiary was held to be testamentary (*Robb's Trs.*, 1872, 10 M. 692; *Cunningham*, 1871, 9 M. 713).

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 (*Arnott*, 1872, 11 M. 62; *Muir's Trs.*, 1869, 8 M. 53; *Simsons*, 1883, 10 R. 1247). Writing in pencil is more apt to be considered as deliberative merely; but if it is truly testamentary in its nature or terms, being written in pencil will not destroy its validity. Holograph pencil jottings upon a holograph will, which had been revoked by the birth of children, were held to be merely deliberative in *Munro's Exrs.*, 1890, 18 R. 122. Unsigned pencil alterations made on a written will will be presumed to be deliberative merely; but if there is competent evidence, parole or otherwise, to show that he intended them to be final, they will receive effect (*Lamont*, 1887, 14 R. 603).

In order to receive effect, the document or documents containing the will must contain a completed act, and not merely an intention to do something at some future date (*Munro*, 1813, 1 Dow, 437; *Maclean*, 1861, 23 D. 1099; *Cunningham*, 1871, 9 M. 713; *Duguid*, 1839, 1 D. 473). To give directions for the preparation of a will does not import legacies to the persons to be favoured unless the will is completed (*Scott*, 1864, 2 M. 613; *Lowson*, 1866, 4 M. 631; *Forsyth's Trs.*, 1872, 10 M. 616; *Whyte*, 1881, 8 R. 940; 1882, 9 R. (H. L.) 53). In *Maclean* the question whether a document was a memorandum or a completed will was held not proper for jury trial.

A will once completed, it alone is evidence of the party's intention, and drafts or instructions for its preparation cannot be looked at (*Blair*, 1849, 12 D. 97). Except in the case of mutual wills, which partake in some measure of the nature of contracts, a will takes effect only from the date of the testator's death. He may revoke it at any time, and a clause declaring a legacy irrevocable may itself be revoked (*Dougall's Trs.*, 1789, Mor. 15949). Even delivery of a testamentary writing to a person favoured in it will not make it irrevocable (*Miller*, 1826, 4 S. 822). But just as an expressed intention to make a will will not make one, so the clearest evidence of intention to revoke will not recall one unless the intention be carried into action. Thus in *Walker*, 1825, 4 S. 323, it was proved that a deceased person had asked his agent to send him his will that he might cancel it. This was not done, and reduction of the deed was refused.

It is the last will that prevails, but a man's will may be, and often is, contained in more than one document. The mere fact of making a subsequent will does not work a total revocation of a previous one; unless the latter expressly revoke the former, or the two be incapable of standing together; for though it be a maxim that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so they be all testamentary, may be admitted to probate, as together containing the last will of the deceased; and that although one may be partially inconsistent with another of an earlier date, the latter instrument will revoke the former as to those parts

only which are inconsistent. If a number of papers are found bearing to be testamentary, and you can execute the whole as one testament, you are bound to do so (*Stoddart*, 1852, 1 Macq. 163). Accordingly, in that case seven deeds or writings were held to contain the last will of a deceased person (*Baird*, 1856, 18 D. 1246; *Grant*, 1849, 11 D. 860; *Alves*, 1861, 23 D. 712; *Horsbrugh*, 1847, 9 D. 329; *Black*, 1841, 3 D. 522; *Low's Exrs.*, 1873, 11 M. 744). A will may therefore be contained in one or a number of formally executed deeds; or in a holograph writing or writings; or in a deed, probative or holograph, which adopts or provides for the execution of writs not formally executed or holograph, and such writs identified in the manner set forth by the maker of the principal deed.

The Court will not give effect to testaments or codicils which do not come under some one of these categories (*Maitland's Trs.*, 1871, 10 M. 79; *Rankine*, 1849, 11 D. 543; *Inglis*, 1831, 5 W. & S. 785).

Execution of Will.

Reference must be made to the article on Execution of Deeds for the requisites of a probative deed,—but it may be useful to set out what are the requisites now demanded by our law.

An unsubscribed will is by the law of Scotland a nullity (*Bradford*, 1884, 11 R. 1135).

A will signed by mark has been held null (*Crosbie*, 1865, 3 M. 870).

A signature written over a tracing made by another is not good (*Crosbie*, 1749, Mor. 16814), but the hand may be supported (*Noble*, 1875, 3 R. 74), but not led (*Harkness*, 1821, 2 Mur. 558; *Wilson*, 1814, Hume, 923).

A will cannot be signed with a stamp or seal made to represent a person's signature (*Stirling Stuart*, 1885, 12 R. 610), but it may be "touched up" or even illegible (*ib.*).

A blind man may either sign himself or employ a notary (*Earl of Fife*, 1823, 1 S. Ap. 498; *Couts*, 1681, Mor. 12601; *Reid*, 1837, 16 S. 273).

Deed Signed with Initial Letters.—It has been decided, in spite of the provisions of the Acts regulating the subscription of deeds, that where a deed is signed by the grantor with his initials only, that the fact that the initials are his and were adhibited by him may be proved by witnesses (*Grierson*, 1633, Mor. 16802; *Traquair*, 1724, Mor. 16809). It is necessary to prove both that the deed in question was subscribed by the party, and that he was in use to subscribe by initials (*Ker*, 1693, Mor. 16805; *Weirs*, 22 June 1813, F. C.; *Speirs*, 1879, 6 R. 1359; *Din*, 18 June 1812, 17 F. C. 394).

By section 40 of the Conveyancing Act, 1874, 37 & 38 Vict. c. 94, every holograph writing of a testamentary character is presumed, in the absence of evidence to the contrary, to be of the date it bears. This was an alteration of the rule by which holograph deeds did not prove their own date. The presumption may be rebutted by evidence *pro ut de jure*.

Formal Execution.—In order to render a deed probative by the law of Scotland, it must—

1. Be subscribed by the grantor at the end; and if it consists of more than one sheet, also at the foot of each page.

2. It must be signed on the last page by two witnesses who either see the party subscribe or hear the signature acknowledged. The witnesses may be male or female, but they must be fourteen years old, and subject to no legal incapacity. They should have no interest in the deed; though that they take legacies under it is not fatal either to the deed or to the gift (*Ingram*, 1801, Mor. "Writ," App. No. 2; *Simsons*, 1883, 10 R. 1247).

3. The designation of the witnesses is to be set forth in the testing clause, or follow the signature of the witnesses. As to the subscription of witnesses *ex intervallo*, see *Stewart*, 1877, 4 R. 427; *Tener's Trs.*, 1879, 6 R. 1111; *Thomson*, 1892, 20 R. 59. Marginal additions, interlineations, deletions, or erasures should be authenticated by signature or initials. Holograph deeds do not require witnesses. If they are testamentary, they are presumed to be of the date they bear; in the absence of evidence to the contrary (Act 1874, s. 40). No deed executed after 1st October 1874 (*Gardner*, 1878, 5 R. (H. L.) 105), subscribed by the maker and bearing to be attested by two witnesses subscribing, is deemed invalid because of any informality of execution, but the burden of proving that it was subscribed by the grantor and by the witnesses lies upon the party using or upholding it. The proof may be led in any action or proceeding in which it is founded on or objected to, or in a special application to the Court of Session or the Sheriff within whose jurisdiction the defender in any such application resides (s. 39; *Addison*, 1875, 2 R. 457; *Smyth*, 1876, 3 R. 573; *M'Laren*, 1876, 3 R. 1151; *Thomson's Trs.*, 1878, 16 S. L. R. 67). Ld. Deas said in *M'Laren*: "I do not think the proof competent and requisite under the statute was intended to be limited 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 grantor 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." When the Court was asked to declare, further, that the deed was a valid deed, and entitled to effect according to its legal import, the Court directed that part of the prayer to be deleted (*Addison*, 1875, 2 R. 457).

Notarial Execution.—The deed of a person who, from any cause, cannot write, may, after having been read over to the grantor, be validly executed by a notary public or justice of the peace subscribing the same for him, in his presence and by his authority, before two witnesses. In the case of a deed of a testamentary nature, the parish minister may act for any person dwelling in his parish. The persons acting for one who cannot write must have no interest in the deed, and ought to be certified as to the identity of the person for whom they act.

The docquet, which must be holograph (*Henry*, 1871, 9 M. 503; *Campbell*, 1895, 22 R. 443; *Irvine*, 1892, 19 R. 458), need not actually conform to the schedule given in the Act (*Aitchison's Trs.*, 1876, 3 R. 388). The schedule is in the following terms:—

> By authority of the above-named and designed *A. B.*, who declares that he cannot write, on account of sickness and bodily weakness (*or*, never having been taught, *or*, *otherwise as the case may be*), I., *C. D.*, notary public (or justice of the peace for the county of [*name it*], *or as regards wills or other testamentary writings executed by a parish minister as notary public in his own parish*, minister of the parish of [*name it*]), subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him, all in presence of the witnesses before named and designed, who subscribe this docquet in testimony of their having heard (or seen) authority given to me as aforesaid, and heard these presents read over to the said *A. B.*

The witnesses ought to see the notary or other authorised person subscribe, and they should sign at the same time as he does. If the docquet is not holograph, the defect cannot be remedied after the death of the testator (*Campbell*, *supra*). The only privilege that a testamentary writing now possesses over other deeds is that a minister may act as notary.

Holograph Wills.

A holograph will is good wherever made, and needs no witnesses. It ought to mention that it is holograph, in which case it is presumed to be holograph till the contrary is proved (Ersk. iii. 2. 22; 1 Bell's *Com.*, 5th ed., 324; *Turnbull*, 1844, 6 D. 896; *Robertson*, 1844, 7 D. 236; *Waddel*, 1845, 7 D. 605; *Cranston*, 1890, 17 R. 410). The person founding on a deed as holograph must prove that it is so, either by the evidence of persons who saw it written or by evidence as to handwriting which satisfies the Court (*Anderson*, 1858, 20 D. 1326; affd. 1858, 3 Macq. 180).

Holograph writings unsigned are presumed to be incomplete. Accordingly, an unsigned holograph will, though containing the maker's name in the document, will not receive effect (*Dunlop*, 1839, 1 D. 912; *Skinner*, 1883, 11 R. 88; *Goldie*, 1885, 13 R. 138; *Pettierew's Trs.*, 1884, 12 R. 249; *Russell's Trs.*, 1883, 11 R. 283). On the other hand, in *Burnie's Trs.*, 1894, 21 R. 1015, an unsubscribed holograph writing underneath the subscription of a holograph settlement was held to be part of the settlement. Ld. Young, who gave the leading opinion in that case, said: "Whether we should give effect to an unsubscribed writing appended to, or prefixed to, or indorsed upon a holograph will, which is itself subscribed, depends on circumstances, but I do not think that there is any technical or formal rule which compels us to reject such an unsubscribed writing."

A writing, to be privileged as holograph, does not require to be entirely in the handwriting of the maker: it is sufficient if the essential clauses are in his handwriting (*Vans*, 1675, Mor. 16885; *Panton*, 1824, 2 S. 632; *A.'s Exr.*, 1874, 11 S. L. R. 259). In *Macdonald*, 1890, 18 R. 101, it was decided that a printed form filled up by a testator, and signed by him, was not a holograph will. Nothing will give the character of holograph to a document not wholly in the handwriting of the alleged grantor unless either (1) there is so much of the material part of it in his handwriting as sufficiently expresses its scope and makes the rest of it unimportant, or, (2) by words appended to it over and above his signature, he declares expressly or by indubitable implication that he adopts the whole writing as his (*Maitland's Trs.*, 1871, 10 M. 79; *Gavine's Tr.*, 1883, 10 R. 448).

In *M'Millan*, 1850, 13 D. 187, a mutual will, written by one person and signed by the others, was held to be his will (*Laurie*, 1859, 21 D. 240; *Wilsone's Trs.*, 1861, 24 D. 163). Words in the handwriting of a grantor clearly adopting what is not in his handwriting will give that the privilege of a holograph writ (*M'Intyre*, 1 Mar. 1821, F. C.). A mere reference by way of narrative is not equivalent to adoption (*Boswell*, 1852, 14 D. 378; *Urquhart*, 1851, 13 D. 742).

Interlineations, etc.—Words written on erasure, or marginal additions or interlineations in holograph writings, if proved to be in the handwriting of the maker of the deed, are valid (*Robertson*, 1844, 7 D. 236; *Brown*, 1884, 11 R. 821; *Grant*, 1849, 11 D. 860; *Horsburgh*, 1848, 10 D. 824). "A holograph deed depends mainly on the handwriting of the grantor 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 grantor—on the contrary, being in his handwriting proves that it was made by him; so that it stands in the same situation as an ordinary deed when it has an express clause mentioning that the alteration was made by the grantor" (Ld. M'Kenzie in *Robertson*, 1844, 7 D. 236; *Kemps*, 1802, Mor. 16949; *Bruce*, 1666, 2 Br. Sup. 427; *Mags. of Dundee*, 1858, 3 Macq. 134). You

may, in order to find the meaning of a testator, read obliterated words if they are still legible (*Chapman*, 1860, 22 D. 745; *Pattison's Trs.*, 1888, 16 R. 73). Ld. M'Laren, Ordinary, lays down the following rules :—

1. If a will or codicil is found with the signature cancelled, or with lines drawn through the essential clauses, then on proof that this was done by the testator with the intention of revoking, the will is revoked.

2. If some of the legacies only are scored out, there is only a question as to these particular legacies. This would be sufficiently vouched by the initials of the testator in his own handwriting.

3. Marginal additions and interlineations, even apparently in the handwriting of the deceased, would only be held good if authenticated by signature or initialling. (Note that there is authority the other way.)

4. When words are scored out and others are inserted in their places, 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 (*Parker*, 1876, 13 S. L. R. 405).

Deletions and alterations, even on deeds not holograph, have been sustained if made by the testator, and considered final and not merely deliberative (*Grant*, 1849, 11 D. 860; *Richardson*, 1845, 8 D. 315; *Kemps*, 1802, Mor. 16949; *Traquair*, 1822, 1 S. 527).

A bank cheque made payable after the death of the grantor is not a testamentary instrument (*Milne*, 1884, 11 R. 887).

Blanks in Writs.

The Act 1696, c. 25, provides "that for hereafter no bonds, assignations, dispositions, or other deeds be subscribed blank in the person or persons' name in whose favours they are conceived, and that the foresaid person or persons be either insert before or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing before the delivery; certifying that all writs otherwise subscribed and delivered blank as said is, shall be declared null." The name of the disponee is presumed to have been properly filled in (Ersk. iii. 2. 6). The Act applies to trust deeds blank in the name of the trustees (*Pentland*, 1829, 7 S. 640); but the grantor may in a testamentary deed give power to another person to name his beneficiary (*Murray*, 1729, Mor. 4075; *Snodgrass*, 1806, Mor. Service of Heirs, App. No. 1; *Hill*, 1824, 3 S. 389; affd. 1826, 2 W. & S. 80; *Ewen*, 1830, 4 W. & S. 346). Charitable trusts are specially favoured (*Magistrates of Dundee*, 1858, 3 Macq. 134; *Crichton*, 1828, 3 W. & S. 329). Gifts of legacies can stand independent of the appointment of an executor.

Vitiations that make a grant illegible are fatal to the grant (*Grant's Trs.*, 1847, 6 Bell, 153; *Abernethie*, 1835, 13 S. 263; *Gollan*, 1863, 4 Macq. 585). Words written on erasure, unauthenticated, are taken *pro non scriptis*. If such words are essential to the clause in which they are found, and the clause without them is insensible, the clause is void; and if the clause so avoided be essential to the deed, it follows that the deed also becomes void; but if, after rejecting the words written on erasure, the words which remain are sufficient to enable the Court to ascertain the meaning of the clause, and to give its proper effect to it, then the words rejected are not indispensable, and the clause does not become void.

Wills Privileged.—Wills were privileged in two particulars—

1. A person who could not write could have his will executed by one notary and two witnesses.

2. The minister of the parish in which the testator resided could act as notary (*Trail*, 27 Feb. 1805, F. C.).

Erskine in his *Institutes*, iii. 2. 23, states that testator deeds are sustained though not quite formal, if the testator's purpose sufficiently appears; but this doctrine does not seem to be supported by decisions. On the contrary, it seems to be the law that they must be authenticated in the usual way, that is, they must be either tested or holograph (*Moncrieff*, 1710, Mor. 15936; 1711, Rob. Ap. 26; *Rankine*, 1849, 11 D. 543; *Crosbie*, 1865, 3 M. 870).

A document, in itself improbative, can be adopted and made part of a formal will by using in the formal will words which show the testator's wish to adopt it (*M'Intyre*, 1 March 1821, F. C.; *Buchan*, 1828, 6 S. 864; *Inglis*, 1831, 5 W. & S. 785; *Cleland*, 1851, 13 D. 504).

A testator can adopt as valid improbative writings already written (*Speirs*, 1879, 6 R. 1359; *Inglis*, 1828, 6 S. 864; *Callander*, 1863, 2 M. 291), or declare that later informal writings are to form part of his settlement. If they are identified in the manner set forth by the testator, they will be valid (*Baird*, 1856, 18 D. 1246; *Grant's Trs.*, 1862, 24 D. 1211: *Young's Trs.*, 1864, 3 M. 10).

Where a person disposes of his estate to trustees, reserving power to give directions, writings will be effectual which are identified in the manner prescribed by the testator (*Wilsone's Trs.*, 1861, 24 D. 163; *Gillespie*, 1831, 10 S. 174; *Lowson*, 1866, 4 M. 631; cf. *Rankine*, 1849, 11 D. 543; *Dundas*, 13 May 1807, F. C.).

Delivery of a testamentary writing does not make it irrevocable unless a beneficial and indefeasible right is conferred on a person at the date of delivery (*Sommerville*, 18 May 1819, F. C.).

A letter promising a payment after the writer's death, containing no words of obligation, was considered testamentary, and nothing was due on the death of the writer, predeceased by the person to whom it was addressed (*Miller*, 1859, 21 D. 377; *Duguid*, 1831, 9 S. 844).

Where a writing involves a contract *inter vivos*, it cannot be recalled (*Paterson*, 1893, 20 R. 484; Stair, iii. 8. 28–33; Ersk. iii. 9. 6; *Murison*, 1854, 16 D. 529).

A testamentary act cannot be recalled by intention alone; there is required some definite act of the testator's will, which can only be proved by a proper instrument (*Stirling-Stuart*, 1885, 12 R. 610; see *Blackwood*, 1875, 12 S. L. R. 384).

By accepting a provision with the condition adjected that "by acceptation hereof she binds herself to execute a settlement" in a particular way, a widow was held to have bound herself to leave her estate in a particular way, though during life she could do as she liked (*Murray*, 1895, 22 R. 927; see *Husband*, 1898, 25 R. 1201).

The authorities appear to establish that 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).

"That 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, there can be no doubt" (Ld. Rutherfurd in *Murison, supra*; *Curdy*, 1775, Mor. 15946; *Robertson*, 1892, 19 R. 849).

A will may be revoked by destroying it *animo revocandi*, or giving instructions to have it destroyed (*Falconer*, 1848, 11 D. 220; *Winchester*, 1863, 1 M. 685; *Bonthrone*, 1883, 10 R. 779; *Chisholm*, 1673, Mor. 12320). Where a will, known to have existed, cannot be found, the presumption is

that it has been cancelled (*Bonthrone, supra*). When a duplicate is found cancelled, and there is evidence that the testator had cancelled it intending to revoke it, the will will be held to be revoked (*Crosbie*, 1865, 3 M. 870; M'Laren, 410). A universal settlement revokes by implication all that have preceded it (*Brander's Trs.*, 1883, 10 R. 1258; see *Reynolds*, 1884, 11 R. 759). When a testator makes a will when he has no children, and children are subsequently born, there is a presumption that the will is revoked, especially if it is a universal settlement. This is known as the *conditio si sine liberis testator decesserit*. For deeds that have been held to be irrevocable, see *Gilpin*, 1869, 7 M. 807; *Tennent*, 1869, 7 M. 936; *Hughes*, 1892, 19 R. (H. L.) 33; *Colquhoun*, 1829, 7 S. 709; *Findlay's Trs.*, 1886, 14 R. 167; *Dobie's Trs.*, 1887, 15 R. 2; *Munro's Exrs.*, 1890, 18 R. 122; *Adamson's Trs.*, 1891, 18 R. 1133; *Millar's Trs.*, 1893, 20 R. 1040; *Elder's Trs.*, 1894, 21 R. 704; *Elder's Trs.*, 1895, 22 R. 505. If a revoking deed is invalid, a previous will is revived (*Kirkpatrick's Trs.*, 1 R. (H. L.) 37; *Stirling-Stuart*, 1885, 12 R. 610). Revocation of a revoking deed may have the effect of reviving the original deed (*Howden*, 8 July 1815, F. C.; *Dove*, 1827, 5 S. 734).

In the *Juridical Styles* forms of deeds are given appropriate to carry into effect testamentary purposes. These are—

1. Testaments and codicils.
2. Dispositions and settlements of moveables.
3. General dispositions and settlements, including settlements in trust.
4. Bonds of provision to wives and children.
5. Nominations of tutors and curators.
6. Deeds of mortification.
7. Deeds of assumption of new trustees.

Testament.—A testament is, strictly speaking, the appointment of an executor. "I appoint A. B. to be my executor" is a good testament, and lays upon A. B. the duty of realising the moveable estate, paying debts and expenses, and dividing what is left among the legal representatives according to their legal rights.

At one time the executor-nominate took the whole free estate as universal legatee, but by 1617, c. 14, his claim was reduced to one-third of the dead's part undisposed of by the deceased; and by the Moveable Succession Act of 1855, s. 8, this right also was abolished, and the executor's office is now like that of a gratuitous trustee.

The testament usually also contains instructions for the payment of debts and legacies, and for the disposal of the residue of the estate. Often the executor is appointed residuary legatee. They also frequently contain clauses revoking previous testaments, and declaring whether or not provisions in favour of the spouse or of children are to be in lieu of or in addition to their legal claims.

If the residue is to go to a third party, the order to pay debts and legacies is followed by a special order to pay or make over the residue to the residuary legatee as soon as the debts and legacies are paid.

Disposition and Settlement.—Another form the deed may take is that of a *de præsenti* conveyance to a disponee, under the burden of paying deathbed and funeral expenses, debts and legacies, with or without an order as to the payment of residue according as the disponee is to be residuary legatee or not. Such a deed contains a reservation of the testator's liferent, with power to dispose of the estate at pleasure for onerous causes or gratuitously, and a clause dispensing with delivery.

A bequest is quite good without the appointment of an executor.

Should none be appointed by the testator, or should the one he appoints refuse to act, an executor-dative will be appointed.

When a legacy was left to "A. B., with power to see this will executed," this was held to be an appointment as executor (*Dundas*, 1837, 15 S. 427). Where a testatrix left a will in these terms, "My cousin A. B. is to be my heir," and then left various legacies and made disposal of "the rest," this was held not to be a nomination of an executor (*Jerdon*, 1897, 24 R. 395). Where an executor was named, and the testator went on to say, "I hereby debar and seclude all others from any right or interest in my said executry," the executor was held to be universal legatary.

With a testament there is sometimes coupled a special assignation. The object of this is to give the general disponee the full right to the subject assigned, without the necessity of confirmation. 1690, c. 26, provides—

"That where special assignations and dispositions are lawfully made by the defunct, though neither intimate nor made public in his lifetime, they shall be yet good and valid rights and titles to possess, bruik, enjoy, pursue, or defend, albeit the sums of money or goods therein contained be not confirmed."

As a posterior will does not work a total revocation of a prior one, unless the latter expressly revokes the former, or the two are incapable of standing together, it is usual to have an express clause dealing with the matter of revocation. "It is perfectly well known to every professional man that when called in to prepare a will, his duty is to ascertain if there be any former testamentary papers; and if there be, he is to take the testator's instructions whether he intends to revoke it, or to make the new will subsidiary or additional."

Codicil.—A codicil is a testamentary writing by which alterations are made on previous *mortis causa* writings. Its most common use is to grant new bequests, or to revoke bequests made by the previous deed. While the codicil may be revoked or destroyed without the previous deed being thereby invalidated, the revocation of the principal deed will, as a general rule, annul also the codicil.

Trust Disposition and Settlement.—The form of settlement most frequently used in Scotland is the Trust Disposition and Settlement, because of the ease with which it can be adapted to varying circumstances. It may be a deed of much complexity.

A general disposition and settlement makes a total settlement of the testator's estate, both heritable and moveable, upon a particular individual, under the burden of debts, legacies, and provisions. In dealing with heritage, the conveyance had to be made absolute or *de præsenti* until 1868, and this is still often done, while by means of clauses dispensing with delivery, reserving power of revocation and right of liferent, the testator remained proprietor of the subjects.

A trust disposition and settlement is a general disposition and settlement, with those clauses engrafted on it which are necessary for constituting a trust. It consists of two parts, the testamentary part of which does not fall by failure of the trustees, unless where the main purposes of the trust are left to the discretion of the trustees (*Fraser*, 1840, Hume, 885; *Robbie's Judicial Factor*, 1893, 20 R. 358). The main objects of the deed are the collection and distribution of the estate, the protection of the rights of beneficiaries, and to supersede by conventional arrangements the ordinary rules of law with regard to succession.

The clauses reserving the testator's liferent and power to alter, and

dispensing with delivery, were only necessary where the deed dealt with heritage. The effect of these clauses was pointed out by Ld. Pres. Inglis in the case of *Hutchison*, 1872, 11 M. 229, as follows:—

"A *mortis causa* deed remaining undelivered in the hands of a grantor produces no change on the title of the property conveyed. The grantor, being infeft, remains the undivested proprietor in fee, and the usual clause in such deeds reserving the grantor's liferent is intended only to provide for the contingency of the deed being delivered during his life. The other usual clause, dispensing with the delivery of the deed, though found undelivered in the grantor's repositories after his death, makes it 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 grantor's death gives it the effect of a delivered deed."

The deed concludes with a clause of registration and testing clause in the usual form.

Testaments may be validated after the testator's death by homologation on the part of those who might have interest to object to them, or by *rei interventus* (*Pollock*, 1849, 12 D. 143). Testaments, testamentary instruments, and dispositions *mortis causa* are free from stamp duty (33 & 34 Vict. c. 97, Sched.; 54 & 55 Vict. c. 39, Sched.).

Mutual Wills.

"The general character of a mutual settlement is this, that *quoad* third parties interested as beneficiaries only, it is testamentary, but *quoad* the testators it is pactional. I think it partakes of the nature both of a testament and of a contract. If you look at the position in which the grantors stand to the beneficiaries, it is testamentary; if you look at the position in which they stand towards each other, it is contract" (Ld. Curriehill in *Hogg*, 1863, 1 M. at p. 658). Accordingly, while the parties can revoke or alter it together, one cannot revoke or alter it after the death of the other, unless power is reserved so to do.

Mutual deeds are effectual without delivery (*Robertson's Trs.*, 1873, 1 R. 323; *Fernie*, 1854, 17 D. 232; *Brown*, 1852, 1 Macq. 79). Examples of mutual deeds which it was held a survivor could alter will be found in *Traquair*, 1872, 11 M. 22, and in *Stiven*, 1873, 11 M. 262; a deed that could not be recalled was dealt with in *Kerr*, 1873, 11 M. 780.

It has been said that a mutual will is not merely a declaration of intention, but an obligation not to revoke. Therefore a mutual will is a sort of contract (*M'Millan*, 1850, 13 D. 187). Accordingly, it is usual to have an express power of revocation in the deed. There is a presumption in favour of the terms being testamentary and not contractual (*Traquair*, 1872, 11 M. 22). Ld. M'Laren says that mutual wills are simply two wills in one instrument, and that there is no difference in the principles of construction applied to those executed by spouses and those executed by persons who are not married to one another (vol. i. 421).

Mutual wills, in practice, are usually executed by spouses, in which case they are revocable by either party as donations, except in so far as they are onerous. "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; for as trifling inequalities ought to be overlooked in the transactions of those who are so closely united, the

excess on the one side ought to be considerable in order to found the party who is hurt in a right of revocation" (Ersk. i. 6. 30; *Stiven*, 1873, 11 M. 262; *Rae*, 1875, 2 R. 676; *Beattie's Trs.*, 1884, 11 R. 846; *Kay's Tr.*, 1892, 19 R. 1071). So far as onerous, they are contractual, and cannot be revoked (*Buchanan's Trs.*, 1890, 17 R. (H. L.) 53; *Craich's Trs.*, 1870, 8 M. 898; *Croll's Trs.*, 1895, 22 R. 677; *Mudie*, 1896, 23 R. 1074). Even if onerous as between the spouses, they may be gratuitous, and therefore revocable, as regards third parties (*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 one spouse (*Beattie's Trs.*, 1884, 11 R. 846; *Mitchell*, 1877, 4 R. 800; *Hunter*, 1831, 5 W. & S. 455; *Melville*, 1879, 6 R. 1286). Power in a survivor to use or encroach has been construed as limited to encroachment during the life of the survivor and for the use of the latter (*Reddie's Trs.*, 1890, 17 R. 558). The exercise of a power of revocation operates the withdrawal of the estate of the person so revoking from the embrace of the settlement, and legacies and shares of residue suffer a proportionate diminution (*Wilsone's Trs.*, 1861, 24 D. 163). The will may be so worded as to affect only the survivor's property at the date of his or her death; in which case he or she may affect that estate during her life by gift or otherwise; or the survivor may have a full right of fee (*Hagart's Trs.*, 1895, 22 R. 625; *Nicoll's Exrs.*, 1887, 14 R. 384). Mutual wills are presumed not to affect the savings of a surviving spouse (*Berwick's Exr.*, 1885, 12 R. 565; *Morris*, 1882, 9 R. 952).

Wills Act.

The Wills Act of 1861 (24 & 25 Vict. c. 114) enacts by sec. 1, that "every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed if made according to the forms required (1) either by the law of the place where the same was made, or (2) by the law of the place where such person was domiciled when the same was made, or (3) by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin."

By sec. 2 every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile) shall, as regards personal estate, be held to be well executed if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

By sec. 3 no will or other testamentary instrument shall be held to be revoked, or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same (see *Parris' Trs.*, 1861, 23 D. 812). We have already seen that a foreign will will now carry heritage (*Connel's Trs.*, 1872, 10 M. 627; *Studd*, 1880, 8 R. 249). Under the old law, when a domiciled Englishman had conveyed heritable estate to trustees by a formal disposition, he could thereafter dispose of it by his will (*Ker*, 1829, 7 S. 454; *Cameron*, 1831, 9 S. 601; 1833, 7 W. & S. 106).

Wills in Roman Law.—See Succession in Roman Law.

Winding-up.—See Joint Stock Companies.

Winter-Herding Act.—Before 1686 the obligation not to allow one's bestial to trespass on the lands of another existed only for the protection of artificial crops "in haining time while the corns are upon the ground" (Stair, ii. 3. 67). After the crop was cleared, the owner had to herd his own ground, and "turn off his neighbour's goods without wronging them, but could not put them in the poind-fold" (*ib.*). The Act 1668, c. 11 (a statute which "cannot be said to be suited to the present day," per Ld. J.-Cl. Moncreiff in *M'Arthur*, 1818, 6 R. 41, though still in observance), altered the law in this respect. It enacts that "all heritors, liferenters, tenants, cottars, and other possessors of lands and houses shall cause herd their horses, nolt, sheep, swine, and goats the whole year, as well in winter as in summer, and in the night-time shall keep the same in houses, folds, or enclosures, so as they may not eat or destroy their neighbour's ground, woods, hedges, or planting; certifying that such as shall contravene, they shall be liable to pay half a merk, *toties quoties*, for ilk beast they shall have going on their neighbour's ground, by and attour the damage done to the grass or planting; and that it shall be lawful to the heritor or possessor of the ground to detain the said beasts until he be paid of the said half-merk for ilk beast found upon his ground, and of his expenses in keeping the same." The Act applies where damage is done to corns as well as where it is done to grass or planting (*Govan*, 1794, Mor. 10499). The penalties are exigible where the trespass is committed by sheep which have got over a mutual march fence (*Loch*, 1799, Mor. 10501). A herd, who was sent to detain five cattle to be pounded under the Act, got within six yards of them when they moved on to the public road, along which they went 200 yards. He turned and drove them back. It was held that as he had not done any overt act in the way of detaining them before their trespass had ceased, he was not entitled to take possession of them (*M'Arthur, ut supra*). (See also *Fraser*, 1899, 1 F. 487; *Grant*, 1888, 2 White 6.)

[Stair, *ut supra*; Ersk. iii. 6. 28; Bankt. iv. 41. 16; Rankine, *Landownership*, 534.]

Witness.

I. Attendance and Protection of Witnesses.

The attendance of a witness may be compelled. It is enjoined by citation, which he is bound to obey, however inconvenient such obedience may be, and however good may be the objections to his admissibility (Dickson, *Evidence*, s. 1690; see *Mackie*, 1868, 1 Coup. Appendix I.).

A copy of the interlocutor granting any commission or diligence (see Commission, Proof by), or fixing the trial, certified by the clerk to the process, or by his assistant, is a good warrant for citation (13 & 14 Vict. c. 36, ss. 25, 43). If the trial be before a Lord Ordinary without a jury, the certified copy of the interlocutor fixing the trial is used instead of letters of first diligence; and, in the event of witnesses failing to attend, letters of second diligence are taken out. If the trial be before a Lord Ordinary with a jury, it is the practice to take out letters of first and second diligence, which are combined in one writ. Before putting letters of second diligence into force, tender should be made of money sufficient to convey the witness to the place where he is to depone (see Citation; Mackay, *Manual*, 345; *Jurid. Styles*, iii. 388).

As to the procedure in civil cases regarding the citation of witnesses out of the jurisdiction of the Court, see Citation; Commission, Proof by.

In civil cases in the Sheriff Court, a copy of the Sheriff's interlocutor, certified by the sheriff clerk, fixing the diet of proof, or of that portion of such interlocutor which relates to that matter, is a sufficient warrant for citing witnesses and havers within the jurisdiction of that Sheriff. Such a warrant will be effectual within another sheriffdom, if indorsed by the sheriff clerk thereof. If a witness or haver, duly cited on a citation of at least forty-eight hours, fail to appear, he forfeits a penalty not exceeding forty shillings in favour of the party on whose behalf he was cited, unless reasonable excuse be offered and sustained by the Sheriff; and the Sheriff may grant second diligence for compelling his attendance, the expense whereof shall fall upon him, unless a special reason to the contrary be stated and sustained by the Sheriff (16 & 17 Vict. c. 30, s. 11).

Arbiters, being but private persons, cannot compel the attendance of witnesses or havers. But this defect is supplied by the Court, which will grant the necessary warrant at the suit of the arbiters or of either of the parties (Ersk. iv. 3. 31; *Blaikies Brothers*, 1851, 13 D. 1307). The application must be made by petition to one of the Divisions in session, and to the Lord Ordinary on the Bills in vacation (Mackay, *Manual*, 530; *Harvey*, 1826, 4 S. 809; *Caird*, 1865, 3 M. 851. See also *Blaikie*, 1852, 14 D. 590, as to the circumstances in which a summary petition to the Sheriff to ordain a haver to produce writs, and failing production to grant warrant of imprisonment, was held competent). A petition praying the Court to grant warrant to cite a person residing in England to give evidence before an arbiter in Scotland is incompetent (*Highland Rwy. Co.*, 1868, 6 M. 896). The proper course is to apply for a commission, and proceed under the Act 6 & 7 Vict. c. 82 (*Blaikies Brothers*, 1851, 13 D. 1307). It is thought that the Act 17 & 18 Vict. c. 34 would apply in a judicial reference, as the case still depends before the Court (Mackay, *Manual*, 530). Arbitrators under the Railway Companies Arbitration Act, 1859, may grant diligence for the recovery of documents and for citing witnesses; and the Lord Ordinary may, on application made to him, issue letters of supplement or other necessary writs in support of the diligence (22 & 23 Vict. c. 59, s. 18).

The written execution of citation of witnesses in the form and with the authentication prescribed by the Criminal Procedure (Scotland) Act, 1887, s. 23, and Sched. D, is sufficient to entitle the Court to fine, or, if cause be shown, to grant warrant for apprehension and imprisonment (2 Hume, 373; 2 Alison, 396, 397; Macdonald, *Crimes*, 419). In criminal cases and proceedings for penalties, the Act 11 Geo. IV. and 1 Will. IV. c. 37, s. 8, makes effectual a warrant of citation by any Court in Scotland although the witness cited does not reside within the jurisdiction of the Court granting the warrant; and the Act 45 Geo. III. c. 92, ss. 3, 4, enacts that process issued for citing witnesses in a criminal prosecution in one part of the United Kingdom shall be effectual in any other part. It also provides for the punishment of witnesses failing to appear, if, at the time of service, tender has been made of their expenses of travelling and attendance. If there be reason to believe that a witness is likely to abscond, the Court may, on an application supported by a sworn statement to that effect, grant warrant for apprehension and imprisonment, unless he find caution to appear at the trial (2 Hume, 375; 2 Alison, 398–400).

The Summary Procedure Act, 1864, s. 10, provides for the issue of a warrant for the apprehension of a witness who neglects or refuses to appear, no just excuse being offered on his behalf, and for the summary punishment by fine or imprisonment of any witness who wilfully fails to

attend, or refuses to be sworn, or to depone, or to produce documents (see CRIMINAL PROSECUTION, II. iv. (5)).

If a witness be in fear of diligence, the Court will grant him protection to appear (2 Hume, 374; 2 Alison, 400; Macdonald, *Crimes*, 420).

If a witness be in prison, his attendance may be obtained under warrant of one of the Supreme Courts (Dickson, *Evidence*, s. 1714). Where the examination is on commission, the practice is to take it in the prison (*ib.*).

As to the case of *socius criminis*, see II. (*g*) below.

II. ADMISSIBILITY OF WITNESSES.

(*a*) *General Rule.*—The rules excluding the evidence of certain persons which at one time prevailed in Scotland (Balfour, *Practicks*, title "Anent Probatioun be Witnessis," pp. 373 *et seq.*; Stair, iv. 43. 7–11; More, *Notes*, 409 *et seq.*; Tait, *Evidence*, 341; Dickson, *Evidence*, s. 1542) have been gradually relaxed in practice and by legislation (9 Geo. IV. c. 29, s. 10; 11 Geo. IV. and 1 Will. IV. c. 37, s. 9; 3 & 4 Vict. c. 59; 15 & 16 Vict. c. 27; 16 & 17 Vict. c. 20; 61 & 62 Vict. c. 36; see also 51 & 52 Vict. c. 46); and it may be laid down as a general proposition, that all persons capable of giving rational evidence are competent witnesses both in civil and criminal causes (Kirkpatrick, *Digest*, s. 161), and that the old grounds of objection, in so far as they have any validity, go to the credibility (see III. (*d*) (vi.) below) rather than to the admissibility of the witness (Dickson, *Evidence*, s. 1542). This proposition must be taken subject to certain exceptions, limitations, and explanations.

(*b*) *Age of Witnesses.*—The judge has a discretion as to the admissibility as witnesses of pupil children (see *Robertson*, 1888, 15 R. 1001). In exercising it he takes into account the nature of the case (*ib.*) as well as the intelligence of the child, and he may inform himself on the latter point by examining the child, and, if necessary, by taking other evidence. In examining the child, not only its words but its manner is to be regarded (Macdonald, *Crimes*, 448; Dickson, *Evidence*, s. 1548). The pupil children of accused persons are competent witnesses against them (3 & 4 Vict. c. 59; *Cairns*, 1841, 2 Swin. 531; *Punton*, Bell, *Notes*, 250).

The old rule excluding pupils as witnesses remains in the case of instrumentary witnesses (Dickson, *Evidence*, ss. 694, 1546). In their case, admissibility depends upon their age at the time of the execution of the instrument; in the case of other witnesses, it depends upon their age when tendered (*Id.*, *ib.*, s. 1547).

Children under twelve years of age are not sworn, but are admonished by the judge to tell the truth. Children between twelve and fourteen may be sworn, if the judge be satisfied that they understand the nature of an oath. Children of fourteen and upwards may be sworn without inquiry, unless a special examination be called for and show that the child does not understand the nature of an oath (2 Hume, 341; 2 Alison, 433; Dickson, *Evidence*, s. 1549).

(*c*) *Mental Capacity of Witnesses.*—The question of mental capacity is one of degree, and every case must be considered on its own merits (*Skene Black*, 1887, 1 White, 365). "Fatuous and furious persons are not capable of being witnesses, while they are in that condition, and even of things that then occurred, except they had long intervals, for short intervals are hard to be known" (Stair, iv. 43. 7 (2); see 2 Hume, 340; *Meldrum*, 1826, Syme, 30; *Tosh*, 1873, 1 R. 254. As to the English law, see Taylor, *Evidence*, s. 1375). According to Hume, if a fit of mental derangement follow the event to which a witness is called to speak, he is inadmissible

(2 Hume, 340; *Sheriff and Mitchell*, 1866, 5 Irv. 226; see *M'Kenna*, 1869, 1 Coup. 244; *Tosh, ut supra*; 2 Alison, 436; Dickson, *Evidence*, s. 1552). But admissibility is not affected by mere delusions, unless they relate to the matter of the trial (Dickson, *Evidence*, s. 1553; *R.* v. *Hill*, 2 Den. C. C. 254; see *Stott*, 1894, 1 Adam, 386), or by the fact that the deponent, although *compos mentis*, suffered from loss of memory and mental power by reason of old age (*Nicholson*, 1829, 7 S. 743; *Riley*, 1853, 16 D. 323), or that he was, at the date of the occurrences to which he speaks, a patient in a lunatic asylum (*Sheriff and Mitchell, ut supra*; *Littlejohn and Gall*, 1881, 4 Coup. 454; *Stott, ut supra*). In a trial for rape, an objection to the reception of the injured person as a witness, on the ground that she was incapable of understanding the nature and obligation of an oath, was sustained (*Murray*, 1866, 5 Irv. 232; *R.* v. *Hill, ut supra*; *Riley, ut supra*. But see *Skene Black*, 1887, 1 White, 365, where Ld. M'Laren indicated that inability to understand the nature of an oath was ground not for rejecting the witness but for dispensing with the oath), a statement made by her *de recenti* being admitted (*Murray, ut supra*; cf. *M'Namara*, 1848, Ark. 521; *Skene Black, ut supra*).

It is for the Court to satisfy itself as to the mental capacity of the witness (*Riley, ut supra*; *O'Neil and Gollan*, 1858, 3 Irv. 93, where a witness was disallowed, there being no medical evidence tendered as to the cause of incapacity. See also *M'Namara, ut supra*, where the Court refused, on the medical evidence led, to allow a person to be examined as a witness).

(*d*) *Deaf and Dumb and Inarticulate Witnesses.*—Deaf and dumb persons are admissible as witnesses on proof that they have mental capacity sufficient to observe and to remember, and that they know right from wrong, understand the obligation of an oath, and believe in a God who punishes evil-doers (2 Hume, 340; *Martin*, 1823, Sh. J. C. 101; *Wintrup*, 1827, Sh. J. C. 211; *White*, 1842, 1 Broun, 228), although they are wholly uneducated and unable to communicate save by natural signs (*Farquhar*, 1835, Bell, *Notes*, 245; *Montgomery*, 1855, 2 Irv. 222; *Howieson*, 1871, 2 Coup. 153). However, the Court has admitted deaf and dumb persons as witnesses without being sworn, who were imperfectly acquainted with the difference between right and wrong, and who did not understand the nature of an oath (*Farquhar, ut supra*; *Montgomery, ut supra*), or knew of the existence of a God (*Rice*, 1864, 4 Irv. 493). The same principles are applied in the case of an inarticulate witness (*Howieson, ut supra*; cf. *O'Neil and Gollan*, 1858, 3 Irv. 93). The examination is generally conducted through the medium of a sworn interpreter; sometimes by means of written question and answer (Dickson, *Evidence*, s. 1556. In England the latter is regarded as the more satisfactory method: Taylor, *Evidence*, s. 1376).

(*e*) *Religious Belief of Witnesses.*—A witness is no longer inadmissible on the ground that he has no religious belief (51 & 52 Vict. c. 46). It is to be observed that this statute applies only where the witness objects to be sworn on the ground set out by the Act, where he affirms in terms of the Act, and where he satisfies the Court that he has no religious belief or that the taking of an oath is contrary to his religious belief (*R.* v. *Moore*, 17 Cox C. C. 458). It does not provide for the admission of an atheist who does not himself object to be sworn; but it enacts that the validity of an oath duly administered and taken shall not be affected by the absence of religious belief in the person sworn (51 & 52 Vict. c. 46, s. 3). See III. (*e*) below.

(*f*) *The Party or Accused and his Relations as Witnesses.*—Prior to

the passing of the Act 16 Vict. c. 20, party witnesses were excluded. This rule was, however, relaxed, in certain cases, by allowing a party to have his opponent examined. Since the passing of that statute this procedure has practically become obsolete. It is, however, still competent (see Shand, *Practice*, 403 *et seq.*; Mackay, *Manual*, 335). By the third section of the Act above cited it is made competent

> to adduce and examine as a witness in any proceeding in Scotland any party to such action or proceeding, or the husband or wife of any party . . . ; but nothing herein contained shall render any person, or the husband or wife of any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence either for or against himself or herself, his wife or her husband, excepting in so far as the same may be at present competent by the law and practice of Scotland, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any proceeding render any husband competent or compellable to give against his wife evidence of any matter communicated by her to him during the marriage, or any wife competent or compellable to give against her husband evidence of any matter communicated by him to her during the marriage.

This section was declared inapplicable to proceedings instituted in consequence of adultery, and in certain other cases (*ib.*, s. 4), and to Revenue cases (19 & 20 Vict. c. 56, s. 43). The fourth section of the Act 16 Vict. c. 20 was repealed by the Act 37 & 38 Vict. c. 64, s. 1; and the second section of the Act last cited provides as follows:—

> The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

As to the effect of this enactment, see III. (*d*) (vi.) below. Observe that by its third section this Act provides that nothing therein contained shall alter the law as to proof of promise of marriage or any action of declarator of marriage founded thereon, *cum copulâ subsequente* (see Fraser, *H. & W.* i. 386).

The terms of the Act 16 Vict. c. 20, s. 3, excepted from admissibility a person accused in criminal proceedings, and, accordingly, such a witness was disallowed in a prosecution under the Tweed Fisheries Act (11 Geo. IV. c. liv.; *Stevenson*, 1854, 1 Irv. 603); the Excise Duties Act, 1855 (*Watson*, 1857, 19 D. 380); the Salmon Fisheries Act, 1862 (*Blair*, 1864, 4 Irv. 545); the Licensing (Scotland) Act, 1853 (*Bruce*, 1861, 24 D. 184); the Excise Licenses Act, 1825 (*Alison*, 1862, 1 M. 87); the Spirits Act, 1880 (*Lord Advocate* v. *D. J. Thomson & Co.*, 1885, 23 S. L. R. 3); and the Customs Consolidation Act, 1876, s. 179 (*Dodsworth*, 1886, 14 R. 238); but admitted in a complaint for breach of interdict (*Christie Miller*, 1879, 6 R. 1215).

As to the question of the admissibility of an accused's letters when tendered on his behalf, and when tendered against his interest, see 2 Hume, 396; 2 Alison, 611; Dickson, *Evidence*, s. 273; *Scott*, 1892, 19 R. (J. C.) 63.

A person is not debarred from giving evidence by the fact that he conducts his own case. It has been observed of such a practice that, except in small debt cases, it is highly objectionable (Dickson, *Evidence*, s. 1569; Taylor, *Evidence*, s. 1391).

In criminal cases, one spouse was, until recently, inadmissible as a witness for or against the other, save where the subject-matter of the trial was an injury inflicted on the former by the latter (2 Hume, 349; 2 Alison,

461; *Robertson*, 1896, 2 Adam, 92; see also *Auld*, 1874, 1 R. 1015. An exception to this rule is furnished by the case of *Christie*, 1731, 2 Hume, 400, noticed in *Surtees*, 1872, 10 M. 866; see PENURIA TESTIUM). To disqualify a witness on the ground that he or she is a spouse of the accused, there must be full proof of marriage, regular or irregular (Dickson, *Evidence*, s. 1570; *Becket*, 1831, Bell, *Notes*, 251; *May*, 1856, Irv. 479; *Reid*, 1873, 2 Coup. 415). As to the question whether, for the purpose of disqualification, an irregular marriage can be incidentally proved, see *Becket*, *ut supra*; *Muir*, 1836, 1 Swin. 402; *Reid*, *ut supra*; and cf. *Innes*, 1837, 2 Sh. & M'L. 417, and *M'Donald*, 1891, 18 R. 502). Where an accused was charged with assaulting his wife and child, it was held that the wife's evidence was admissible only as to the assault upon herself (*Loughton*, 1831, Bell, *Notes*, 252; see Macdonald, *Crimes*, 449). A spouse has been held admissible where the injury consisted in a false accusation (*Miller*, 1847, Arkley, 355; Dickson, *Evidence*, s. 1572); and inadmissible where it consisted in theft (*Muirhead*, 1886, 1 White, 105), or bigamy (Dickson, *Evidence*, s. 1572; *Armstrong*, 1844, 2 Broun, 251; see also *Barr*, 1860, 3 Irv. 649, where the question was raised whether the first husband is a competent witness in proof of an incidental point arising on the evidence). He may be brought as a production to be identified (*Lary and Mitchell*, 1817, 2 Hume, 349; *Bryce*, 1844, 2 Broun, 119; Dickson, *Evidence*, s. 1816; see III. (*c*) below). A spouse adduced to prove personal injury inflicted on himself or herself by the other spouse may not decline to answer (*Commelin*, 1836, 1 Swin. 291; *A. B.*, 1824, Bell, *Notes*, 252; see 2 Alison, 462). Where a husband and wife were charged with the murder of their child, it was held that, if the evidence of the latter was to be used against the former, the proper course was to make her a witness in the case, and not to charge her with the offence (*Kemps*, 1891, 3 White, 17).

The parents and children of accused persons are admissible and compellable witnesses (3 & 4 Vict. c. 59; see *Rae*, 1888, 2 White, 62; cf. *A. B.*, 1887, 1 White, 535, and note).

As to the examination of the wife of a bankrupt, see 19 & 20 Vict. c. 79, ss. 90, 91; *Sawers*, 1858, 21 D. 153; *M'Kay*, 1863, 1 M. 440; *Park*, 1871, 10 M. 10.

Under the following statutes the accused is admissible as a witness: The Customs Consolidation Act, 1876, s. 259; the Coal Mines Regulation Act, 1887, s. 62: the Diseases of Animals Act, 1894, s. 57 (3); the Explosives Act, 1875 (38 Vict. c. 17), s. 87; the Merchant Shipping Act, 1894, s. 697: and the Metalliferous Mines Regulation Act, 1872, s. 34 (4). See also the Naval Discipline Act, 1866, s. 92.

Under the following statutes the accused and the husband or wife of the accused are admissible as witnesses: The Army Act, 1881, s. 156 (3); the Betting and Loans (Infants) Act, 1892 (55 Vict. c. 4), s. 6; the Chaff-cutting Machines (Accidents) Act, 1897, s. 5; the Conspiracy and Protection to Property Act, 1875, s. 11; the Corrupt and Illegal Practices Prevention Acts, 1883, s. 53 (2), and 1895, s. 2; the Criminal Law Amendment Act, 1885, s. 20; the Evidence Act, 1877, s. 1; the Explosive Substances Act, 1883, s. 4 (2); the False Alarms of Fire Act, 1895, s. 2; the Merchandise Marks Act, 1887, s. 10 (1); the Prevention of Cruelty to Children Act, 1894, s. 12 (see *Kemps*, 1891, 3 White, 17); and the Sale of Food and Drugs Act, 1875, s. 211.

The most recent relaxation of the rules excluding an accused person and the wife or husband of such person from giving evidence is the

Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36). Its provisions are as follows :—

1. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows :—

(*a*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application :

(*b*) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution :

(*c*) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged :

(*d*) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage :

(*e*) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged :

(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged ; or

(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution ; or

(iii.) he has given evidence against any other person charged with the same offence.

(*g*) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness-box or other place from which the other witnesses give their evidence:

(*h*) Nothing in this Act shall affect the provisions of sec. 18 of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

2. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

3. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

4. (1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence, and without the consent of the person charged.

(2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

5. In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by sec. 36 of the Criminal Procedure (Scotland) Act, 1887.

6. (1) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877.

(2) But this Act shall not apply to proceedings in courts-martial unless so applied—

(*a*) as to courts-martial under the Naval Discipline Act, by general orders made in pursuance of sec. 65 of that Act ; and

(*b*) as to courts-martial under the Army Act, by rules made in pursuance of sec. 70 of that Act.

7. (1) This Act shall not extend to Ireland.

(2) This Act shall come into operation on the expiration of two months from the passing thereof.

(3) This Act may be cited as the Criminal Evidence Act, 1898.

SCHEDULE.

ENACTMENTS REFERRED TO.

Session and Chapter.	Short Title.	Enactments referred to.
5 Geo. IV. c. 83 . .	The Vagrancy Act, 1824	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.
8 & 9 Vict. c. 83 . .	The Poor Law (Scotland) Act, 1845	Sec. 80.
24 & 25 Vict. c. 100 .	The Offences against the Person Act, 1861	Secs. 48 to 55.
45 & 46 Vict. c. 75 .	The Married Women's Property Act, 1882	Sec. 12 and sec. 16.
48 & 49 Vict. c. 69 .	The Criminal Law Amendment Act, 1885	The whole Act.
57 & 58 Vict. c. 41 .	The Prevention of Cruelty to Children Act, 1894	The whole Act.

The difficulties of construing the provision of sec. 4 (1) with that of sec. 20 of 48 & 49 Vict. c. 69, one of the enactments mentioned in the schedule, were recognised by Wills, J., in the case of *Brazil*, "Times," Feb. 27, 1899. In that case the wife declined to give evidence, and was allowed to leave the witness-box.

(*y*) *Accomplices as Witnesses.*—The public prosecutor may examine one *socius criminis* against another; and, if he require the judge to caution him and explain to him that what he says cannot be used against him, he cannot thereafter prosecute the witness for the offence in regard to which he has deponed (2 Hume, 367; 2 Alison, 452; Dickson, *Evidence*, ss. 1560, 1561; Macdonald, *Crimes*, 433). Where several persons are charged under the same indictment and go to trial, they are inadmissible as witnesses. The proper course is to move for a separation of the trials (*Hagan*, 1883, 1 Irv. 342; *Nicolson*, 1887, 1 White, 307). This motion will not, however, be granted except on special cause shown (see *M'Pherson* or *Dempster*, 1862, 4 Irv. 113; *Marr*, 1881, 4 Coup. 407; 2 Hume, 175, 402; Macdonald, *Crimes*, 443). Where persons are charged with the same crime on different indictments, it is in the discretion of the Court to disallow their examination (*Mitchell*, 1887, 1 White, 321). Where one accused pleads guilty, his evidence for a co-accused is competent (*Brown & M'Leish*, 1856, 2 Irv. 577; *Wilson*, 1860, 3 Irv. 623). Where, during the course of a trial, the charge is abandoned against one of the accused, no plea having been tendered, nor any motion for separation of the trials having been made, it is for the Court to decide whether he shall or shall not be admitted as a witness for the other accused (cf. *M'Fadyen*, 1857, 2 Irv. 599, with *Nicolson*, *ut supra*).

The unsupported evidence of a *socius criminis* is not received as sufficient evidence (*Campbell* or *Brown*, 1855, 2 Irv. 232); and it is doubtful whether the evidence of one unsuspected person is sufficient if supported by that of a *socius criminis* (2 Hume, 383; 2 Alison, 554; Macdonald, *Crimes*, 496).

(*h*) *An alien enemy* is admissible as a witness (*Maguire*, 1857, 2 Irv. 620).

(*i*) *An unreponed outlaw* is inadmissible as a witness. He may be reponed on application by the public prosecutor made before the trial, or on his giving himself up to justice (2 Hume, 272; 2 Alison, 250; *Hunter*, 1838, 2 Swin. 181).

(*j*) *An agent* is now an admissible witness in an action of which he has the professional conduct, save in the case of an action of declarator of marriage founded on a promise of marriage *cum copulâ subsequente* (see 15 & 16 Vict. c. 27, s. 1; 16 Vict. c. 20, ss. 2, 4; 37 & 38 Vict. c. 64, ss. 1, 3). Even in the excepted case he is a competent witness upon points to which he could have spoken prior to the Act of 1852 (see Dickson, *Evidence*, s. 1577).

(*k*) *Bribery as a Ground for excluding a Witness.*—A person is inadmissible on behalf of his adducer, if the latter, either himself or by his authorised agent, bribe or attempt to bribe him (2 Hume, 377; 2 Alison, 497; Dickson, *Evidence*, s. 1579. The tendency of practice is to apply the rule in very flagrant cases only: Macdonald, *Crimes*, 456). But bribery or attempt to bribe by a third party without such authority does not disqualify (*M'Kinlay and Gordon*, 1829, Sh. J. C. 224). Promises of reward or of protection (Dickson, *Evidence*, ss. 1582–1584; *Grant*, 1820, Sh. J. C. 50; *Hunter*, 1838, 2 Swin. 1; see also *Brown*, 1836, 1 Swin. 293; *Leys*, 1839, 2 Swin. 337), or of immunity from prosecution (*Emond*, 1830, Bell, *Notes*, 247; *Dickson*, 1837, Bell, *Notes*, 248; see also 2 Hume 277), do not exclude a Crown witness. The receipt by a witness of an extravagant sum, in name of travelling expenses, may disqualify him (Dickson, *Evidence*, s. 1580; *Humphreys* or *Alexander*, 1839, 2 Swin. 356).

(*l*) *Tutoring as a Ground for excluding a Witness.*—A person is inadmissible on behalf of his adducer if the latter, either himself or by his authorised agent, "tutor" him, *i.e.* instruct him how to depone. But tutoring by a third party without such authority does not disqualify (2 Hume, 378, 379; 2 Alison, 501; *Hunter*, 1838, 2 Swin. 1; *Clark and Greig*, 1842, 1 Broun, 250). The Court has refused to set aside a conviction on the ground that a witness after examination communicated to a witness not yet examined what he had been asked and what he had answered (*Campbell*, 1884, 5 Coup. 468). If the alleged instruction were the result not of an intention to tamper with the witness but of ignorance and carelessness, and have not influenced his mind so as to affect his evidence, it will not render him inadmissible (cf. *Fraser*, 1841, 3 D. 1132, with *Donaldson*, 1842, 4 D. 1215; see Dickson, *Evidence*, ss. 1586, 1587). Even an unsuccessful attempt to tutor will disqualify if the intention to tamper with the witness be clear (Ersk. iv. 2. 28; 2 Alison, 503; Dickson, *Evidence*, s. 1588).

The case of *Gilchrist*, 1831, Bell, *Notes*, 253, may be noted, where the Court refused to disallow a witness, on the ground that he had written to his wife telling her what to depone in corroboration of his own evidence.

Witnesses who have been precognosced in each other's presence will be disallowed when the irregularity proceeds from an intention to tamper, or imperils the case of the party against whom they are adduced (2 Hume, 379, 380; Dickson, *Evidence*, ss. 1593, 1594; *Duncan*, 1834, 12 S. 935; *Aitken*, 1840, 2 D. 1029; *Reid*, 1843, 5 D. 656; *Mitchell*, 1850, J. Shaw,

293). But the objection will not be sustained where the witness was present at the precognition of other witnesses in the course of his official duty (2 Hume, 380; *Begrie*, 1820, Sh. J. C. 8; *Smith*, 1837, Bell, *Notes*, 270; *Barr*, 1850, J. Shaw, 362), except in special circumstances (*Robertson*, 1849, J. Shaw, 186; *Daly and Kirk*, 1880, J. Shaw, 354); and witnesses who speak to matter of opinion (OPINION EVIDENCE) will not be excluded because they have heard witnesses precognosced or seen their precognitions, provided that these last are not witnesses on matters of opinion (2 Hume, 380; Dickson, *Evidence*, s. 1596; *Richardson*, 1824, Sh. J. C. 125; *Fraser*, *ut supra*. As to the limits of this practice, see Dickson, *Evidence*, s. 1597; *M'Lure*, 1848, Arkley, 448; *Mitchell*, 1850, J. Shaw, 293).

(*m*) *Admissibility of Persons who have heard the Evidence of previous Witnesses.*—The third section of the Act 3 & 4 Vict. c. 59 provides that where it is objected to a witness that he has, without the permission of the Court or the consent of the party objecting, been present in Court during all or any part of the proceedings, the Court may admit the witness on being satisfied that his presence "was not the consequence of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his or her presence, or that injustice will not be done by his or her examination." In practice, the parties and their agents remain in Court while the evidence is being led (Dickson, *Evidence*, s. 1601). As to the practice in regard to witnesses on matter of opinion, see (*l*) above, and OPINION EVIDENCE.

(*n*) *Malice of Witnesses.*—Bare words of enmity, however violent, are not sufficient to exclude a witness (2 Hume, 360; *Miller*, 1818, *ib.* 359, note). But he may be disqualified by overt acts of hostility, such as firing a pistol at the person against whom he is adduced with intent to kill (see 2 Hume, 363); or by vindictive words following upon such acts (*Spalding*, 1673, 2 Hume, 363; *Cunningham*, 1677, *ib.*: *Master of Tarbat and Poiset*, 1691, *ib.* 358; cf. *Innes*, 1833, Bell, *Notes*, 258; *Speeks*, 1835, *ib.*). According to Hume, a witness would be excluded if the malicious expressions used by him originated "in any substantial cause, such as can be supposed to infuse so bitter a hatred into the heart" (2 Hume, 360). In several cases, however, where there has been an absence of hostile acts, such expressions have been held not to disqualify, although the relations of the speaker and the person spoken against have been such as to occasion extreme bad feeling on the part of the former towards the latter (2 Hume, 358–362; *Glen*, 1827, Syme, 267; *Clark and Greig*, 1842, 1 Broun, 250).

The objection to admissibility on the ground of malice has not infrequently been due to a plot between the accused and a witness, whose evidence, if led, would be unfavourable to him (see Dickson, *Evidence*, s. 1610).

(*o*) *Judges as Witnesses.*—Judges of Inferior Courts (*Walker*, 1838, Bell, *Notes*, 99; *Monaghan*, 1844, 2 Broun, 131), and, it is thought (see Dickson, *Evidence*, ss. 1635–1637; Macdonald, *Crimes*, 453), judges of the Supreme Courts, are admissible as to matters which occurred before them officially.

(*p*) *Arbiters as Witnesses.*—As to the admissibility of an arbiter as a witness in an action to enforce or set aside his award, see ARBITRATION.

(*q*) *Officers of Court as Witnesses.*—It was held, in a case where the Teind Clerk had been called as a witness and haver, that the proper mode of obtaining the information desired was by judicial remit and report (*Fogo*, 1867, 6 M. 105; see *M'Donagh*, 1869, 1 Coup. 299).

(*r*) *Jurymen, members and officers of either House of Parliament as witnesses; privilege* attaching to communications made to a *medical, legal, or*

spiritual adviser, or passing between *public officials or departments*, or *between the parties on the same side of a cause*, or between *husband and wife*:—see CONFIDENTIAL COMMUNICATIONS.

(*s*) As to evidence rejected on grounds of "morality, decency, and policy," see EVIDENCE, II.

(*t*) Observe that a witness disqualified as to one of several co-accused is disqualifed as to all (Dickson, *Evidence*, ss. 1611, 1612; *Hunter*, 1838, 2 Swin.-1). In order to render such a witness admissible, the trials must be separated (*Wilson*, 1826, Syme, 40; *M'Manus*, 1833, Bell, *Notes*, 251; *Clark and Greig*, 1842, 1 Broun, 250).

Decisions conflict on the point whether the spouse of an accused who is outlawed is admissible against another accused under the same libel (*Todd*, 1835, Bell, *Notes*, 251; *Clark and Greig*, *ut supra*; Dickson, *Evidence*, s. 1611; Macdonald, *Crimes*, 460, note 2).

Ld. Kilkerran observes (*Gray*, 1752, Mor. 16764; *Barony of Tillibole*, 1752, *ib.*) that a witness disqualified as to any one of several defenders pursued *super eodem medio concludendi* is disqualified as to the others (see Dickson, *Evidence*, s. 1614).

(*u*) *Time of stating Objections to Admissibility.*—An objection to the admissibility of a witness should be stated before he is sworn, unless it is to be proved by his own initial examination. In cases where the husband or wife of a party is inadmissible as a witness, it is *pars judicio* to stop the examination so soon as that fact appears. The proper time for objecting to witnesses examined on commission is when their depositions are tendered at the trial or proof (Dickson, *Evidence*, ss. 1629, 1630).

(*v*) *Mode of stating Objections to Admissibility.*—Formerly the usual way of proving an objection to the admissibility of a witness was by examining him *in initialibus* (Stair, iv. 43. 11; Ersk. iv. 2. 28, 29; Tait, *Evidence*, 399; Dickson, *Evidence*, s. 1632). This examination may be dispensed with; but it is still competent if required by the judge or commissioner, or by the party against whom the witness is called (3 & 4 Vict. c. 59, s. 2; *Reid*, 1873, 2 Coup. 415). It is almost unknown in practice. Stair observes (iv. 43. 11) that an objection to the admissibility of a witness may be proved by the oath on reference of his adducer.

As to the obsolete procedure by way of reprobator, see Dickson, *Evidence*, s. 1634.

See PENURIA TESTIUM.

III. EXAMINATION OF WITNESS.

(*a*) *Interpreter.*—A witness who does not understand the English language is examined through a sworn interpreter (Dickson, *Evidence*, s. 1793; *Humphreys* or *Alexander*, 1839, Swin. Rpt.; *M'Ra*, 1841, Bell, *Notes*, 270). As to witnesses deaf and dumb or inarticulate, see II. (*d*) above.

(*b*) *The Witness must depone* in causâ.—A witness must give his testimony orally in the case in which it is required (Dickson, *Evidence*, s. 1716). Accordingly, written statements of fact by persons still alive, *e.g.* letters (*Stewart*, 1893, 20 R. 260), confessions (*Caralari*, 1854, 1 Irv. 564), reports (*Sturrock*, 1849, 12 D. 166), certificates (*Ure*, 1832, 10 S. 450), and affidavits (see AFFIDAVIT), are excluded unless sworn to by the writer in the witness-box (2 Alison, 541; Dickson, *Evidence*, s. 1779). The rule does not apply to the reports of judicial referees (*Brown*, 1842, 4 D. 386), or to certificates of good character, produced in mitigation of sentence, where the accused has pled guilty (*Waugh*, 1831, Bell, *Notes*, 287; *Rosenberg*, 1842, 1 Broun, 367;

Stalker, 1844, 2 Broun, 79; *Sutherland*, 1847, Arkley, 242); and letters are sometimes admitted, not in proof of what is stated therein, but to prove that such statements were made (*Coles*, 1895, 22 R. 716; see BEST EVIDENCE: PAROLE).

As to the proper mode of proving what is set forth in scientific works, see OPINION EVIDENCE.

A deposition on oath emitted in one cause, is, in general, inadmissible in another cause, although the parties and the subject-matter be the same (*Stevens*, 1882, 9 R. 730; Dickson, *Evidence*, s. 1718; cf. *Stewart*, 1863, 1 M. 449). But the rule does not apply where the later is truly a continuation of an earlier cause, which has been rendered abortive owing to some formal objection, *e.g.* an objection to the pursuer's title (*Macindoe*, 7 Dec. 1826, F. C.; as to jury trials, see Dickson, *Evidence*, s. 1719); or in certain actions of relief (Ersk. ii. 3. 32; *Gordon*, 1748, Mor. 14045; Dickson, *Evidence*, s. 1720); and a suspension on the ground that, in convicting the accused, the magistrates had proceeded partly upon the opinion which he had given in another case, and which had been put to him in cross-examination, was refused (*Gibson*, 1892, 3 White, 415). Moreover, the death of a witness will render admissible his deposition emitted in a previous case in which the parties and the subject-matter were the same (*Watson*, 1837, 15 S. 753; *Cleland*, 1847, 10 D. 40; *Willox*, 1848, 10 D. 807; *Souter*, 1859, 21 D. 835; as to a deceased bankrupt's deposition, see Bell, *Com.* ii. 482), save where the circumstances under which it was emitted "raise a presumption that it does not give a proper reflex" of the deponent's mind (*Geils*, 1855, 17 D. 397, 404, per Ld. Pres. M'Neill; see *Gordon*, 1850, 13 D. 1). See BEST EVIDENCE.

When such a deposition is admissible, it may be proved by the certified notes of the presiding judge or of the shorthand writer (*Cleland*, 1847, 10 D. 40; *Bell*, 1862, 24 D. 1428; 24 & 25 Vict. c. 86, s. 13; 31 & 32 Vict. c. 100, s. 37; see Taylor, *Evidence*, s. 546), or by the evidence of anyone who was present when it was emitted (Dickson, *Evidence*, ss. 211, 1726; see *Mackenzie*, 1827, Syme, 158; *Stewart*, 1855, 2 Irv. 166). And where a witness, examined on interrogatories before the first trial, attended it and died before the second trial, it was held that either the deposition or the judge's notes might be admitted (*Willox*, 1848, 10 D. 807).

As to depositions taken to lie *in retentis*, and the examination of witnesses on interrogatories, see COMMISSION, PROOF BY. As to depositions of deceased witnesses in criminal cases, see DEPOSITION BY DECEASED.

(*c*) *The Witness must be Sworn or must Affirm.*—Subject to what has been said above as to the examination of pupil children, of persons deaf and dumb or inarticulate, and of persons suffering from mental incapacity (see II. (*b*) (*c*) (*d*)), a witness must be put on oath (Dickson, *Evidence*, s. 1757), even though adduced merely to be shown to the jury (*Milne*, 1866, 5 Irv. 229). The usual oath is in these terms: "I swear by Almighty God, and as I shall answer to God at the great day of judgment, that I will tell the truth, the whole truth, and nothing but the truth"; but a person is bound by an oath lawfully administered, if administered in such form and with such ceremonies as he may declare to be binding upon his conscience (1 & 2 Vict. c. 105; see *M'Laughlin*, 1863, 4 Irv. 273). Thus a Jew was sworn on the Old Testament, with his hat on, and a staff in his hand (*Horn and Maclaren*, 1831, Bell, *Notes*, 265; 2 Alison, 431; as to a Mohammedan, see *Morgan's case*, 1 Leach C. C. 54; as to a Chinaman, see *R.* v. *Entrehman*, C. & Marsh. 248). If the witness object to be sworn, and state as the ground of such objection, either that he has no religious belief, or that the

taking of an oath is contrary to his religious belief, he may make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law (51 & 52 Vict. c. 46, s. 1). The affirmation must be in the following terms: "I, A. B., do solemnly, sincerely, and truly declare and affirm," and shall then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness (*ib.*, s. 2). Every affirmation in writing shall commence: "I, , of , do solemnly and sincerely affirm," and the form in lieu of jurat shall be: "Affirmed at , this day of 18 . Before me" (*ib.*, s. 4. See *M'Cubbin*, 1850, 12 D. 1123, as to the necessity of using the precise words of the statutory form). A false statement on affirmation attracts the same pains and penalties as a false statement on oath (*ib.*, s. 1). Observe that an oath duly administered and taken is not invalidated by the fact that the person had, when sworn, no religious belief (*ib.*, s. 3).

A witness refusing to be sworn or to affirm may be imprisoned for contempt of Court (2 Alison, 432; *Tweedie*, 1829, Shaw, 222; *Bonnar*, 1836, 1 Swin. 39; cf. *M'Laughlin, supra cit.* See also Summary Procedure Act, 1864, s. 10).

(*d*) *Mode of Conducting the Examination.*

(i.) *Witness must be examined separately*, see above, II. (*k*) and (*l*), and Opinion Evidence.

(ii.) *Witness may be examined* in initialibus, see above, II. (*t*) and (*u*).

(iii.) *Examination, Cross-Examination, and Re-Examination.*—The witness, after having been sworn and after having been examined *in initialibus*, if such examination be required, is examined in chief upon the merits of the case. The A. S., 16th Feb. 1841, regulates the procedure in jury causes; and so far as the examination of witnesses is concerned, the directions there laid down apply in proofs before a judge (Mackay, *Manual*, 334; Wilson, *Sheriff Court Practice*, Pt. II. chap. ii. s. ix.). The counsel who begins the examination continues it throughout, without interruption from any quarter (unless when an objection is taken to the legality of the question), until he has exhausted the examination. After this, a counsel on the opposite side may cross-examine without interruption, until he has exhausted his cross-examination (A. S., 16th Feb. 1841, s. 28); and it is competent for him to examine the witness not in cross only, but also *in causâ* (3 & 4 Vict. c. 59, s. 4). Then the counsel who first examined in chief may re-examine, confining his re-examination strictly to such new matter as may have arisen in cross-examination, unless with permission of the Court (A. S., 16th Feb. 1841, s. 28). The counsel who cross-examined has no right to a second cross; but the Court will put, or allow him to put, any question which may be proper for clearing up matters left doubtful by the re-examination (Dickson, *Evidence*, s. 1763). When the counsel have concluded the examination, and sometimes during that examination, the Court put any questions that suggest themselves; and, at the former stage, will put any competent questions suggested by the jury (*ib.*). But the sequence of examination may be altered to suit the exigencies of particular cases. Thus a defender may reserve his cross-examination of his own witnesses, if called for the pursuer, and take it along with his own examination of them in chief. And where a witness is to speak to certain facts which must be established before the remaining facts are proved, he may be examined as to the preliminary facts, and his further examination may be taken at a later stage of the proof (Dickson, *Evidence*, s. 1764). See Cross-Examination.

It is in the discretion of the presiding judge to allow a witness to be recalled after examination (*Hamilton*, 1811, 2 Hume, 381, note 2; *Scott*, 1842, 1 Broun, 131; 2 Alison, 543; Tait, 435; 15 & 16 Vict. c. 27, s. 4). He may be recalled although he has not been re-enclosed (*Gilchrist*, 1831, Bell, *Notes*, 261). The recall may be allowed either on the motion of parties (15 & 16 Vict. c. 27, s. 4), or on the Court's initiative (*A.* v. *B.*, 1858, 20 D. 407; *Collison*, 1897, 24 R. (J. C.) 52). Thus a motion to recall has been granted where the object was to ask a witness whether on a special occasion, prior to his examination, he had made a statement differing from the statement made by him on examination (cf. *Robertson*, 1874, 1 R. 532, 594, and *Hoey*, 1884, 11 R. 578, with *Begg*, 1887, 14 R. 497), or to rectify some accidental omission in his examination (see *Wilson*, 1862, 4 Irv. 256; *Wilkie*, 1886, 1 White, 242, where the motion was refused). Further, if it appear "suddenly and unawares" from the evidence of a witness that a previous witness had expressed malice against the accused, the previous witness may be recalled and re-examined on the point (*Robertson*, 1856, 2 Irv. 411). See (vi.) below.

A witness, if he discover that he has made some mistake in giving his evidence, may have the mistake rectified on application *de recenti* (Dickson, *Evidence*, s. 1770; Tait, *Evidence*, 434).

(iv.) *Questions must be Relevant; Leading Questions; Witness must depone to Facts, not to Inferences.*—The questions must be relevant (Evidence, I. (1)). In prosecutions for offences against chastity, the character of the woman may be proved by the accused, both to negative the charge and in alleviation of the crime (1 Hume, 304; 1 Alison, 215; 2 Alison, 531; *Tweedie*, 1836, 1 Swin. 22). Notice must be given to the prosecutor, unless he has attempted to set up the woman's character (Hume, *ib.*; Alison, *ib.*; *Wight*, 1836, 1 Swin. 49; *Blair*, 1842, 2 Broun, 147; *Macmillan*, 1846, Arkley, 209; *Forbes*, 1858, 3 Irv. 186; *Reid*, 1861, 4 Irv. 124). It is, in general, incompetent to prove specific acts of unchastity with persons other than the accused (*Dickie*, 1897, 24 R. (J. C.) 82, where the authorities are cited and discussed). If the woman's reputation is to be attacked, the proof must be confined to the period at, or immediately prior to, the date of the alleged offence; and if the accused succeed in proving her loose character at one or other of those periods, he may carry back his proof as far as he pleases (*Reid*, *ut supra*). It seems competent to prove that she was the companion of prostitutes (*Webster*, 1847, Arkley, 269). So, too, a person accused of murder may, on notice to the prosecution (*Brown*, 1836, 1 Swin. 293), prove that the injured person was quarrelsome (*Blair*, Bell, *Notes*, 294; *Irving*, 1838, 2 Swin. 109). But proof of acts of violence committed by him on the accused (*Shiels*, 1846, Arkley, 171), or on third persons (*Irving*, *ut supra*), has been disallowed. In a recent case, it was held competent for a person charged with assault to ask the injured person whether he was under the influence of drink at the time of the alleged offence, Ld. M'Laren observing that "it is undoubtedly the right of every accused person to cross-examine the principal witness or injured party as to his character generally, and specially as to his conduct at or near the time when the occurrence took place" (*Falconer*, 1893, 1 Adam, 96).

As to the relevancy of the parties' character in civil actions, see Character of the Parties in Civil Actions; Cross-Examination.

It frequently happens in the course of a trial that the relevancy of material facts is not at once apparent, and the Court has therefore to rely to no inconsiderable extent on the discretion and fairness of the counsel engaged (Dickson, *Evidence*, s. 1; Macdonald, *Crimes*, 465).

When examined in chief, the witness must not be "led," *i.e.* he must not be asked questions in terms which suggest the answers desired. Nor will questions be permitted which assume as proved, facts which have not been proved, or answers as given which have not been given (Dickson, *Evidence*, s. 1771; Taylor, *Evidence*, s. 1404). The rule must, however, be applied reasonably, else the leading of evidence would be unduly prolonged; and, accordingly, it is not enforced in regard to that portion of the examination which is preliminary to the material portion (Dickson, *Evidence*, s. 1772; Taylor, *Evidence*, s. 1405). Further, a leading question may be put when the mind of the witness can be directed to the subject of the inquiry only by a particular specification thereof (see *Auchmutie*, 1817, 1 Mur. 212; *Walker*, 1821, 2 Mur. 509; *Aiton*, 1823, 3 Mur. 285; *Woods*, 1839, Bell, *Notes*, 267). As to the limits within which the exclusionary rule obtains in cross-examination, see *Mure*, 1858, 3 Irv. 280; CROSS-EXAMINATION.

The witness must depone to facts and not to inferences (see OPINION EVIDENCE as to the exceptions to this rule). It may be observed in this connection, that in inquiries which open without any written notice to the accused of the *gravamina* to be advanced against him, it is essential when he is examined as a witness to question him on the matter of the charge. In the absence of interrogation upon these points, inferences are not to be drawn regarding them from the evidence of other witnesses (*Watson*, 1892, 19 R. 1078; *Turner*, 1894, 22 R. 18).

(v.) *Competent Questions must be answered; Criminating Questions.*—The witness is bound to answer all competent questions, and, if he refuse, may be imprisoned (2 Hume, 140; 2 Alison, 438, 550; *Kerr*, 1822, Sh. 68; *M'Laughlin*, 1863, 4 Irv. 273; see Summary Procedure Act, 1864, s. 10); and all statements made by him *in bonâ fide*, which are relevant to the cause, are privileged unless malice is proved (*Watson*, 1862, 24 D. 494; *Mackintosh*, 1875, 2 R. 877). He may, however, decline to answer any question, if the answer would expose him to a criminal charge, or to depone to facts from which criminality might be inferred (Dickson, *Evidence*, ss. 1786, 1789; Taylor, *Evidence*, ss. 1453–1458; see 61 & 62 Vict. c. 36, s. 1 (*f*), quoted II. (*f*) above); but he cannot resist being sworn and interrogated. If he waive his privilege, his evidence is competent (*Setton*, 1816, 1 Mur. 12); and if he give a negative answer, he may not be questioned upon specific facts, in order that his criminality may be inferred from his answer (*Millar*, 1837, 1 Swin. 483), nor may extrinsic evidence be led for that purpose (*Kennedy*, 1896, 2 Adam, 51). A *socius criminis* must answer all questions relating to the charge on which his evidence is sought (Dickson, *Evidence*, s. 1788. See *Jantzen*, 3 Feb. 1814, F. C., where an accomplice in a robbery, who had been received as a Crown witness, was examined *in initio litis*, in a civil action against him at the instance of the person robbed, for recovery of his property). A witness may not refuse to say whether he has been convicted of a specified crime (*Johnston*, 1845, 2 Broun, 401); nor may he decline to answer a question affecting his credit only (*Pender*, 1836, 1 Swin. 25). Where the presiding judge is satisfied that the sole purpose of a question is to insult the witness, he will disallow it (*Falconer*, 1893, 1 Adam, 96). It is thought that a bankrupt, when examined under the Bankruptcy Act, must answer all questions relative to his affairs, whether they incriminate him or not (*Sawers*, 1858, 21 D. 153; Dickson, *Evidence*, s. 1787; Goudy, *Bankruptcy*, 250).

Sec. 2 of the Act 37 & 38 Vict. c. 64 provides that "the parties to any proceeding instituted in consequence of adultery, and the husbands and

wives of such parties, shall be competent to give evidence in such proceeding; provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disprove of his or her alleged adultery." The effect of this enactment is that when it is proposed to ask a witness whether he has been guilty of adultery, he may say that he is not desirous of being interrogated on the subject, and it will then be the duty of the judge to refuse to allow the question to be put (*Bannatyne*, 1886, 13 R. 619). Of course, he may answer the question if he will (*Cook*, 1876, 4 R. 78); and, if he give a negative answer, his credit may be tested by all competent questions (*Muir*, 1873, 11 M. 529).

(vi.) *Impugning Credibility of Witnesses.*—The rules excluding the evidence of certain persons whose character, or relationship to the parties, or interest in the cause, raised doubts as to the reliability of their evidence, have practically been swept away (see above, II. (*a*)). These grounds of objection, however, while no longer operative to exclude, are still entitled to consideration on the question of credibility (Dickson, *Evidence*, ss. 1624, 1625; *King*, 1842, 4 D. 590, per Ld. J.-Cl. Hope; see *Nicolson*, 1887, 1 White, 307, where certain questions designed to show the malice of the witness were disallowed by Ld. Young; and *Beecham*, 1891, 29 S. L. R. 1, where the value of hired evidence is discussed). The credibility of a witness may not, however, be impugned on the ground of general bad character or untruthfulness (2 Hume, 352; *Galloway*, 1836, 1 Swin. 232), save in the exceptional cases mentioned in the preceding section (see also Character of the Parties in Civil Actions; Cross-Examination; *Maclean*, 1827, Bell, *Notes*, 294; *Buchan*, *ib.*, 293), and in the case of prostitutes (*Webster*, 1847, Ark. 269; *Walker*, 1871, 9 M. 1091; *Tennent*, 1883, 10 R. 1187). See, however, *A.* v. *B.*, 1895, 22 R. 402, per Ld. Pres. Robertson. A witness may be asked whether he has committed or stands indicted for a crime or offence which affects his credibility. As to the cases in which he may decline to answer, see (v.) above.

Sec. 3 of the Act 15 Vict. c. 27 makes it competent in examining a witness, to ask him whether he has on any previous occasion made any statement pertinent to the issue different from the evidence now given by him. If the witness give a negative answer, and it is proposed to contradict him, it is necessary "to lay a foundation" (see Cross-Examination) by interrogating him specifically as to the time, place, and person, when, where, and to whom, the former statement was made (*Gall*, 1870, 9 M. 177; cf. *Clark*, 1862, 24 D. 1315; *Ross*, 1863, 1 M. 783; *M'Hardie*, 1834, Bell, *Notes*, 288; *Robertson*, 1842, 1 Broun, 152); and this rule applies where the facts are to be proved by documents (*Stevens*, 1839, 2 Swin. 342). Observe that this right may be exercised by the adducer of the witness (*Gall*, *ut supra*; *Leckie*, 1895, 1 Adam, 538). In the case of *Common*, 1860, 3 Irv. 632, the prosecutor was allowed, on the ground that he had no right to a proof in replication, to impeach by anticipation the credibility of a person in the pannel's list of witnesses. See (iii.) above as to the recall of a witness.

A statement on record made by a witness in another action is a proper subject for cross-examination (cf. *Morrison*, 1860, 23 D. 232, with *Stewart*, 1871, 43 Sc. Jur. 578); but a record seems to be inadmissible in evidence for the purpose of contrasting the statements therein contained with the evidence as it comes out in the course of a jury trial (*Cullen's Tr.*, 1865, 3 M. 935; see *Urquhart*, 1865, 3 M. 932).

Where the previous statement was made on oath, the witness may decline to say whether he made it (see (v.) above).

In accordance with what is thought to be the better opinion, it is the practice not to examine a witness on statements made by him on precognition (*O'Donnell* and *Maguire*, 1855, 2 Irv. 236; *Emslie*, 1862, 1 M. 209; Macdonald, *Crimes*, 473; Dickson, *Evidence*, s. 265. The rule holds whether the purpose be to discredit or confirm a witness: *Robertson*, 1842, 1 Broun, 152, 190).

Cross-examination upon statements in a judicial declaration is competent, when the person emitting it has pled guilty and is a witness for his co-accused (*Wilson*, 1860, 3 Irv. 623); incompetent when the person emitting it has been discharged and is a Crown witness (*Milne*, 1866, 5 Irv. 229).

See CROSS-EXAMINATION.

(vii.) *Witness must depone from his own Recollection; he may refresh his Memory.*—In general, a witness must give his evidence orally and from his own unaided recollection (Dickson, *Evidence*, s. 1775). If, prior to his examination, he have emitted a deposition, and fear that he may make statements inconsistent with it, he is entitled to have it destroyed (*Id. ib.*; 2 Hume, 381; 2 Alison, 534, 535). But where a man is called to prove that he wrote or attested a document, it is sufficient if he swear to his handwriting, although he does not remember writing or signing the document (Dickson, *Evidence*, s. 1776); and the same principle receives effect in the identification of persons and productions (see IDENTIFICATION). Moreover, a witness may refresh his memory as to matters of detail, *e.g.* sums, dates, measurements, etc., by referring to his notes (Dickson, *Evidence*, s. 1777; Taylor, *Evidence*, s. 1406). These notes must have been prepared at the time of, or immediately after, the occurrence to which they refer (*Monaghan*, 1844, 2 Broun, 131; *Wilson*, 1851, 14 D. 1; Dickson, *Evidence*, s. 1778); and it is essential to their admissibility that they have been prepared by himself or in his presence, or that he had examined them when the facts were fresh in his memory and satisfied himself of their accuracy (Dickson, *Evidence*, s. 1784; Taylor, *Evidence*, s. 1410). Where a witness had, apart from his notes, no recollection of the matter to which they referred, he was not allowed to refer to them, as they had not been libelled on and produced (*Macpherson*, 1845, 2 Broun, 450). Further, a witness may not refresh his memory by means of documents not his own and not produced (Macdonald, *Crimes*, 462); but this rule was relaxed in the case of a document which the witness had received from the accused, and retained ever after in his possession (*Wilson*, 1861, 4 Irv. 42). Whether a witness may refer to a copy of his notes without having the original notes with him depends upon the circumstances of the particular case (Dickson, *Evidence*, ss. 1781–1783; Taylor, *Evidence*, s. 1408; and cf. *Wilson*, 1851, 14 D. 1, with *Campbell*, 1840, 2 D. 663).

Documents which are inadmissible in evidence, *e.g.* deeds insufficiently stamped (*Birchall*, [1896] 1 Q. B. 325), may be used by the witness to refresh his memory.

Further, an expert witness may refresh his memory by referring to authoritative works of science. See OPINION EVIDENCE.

The agent of the party against whom the witness, who uses documents to refresh his memory, is adduced, is entitled to see them (Dickson, *Evidence*, s. 1785; *Niven*, 1898, 25 R. (J. C.) 89).

IV. Number of Witnesses required.

The testimony of one witness is not full proof (Dickson, *Evidence*, 1807; *Wallace*, 1891, 19 R. 233). But the rule means nothing more than this,—that where there is no evidence, either oral, documentary, or circumstantial, to prove a case, other than the evidence of one witness, the case must be held not proved (*Lees*, 1893, 3 White, 468, per Ld. J.-Cl. Macdonald; cf. *Jarvie*, 1875, 2 R. 623, per Ld. Pres. Inglis). Accordingly, it is sufficient if the witness be corroborated by circumstances, or by the accused's declaration or confession (Dickson, *Evidence*, s. 1808). So, too, while the evidence of a single witness will not suffice to prove one isolated act of adultery, it may be regarded as sufficient if corroborated by other witnesses who speak to other facts of a similar nature (Dickson, *ib.*; cf. *Wilson*, 1898, 25 R. 788, with *Dombrowitzki*, 1895, 22 R. 906). The same rule was applied in an action of damages in which the same slander had been repeated on several occasions (Dickson, *ib.*; see also *Wilson*, 1861, 24 D. 67). It is to be observed that the denial by the defender in an action of affiliation of material facts does not, although not believed, corroborate the pursuer's statement. At the same time, the case may assume a complexion adverse to him if his contradiction of statements by her, as to which she is corroborated, be disproved (*Macpherson*, 1896, 23 R. 785; see also *M'Bayne*, 1860, 22 D. 738; *Dunn*, 1875, 3 R. 236; *M'Kinven*, 1892, 19 R. 369; *Young*, 1893, 20 R. 768). In criminal cases, where several acts of the same crime are charged, it is enough if one witness speak to each act (Dickson, *Evidence*, s. 1809). A substantive aggravation may be proved by one witness (*Cameron*, 1839, 2 Swin. 447; *Davidson*, 1841, 2 Swin. 630). Even where the acts charged are independent instances of the same kind of crime, the common character found in each instance may render the proof of one admissible in supplement of the evidence as to another (see Evidence, I. (1)).

As to the amount of corroboration required in the case of *socii criminis*, see II. (*g*) above.

See also Penuria testium.

V. Witness' Expenses.—See Expenses.

Woodcock.—The woodcock is not under the Night Poaching Act, but it is protected by the Day Trespass Act (2 & 3 Will. iv. c. 68), and the Poaching Prevention Act (25 & 26 Vict. c. 114), and it also falls under the Game Licence Act, 1860 (23 & 24 Vict. c. 90), subject to the exception that woodcock and snipe may be taken by nets or springs without incurring the penalties of the Act. Woodcock are also specially protected by the Wild Birds Protection Acts of 1880 and 1894. Accordingly, it is illegal to take them between 1st March and 1st August, or to take their eggs within any area protected by an order under the Act of 1894.

Wood.—See Forest; Timber.

Woods and Forests, Commissioners of.—See Crown Lands.

Workmen.—See Hiring; Master and Servant; Desertion of Service; Truck Acts; Employers' Liability Act; Reparation; Workmen's Compensation Act.

Workmen's Compensation Act, 1897.—This Act, which came into operation on 1st July 1898, provides compensation to workmen engaged in certain employments, for injuries received in the course thereof (s. 1 (1)). The leading feature of the Act is that the liability of an employer arises from the occurrence of an accident, and that questions of negligence on his own or his servants' part are not regarded. The liability of an employer on these grounds, *e.g.* at common law and under the Employers Liability Act of 1880, is left untouched by the present Act, except that it is provided that an employer shall not be liable to pay compensation both under the Act and independently of it (s. 1 (2) (*b*)).

Accident.—The Act extends only to injuries arising from "accident." Sickness and disease arising from continued employment at an unhealthy occupation are not included. All accidents are included provided they arise (1) "out of and" (2) "in course of the employment" (s. 1 (1)). These conditions must both be present (*Smith*, [1899] 1 Q. B. 141). These conditions were held to be complied with where a workman, in an apparent emergency, went to assist his superior at a part of the works, other than where his regular employment lay at the time (*Durham*, 1898, 1 F. 279), where he was working negligently and in a way he had been warned not to adopt (*M'Nicholas*, [1899] 1 Q. B. 773). On the other hand, an accident was held not to arise out of the employment where the workman engaged in work which he was forbidden to perform (*Lowe*, 1899, 1 Q. B. 261), and where he put himself in a position of danger for a purpose of his own (*Smith*, [1899] 1 Q. B. 141).

Injuries for which the Act does not provide compensation are those proved to be attributable to the serious and wilful misconduct of the workman claiming (s. 1 (2) (*c*)). Mere negligence does not instruct this defence (*M'Nicholas*, [1899] 1 Q. B. 773); and it has been held that acting in violation of a rule under the Coal Mines Act, of which the workman had failed to inform himself (*M'Nicol*, 1899, 1 F. 604), and even disobeying a rule which was known, do not necessarily amount to such misconduct (*Rumboll*, 1899, 80 L. T., N. S. 42).

Employer.—The person liable in compensation may or may not be the actual employer of the injured workman, since the Act applies only to the "undertakers" of the employment or work (s. 7 (1)). The claim, therefore, of a workman employed by a sub-contractor lies against the employer of his master, who is the undertaker (s. 4). The latter is entitled to be indemnified by the sub-contractor (s. 4). Where, also, a workman is injured by the fault of a person not contractually related with the undertaker, and he is liable in compensation under the Act, the undertaker is entitled to indemnity from that person (s. 6). The Act contains provisions for defining undertakers in the various industries to which it applies (s. 7 (2)). In the case of factories, the undertaker is the person who is occupier in the sense of the Factory Acts.

Employments.—The Act applies to employment on, in, or about a railway, factory, mine, quarry, engineering work, any building which exceeds thirty feet in height, and is (1) either being constructed or repaired by means of a scaffolding, or (2) being demolished, and to any building which is being constructed, repaired, or demolished with the assistance of mechanical power (s. 7 (1)). "Factory" has the same meaning as in the Factory Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery or plant to which any provision of the Factory Acts is applied by Factory Act of 1895, and every laundry worked by mechanical power (s. 7 (2)). In the case of a building at which mechanical power is not present, it must at the

time of the accident be thirty feet in height (*Billings*, [1899] 1 Q. B. 70); where mechanical power is present, height is immaterial (*Mellor*, [1899] 1 Q. B. 374). Illustrations of employment in or about machinery are found in the case of a stevedore working on a ship which is being unloaded by a steam crane on a quay (*Woodman*, [1899] 1 Q. B. 15), and an engineman attending to an engine temporarily used for grinding mortar for, and near, a building in the course of erection (*M'Nicholas*, [1899] 1 Q. B. 773). But a steam winch on board ship and forming part of the ship's equipment, though used for discharging cargo on to a quay, has been held not to be a factory within the meaning of the Act of 1895 (*Aberdeen Trawling Co.*, 1899, 1 F. 786).

Workman.—This word includes employes of all grades (s. 7 (2)), but not a sub-contractor (*M'Gregor*, 1899, 1 F. 536). In the case of a fatal injury the dependants of the workman are *inter alios* included in the word (s. 7 (2)). Dependants mean such of the persons entitled to sue for damages or *solatium* in respect of the death of the workman as were wholly or in part dependent on the death of the workman at the time of his death. A person wholly or in part dependent on the deceased for the ordinary necessaries of life, having regard to his class and position, is a dependant in the sense of the Act, but not one who merely derives a benefit from the earnings of the deceased (*Simmons*, [1899] 1 Q. B. 1005).

Amount of Compensation.—In the case of fatal injury, when the deceased leaves dependants who were wholly dependent on the deceased, the compensation is a sum equal to three years' earnings, or £150 if the earnings are less than that, but in no case more than £300 (First Sched. (1) (*a*) (i.)). Where the dependants were partially dependent, the compensation is such sum, not exceeding the above, as is reasonable and proportionate to the injury to the dependants (First Sched. (1) (*a*) (ii.)). Where there has been less than three years' service in the employment, 156 times the average weekly earnings are taken as the equivalent. These are to be ascertained by dividing the total amount earned by the number of weeks the deceased was in the service (*Keast*, 1899, 15 T. L. R. 141; *Price*, [1899] 1 Q. B. 493).

If a workman leaves no dependants, there may be recovered the reasonable expenses of his medical attendance and burial up to the sum of £10 (First Sched. (1) (*a*) (iii.)).

Where an injury is not fatal, but total or partial incapacity results, the compensation is a weekly payment during the incapacity after the second week, not exceeding half of the workman's previous average weekly earnings up to the sum of £1 per week (First Sched. (1) (*b*)). For the first fortnight no compensation is payable. In fixing the amount of the weekly payment, regard is to be had to the earnings of the workman before, and the amount he is able to earn after, the accident (First Sched. (2)). Such payment is subject to review, and after six months an employer may redeem by payment of a lump sum (First Sched. (12) (13)).

Liability of Undertaker for Sub-contractor. — Where an undertaker employs a sub-contractor, he is liable (1) in the compensation payable by a sub-contractor under the Act; (2) in the compensation which would be payable by the sub-contractor if the sub-contractor were liable under the Act, although the sub-contractor is not so liable; (3) in damages in which the sub-contractor is liable at common law or under the Act of 1880 (s. 4). An undertaker may, however, be entitled to indemnity from the person for whom he has to pay (s. 4). The liability of the undertaker does not extend to work merely ancillary or incidental to his business, and not a part of or process in it (s. 4).

Indemnity claimable from Third Party.—Where an employer has to pay

compensation to a workman for an injury caused by the fault of a third party, the employer is entitled to be indemnified by the third party (s. 6).

Procedure.—Notice of the accident has to be given "as soon as practicable after," and a claim for compensation must be made "within six months from," the occurrence of the accident (s. 2 (11)). All questions in dispute are to be settled by arbitration (s. 1 (3)). In Scotland, failing agreement upon an arbitrator, a claim is to be prosecuted under the provisions of sec. 52 of the Sheriff Court Act of 1876 (Second Sched. 14 (*c*)). The decision of an arbitrator is final on fact, but on a question of law decided by a Sheriff as arbitrator an appeal is allowed to the Inner House by way of a stated case (Second Sched. 14 (*c*), Act of Sederunt, 3rd June 1898). The stated case must set forth the question of law decided by the arbitrator and his decision thereon (*Murnin*, 1899, 1 F. 634). Provision for various points of procedure is made, in the case of Scotland, by the Act of Sederunt above cited, and in the case of England by Rules of Court. The duties and fees of Medical Referees are dealt with in Statutory Rules and Orders, 1898, No. 407.

[Glegg, *Commentary on Workmen's Compensation Act*; Ruegg on do.; Minton-Senhouse and Emery, *Accidents to Workmen*.]

Workshop.—See Factory Acts.

Wounding.—See Assault.

Wreck.—*Early Law.*—According to early Scots law, all wrecks escheated to the Crown unless some living creature, man or beast, were found on board, in which case the owner was entitled to claim the wreck within a year and a day (Alex. II. c. 25; *Hamilton*, 1622, M. 16791). This provision as to the necessity of some living creature having escaped alive in order that the owner's claim might be admitted was obsolete by 1725 (*Montsir*, M. 16796). The Statute 1429, c. 124, relaxed the law in the case of vessels belonging to foreign countries whose law of shipwreck was less stringent than the Scots law, and provided for a reciprocal treatment of such vessels (*Jacobson*, 1674, M. 16792). Other enactments on the subject are: 12 Anne, sess. 2, c. 18; 4 Geo. I. c. 12; 5 Geo. I. c. 11, s. 13.

Modern Law.—The present law on the subject of wrecks is contained in Part IX. of the Merchant Shipping Act, 1894. The Act does not expressly define what is to be regarded as a wreck, merely stating that "the expression 'wreck' includes jetsam, flotsam, lagan, and derelict found in or on the shores of the sea or any tidal river" (s. 510). A barge which had got adrift from its moorings, and was found by salvors with no one on board in the estuary of the Thames, was held not to be a wreck (*The Zeta*, 1875, L. R. 4 A. & E. 460). In the case of *Palmer* (1858, 3 H. & N. 505) it was decided that timber which had drifted from the place where it was moored, and was found floating at sea without an apparent owner, was not "wreck." It is to be noted that the term "wreck" is applied in the Act both to a vessel which has been wrecked and to portions of such vessel, or of its cargo and apparel, which have been cast up on the shore. By sec. 566 the Board of Trade have the general superintendence throughout the United Kingdom of all matters relating to wreck, and are empowered to appoint local officials, styled Receivers of Wreck, whose duties are defined by the Act. Their fees and expenses are dealt with in sec. 567.

Where a British or foreign vessel is wrecked, stranded, or in distress at any place on or near the coasts of the United Kingdom, or any tidal water within the limits of the United Kingdom, the local Receiver of Wreck,

upon being made acquainted with the circumstance, must proceed forthwith to the spot, and take charge of all operations for the preservation of the vessel, the lives of the persons belonging to it, and the cargo and apparel. Disobedience to his orders is punishable by fine (s. 511). He is also given power to require, under penalties, the assistance of such persons as he may think necessary, and of any vessels and vehicles at hand (s. 512). By sec. 513 the owner or occupier of lands adjoining the place where the wreck has occurred must, under pain of fine, permit persons, if necessary, to pass over his lands, with or without vehicles, for the purpose of rendering assistance, and to deposit on his lands articles recovered from the wreck, the owner or occupier having a right to compensation for any resulting damage. The Receiver may cause the apprehension of any person plundering, creating disorder, or obstructing, and may suppress such action by force (s. 514). When the vessel, or any part of its cargo and apparel, is plundered, damaged, or destroyed by riotous persons, the owners are entitled to be compensated by the inhabitants of the adjacent county, city, or borough, as if the offence had been committed under the Riot Act of 1854 (s. 515). In the absence of the Receiver, his duties may be discharged by the following officials in the order named: chief officers of customs, principal officers of the coastguard, officers of inland revenue, sheriffs, justices of the peace, naval and military officers on full pay, who are to be regarded as the Receiver's agents (s. 516). Sec. 517 requires an examination to be held by a Receiver of Wreck or, at the request of the Board of Trade, a Wreck Commissioner, whom failing, a Justice of the Peace, as to any vessel which is or has been in distress, the examination to be reported to the Board of Trade and Lloyd's.

Where any person finds or takes possession of any wreck, he must, if the owner thereof, give notice to the Receiver, and if not the owner, must deliver the same to the Receiver (s. 518). All cargo, etc., washed ashore, or otherwise lost or taken from a wreck, must be delivered to the Receiver, under a penalty, which is imposed upon every person, whether the owner or not, who fails, by secreting the articles or otherwise, to obey this rule (s. 519). The Receiver is required to give public notice within forty-eight hours of his having taken possession of any wreck (s. 520). The owner of any wreck in the possession of the Receiver, on establishing his claim within a year, and on payment of salvage, fees, and expenses, is entitled to delivery thereof. In the case of foreign ships and cargo, the respective consular officials are to be held to be the owner's agents in the absence of the owner or his representatives (s. 521). The Receiver may in certain specified cases sell wreck in his possession, and hold the proceeds in lieu thereof (s. 522).

All unclaimed wreck is the property of the Crown, or the Crown's grantee. (See the following cases as to Crown grants of the right of wreck: *Commissioners of Customs*, F. C., 25 May 1810, and 2 December 1812; *Breadalbane*, 1850, 12 D. 602; *Hebden*, 1868, 6 M. 489.) Where the Crown has granted to a subject the right to wreck found in any district, that person must deliver particulars of his title to the local Receiver, and is entitled to notice from the Receiver, within forty-eight hours, of any wreck taken possession of by the latter. On the expiry of a year the wreck is to be delivered, on payment of expenses, to the grantee of the Crown if the Crown has parted with its right to wreck in the district in question; otherwise the wreck is to be sold, and the proceeds applied for behoof of the Crown in the manner provided by the Act (ss. 523–5). Secs. 526–9 deal with questions of disputed title to unclaimed wreck, and

the power of the Board of Trade to purchase rights to wreck. The removal by harbour and lighthouse authorities of wrecks dangerous to navigation is provided for in secs. 530–4. Various offences in respect of wreck are dealt with in secs. 535–7, and include the taking of wreck to foreign ports, hindering the saving of vessels or their cargo, secreting or wrongfully carrying away wreck. The common law of Scotland as to crimes relating to wreck will be found in Hume (i. 485). Secs. 331–5 of the Merchant Shipping Act contain provisions as to the treatment of wrecked passengers by emigrant and other ships, and the expenses of their rescue, maintenance, and conveyance. Wrecked foreign goods are liable to the same custom duties as if they had been imported in ordinary course (s. 569). Sec. 477 provides for the appointment by the Lord Chancellor of not more than three Wreck Commissioners for the United Kingdom, who may hold investigations and examinations as to shipping casualties (ss. 466 (2), 517), and preside at Courts of Survey (s. 487).

[Stair, ii. 1. 5; iii. 3. 27; More's *Notes*, cxlvi; Ersk. ii. 1. 13; Bell's *Com.* i. 644; Bell's *Prin.* ss. 1292 and 1292A; Rankine on *Landownership*, 225; Morton on *Wreck Inquiries*; Scrutton's *Merchant Shipping Act*, 1894; Pulling's *Shipping Code*, 1894; etc. Articles SALVAGE; DERELICT; FLOTSAM.]

Writ.—See DEEDS (EXECUTION OF); WILL; REGISTRATION.

Writers to the Signet.—The origin of the Society of Writers to the Signet is not quite certain; but they seem to have at one time been clerks in the office of the Secretary of State, who had charge of the King's Seal. In the Act of Parliament instituting the Court of Session in 1532 they were mentioned as a previously existing body; and they were thereafter recognised as members of the College of Justice, as the new institution was then termed. The establishment of that Court must, however, have added considerably to their importance; for summonses and other writs requiring to be signeted were then substituted for brieves from Chancery, and those new writs were drawn and eventually required to be signed by Writers to the Signet. Being thus officially engaged at the initial stage of litigation, the members of the society might naturally have been expected to act as solicitors in the Court of Session. But they were for a long time prohibited from doing so, by the injunction of the Secretary of State in 1594, by various Acts of Sederunt of the Court of Session, and by their own resolutions as late as the year 1696. But those prohibitions seem to have become obsolete at the beginning of the eighteenth century, and the right of members of the society to conduct litigation in the Court of Session was expressly recognised by that Court in 1754. Since then the Writers to the Signet have formed the principal and most numerous body of solicitors in Scotland, and have held the highest rank in the profession. This honourable position has been to a large extent due to the very great attention which they have always paid to the education of their apprentices. The question has been mooted whether they form an incorporation. They do not possess any charter of incorporation; but they have frequently exercised the powers of a corporate body, and the better opinion is that they are by long custom an incorporation (Mackay, *Practice*, i. 128; *Writers to the Signet*, 1886, 14 R. 31).

There are at present about 511 members of the society. The initial letters W.S. are generally used to designate a member. The office-bearers are a Keeper of the Signet, appointed by the Crown (whose office is now

conjoined with that of Lord Clerk-Register), a Deputy Keeper, appointed by him and in use to act as chairman at meetings of the society; the following officers who are elected annually, though generally re-appointed during life, viz. Treasurer, Fiscal, Librarian, and Collector of the Widows' Fund; and the following officers who are appointed by the Keeper, viz. the Substitute Keeper of the Signet and Clerk (Mr. John Milligan, W.S.), and the Assistant Clerk and Extractor. Further, the Keeper names a considerable number of members as Commissioners to manage the affairs of the society. The Professor of Conveyancing in the University of Edinburgh is appointed by two delegates chosen by the society and other two chosen by the Town Council of Edinburgh, with the Deputy Keeper. The stated general meetings of the society are held on the first Monday of February, the last Monday of May, the third Wednesday of June, and the third Monday of November.

In 1803 the society obtained an Act of Parliament to enable them to raise a fund for the benefit of widows of members, and this Act was amended by subsequent Acts in 1818, 1831, 1836, and 1898. The fund is maintained by the entry-money payable by intrants as aftermentioned, by an annual rate of £6, 6s. from each member, and by certain additional rates levied on those who enter the society after the age of twenty-four, and on marriages. The annuity to which each widow is entitled is at present £80. The actual amount of the fund at Whitsunday 1897 was £258,096, 13s. 3d.

The library, founded in 1755, now numbers over 94,000 volumes, exclusive of pamphlets and tracts. It is kept up by the entrance fees of members. The lower hall of the library cost upwards of £12,000, and the upper hall was purchased from the Faculty of Advocates for £12,000.

No person can be admitted into the society without having been apprenticed to a member of the society. On account of the high standard of the examinations for admission to the society, the Court of Session are in the habit of admitting as law agents, without further examination, all who have been admitted as members. The following are the existing regulations with reference to apprentices and intrants:—

APPRENTICES.

I. The period of indenture shall be five years, and the age for entering into indenture not under eighteen: Provided always that where an applicant for indenture is over the age of nineteen, and holds a degree in Arts or in Law of a University of Great Britain or Ireland, granted after examination, the period of indenture may be three years.

II. Applicants for indenture who do not hold such a degree shall, before entering into indenture, produce evidence of having passed both examinations in general knowledge, including book-keeping, prescribed by the Act of Sederunt 18th March 1893, following upon the Law Agents and Notaries Public (Scotland) Act of 1891; or of having otherwise complied with the requirements of the Acts of Sederunt as regards these examinations.

III. The form of application for leave to enter into and to assign indentures is by petition to the Keeper and Commissioners of the Signet.

(*a*) *Indentures.*—Upon the prayer of the petition being granted, *but not till then*, the indenture may be signed, and must then be recorded in the Register of Probative Writs for the county, and intimated to the Registrar of Law Agents, in terms of sec. 5, subsec. 2, of the Law Agents Act, 1873. Thereafter, the extract registered indenture, with the Registrar's certificate thereon, must be presented at the Signet Office for registration, and that

within three months from the date of the indenture, *otherwise a penalty will be incurred.*

(*b*) *Assignations of Indentures.*—These may be signed upon the prayer of the petition being granted. They must then be intimated to the Registrar of Law Agents, and thereafter registered at the Signet Office within three months of their dates.

IV. The fees payable on entering into indenture are as follows:—To the society fund, £132, 1s.; to the widows' fund, £50, 0s. 1d.; apprentice fee, £100; stamp for indenture, £60; fees at Signet Office for petition, and recording indenture, £3: total, £345, 1s. 1d. Stamp for assignation of indenture, 10s.; incidental petitions, each, £1. In addition to the above there are (1) recording fees in Register of Probative Writs; (2) Registrar's fee.

INTRANTS.

V. Upon the expiry of the term of apprenticeship the indenture must be discharged, and the discharge and oath of service recorded at the Signet Office, within three months after the date of the discharge, *otherwise a penalty will be incurred.* Thereafter a petition may be presented praying the Keeper and Commissioners of the Signet to examine the applicant in the law, civil and criminal, of Scotland.

VI. Along with such petition, the candidate shall produce certificates of his having attended, in at least two separate winter sessions, four courses of law classes in a Scottish University—viz. one of Civil Law, one of Scots Law, one of Conveyancing, and a second course of any one of these; and of his having taken part in at least two-thirds of the ordinary examinations in each of the said classes, unless for reasons satisfactory to the professors. Where the applicant holds a degree of LL.B. of any Scottish University, it shall not be necessary for him to attend a second course of any of the classes.

The Commissioners, *at the special request of the examiners*, recommend apprentices to attend the class of Procedure and Evidence in the University of Edinburgh.

VII. The examinations are directed both to the theory and to the practice of the law; are partly written and partly oral; and embrace the following subjects:—Heritable Rights; Moveable Rights; Conveyancing; Contracts; Summonses, Actions, and Forms of Process; Diligence; Criminal Law and Procedure.

VIII. The fees payable by intrants are:—For recording discharge of indenture, and petition to pass, £2; to the society fund, £60; stamp for commission, £25; signet fees on commission, £50; hallkeeper's fee, 17s.: total, £137, 17s.

Wrongful Imprisonment.—See HABEAS CORPUS; IMPRISONMENT; REPARATION.

Yeomanry—A volunteer cavalry force, which is regulated by the Act 1804, 44 Geo. III. c. 54, and Amending Acts (*Manual of Military Law*, pp. 248 and 282). The members of the force are enlisted voluntarily, and are required in all cases of actual invasion, or appearance of any enemy in force off the coast of Great Britain, or of rebellion or insurrection arising or existing within the same, on the appearance of any enemy in force on the

coast, or during any invasion, on summons or signal, to assemble within their respective districts, and to march according to the terms of their service to any part of Great Britain, and on refusal or neglect to do so shall be deemed deserters. This liability continues until it has been declared by proclamation that the enemy has been defeated or expelled, and all rebellion or insurrection then existing within Great Britain suppressed (44 Geo. III. c. 54, s. 22). They may also assemble voluntarily for the purpose of improving themselves in military exercise, or for the suppression of riots (ss. 23 and 46). In order to be efficient, a member of the force must be trained for six days, or five successive days, in each year (Act 1816, 56 Geo. III. c. 39). It is further provided by the National Defence Act, 1888 (51 & 52 Vict. c. 31, s. 2), that the yeomanry may be called out for actual military service whenever the militia is embodied.

Discipline.—Secs. 22, 23, and 46 of the Act of 1804 provide that the yeomanry, unlike the volunteers, are subject to the Mutiny Acts, which by the Act of 1879 (42 & 43 Vict. c. 32) must be construed to refer to the Army Act, when being trained or exercised alone; and it is further provided by the Army Act, 1881 (44 & 45 Vict. c. 58), s. 176 (7), that all non-commissioned officers and men of the yeomanry force of the United Kingdom shall be subject to military law as soldiers—

(*a*) When they or their corps are being exercised, either alone or with any portion of regular forces, or with any portion of the militia when subject to military law; and

(*b*) when they are attached to, or otherwise acting as part of or with, any regular forces; and

(*c*) when their corps is on actual military service; and

(*d*) when serving in aid of the civil power.

Officers of the yeomanry are subject to military law when they are in actual command of men subject to military law, or when their corps is on actual military service (*ib.*, s. 175 (5) (6)).

The yeomanry are entitled to certain pay and allowances when on training (47 & 48 Vict. c. 55, s. 2, and Queen's Regulations).

Officers of the yeomanry are commissioned by Her Majesty, and rank with officers of Her Majesty's Regular and Militia Forces as the youngest of their rank, and with officers of volunteers according to the dates of their commissions (*ib.*, s. 26; 34 & 35 Vict. c. 86, s. 6; 26 & 27 Vict. c. 65, s. 5). Under sec. 71 of the Army Act, the command to be exercised by regular officers over yeomanry, and by yeomanry officers over the regular forces, depends upon regulations made by the Queen. The acceptance of a commission in the yeomanry does not vacate the seat of a Member of Parliament (44 Geo. III. c. 54, s. 58).

Members of the yeomanry must take the oath of allegiance (Act 1804, 44 Geo. III. c. 54, s. 20). Though not exempt from the militia ballot, they are exempt from service in the militia while serving in the yeomanry (ss. 17 and 18). A commanding officer of any corps of yeomanry, when not on actual service, may discharge members, not being commissioned officers, for any disobedience of orders, breach of discipline while under arms, neglect of attendance or duty, misconduct, improper behaviour as a member of the corps, or for other sufficient cause. The member so dismissed is still liable for any fines or subscriptions, and to return his arms, accoutrements, and clothing (s. 27). Yeomanry may quit their corps, except when called out in case of invasion, after giving fourteen days' notice in writing to the commanding officer and delivering up their arms, accoutrements, and clothing, and paying all fines and subscriptions. Any yeoman who enlists in

the regular forces or militia is considered as discharged from his corps (s. 31). When a commanding officer refuses to receive a resignation, the aggrieved person may appeal to two Deputy Lieutenants, or to any one Deputy Lieutenant and one Justice of the Peace (not being members of the corps), and their determination shall be final (s. 33). The buying and selling of arms, accoutrements, clothing, and ammunition is prohibited by secs. 43 and 44, as amended by 47 & 48 Vict. c. 55, which provides for the recovery of fines and penalties under the Summary Jurisdiction Acts. Sec. 50 vests the property of the corps in the commanding officer, and the rules and regulations of any corps must be approved by one of Her Majesty's Principal Secretaries of State.

In Ireland no yeomanry have yet been formed, but the Regulating Act in that country is 42 Geo. III. c. 68, which authorises the voluntary enrolment of troops for the protection of property and the preservation of peace, but does not authorise their being called out compulsorily.

For the conveyance of yeomanry by train, see 5 & 6 Vict. c. 56, s. 20; 7 & 8 Vict. c. 85, s. 12; and the Cheap Trains Act, 1883 (46 & 47 Vict. c. 34). For billeting of yeomanry and impressment of carriages, see Army Act, 1881, s. 181 (3) (4).

[*Manual of Military Law* (War Office, 1894).]

See Army; Billeting; Commission; Court-Martial; Desertion; Enlistment; Furlough; Impressment of Carriages; Military Lands Act; Volunteers.

Zaire.—See Cruives and Zaires.

APPENDIX

APPENDIX

I. ERRATA

VOLUME I

PAGE 11, line 11, *delete* IMPROBATION.
„ 25, line 15, *for* practical *read* prædial.
„ 52, last line, *delete* TACITURNITY.
„ 60, line 8, *delete* ROYAL ASSENT.
„ 61, line 12, *delete* ACT OF UNION.—See UNION.
„ 71, line 23, *delete* MARITIME.
„ 86, line 43, *delete* HORSE ROADS.
„ 117, line 35, *for* See RECORD *read* See ACTIONS, PROCEDURE IN.
„ 128, line 27, *for* 1896 *read* 1894.
„ 170, line 18, *for* (*Calder*, etc., L. R.) 66 P. *read* 6 C. P.
„ „ line 19, *for* 486 *read* 263.
„ „ line 47, *for* POOR'S AGENTS *read* POOR'S ROLL.
„ 191, line 13, *delete* EXTERRITORIALITY.
„ 208, line 14, *for* CHURCH *read* SEATS IN CHURCHES.
„ 209, line 10, *for* COMPANY *read* JOINT STOCK COMPANIES.
„ 211, line 43, *delete* INSULA NATA.
„ 221, line 6, *for* SEPARATION *read* JUDICIAL SEPARATION.
„ 243, line 21, *delete* PALINODE.
„ „ line 22, *for* SLANDER *read* DEFAMATION.
„ 289, line 14, *for* CIVIL IMPRISONMENT *read* IMPRISONMENT FOR DEBT.
„ 310, line 4, *for* CIVIL IMPRISONMENT *read* IMPRISONMENT FOR DEBT.
„ 325, line 39, *for* COMPANY *read* JOINT STOCK COMPANIES.
„ 330, line 32, *delete* ROYAL ASSENT.
„ 336, line 8, *for* drawer *read* drawee.
„ 361, last line, *delete* CASUALTIES OF.

VOLUME II

PAGE 32, line 11, *for* CRIMINAL TRIAL *read* CRIMINAL PROSECUTION.
„ 59, line 22, *delete* See SERVICE; SUCCESSION.
„ 133, line 24, *delete* MATES' RECEIPTS.
„ 141, line 14, *delete* BLACK LIST.—See SLANDER.
„ 157, line 17, *for* SEA FISHERIES *read* FISHINGS.—*Sea Fisheries.*
„ 232, line 20, *delete* INSURANCE BROKER.
„ 238, line 27, *for* 1894, s. 16 *read* 1874, ss. 13 and 37.
„ 243, line 8, *delete* FACULTY TO BURDEN.

VOLUME III

PAGE 26, line 22, *delete* KEYHOLE CITATION.
„ 64, line 19, *for* See RECORD *read* See ACTIONS, PROCEDURE IN.
„ 102, line 8, *delete* STRIKE.
„ 209, line 22, *for* FEE AND LIFERENT *read* LIFERENT AND FEE.
„ 267, line 47, *delete* QUASI-CONTRACT.
„ 281, line 32, *delete* See TWEED FISHERIES ACTS and POLICE PROSECUTION.
„ 296, line 54, *for* s. 14 *read* s. 13.
„ 297, line 27, *for* 1845 *read* 1842.
„ 301, line 10, between "might" and "be" *insert* "not."
„ 313, line 23, *for* 1852, s. 10 *read* 1852, s. 9.
„ 372, line 13, *for* OATH OF CREDULITY *read* OATH IN BANKRUPTCY.

VOLUME IV

PAGE 61, line 4, *delete* CUSTOS ROTULORUM.
„ 230, line 36, *delete* PERSONAL DILIGENCE ACT.
„ 253, line 7, *for* UNION, CHARTER OF, *read* UNION, CLAUSE OF.
„ 299, line 24, *read* "must be in the form of Sched. A annexed to Act of Sederunt, 22nd Dec. 1882."
„ 330, line 3, STATUTORY COMPENSATION ought to be printed in italics.
„ 383, last line, *delete* EIK TO A REVERSION.

VOLUME V

PAGE 42, line 10 from foot of page, *insert* before "Rutherfurd Act" the words "3rd section of the."
„ „ line 3 from foot of page, *insert* before "is born" the words "possesses under an old entail and"
„ 43, line 8 from foot, *for* the words "date of any" *read* "date at which any."
„ „ line 6 from foot, *after* "be entailed" *insert* "comes into operation."
„ 86, line 13, *for* "Otto, *Senel*, etc.," *read* "Otto Lenel, etc."
„ 257, line 5, *delete* FEMALES.—See WOMEN.

VOLUME VI

PAGE 119, line 39, for *vehemdarum* read *vehundarum*.
„ 120, line 24, *for* Willes, G., *read* Willes, J.
„ „ line 24, *for* 3 C. P., *read* 3 P. C.
„ „ line 26, *for* stanch, *read* staunch.
„ „ line 32, *for* 553 *read* 552.
„ „ line 46, *for* 553 *read* 554.
„ 121, line 12, *delete* s in "shipowners."
„ „ line 23, *for* Roller's *read* Rolle's.
„ „ line 32, *for* L. R. 842, *read* 2 R. 842.
„ 141, lines 10 and 11, *for* CLAUSE OF RETURN *read* RETURN, CLAUSE OF.
„ 160, line 31, *for* cover *read* snow.
„ 259, *delete* lines 11 and 12.

VOLUME VII

PAGE 26. line 9 from foot, *for* 13 R. 1051 *read* 12 R. 1051.
„ 38, line 38, *for* 1 M. H. L. 87 *read* 2 M. (H. L.) 86.
„ 142–143. The fifteenth line from foot of page 142 ought to be placed between the fifteenth and sixteenth lines from the foot of page 143.
„ 189, line 4 from foot, *for* Trusts Act, 1857, *read* Trusts Act, 1867.
„ 202, line 26, *for* "truster" *read* "trustee."
„ 233, line 32, *for* of members *read* as members.
„ 366, line 7, *for* expect *read* except.

VOLUME VIII

PAGE 113, line 16, *delete* "and of full age."
„ 372, line 32, *delete* MONTH.
„ 375, line 46, *for* See ROLLS OF COURT *read* See ACTIONS.

VOLUME IX

PAGE 48, line 8 from foot, *for* 1 R. H. L. 43 *read* 13 R. H. L. 43.
„ 260, line 11, *for* council *read* counsel.
„ 271, line 7, *after* Peake, 107, *insert* *MacBrayne*, 1892, 20 R. 224.
„ 356, line 9, *for* 6 R. *read* 6 Macph.

VOLUME X

PAGE 12, line 3 from foot, *after* It is so named *read* because it becomes.
„ 47, line 11, *for* See SUMMONS *read* See INDUCIÆ
„ 175, line 23, *after* under twelve *read* [or now practically under thirteen (48 & 49 Vict. c. 69, s. 4).]
„ 339, last line, *for* See SUPERIORITY, etc., *read* See EXTENT, OLD AND NEW.
„ „ line 2 from foot, *for* SERVICE OF HEIRS *read* BRIEVE.

VOLUME XI

PAGE 47, lines 25–32 are sub-sections of sec. 48, not of sec. 46, as printed.
„ 309, line 3, *for* 17 & 18 Vict. etc., *read* 57 & 58 Vict. c. 60, s. 688.
„ „ line 17, *for* 17 & 18 Vict. etc., *read* 57 & 58 Vict. c. 60, ss. 164, 167.
„ „ line 22, *for* £200 *read* £300.
„ „ lines 24 and 25, *for* 17 & 18 Vict. etc., *read* 57 & 58 Vict. c. 60, s. 547.
„ „ line 27, *delete* from "The application" to "8" in line 29.
„ „ line 33, *for* 17 & 18 etc., *read* 57 & 58 Vict. c. 60, s. 548.
„ „ line 34, *for* £50 *read* £25.
„ „ line 37, *for* £200 *read* £300.
„ „ line 39, *for* £200 *read* £300.
„ „ line 40, *for* Sheriff *read* Court.
„ „ line 41, *for* s. 460 *read* s. 547.
„ 321, lines 8 and 10 from bottom, *for* Courts *read* Court.
„ 323, line 16 from top, *for* hereditary *read* heritable.
„ 345, line 28, *for* sist *read* suit.

VOLUME XII

PAGE 35, line 14, from top, *for* may ultimately *read* formerly might.
„ „ line 17, "But if etc." Put the verbs which are now present tense into past tense, and *insert* after the sentence, "But this has now been altered by the Conveyancing (Scotland) Act, 1874, s. 9."
„ 204, line 27, *for* 7 R. 581 *read* 6 R. 581.
„ 265, line 37, *delete* MONTH.
„ 372, *after* line 25 *insert* "8. Feu-duties or Ground-annuals."

II. ADDENDA

Barony, Right of, vol. ii. p. 34.

I. Constitutional.

The designation of baron appears to have been originally applied in Scottish constitutional practice to all freeholders of the Crown. The Scottish Parliament was essentially feudal in its origin, and at first consisted solely of these freeholders or Crown vassals, on whom the obligation of attending the King's Parliaments and General Councils fell naturally as an incident of their tenure of Crown lands, in conformity with the principles of the feudal system. Subsequently, however, the Parliament came to be composed of clergy and burgesses as well as barons, thus making up what are known as the Three Estates of the Realm. Among the barons themselves a distinction arose between two classes known respectively as the greater and the lesser barons. According to Erskine (i. 3. 3.) the former were distinguished from the latter by the possession of grants or patents of peerage or corresponding titles. The Act 1503, c. 78, however, apparently classified as great barons all who held land of the King of the value of a hundred merks or over. The duty of attending Parliament was felt to be a serious and costly burden by the smaller freeholders of the Crown, and a series of statutes was accordingly passed relieving the lesser barons of the necessity of attendance, a system of representation being introduced whereby they elected Commissioners for the various shires to attend on their behalf. No exemption from attendance was conferred upon the greater barons. The place of the barons in the composition of the Scottish Parliament continued practically on this footing down to the Union of the Crowns (1427, c. 101; 1457, c. 75; 1503, c. 78; 1587, c. 114).

II. Feudal.

In the strict technical language of feudal conveyancing a barony is an estate created by direct grant from the Crown erecting (or confirming the erection of) the lands embraced by the grant *in liberam baroniam, i.e.* into a freehold barony. (For the Style of a Grant of Erection of a Barony see *Jur. Styles*, 3rd ed., vol. i. p. 499.) The Crown alone had the power to create baronies, and the proprietor of a barony could not dispone it to be holden *de se*. Tenure by barony is "the highest and most privileged tenure of land" known to the Scottish feudal system, and carries with it a number of special rights and advantages.

(*a*) Jurisdiction.—In former times a grant of barony conferred important jurisdictions. Ld. Neaves, indeed, says that the proper characteristic of a barony is that it confers jurisdiction, and that "that is the original meaning of it" (*Agnew*, 1873, 11 M. 309, at p. 332). The extent of the jurisdiction of the baron was governed by the terms of his charter of erection. It commonly included all crimes except treason and the four pleas of the Crown, viz. murder, robbery, fire-raising, and rape; jurisdiction

even in the four pleas was sometimes conferred. Jurisdiction in capital crimes, except perhaps theft, required infeftment *cum fossa et furca*, with pit and gallows, the possession of such jurisdiction being "the true mark of a true baron in the ancient time" (Innes, *Scotch Legal Antiquities*, p. 58). The baron could confer some degree of this criminal jurisdiction on his vassal, but only cumulatively with his own. In civil matters the baron was judge in disputes arising among his tenants, such as actions for debt, possessory actions, and the like; and he also decided questions arising between himself and his tenants regarding the observance of the conditions in their tacks, payment of feu-duties and maills or rents, and other estate matters. The vassals of the barony were bound to give suit and attendance at the Baron's Court, which was held periodically for the despatch of judicial and estate business. The jurisdiction was in practice exercised by the baron through his deputy, known as the baron bailie. It was a source of not inconsiderable income, as the baron was entitled to the fines and escheats incidental to the administration of justice in his Court. The Baron Courts were abolished by Cromwell in 1654, but were revived at the Restoration. In 1747, however, the Act 20 Geo. II. c. 43 finally deprived the barons of the wide powers previously enjoyed by them within their lordships, and limited their jurisdiction, in criminal cases, to assaults, batteries, and smaller crimes, with a narrowly-restricted power of punishment, and, in civil cases, to actions for debt or damages not exceeding forty shillings sterling. The latter limitation did not apply to actions by the baron for recovering or uplifting from the vassals, tenants, or possessors of the lands the maills and duties or rents and profits thereof, or for recovery of multures or services payable or prestable to the baron's mills. A reservation was also made in this Act in favour of existing jurisdictions of fairs and markets, coalworks, saltworks, and mines. It was further provided that future grants should not confer more than the limited civil jurisdiction above described. The curtailed jurisdiction which this Act suffered to remain in the hands of the barons, although never abolished, has long been quite obsolete.

An interesting record of the actual work of a Baron Court is preserved in the Baron Court Book of Urie in Kincardine, 1604–1747, published by the Scottish History Society. See also two tracts, giving from early sources the forms of procedure in Baron Courts, contained in a volume entitled *A Compilation of the Forms of Process in the Court of Session, etc.*, Edin. 1809; Carruthers' *Styles*, p. 194; article "Heritable Jurisdictions," 9 *Jur. Rev.* 428; article BARON, *ante*; Innes, *Scotch Legal Antiquities*, pp. 54–60, 98; the curious may consult *The Picture of a Scottish Baron Court*, a Dramatic Poem by Patrick Anderson, Physician to Charles I., reprinted Edin. 1821.

(*b*) UNION OF LANDS.—The charter of erection *in liberam baroniam* constitutes the lands which it comprises a *unum quid*, such that the whole may be carried by a simple conveyance of the barony itself, and such that possession of any one part of it constitutes possession of the whole. Moreover sasine could be taken at any one spot in the barony for the whole, and the delivery of the symbols of earth and stone alone was sufficient although items otherwise requiring different symbols were included in the grant. The charter usually contained a clause of union and dispensation declaring this privilege. The clause sometimes indicated the spot at which sasine should be taken for the whole barony; according to Duff (*Feudal Conveyancing*, p. 113), it was essential to the conferring of the privilege that a particular place should be appointed if the barony comprised discontiguous subjects. (See UNION, CLAUSE OF.)

(*c*) Parts and Pertinents included in a Grant of Barony.—"A title of barony is sufficient to include, without enumeration or its being expressed, every part and parcel of it, and every right and privilege connected with the barony and naturally incident to it: everything, in short, that it may be supposed might naturally accompany and form part and pertinent of a grant of so high a character" (per Ld. Wood in *Duke of Montrose*, 1848, 10 D. 896, at p. 914. See also per Ld. Pres. Inglis in *Lord Adv.* v. *Cathcart*, 1871, 9 M. 744, at p. 749, for a summary of the legal effects of a barony title). Questions have frequently arisen as to what precisely constitute the parts and pertinents properly incidental to a barony.

(1) *Regalia Minora.*—There is some early authority for the view that a barony title carried by implication all the *regalia minora*. This view has, however, been displaced in favour of the opinion that a barony title implies no more than a title to prescribe the *regalia minora* (per. Ld. J.-Cl. Moncreiff in *Duke of Richmond*, 1870, 8 M. 530, at p. 540). *Salmon-fishings* are the most important and valuable of the *regalia minora*, and a large number of cases deal with the question of the right of a baron to salmon-fishings when they have not been specifically conferred upon him. It is now settled that a barony charter, even *cum piscationibus*, is not of itself, in the absence of an express grant, sufficient to confer the right of salmon-fishing, but if in such a case the proprietor of the barony can prove that he has exercised the right of salmon-fishing to the fullest practicable extent for the prescriptive period, it is presumed that the Crown intended by its original grant to confer upon him the right of salmon-fishing as one of the pertinents of his barony, and his title to the privilege is secure (*Nicol*, 1868, 6 M. 972; *Duke of Richmond, cit.*). The prescriptive possession must be ascribable to the barony title (*Milne's Trustees*, 1873, 11 M. 966), and the right is subject to the maxim *tantum prescriptum quantum possessum* (*Lord Adv.* v. *Cathcart, cit.*). (See article Fishings: Stewart, *Law of Fishing*, ch. vi.) It is not necessary to discuss here the relation of a barony title to other *regalia minora*, such as fortalices, gold and silver mines, forests, swans, etc., the law as to which is now obsolete. Reference, however, may be made to the case of the *Duke of Montrose, cit.*, in which it was held that a charter of barony is a sufficient title to establish a prescriptive right to a *ferry* to and from any part of the lands of the barony, and to the case of the *Earl of Stair*, 1880, 8 R. 183, where a proprietor of barony lands bordering on the sea, who had no grant of *harbour*, was held not entitled to exclude fishermen from a harbour built by him on the shore *ex adverso* of his barony, or to exact harbour dues.

(2) *Seashore.*—The question whether a mere grant of barony carries the foreshore without explicit mention of it has never been expressly decided, but the rule is now well established that prescriptive possession of the foreshore by the proprietor of a barony *de facto* bounded by the sea is sufficient to establish the baron's right to the foreshore. With the right to the foreshore go, of course, any minerals which may be under it. If the title expressly mentions the sea as the boundary of the estate, that amounts to a grant of the foreshore. (Art. Seashore; *Agnew, cit.*; *Young*, 1885, 13 R. 314, 1887, 14 R. H. L. 53; *Wemyss' Trustees*, 1896, 24 R. 216, H. L. 1899, 36 S. L. R. 977, [1900] A. C. 48.)

(3) *Mussel Scalps.*—In the case of *The Duchess of Sutherland*, 1868, 6 M. 199, a barony title *cum piscationibus*, coupled with evidence of exclusive possession during the prescriptive period, was held sufficient to establish an exclusive right to mussel scalps between high and low water on the shore adjoining the barony.

(4) *Sea Ware.*—A barony title to lands *de facto* bounded by the sea confers on the Crown vassal, as an inherent part of his grant, the privilege of collecting sea ware cast on shore *ex adverso* of the barony.

(5) *Submarine Minerals.*—In *Wemyss' Trustees, cit.*, the rule of law as to the acquisition by prescription of the foreshore was extended by the Court of Session, to the effect of deciding that a barony title to lands *de facto* bounded by the sea was sufficient to enable the proprietor to acquire by prescription the right to work submarine minerals *ex adverso* of the barony. On appeal the judgment of the Court of Session was reversed, but not on this question. See, however, the opinions of Ld. Herschel and Ld. Watson in the House of Lords, which contain interesting observations on the law as to the property in submarine minerals, and the rights of an adjacent barony proprietor with regard to them.

(6) *General Observations.*—It is no obstacle to the prescriptive acquisition of any right as a part and pertinent of a barony that the right claimed constitutes part of the patrimonial estate of the Crown, as is the case, for example, with salmon-fishings and the *solum* of the foreshore, provided it be a right communicable by the Crown to a subject, for a barony title, flowing as it does from the Crown, is derived from a party competent to grant such rights (see per Ld. Wood in *Duke of Montrose, cit.*, at p. 914).

The theoretical foundation of the rule which enables the proprietor of a barony to acquire these rights by prescription is that his prescriptive possession of them establishes the presumption that they were intended to be included in the original grant in his favour. It is essential, accordingly, that this presumption should not be displaced by the history of the title, or be shown to be untrue in fact. Further, extraneous subjects so claimed "must be locally situated in such proximity to the general barony estate as to be capable of being treated in a reasonable sense as a pertinent of the barony (per Ld. M'Laren in *Wemyss' Trustees, cit.*, at p. 236; *Lord Adv.* v. *Hunt*, 1867, 5 M. H. L. 1). Discontiguity, however, is not inconsistent with the notion of a pertinent. With regard to the extent of the possession necessary, Ld. Watson (*Wemyss' Trustees, cit.*) recognises a distinction between the prescriptive possession which establishes a new and adverse right in the possessor, and the prescriptive possession which the law admits for the purpose of construing or explaining, in a question with its author, the limits of an antecedent grant or conveyance. In the first case the rule obtains *tantum prescriptum quantum possessum*, but in the second case a much more liberal effect has been given to partial acts of possession as evidencing proprietary possession of the whole. In *Agnew, cit.*, Ld. Neaves indicates the opinion that it does not necessarily require that the possession of a subject claimed as a pertinent should be prescriptive, if the possession is such as in the circumstances shows that it was intended that the subject should be included in the barony.

[Authorities.—Stair, ii. 3. 2; ii. 3. 60 *seq.*; Ersk. i. 3. 2–4; i. 4. 25–29; ii. 3. 46–47; Duff's *Feudal Conveyancing*, pp. 60, 65–6, 113, 251–2; Menzies' *Lectures*, 3rd ed., pp. 576, 580, 826–7; Bell's *Lectures*, 3rd ed., pp. 574–5, 589, 604–7, 660; Bell's *Principles*, ss. 739, 750–5.]

British Ship.—The rights, duties, and liabilities connected with British ships are codified in the Merchant Shipping Act, 1894. It is not possible here to do more than call attention to the provisions relating to their ownership, management, and relation to criminal jurisdiction.

Ownership.—A British ship must be owned by a British subject,

whether natural born or naturalised, or a denizen by letters of denization, or a corporate body established under, and subject to, the laws of some part of the British dominions (s. 1). She must be registered, unless she does not exceed 15 tons burden and is engaged in British river or coasting trade, or does not exceed 30 tons burden and is employed solely in fishing or trading coastwise on the shores of Newfoundland, or in the Gulf of St. Lawrence and the coast of Canada bordering thereon (ss. 2 and 3); and she can be detained until the certificate of registry is produced. Before registration she must be surveyed, measured, and marked with her name and draught of water, and a declaration of ownership must be made. Upon registration a certificate of registration is given to her owner, containing the particulars entered concerning her in the registry-book and the name of her master; any change of her master or owner must be indorsed upon it, and it must be surrendered in the event of her being lost or ceasing to be a British ship (ss. 19–21). For registration purposes, the property in a British ship is divided into sixty-four shares; not more than that number of individuals can be registered as owners at the same time, except that while no person may be registered as owner of a fractional part of a share, as many as five persons may be registered as joint-owners of a single share (s. 5). The right to direct the movements of the ship belongs to the majority of owners, but the minority can obtain bail for the value of their shares if she is sent on a voyage to which they object. The transfer of a registered ship must be made by bill of sale, and the transfer registered (ss. 24–26), as must any transmission of the property by death, bankruptcy, or marriage; but if a ship really exempt from registration has been registered, that does not make her liable to the conditions attaching to registered ships, *e.g.* a pleasure boat of 7 tons burden registered unnecessarily can be transferred without a bill of sale (*Benyon* v. *Cresswell*, 1848, 12 Q. B. 899). If a ship or a share in her is mortgaged, the mortgage must be registered; the mortgagee has an absolute power of sale over her, and the Act provides for the transfer and transmission of mortgages. If the owner wishes to sell or mortgage a ship at any place out of the country in which her port of registry is situated, he can do so by a certificate of mortgage or sale (ss. 39–46). See SHIP (*Mortgage*). In case of the owner being incapable of performing the formalities required by the Act, he can do them by his guardian, etc.; no notice of any trust can be entered in the register, but equitable interests may be enforced by and against owners and mortgagees of ships (ss. 56, 57), and the beneficial owner as well as the registered owner is liable to all the duties and penalties imposed by the Act. The name of the managing owner or ship's husband must be entered in the register. The name of the ship must not be changed except by leave of the Board of Trade, nor must she be described by any other than her registered name. If she is so altered as not to correspond with her registered description, she must be registered anew (s. 48). If a ship, required by the Act to be registered, is not registered, she is not recognised as a British ship (s. 2): and the effect of this is that while, on the one hand, she is not entitled to any benefits or protection enjoyed by British ships, or to carry the British flag, or assume British national character, on the other hand, so far as regards the payment of dues, the liability to fines and forfeitures, and the punishment of offences committed on board her, she is dealt with in the same manner in all respects as if she were a recognised British ship (s. 72), *e.g.* she is not entitled to limit her liability in case of collision (*The Andalusian*, 1878, 3 P. D. 182).

Management.—A British ship must not conceal her national character or assume a foreign one (*The Sceptre*, 1876, 3 Asp. 269; *The Annandale*, 1877, 2 P. D. 218), or she may be forfeited to the Crown. The proper colours for a British merchant ship to carry are the red ensign, unless a warrant to carry others is granted by Her Majesty or the Admiralty. Carrying illegal colours is punishable by fine and forfeiture of those colours (*R.* v. *Ewan*, 1856, 2 Jur. N. S. 454); and failing to hoist proper colours if required to do so, by fine (ss. 73, 74). She is also bound to take on board distressed British seamen sent home by a consul or other authority (ss. 191–193). She must carry a duly-certified master (but coasting vessels need not carry certificated masters); if of 100 tons, she must have at least one qualified mate besides; if she is foreign-going and has more than one mate, they must be duly certificated; if she is a foreign-going steamship of 100 nominal horse-power, she must carry two qualified engineers, and if less than 100 nominal horse-power, one. A foreign-going ship with one hundred persons must carry a medical officer (s. 209). The owner or master of a home trade passenger ship of 80 tons burden must produce twice a year to a marine superintendent the certificates of competency of the officers of his ship (s. 103). Conditions are prescribed as regards the provisions, health, and accommodation of the crew; and in the case of ships going from the United Kingdom, through the Suez Canal or round the Cape of Good Hope or Cape Horn, the provisions and water are inspected by Board of Trade officers (ss. 198–210). Official logs are kept in every ship, in which the master must enter all the events happening on the voyage; and the official logs of foreign-going ships are delivered on their return to a mercantile superintendent. Special provisions are also made for passenger and emigrant ships, for fishing boats (see FISHINGS), and for the navigation of ships (see COLLISION). The law as to wages and discipline of the master and crew is dealt with under SEAMEN (*q.v.*), and applies to unregistered British ships which ought to have been registered equally with registered ships (s. 266). Shipowners are also responsible for the proper equipment of their ships with life-saving appliances, and, if the ship carries passengers, with properly adjusted compasses, distress signals, etc. (s. 428–435). The Board of Trade may require the ship's draught of water to be recorded (s. 436), and in all British ships (except coasters under 80 tons burden, fishing vessels, and pleasure yachts) the deck line must be marked clearly on both sides amidships, to show the position of each deck which is above water; and a load line must be marked in the same place to show the maximum load line in salt water, which must not be submerged, whether in the case of foreign-going ships or coasters, or the ship may be detained as unsafe (ss. 437–440 and 459). Sending an unseaworthy ship to sea is a misdemeanour (s. 457), and the shipowner impliedly warrants to his crew that the ship is seaworthy to the best of his care and endeavour (s. 458). He is not liable in the case of fire or loss of valuables not declared to be so on shipment, if happening without his loss or privity (s. 502).

English Criminal Jurisdiction over British Ships.—A British ship upon the high seas is part of the territory of England; and "all persons on board her may be considered as within the jurisdiction of that nation whose flag is flying on the ship, in the same manner as if they were within the territory of that nation" (Blackburn, J., *R.* v. *Anderson*, 1868, L. R. 1 C. C. 164). The jurisdiction of the Admiralty also extends over British ships in foreign rivers below the bridges, where the tide ebbs and flows, and where great ships go, although the municipal authorities of the foreign country may be entitled to concurrent jurisdiction (15 Rich. II. 3, 1391). Thus a foreigner

has been convicted of manslaughter on board a British ship in the river Garonne in France, thirty-five miles from the sea, within the flow and ebb of the tide (*R.* v. *Anderson, supra*). Where a larceny was committed by a person unknown on board a British ship lying in the river, moored to the quay at Rotterdam, eighteen miles from the sea, a person who afterwards in England received the property so stolen was tried at the Central Criminal Court (*R.* v. *Carr*, 1882, 10 Q. B. D. 76); and so has a larceny on board a British ship in a Chinese river, thirty miles from the sea, though no evidence was given as to the tide flowing or where the vessel lay (*R.* v. *Thomas Allen*, 1837, 1 Moo. C. C. 494). The Merchant Shipping Act, 1894 (reproducing the older law), gives jurisdiction in the case of any offence committed by a British subject on board any British ship on the high seas, or in any foreign port or harbour, or by a person not a British subject on board any British ship on the high seas, to any Court in Her Majesty's dominions within the jurisdiction of which that person is found (s. 686); and it is immaterial in what manner that person is brought within the jurisdiction, whether by force or otherwise (*R.* v. *Sattler*, 1858, Dears. & B. C. C. 525), unless the offence be committed in order to free himself from unlawful restraint. Sec. 687 of the same Act provides that "all offences against property or person committed in or at any place, either ashore or afloat, out of His Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively . . . as if those offences had been committed within the jurisdiction of the Admiralty of England." Thus the crew of an English yacht, cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, who were obliged to take to an open boat, and under pressure of hunger killed a boy, one of their number, for food, were held guilty of murder (*R.* v. *Dudley*, 1884, 14 Q. B. D. 273). A hulk retaining the general appointments of a ship registered as a British ship, and hoisting the British ensign, though only used as a floating warehouse, is a British ship within the above statute (*R.* v. *Armstrong*, 1875, 13 Cox C. C 184). It makes no difference whether the ship be registered or not (s. 72 of the Act); it has been held to be unnecessary to produce her register, it being enough to show that she belongs to British owners and carries the British flag (*R.* v. *Frank Allen*, 1866, 10 Cox C. C. 405), and that evidence that the ship was a British ship of Shields, and sailed under the British flag, was sufficient, though no proof of the register or of her ownership was given (*R.* v. *Sebery*, 1870, L. R. 1 C. C. R. 264). But though the register, and the fact of the owner being resident in England, and the ship sailing under the British flag, afford *primâ facie* evidence that the ship is British, this is rebutted by proof that the owner is not a British subject, and it cannot be presumed in such a case that letters of denization or naturalisation have been granted to him (*R.* v. *Bjornsen*, 1865, L. & C. 545).

See Admiralty, Scottish High Court of.

Cremation.—This method of disposing of dead bodies has always been much used in the East; but in Europe it seems to be opposed to the instincts of most people, and certainly has never been generally adopted. There is, however, no doubt that, apart from sentimental considerations, it is, from a purely sanitary point of view, preferable to interment. Sanitary reformers have for some time advocated its adoption in this country, but the general opinion was that it was illegal, and, consequently, cremations

seldom or never took place. A case, however, came before Mr. Justice Stephen, who decided that, if conducted in such a way as not to offend public feeling or prevent proper investigation being made as to the cause of death, cremation is not illegal (*R.* v. *Price*, 1883, 12 Q. B. D. 247). Since that decision, crematories have been started, and those who desire to set an example of disposing of the dead in such a manner as to prevent the danger of their poisoning the living, can cremate them. The conditions under which the rite can be practised with safety are, however, uncertain, as Parliament has hitherto refused to pass any statute for regulating cremation, for fear of giving to the practice a positive sanction in the place of the purely negative sanction given by the above decision. The law must, for the present, be considered as unsettled.

Dogs; Dogs Act, 1871, vol. iv. p. 316.—The preamble of this statute is that it is expedient to provide further protection against dogs.

Sec. 1 provides that any constable may take possession of, detain until claimed, or, if unclaimed within five days, sell or destroy, any dog straying on the highway and not under control, which he has reason to suppose dangerous or savage. Moneys arising from the sale are to be paid to account of the local rate (see Schedule).

Under sec. 2 any Court of summary jurisdiction may take cognizance of a complaint that a dog is dangerous and uncontrolled, and in that case may summarily order it to be kept by the owner under proper control or destroyed. Failure to comply with such order may be followed by a penalty of twenty shillings for every day since its date.

The local authority (see sec. 3 and Schedule) may, if a dog, mad or suspected to be mad, is found within their jurisdiction, make, and when made vary or revoke, an order imposing restrictions on all dogs not under the control of any person, for such period as they think fit. Any contravention of such order may be punished by a penalty not exceeding twenty shillings.

[See *Henderson*, 1876, 3 R. 623; Irons, *Police Law*; as to duties payable on dogs, see 30 Vict. c. 5; 41 & 42 Vict. c. 15, ss. 17–23.]

See Animals, Liability for Damage caused by Dangerous.

Drunkards, Habitual, vol. iv. p. 359.—By the Inebriates Act, 1898 (61 & 62 Vict. c. 60), which is to be construed as one with the Inebriates Acts, 1879 and 1888, some slight amendments are made on the provisions of the earlier Acts, and provision is made for the establishment of State inebriate reformatories and certified inebriate reformatories, and for the compulsory detention of certain habitual drunkards.

Retreats for Inebriates.—The amendments on the previous Acts necessitate the following alterations on the text of the article in vol. iv. viz.:—P. 360, l. 12, for "13 months" read "two years" (s. 15); l. 26, for "two justices" read "one justice"; l. 31, for "12 months" read "two years" (s. 16); l. 44, after "s. 26" add "1898, s. 18 (2)." A county council, as the local authority under the Acts, may delegate any of their powers to a committee (ss. 13, 25 (d)). A county council or town council, or two or more combined, may contribute towards the establishment or maintenance of a retreat under the Acts (ss. 14, 25 (d)). Provision is made for extending the period of detention or for the readmission of one who is or has at any

time been detained in a retreat (s. 17); and it is enacted that the period between the escape and return of a patient who has escaped from a retreat shall not be treated as part of his term of detention (s. 18 (1)). In the case of a patient dying while absent from a retreat on licence, a statement, with certain particulars, must be drawn up and sent to the procurator-fiscal and other persons mentioned (ss. 19 (1), 25 (g)); and if the person in charge of the patient fails to comply with these requirements, he is declared guilty of an offence under the Acts (s. 19 (2)).

Power is given to the Secretary for Scotland to make regulations with regard to matters necessary for carrying out the provisions of the Acts with respect to retreats. And forms contained in these regulations are to supersede the forms given in Sched. II. to the Act of 1879. No such regulations have as yet been issued.

State Inebriate Reformatories.—The Secretary for Scotland may establish State inebriate reformatories, to be maintained out of moneys provided by Parliament (ss. 3, 25 (a)). He is also empowered to make regulations for any such institution; and, subject to such regulations, the Prisons (Scotland) Act, 1877, and the rules thereunder, are to apply to it as if it were a prison, provided that no regulation may authorise the infliction of corporal punishment (ss. 4, 25 (a) (c)). No State inebriate reformatory has been established in Scotland, nor have any regulations been issued under this section.

Certified Inebriate Reformatories.—Any county council, town council, burgh commissioners, or any persons desirous of establishing an inebriate reformatory may apply for a licence to the Secretary for Scotland, who may certify it as an inebriate reformatory (ss. 5 (1), 25 (a) (d)). Power is given to the Secretary for Scotland to make regulations as to the granting, withdrawal, and resignation of such certificates (s. 5 (2)). Those in force are dated 14th February 1899. The Secretary for Scotland has also, as empowered by the Act (s. 6), made regulations of the same date as to their management, the treatment of the inmates, and other matters.

The Treasury may contribute towards the expenses of the detention of persons in inebriate reformatories (s. 8); and any county council, town council, or burgh commissioners, or two or more of them in combination, may contribute to or undertake the maintenance of a reformatory, or the expenses of detention of any person in a reformatory (ss. 9 (1), 25 (*d*)). And county councils and town councils have power to raise money to defray expenditure under the Act (ss. 9 (2), 25 (*e*)).

There is as yet no certified inebriate reformatory in Scotland.

Criminal Habitual Drunkards.—When a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the Court is satisfied that it was committed under the influence of drink, or that drunkenness was a contributing cause, and the offender admits or is found by the jury to be a habitual drunkard, the Court may, in addition to or in substitution for any other sentence, order his detention for not more than three years in a State inebriate reformatory, or in any certified inebriate reformatory the managers of which are willing to receive him (s. 23 (1)). When the prisoner has pleaded not guilty, the jury is first to try the offence with which he is charged, and, if he is convicted, the same jury is to be resworn to try whether he is a habitual drunkard. An admission of habitual drunkenness will obviate the trial of the second part of the charge. When the prisoner has admitted the offence but denied the habitual drunkenness, the jury will be sworn to inquire into that question (s. 23 (2)). The Act seems to contemplate that the fact of being a habitual drunkard will be included in the indictment as an aggravation of the offence charged, but

that the jury will only proceed to try that part of the charge in the event of the Court being satisfied from the evidence as to the offence that drunkenness was a contributing cause, or that the offence was committed under the influence of drink.

Any person who commits any of the offences mentioned in the first Schedule to the Act, and who within twelve months preceding the commission of the offence has been three times convicted summarily of any of these offences, and who is a habitual drunkard, is liable on conviction to detention for not more than three years in a certified inebriate reformatory (s 24). The twelve months are those preceding the commission of the offence, not the conviction therefor. Such person must be charged with being a habitual drunkard, and tried on indictment before the Justiciary Court or a Sheriff and jury. But he may consent to trial before the Sheriff summarily (s 24). Being drunk is an ingredient of each of the offences mentioned in the schedule. The three previous convictions do not constitute the person a habitual drunkard. That expression has still the meaning given to it by the Act of 1879, s. 3; and in this case also the Act seems to require the aggravation of habitual drunkenness to be charged in the indictment and proved to the satisfaction of the Court. But the jury in this case does not require to be re-sworn to try this part of the charge. The sentence of detention in a reformatory would in this case appear to be in substitution of any other mode of punishment for the offence charged.

Medical Practitioners and Dentists.

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Introduction.—The practice of the healing art has long obtained legal sanction and recognition in this country. Practitioners were divided into three main branches, known respectively as physicians, surgeons or barber chirurgeons, and apothecaries, whose functions and status were quite distinct, who were governed by different charters and statutes, and pursued their callings independently of, and sometimes in antagonism to, one another. Besides the above, there have always been, as there are still, persons who attended to human ailments without having any legally recognised qualification for doing so. The union of all qualified persons, and their recognition as members of one profession, is modern.

Physicians.—By a statute passed in the year 1511 (3 Hen. VIII. c. 11), no person was permitted to take upon him to exercise and occupy as a physician and surgeon until he had been examined and approved for that calling. The examination was in those days conducted under the sanction of, and the approval obtained from, the bishop of the diocese.

Physicians obtained a charter of incorporation in the year 1518, and in 1522 the college got the right of examining and approving persons to practise physick, concurrently with graduates of the universities of Oxford and Cambridge. The bishop's licence was thus superseded (14 & 15 Hen. VIII. c. 5). The college were also empowered to exercise control and supervision over all

dealers in drugs. By a subsequent Act of the same reign (32 Hen. VIII. c. 40), persons chosen and admitted by the President and Fellowship of the English College of Physicians were authorised to practise in physick, including surgery, anywhere within the realm. The charter and Act of 1522 were recognised and confirmed in 1553, and the privileges of the college enlarged (1 M. Sess. 2, c. 9). Their charter and privileges were again recognised by statute in 1858, 1859, 1860, and 1886. The material portions of these Acts are discussed in subsequent parts of this article.

SURGEONS.—Surgery was originally practised by barbers. In the city of London the barbers obtained a charter of incorporation from King Edward IV. in the year 1461. Many other skilled surgeons were, however, in practice, and in the year 1540 they and the barbers were incorporated, and were given the exclusive right to practise surgery within the city of London and its suburbs (32 Hen. VIII. c. 42). Under the title of "the mystery and commonalty of barbers and surgeons of London," the physicians and barber surgeons seem to have attempted to monopolise all treatment of disease to their own profit, for in the year 1542 (34 & 35 Hen. VIII. c. 9) an Act was passed declaring that it shall be lawful for any subject of the king "having knowledge and experience of the nature of herbs, roots, and waters, or the operation of the same," to practise, use, and minister in and to any *outward* disorder, any herbs, ointments, bettes, pultess, and cornplaisters, according to their cunning, or drinks for the stone, strangury, or agues, without suit, vexation, trouble, penalty, or loss of their goods." The company obtained a further charter in the year 1629 (5 Car. I.), giving it the right to examine and approve all persons who wished to practise surgery in London and Westminster, and empowering persons so approved to practise anywhere in England. In the year 1745, by statute 18 Geo. II. c. 15, the barbers and surgeons were separated into two companies. All the above liberties and privileges were transferred to the new Company of the Art and Science of Surgeons of London, who were empowered to make by-laws, etc., for their own regulation, ordinance, and government, and to examine candidates and authorise those who passed successfully to practise the art and science of surgery throughout His Majesty's dominions.

It has been suggested that the above Acts, or, at anyrate, the older ones, are obsolete. The English Court of Appeal, however, in 1885, did not adopt the suggestion, though it did not expressly overrule it (*Davies* v. *Makuna*, 1885, 29 Ch. D. 596). There have since that time been several general Statute Law Revision Acts: but the above Acts, though amended in some minor points, remain on the list of statutes in force in the United Kingdom.

APOTHECARIES (see PHARMACY ACTS).—In the year 1618 King James the First of England granted a charter of incorporation to the Apothecaries of London, by virtue of which they practised their art and mysteries and enjoyed special rights and privileges for a period of two centuries. The charter was superseded in the year 1815 by the Apothecaries Act (55 Geo. III. c. 194). By it the master wardens and society of apothecaries were empowered to regulate the conduct of members of their craft throughout England and Wales. No person, not already in practice, might for the future practise as an apothecary, or apothecary's assistant, without passing an examination as to his fitness, and obtaining a certificate of his qualification (ss. 14–17). Any person who should thereafter act or practise as an apothecary without having obtained such certificate was declared guilty of an offence, and liable to a penalty (s. 20); and it was further provided that no apothecary shall be allowed to recover any charges in a Court of law, unless he should prove at the trial that he had obtained the certificate

(s. 21). The Act gives no definition of what constitutes practising as an apothecary, beyond reciting (s. 5) that "it is the duty of every person using or exercising the art and mystery of an apothecary to prepare . . . and dispense such medicines as may be directed by a physician." Making up medicines prescribed by a physician, or by any other person, including the apothecary himself, would therefore come within the Act, but surgical attendance would not (*Woodward* v. *Bell*, 1834, 6 Car. & P. 577). "Dispensing, mixing medicine, giving medical advice, and attending the sick as medical adviser must be considered as acting as an apothecary" (per Cotton, L.J., in *Davies* v. *Makuna*, 1885, 29 Ch. D. 606). Carrying on business by means of qualified assistants seems not to be prohibited (*ibid.*; see also *Pharmaceutical Society* v. *London and Provincial Supply Association*, 1880, 5 App. Cas. 857). But a qualified man cannot legally recover charges for medical aid and advice rendered by an unqualified assistant, unless under his own express direction and supervision (*Howarth* v. *Brearley*, 1887, 19 Q. B. D. 303).

Apothecaries are distinct from chemists in that they may apply and administer medicines, while chemists may only prepare, dispense, and sell them (*Apothecaries Co.* v. *Greenough*, 1841, 1 Q. B. 800). Pharmaceutical chemists are not considered to be medical practitioners, but are subject to the special regulations of the Pharmacy Acts (*q.v.*). If a chemist prescribes medicine to his customers, as well as makes it up and sells it, he renders himself liable to the penalty under the Pharmacy Act (*Apothecaries Co.* v. *Nottingham*, 1876, 34 L. T. 76).

Medical Acts.—The union of the different branches of the medical profession under one governing body was effected in the year 1858 by the Medical Act 21 & 22 Vict. c. 90. The original Act was amended in 1859 (22 Vict. c. 21), 1860 (23 & 24 Vict. c. 7), 1876 (39 & 40 Vict. c. 40, and c. 41), and in 1886 (49 & 50 Vict. c. 48). These Acts are to be read together, and are known as the Medical Acts. By their operation, and especially by that of the Act of 1886, the scope of the original Act has been considerably enlarged.

The constitution of the General Council has been remodelled. It now consists of thirty members, five of whom are appointed by the Crown, twenty are chosen by universities and medical colleges, and five are elected by the registered medical practitioners in England, Scotland, and Ireland (Act of 1886, s. 7).

Medical Council.—By sec. 3 of the Act of 1858 the "General Council of Medical Education and Registration of the United Kingdom" was established. They were directed to appoint registrars (s. 10), who were to keep a correct register of persons legally qualified to practise medicine (s. 15). The register, showing the qualifications of the persons in it, is to be published annually; and the absence from it of any name of any person is *primâ facie* proof that he is not registered (s. 27). The qualifying degrees are set out and enumerated in sec. 18 and Sched. A, as amended by subsequent Acts; and the General Council were empowered, in case it should appear to them that the course of study and examinations to be gone through in order to obtain a qualification from any of the bodies named was not such as to secure the possession by persons obtaining such qualification of the requisite knowledge and skill for the efficient practice of their profession, to represent the same to the Privy Council (s. 20), who may thereupon order that any qualification granted to such body shall not confer the right to be registered (s. 21; Act of 1886, s. 4). No examining body may, however, impose upon a candidate offering himself for examination an obligation to adopt or refrain

from adopting the practice of any particular theory of medicine or surgery (*e.g.* homœopathy) as a test or condition of admitting him to examination or granting him a certificate. A body who do so may lose their power of conferring any right to be registered (s. 23). If any registered practitioner is convicted of a crime, or adjudged by the General Council to have been guilty of infamous conduct in any professional respect, the Council may order his name to be erased from the register (s. 28). They are the sole judges of all questions of fact in such inquiries, and there is no appeal from their decision (*Allbutt* v. *General Council*, 1889, 23 Q. B. D. 400). But they must inquire into the case and decide it themselves, after giving the person implicated an opportunity of being heard on the point. The mere withdrawal of a diploma by the body which originally granted it is not of itself a sufficient ground for removing a name from the register (*Ex parte Partridge*, 1887, 19 Q. B. D. 467). If it is shown that a medical man, in the pursuit of his profession, has done something which would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, it is open to the Council to find him guilty of "infamous conduct in a professional respect." They must, of course, have evidence on which to support their finding (*Allinson* v. *General Council*, [1894] 1 Q. B. 750). The issue of advertisements with a view to induce the public to consult the advertiser in preference to other practitioners comes within this definition (*ibid.*). The Council in the exercise of their functions under this section are a quasi-judicial body. If, therefore, any of the members who take part in the decision of a case have so acted as to disqualify them from acting judicially, *e.g.* by sitting on a case in which they have shown a bias or have a pecuniary interest, the proceedings might be set aside (*Leeson* v. *General Council*, 1889, 43 Ch. D. 366; *Allinson* v. *General Council*, *supra*). On the other hand, they cannot be sued for an erroneous exercise of their discretion, as for striking a man off the register when they are not really empowered to do so (*Partridge* v. *General Council*, 1890, 25 Q. B. D. 90). The Privy Council have now a general power of supervision over the Medical Council. If at any time it appears to them that the Medical Council has failed to exercise any power or to perform any duty vested in or imposed on it by the Acts, they may notify their opinion to it; and if the Medical Council fail to comply with any direction of the Privy Council relating to such notification, the Privy Council may themselves give effect to their directions, and exercise any power or do any act vested in or authorised to be done by the Medical Council, and may of their own motion do any act or thing which by the Medical Acts they are authorised to do on a representation from the Medical Council (Act of 1886, s. 19).

Qualification for Registration.—Prior to 1887 the various constituents of the Medical Council each granted their own diplomas, entitling their holders to practise in some one or more departments of medicine, *e.g.* as apothecaries or surgeons. More than one diploma was requisite for a man who was desirous of practising generally. Since June 1887 no person may be registered unless he has passed a qualifying examination sufficient to guarantee the possession of the knowledge and skill requisite for the efficient practice of medicine, surgery, and midwifery (Act of 1886, ss. 2 and 3).

A registered practitioner is entitled to practise medicine, surgery, and midwifery in the United Kingdom, and (subject to any local law) in any part of Her Majesty's dominions, and to recover in respect of such practice any expenses, charges in respect of medicaments or other appliances, or any fees to which he may be entitled (except *fellows* of a college of physicians

who, by its by-laws, may be prohibited from suing for their fees (s. 6). Previously to this latter Act practitioners could be, and frequently were, registered in respect of one or more qualifications only, *e.g.* apothecary or surgeon, and were not legally qualified to practise generally. The position of such persons remains unaltered. They are entitled to practise, in pursuance of the qualification they originally possessed, in medicine, surgery, or midwifery, or any of them, according as they were previously entitled to practise the same, but not further or otherwise (s. 24). Under sec. 31 of the Act of 1858, which is now repealed, it was decided that a practitioner who only held a partial qualification could not recover for services by him in a capacity for which he held no legal qualification. A surgeon consequently could not recover charges for medicines supplied, unless they were ancillary to surgical treatment (*Leman* v. *Fletcher*, 1873, L. R. 8 Q. B. 319). In order to maintain an action the plaintiff must show that he was duly registered at the time when the services were rendered (Act of 1858, s. 22; *Leman* v. *Housley*, 1874, L. R. 10 Q. B. 66; *Howarth* v. *Brearley*, 1887, 19 Q. B. D. 306).

Persons already on the register for one qualification may, however, subsequently have a higher degree, or additional qualification, inserted there in addition to or in substitution for the qualification previously registered (Act of 1858, s. 30).

Medical diplomas granted in a British possession or foreign country may also be registered, if they are recognised for the time being by the General Council as furnishing a sufficient guarantee of the possession of the requisite knowledge and skill for the efficient practice of medicine, surgery, and midwifery (Act of 1886, ss. 11–17). Possessors of diplomas for proficiency in sanitary science, public health, or State medicine, granted after special examination, which appear to deserve recognition, may have such diplomas entered in the register (*ibid.* s. 21). They derive therefrom no additional qualification for ordinary practice; but the diplomas are important with a view to obtaining certain appointments, such, for instance, as that of Medical Officer of Health (*q.v.*).

Obtaining or attempting to obtain registration by false pretences is a misdemeanour punishable with twelve months' imprisonment (s. 39).

Privileges of Registered Persons.—Only persons registered under the Acts are entitled to call themselves legally qualified medical practitioners (Act of 1858, s. 34). They only are eligible for various appointments (*ibid.* ss. 33–36), and they only can give valid certificates in cases where certificates of a medical practitioner are required (*e.g.* for burial, etc.) (s. 37).

Following similar provisions in the earlier Acts with respect to members of different branches of the medical profession, the Act of 1858, s. 35, exempts persons duly registered from serving on all juries and inquests whatsoever, and from serving all corporate, parochial, ward, hundred, and township offices, and from serving in the militia.

The position of a registered practitioner, besides the privileges already alluded to, is further protected by penal consequences on those who without due authority assume the title. It is, as already stated, a misdemeanour to attempt to obtain registration without being qualified. Any person, moreover, "who shall wilfully and falsely pretend to be, or take or use the name or title of, a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner or apothecary, or any name, title, addition, or description implying that he is registered or that he is recognised by law as a physician, or surgeon, or licentiate in

medicine and surgery, or a practitioner in medicine, or an apothecary," is liable to a penalty of £20, which may be recovered summarily before magistrates (Act of 1858, s. 40).

Women.—In former times women were considered ineligible for the medical, as for other learned professions. A movement, however, in favour of their admission gained considerable force early in the latter half of the present century. The Colleges of Physicians and Surgeons, and most of the other bodies able to confer medical degrees, were averse to the admission of women to practise, but the Society of Apothecaries were willing to confer the right, so far as they could legally do so. Whether they could, was considered doubtful. The doubt was, however, resolved, as far as they were concerned, in the year 1874 by the Apothecaries Act (37 & 38 Vict. c. 34, s. 5), which declares that "nothing in this Act shall deprive the society of such right as they now have, or relieve from any existing obligation, to admit women to the examinations required for certificates to practise as apothecaries," or to enter on their list of licentiates women who shall have satisfactorily passed such examinations. Similar powers to examine and admit women to practise were given in the following year to the College of Surgeons of England (38 & 39 Vict. c. 43, s. 2). And in 1876 it was enacted that the powers of every body entitled to grant qualifications for registration should extend to granting such qualifications "to all persons without distinction of sex" (39 & 40 Vict. c. 41, s. 1). The exercise of the powers so given was not, however, made compulsory, and women were not given any right to take part in the government, management, or proceedings of the universities or corporations mentioned in the Medical Act, 1858. The Act of 1886 made no further alteration in this respect.

Dentists.—Dentists were not legally recognised as a separate profession till the year 1878, but at best were licensed by the College of Surgeons, though many of them had no degree at all. By an Act of that year (41 & 42 Vict c. 33) the Medical Council were intrusted with the duty of keeping a register of persons entitled to practise as dentists, and have with respect to it powers similar to those they have under the Medical Acts with respect to the medical register. This Act was in some respects altered and amended by the Medical Act 1886.

Probably the earliest reference to the art of dentistry in the statute-book appears in 32 Hen. viii. c. 42, s. 3 ("For barbers and surgeons"), where it is enacted that "no manner of person within the city of London . . . using barbery or shaving . . . shall occupy any surgery, letting of blood, or any other thing belonging to surgery, drawing of teeth only except"—"and hence this art fell into, or rather perhaps remained almost entirely in, the hands of the barbers, and until a recent period was not cultivated by the surgeons as even ancillary to their calling" (Weightman, *The Medical Practitioners' Legal Guide*, 1870, p. 146). According to the *Encyclopædia Britannica* (article, Dentistry): "For long it was practised to a large extent as a superadded means of livelihood by persons engaged in some other pursuit, and without any professional education whatever." For an explanation of this state of things, and a slight notice of the progress of the art to legal regulation, the article cited may be referred to. The Medical Act of 1858 provided that Her Majesty might, by charter, grant to the Royal College of Surgeons of England power to examine, with a view to testing whether the candidates were fit to practise as dentists, and to grant certificates to such candidates (s. 48). Nothing in this Act (21 & 22 Vict. c. 90) was to prejudice or in any way to affect "the lawful occupation, trade, or business of chemists and druggists and dentists" (s. 55).

In 1878 was passed the Dentists Act (41 & 42 Vict. c. 33)—the charter of the profession. The following is a summary of its provisions:—

A. Registration: After August 1, 1879, no one is to call himself a dentist, or take any name implying that he is registered under this Act, or that he is a person specially qualified to practise dentistry, unless he is registered under this Act; but this does not apply to legally qualified medical practitioners. Penalties are denounced against offenders, and prosecutions may be undertaken by certain defined public bodies (especially by the General Council established by the Act of 1858) and (since the Medical Act of 1886, 49 & 50 Vict. s. 26) by any private person. After the date above mentioned only registered persons or legally qualified medical practitioners are entitled to recover any fee or charge in any Court for dental work, etc. The persons entitled to be registered are—(*a*) licentiates in dental surgery or dentistry of any of the medical authorities; (*b*) those entitled to be registered as foreign or colonial dentists; (*c*) those "at the passing of this Act *bonâ fide* engaged in the practice of dentistry or dental surgery, either separately or in conjunction with the practice of medicine, surgery, or pharmacy." The last class had to satisfy the registrar of their *bona fides*. Residents in the United Kingdom need not be British subjects to be registered, nor are British subjects outside the United Kingdom debarred thereby from registration. In certain appropriate circumstances, a man with a recognised certificate may be registered as a colonial dentist without examination in the United Kingdom, and there is a similar registration of a foreign dentist; what constitutes a recognised certificate in both these cases depends on the General Council, but there is an appeal to the Privy Council. The General Registrar (of the General Council) must keep in the Dentists' Register one alphabetical list of all United Kingdom dentists (*i.e.* classes (*a*) and (*c*)), one for colonial and one for foreign dentists, and there are various regulations as to the control of the Council over these registers. The General Registrar may erase from his register the name of a person who has ceased to practise, but not, speaking generally, without that person's consent. The Council may erase from the register an entry incorrectly or fraudulently made, and the name of a practitioner convicted of crime or guilty of disgraceful conduct, and a name so erased shall also be erased from the list of licentiates above referred to; but no man's name shall be erased "under this section on account of his adopting or refraining from adopting the practice of any particular theory of dentistry or dental surgery." A name so erased may be restored if the Council thinks fit, and there is to be a permanent committee of the Council to deal with cases of erasure and restoration. In *R.* v. *The Medical Council* ([1897] 2 Q. B. 203) the Court of Appeal held that an applicant who was at the time of the passing of the Dentists Act articled as a pupil within the meaning of sec. 39, but had not made the declaration required by sec. 7 (*i.e.* before August 1, 1879), was not entitled to be registered. The right to registration of a pupil whose articles expired on or after August 1, 1879, and before January 1, 1880, was left uncertain (*ibid.*).

B. Examination: "Notwithstanding anything in any Act of Parliament, charter, or other document," any of the medical authorities who have power to grant surgical degrees may examine persons who wish to practise dentistry and may grant certificates, and the holder of such a certificate shall be a licentiate in dental surgery or dentistry of the body granting it; the candidate must be at least twenty-one years old. The following bodies may appoint boards of examiners in dental surgery or dentistry to conduct the examinations mentioned:—The Royal College of Surgeons of Edinburgh,

the Faculty of Physicians and Surgeons of Glasgow, the Royal College of Surgeons in Ireland, and any university in the United Kingdom. The Royal College of Surgeons of England shall continue to examine and grant certificates (as above). The Act contains many provisions as to examinations in dentistry. A certificate under this Act confers no right or title on the holder to be registered under the Medical Act, 1858, in respect of such certificate, nor any recognition of him by law as a licentiate or practitioner in medicine or general surgery. The Act contemplated the establishment of medical boards, and provided for their conduct of examinations, but such institutions do not seem to have come into existence (see the Act of 1886, 49 & 50 Vict. c. 48, s. 26).

Persons registered under this Act may, if they desire, be exempt from serving on all juries and inquests, and from serving all corporate, parochial, ward, hundred, and township offices, and from serving in the militia. The penalty for obtaining registration under this Act by false representations is fine, or imprisonment not exceeding twelve months. Penalties may be recovered in England under the 11 & 12 Vict. c. 43, in Scotland under the 27 & 28 Vict. c. 53, and in Ireland under the 14 & 15 Vict. c. 93 (and certain special statutes for Dublin), or under the Acts amending these Acts.

Sec. 26 of 49 & 50 Vict. c. 48 deals with "Dentists," but its material enactments are included above.

In *Ex parte Partridge* (1887, 19 Q. B. D. p. 467), a Divisional Court held that where a person has been registered under the Act of 1878 as a licentiate of a medical authority, the fact that his diploma has since been revoked by such medical authority does not render him liable to be erased from the Dentists' Register under the Act, and granted a mandamus to the General Council to restore the name of one Partridge to that register. The Council appealed to the Court of Appeal, but the decision of the Court below was affirmed.

Mr. Partridge then (in 1890) brought an action in respect of the period during which his name had been removed from the register, but the judge (Huddleston, B.) held in *Partridge* v. *General Council of Medical Education and Registration of the United Kingdom* (1890, 25 Q. B. D. p. 90) that the functions exercised by the General Council under secs. 11 (5) and 13 respectively being discretionary, and not merely ministerial, whether they acted under one or the other, they were not liable to an action for the erroneous exercise of their discretion in the absence of *mala fides*. Upon appeal, the Court of Appeal affirmed this judgment.

Prosecutions have generally proceeded under sec. 3 of the Act. Since the decision of a Divisional Court in *The Royal College of Veterinary Surgeons* v. *Robinson*, [1892] 1 Q. B. 557, prosecutions (which have mainly been instituted by the British Dental Association) have taken a somewhat wider range. Thus a conviction was secured where a person not on the register issued cards with the words "Dental Surgery" following his name, and had the same words, as well as "English and American dentistry," "Painless dentistry," etc., on his premises, and this though he proved that the lessee of the premises was a qualified practitioner who was frequently there, and that he was his servant (58 *J. P.* p. 321). There was also a conviction where the defendant issued a long circular with a telegraphic address, "Dentist, Manchester," advertising his "Free Dentorium or Dental Consulting Rooms," and "teeth extracted": the defence was that he did not act or practise as a dentist, and that there was a duly qualified person on the premises (*ibid.* p. 778). In the first of those cases, and perhaps in

the second, it will be observed that the defendant did not anywhere state in so many words that he was a qualified dentist or even a dentist at all.

At the present moment (1897) the profession considers itself hampered by the decision of the House of Lords in *The Pharmaceutical Society* v. *The London and Provincial Supply Association Limited* (1880, 5 App. Cas. 857), where (shortly) it was held that a company could do that which a "person" might not, namely, describe itself as druggists, pharmaceutists, etc. (and, therefore, presumably as dentists), and accordingly an attempt is being made to introduce the following (or a like) clause into bills amending the Companies Acts:—"No company shall be registered under a name which shall include or consist of a name, title, sign, description, or addition which cannot by law be taken, used, or exhibited by a natural person, unless such person has a personal qualification." (See *Emslie*, 1897, 24 R. (J. C.) 77; 34 S. L. R. 674.)

Liability for Negligence.—From the fact of medical attendance on a patient a contract of employment is presumed, and the practitioner—like other parties to a contract—may be liable for breach of it. From publicly professing any art there is an implied warranty that the person so professing is of skill reasonably competent for the task he undertakes (*Harmer* v. *Cornelius*, 1858, 5 C. B. N. S. 236). On this principle a medical practitioner is responsible in damages to his patient for gross negligence and want of skill in his treatment of him (*Seare* v. *Prentice*, 1807, 8 East, 352). But such negligence is often difficult to prove; and actions alleging it against medical practitioners are rarely successful. The mere fact that the treatment has not resulted in a cure is no proof of negligence; and the opinion of experts that it was unskilful is generally answered by that of other experts who testify favourably to the course pursued. If the person who attends the patient should be unqualified, he is, like the qualified man, liable for his conduct, and equally bound to bring competent skill to the performance of the duty which he has undertaken, and liable to an action for negligence if he fails to do so (*Ruddoch* v. *Lowe*, 1865, 4 F. & F. 519; *Jones* v. *Fay*, 1865, 4 F. & F. 525). The only difference between his case and that of the qualified man consists in this, that a Court or jury is much more likely to find that the treatment of which complaint is made was unskilful, and the plaintiff can therefore bring his action with a better chance of success.

Criminal Responsibility.—From the nature of the cases to which their skill is directed, the medical profession are exposed to a special responsibility, from which the members of other professions are as a rule exempt. It is the legal duty of every person who undertakes to administer medical or surgical treatment, or to do any other lawful act of a dangerous character, requiring special knowledge, skill, attention or caution, to employ in doing it a common amount of such knowledge, skill, attention, and caution (Stephen, *Dig. of Crim. Law*, 217). If it can be shown that a qualified, or unqualified, practitioner has caused the death of his patient, through the lack of such knowledge, skill, attention, or caution, he may be convicted of manslaughter (*R.* v. *Long*, 1830, 4 Car. & P. 398). But evidence of negligence which would be sufficient to be left to a jury in a civil action, is not necessarily sufficient to justify a conviction on a criminal charge. It should be shown that the accused acted recklessly, or with a criminal intent, or with such gross negligence as to come within the meaning of the word "felonious" (*R.* v. *Ellis*, 1834, 2 Car. & Kir. 470; *R.* v. *Webb*, 1834, 1 Moo. & R. 405; *R.* v. *Noakes*, 1866, 4 F. & F. 920; see also Culpable Homicide).

Pharmacopœia.—The Council were also directed (Act of 1858, s. 54) to

cause to be published, and from time to time republished and amended, a book containing a list of medicines and compounds, and the manner of preparing them, together with the true weights and measures by which they are to be prepared and mixed, and containing such other matter and things relating thereto as they should think fit, to be called the British Pharmacopœia. By a subsequent Act of 1862 (25 & 26 Vict. c. 91), the exclusive right of publishing the pharmacopœia was vested in the General Council, and similar but different pharmacopœias previously published by the Colleges of Physicians in England, Scotland, and Ireland were superseded. See also British Pharmacopœia.

Notification of Disease.—The Infectious Diseases Notification Act, 1889 (52 & 53 Vict. c. 72), made general throughout the country provisions which previously had been adopted in various local Acts. It is in force in the Metropolis, and districts where it has been adopted by the local sanitary authority. Where it is in force, every medical practitioner attending on or called in to visit a patient suffering from an infectious disease—not being an inmate of a hospital for infectious cases—"shall forthwith, on becoming aware that the patient is suffering from an infectious disease, send to the medical officer of health of the district a certificate stating the name of the patient, the situation of the building," etc., where he is, and the infectious disease from which, in his opinion, the patient is suffering (s. 3). He is entitled to a small fee for every certificate duly sent in by him. See also Public Health Acts, vol. x. p. 116.

Navy.

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Introductory.

The navy as a permanent institution provided for out of the national revenues, and with its officers and men regularly engaged in the service of the Crown, may be dated from the reigns of Henry vii. and Henry viii.; but it did not become the chief maritime force of the country until about the middle of the seventeenth century. Up to the latter period it had been maintained and employed rather as an auxiliary to the forces raised, at the outbreak of war, by the seaports and maritime towns which, under various conditions, were under obligations to furnish quotas of ships for the king's use, upon notice being given to them to assemble. When so assembled they were placed under the command of officers appointed by the king; and the soldiers raised by the feudal levies were the principal fighting force. The periods of the thirteenth and fourteenth centuries are important in connection with the growth of the navy, and its organisation under royal officers, by the creation of the officers known as admirals exercising the Crown's jurisdiction by sea, and in 1360 by the appointment of a single high admiral. Whether for the royal ships alone, after a navy had been established, or for the earlier naval forces raised by requisition, levied by the Crown or furnished by private enterprise, naval ordinances were issued as each expedition was sent out. The Lord High Admiral, or the officer placed in command, issued specific instructions placing the persons serving under

military law (*q.v.*); and in the course of time a collection of precedents of offences and punishments grew up, which under the Commonwealth and during the reign of Charles II. (13 Car. II. c. 9) were embodied in Articles of War which served for the government and discipline of the navy both in war and peace, and were the foundation of the Naval Discipline Acts under which the navy is at present governed (*infra*). To these articles were also due the first establishment of naval courts-martial found in the history of the navy, in place of the summary powers which used to be exercised by commanders and captains during earlier periods.

The administrative duties of the Admiralty with regard to the navy are distinguished from its control over the administration of the military law. As to the jurisdiction of the Admiralty Court in Scotland, and the present jurisdiction of the Court of Session, see ADMIRALTY, SCOTTISH HIGH COURT OF. The present article will deal with the subjects of (I.) service in the navy; (II.) the law to which it is subject for the maintenance of discipline; (III.) the naval Courts by which this law is administered.

I. SERVICE IN THE NAVY.

Officers receive their commissions from the Board of Admiralty (*q.v.*), and the prohibition as to sale and purchase in 5 & 6 Edw. VI. c. 16, and 49 Geo. III. c. 126, applies to them; but the limited exemption allowed to purchase and sale of commissions in the army has never applied to them (see COMMISSION *in the Army*).

The manning of the fleet by impressment of men and seizure of vessels is still lawful in war time, but there are several statutory exceptions.

By the Naval Enlistment Act, 1835 (5 & 6 Will. IV. c. 24), no person is liable to be detained in the naval service against his consent for longer than five years, unless he voluntarily enters for a longer term. If he becomes entitled to discharge when his ship is abroad, and he signifies his desire not to continue longer in the service, he must be discharged forthwith, or, if he desire it, be sent in some ship of Her Majesty to some port of the United Kingdom, and there discharged. There is power, however, to detain him for six months in any special emergency or hazard to the public service. Sec. 9 also provides for discharge on a seaman providing one able seaman, or two able-bodied landsmen in his stead. This Act was extended by the Naval Enlistment Act, 1853 (16 & 17 Vict. c. 69, s. 1), to men who, under Admiralty regulations, entered for a term of ten years, or other term of continuous and general service. Able and ordinary seamen, however, are seldom taken directly into the navy, provision having been made by the last-mentioned Act for the training of boys, who form, in ordinary times, the chief recruiting supplies.

By sec. 2 of that Act it is provided that every boy entering when under eighteen should be entered, and liable to serve, until the age of twenty-eight years; and every person who, when of the age of eighteen years or upwards, should be entered as a boy, should be entered for ten years' continuous and general service.

To encourage seamen and others to enter the navy, sec. 4 provides that after proclamation calling for their services being published at any port, during peace or war, seamen who volunteer for the navy are entitled to bounties in such manner, and according to such classes, as may be fixed by the proclamation; and by similar proclamation their term of service can be extended to an additional period of five years.

By the Service of Seafaring Men Act, 1853 (16 & 17 Vict. c. 73), in case of emergency, officers and men of the coastguard, revenue cruisers, and naval pensioners may be required to serve in the navy for a limited period, but not longer than for five years, without their consent; and while serving they are entitled to the same pay and allowances as if they had been entered for ten years in the ordinary way, and pensioners continue to receive their pensions. In case of actual invasion, or imminent danger thereof, officers and men in the customs, and all other public departments, who are of a seafaring character, become liable to serve for one year, on the like terms.

The Naval Reserve and Naval Coast Volunteers may be ordered into actual service.

Moreover, by sec. 8 of the Naval Enlistment Act, 1835, colonial seamen who volunteer to serve in the navy for the regular term are, after their discharge, entitled, if they desire to return to their native colony, to be conveyed thither free of expense, or are allowed a gratuity in money sufficient to cover the cost of their return, according to the discretion of the Admiralty.

The Naval Enlistment Act, 1884 (47 & 48 Vict c. 46), modified the above Enlistment Acts by providing that as to the term of ten years this should no longer be fixed by statute, but that the Admiralty might make regulations enabling men to be entered or re-entered for periods to be fixed by those regulations.

In respect of boys, it also provided that the entry might be for continuous and general service for such period, not exceeding twelve years, or, if they enter below the age of eighteen, not exceeding the time required for them to attain the age of thirty years, as might be fixed by such regulations.

The Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 28, enables guardians to pay out of their funds such sums as may be required by the regulations of the navy on the entry of boys, for providing outfit or otherwise to enable any boy not already an apprentice in the merchant service, who or whose parents are receiving relief, to enter into the navy, and to incur all other expenses necessary for carrying out that object.

By sec. 4 of the Act of 1884, the liability of petty officers and seamen in receipt of pensions, to service in the navy in cases of emergency, was extended to persons enlisted or re-engaged after the passing of the Act, who have served as non-commissioned officers and men of the Royal Marines and are in receipt of pensions; unless they have enlisted in the Army Reserve Force (see RESERVE FORCES).

The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 195–197, provides that a seaman may leave his ship and join the navy without being guilty of desertion, or liable to any punishment or forfeiture: any stipulation in any agreement to the contrary is void, and a master or owner is liable to a fine not exceeding £20 for causing any such stipulation to be introduced.

There are also provisions for obtaining the seaman's effects from the master, and payment of any wages due, with penalties on the master for their contravention.

For the offences of entering the navy from the regular forces or militia, see ARMY; ENLISTMENT; MILITIA.

False answers made upon entering the naval service, with intent to deceive any officer or person authorised to enter or enlist seamen or others,

are punishable under the Vagrancy Act, 1824 (5 Geo. IV. c. 83, s. 3), by sec. 16 of the Naval Enlistment Act, 1853.

The oath of allegiance is not administered to entrants in the navy as it is in the case of enlistment in the army and other land forces.

The Admiralty has the right to discharge any seaman or other person at any time from the naval service, if their services are not required; and discharge may also follow as a punishment on conviction by court-martial (*infra*). Until actual discharge in due form, they remain subject to the discipline of the navy, and to the laws relating thereto.

If, after service for the regular period for which they enlisted, they are discharged at a time when a proclamation is in force requiring the services of seafaring men, they are entitled to receive from the captain or commanding officer of the ships from which they are discharged, certificates of their services, and the Admiralty thereupon issue a protection from service in the navy for two years; but if discharge takes place (except upon the seaman's own application) before the end of the regular term of service, the protection only lasts for one year.

The forging or counterfeiting any such certificate, or in any fraudulent manner causing a certificate to be issued, is a misdemeanour (Naval Enlistment Act, 1835, ss. 1, 2, 3).

The provisions of sec. 91 of the Army Act, 1881 (44 & 45 Vict. c. 58), relating to the sending of lunatic soldiers, by a Secretary of State, to workhouses and lunatic asylums, and other places in which lunatics can be confined, are applied by sec. 3 of the Naval Enlistment Act, 1884, to persons in the naval service. The Admiralty is to be read for Secretary of State, and the declarations made on a person entering into the naval service as a boy, by his parent or guardian, or made by a man on entering such service, are respectively substituted for the attestation paper.

II. The Military or Criminal Law of the Navy.

The discipline of the navy is provided for by the Navy Discipline Act, 1866 (29 & 30 Vict. c. 109), and the Naval Discipline Act, 1884 (47 & 48 Vict. c. 39). They specify all the offences punishable by naval law, and the punishment annexed thereto, except that all crimes not capital, or punishable with penal servitude under the Acts, may, unless the Acts provide otherwise, be punished according to the laws and customs in such cases used at sea (s. 44 of the Act of 1866).

The articles of war specifying the offences are contained in Part I. of the Act of 1866, and they comprise, firstly, offences purely against discipline, which would not be punishable under the ordinary law; and, secondly, offences which are crimes under the ordinary law, but made punishable also by the naval courts-martial, or summarily, under the Act.

Many of the offences under the first class are punishable with death, but in every case now one of the alternative punishments prescribed in sec. 52 can be substituted. This is the case also with those serious offences for which penal servitude is prescribed; that principle in fact being applied to every specified punishment.

Under the second class, murder is punishable with death; manslaughter, with penal servitude, or such other punishment as thereinafter mentioned; sodomy, with penal servitude; indecent assault, with penal servitude, or such other punishment as thereinafter mentioned; robbery or theft, with penal servitude, or such other punishment as thereinafter mentioned.

The above, it will be noticed, do not follow the scale of punishments prescribed under the ordinary law. But sec. 45 provides that other offences may be punished either as prejudicial to good order and discipline (s. 43), or with the same punishment as an ordinary criminal tribunal would award.

The following is the scale of punishments arranged according to degree; and where one punishment is specified but another punishment may be awarded, any one or more of the punishments inferior in degree may be awarded (s. 55):—

1. Death.
2. Penal servitude—life or not less than five years.
3. Dismissal from the service with disgrace; involving in all cases forfeiture of all pay, annuities, pensions, medals, and all other rights of a like kind, and an incapacity to serve in any military, naval, or civil service; and it may be accompanied with imprisonment.
4. Imprisonment, not exceeding two years; or corporal punishment, not more than forty-eight lashes; no officer being subject to it, and no petty or non-commissioned officer, except in case of mutiny.
5. Dismissal from the service.

Other five relate to punishments such as forfeiture of seniority and pay, etc.

Such minor punishments as are now inflicted according to the custom of the navy, or may from time to time be allowed by the Admiralty.

Upon a charge of any offence the prisoner may, upon failure of proof of the commission of the greater offence, be found guilty of another offence of the same class involving a less degree of punishment, but not of any offence involving a greater degree of punishment (ss. 47, 48).

Unless an offender has avoided apprehension, or fled from justice, the trial must take place within three years from the commission of the offence, or within one year after the return of the offender to the United Kingdom (s. 54).

All the offences specified may be tried and punished under the Act (s. 46) if they are committed—

(*a*) Whether in or out of the United Kingdom, in any harbour, haven, or creek, or on any lake or river.

(*b*) Anywhere within the jurisdiction of the Admiralty.

(*c*) At any place, on shore, out of the United Kingdom.

(*d*) In any of Her Majesty's dockyards, victualling yards, steam factory yards, or on any gun wharf, or in any arsenal, barrack, or hospital belonging to Her Majesty—whether in or out of the United Kingdom.

(*e*) The offences of "misconduct in the presence of the enemy," "communications with the enemy," "neglect of duty," "mutiny," "insubordination," "desertion and absence without leave," or "miscellaneous offences"—whether in or out of the United Kingdom.

Every officer in command of a fleet or squadron or of a ship, or the senior officer present at a port, may by warrant under his hand authorise any person to arrest any offender subject to the Act for any offence against the Act mentioned in the warrant. Such person may be taken on board the ship to which he belongs, or some other of Her Majesty's ships; and force may be used for effecting the apprehension (s. 50).

In *R.* v. *Cuming and Another*, 1887, 19 Q. B. D. 13, it was held that a naval officer being subject to the Act might arrest an offender without this warrant.

As to the apprehension of deserters by any constable, or any person in

Her Majesty's service, their examination by a justice of the peace in any part of Her Majesty's dominions, and their committal to prison pending their deliverance into the custody of the naval authorities, see the Naval Deserters Act, 1847 (10 & 11 Vict. c. 62); and article DESERTION.

The persons subject to the Act, and who are made liable thereto, and triable and punishable thereunder, are the following:—

1. Every person in, or belonging to, the navy, and borne on the books of any of Her Majesty's ships in commission—that is, equipped and in service—at the time of the offence.

2. Her Majesty's land forces, when embarked upon any of Her Majesty's ships, under such regulations as may be made by Order in Council.

The order at present in force is one made on the 6th February 1882.

3. All other persons ordered to be received or being passengers on board any of Her Majesty's ships, under such regulations as the Admiralty may from time to time direct.

4. Persons on the books of hired vessels in Her Majesty's service in time of war, being either armed or under the command of a naval officer, if the Admiralty think fit so to direct.

5. The crews of any of Her Majesty's ships wrecked, lost, or destroyed, or taken by the enemy.

6. All spies for the enemy.

7. All persons, not otherwise subject to the Act, *e.g.* civilians, who, being on board any ship of Her Majesty, shall endeavour to seduce from his duty or allegiance any person subject to the Act.

8. The Royal Naval Coast Volunteers, under the Act 16 & 17 Vict. c. 73; and the Royal Naval Volunteers, under the Act 22 & 23 Vict. c. 40, when they are respectively in actual service or under training.

9. The classes of persons who, as before mentioned, may be required to serve in the navy, when so required to serve.

10. Officers of Reserve to the Royal Navy, under the Officers of Royal Naval Reserve Act, 1863 (26 & 27 Vict. c. 70), when called out for training or exercise, or on actual service.

11. Officers and volunteers of the Naval Artillery Volunteers established under 36 & 37 Vict. c. 77, and officers and petty officers of the permanent staff thereof, when on actual service, or undergoing drill, exercise, training, or inspection, together with the navy or marines, or the regular forces, or any part thereof.

III. NAVAL COURTS ADMINISTERING THE LAW.

These courts are either courts-martial, or the Courts of officers in command of ships, whose jurisdiction is derived exclusively from the Naval Discipline Acts over the persons, and the offences committed within the times and places, above described.

Any offence triable under the Acts may be tried and punished by court-martial whether committed by officers or men.

Sec. 1 of the Act of 1884 provides that any offence not capital triable under the Acts, and which is not committed by an officer, may, under such regulations as the Admiralty may make, be summarily tried and punished by the officer in command of the ship to which the offender belongs at the time, either of the commission of the crime, or at the trial of the offence, subject to the restriction that the commanding officer shall not have power to award penal servitude, or to award imprisonment for more than three months. This does not include power to inflict corporal punishment, except for mutiny, unless the offence has been inquired into by one or more

officers appointed by the commanding officer, and his or their opinion as to the guilt or innocence of the prisoner reported to him, whereupon the commanding officer is to act as according to his judgment may seem right (s. 56 of the Act of 1866).

Other persons besides commanding officers who may exercise those summary powers are described in subsec. 3 of sec. 1 of the Act of 1884.

There is no legal right to demand a court-martial; and it is in the discretion of the authority empowered to order such a Court to be held, whether, upon formal application containing the charge or complaint, and other matters as prescribed in the regulations, a trial shall be granted.

In the United Kingdom, the Admiralty is the authority exercising this power. It may also grant commissions to any officer of the navy on full pay, authorising him to order these Courts to be held; and these commissions are granted to commanders-in-chief on foreign stations, and commanders of detached squadrons. Under circumstances detailed in subsecs. (11) and (12) of sec. 58 of the Act of 1866, senior officers of division may be empowered by the commander-in-chief to assemble courts-martial. Subsec. (10) also provides that where at any place there is an officer superior in rank to the officer empowered to order a court-martial, the officer of superior rank may, without a commission for that purpose, order a court-martial. The officer ordering cannot sit as a member of the Court. The president is named by the authority ordering the Court, or this is intrusted in the home ports to the commander-in-chief at the port, or abroad to the senior officer present, when the commander-in-chief is not at the place. The order for the Court is addressed to the president, to whom are sent the charge and other documents. In the absence of the Judge Advocate of the Fleet or deputy, or a special appointment by the Admiralty, the president appoints a judge advocate for the trial (see, as to the duties of this official, article JUDGE ADVOCATE). The president (if the officer ordering the court-martial is not present at the place where it is held) appoints a provost-marshal (*q.v.*) to arrest and keep the prisoner in custody.

A court-martial cannot be held unless at least two ships, not being tenders, and commanded by captains, commanders, or lieutenants on full pay, are together when the court-martial is held. General orders are given or signalled, and all officers junior to the president, of a rank eligible to sit on a court-martial, must be present, unless they are absent with leave.

The Court must consist of not less than five nor more than nine officers.

No officer is qualified to sit unless he be a flag officer, captain, commander, or lieutenant on full pay, and not under twenty-one years of age. If the prisoner is a flag officer, the president must also be a flag officer, and the other officers either of the rank of captain or of higher rank; and if a captain, the president must be a captain or of higher rank, and the other officers commanders or officers of higher rank. If the prisoner is below the rank of captain, the president must be a captain or of higher rank; and if the prisoner is of the rank of a commander, in addition to the president two other members of the Court must be of the rank of commander or of higher rank (s. 2 of the Act of 1884).

The prosecutor cannot sit on any court-martial for the trial of the prisoner whom he prosecutes (subs. (8), s. 58).

The Court must be held on board a ship or vessel of war (s. 59).

A right of objection to members of the Court is allowed (s. 62).

The procedure is laid down in the Admiralty Regulations.

All persons summoned and attending as witnesses are privileged from

arrest while attending, going to, and returning from, the Court. Civilian witnesses not attending, refusing to be sworn, or affirm, or give evidence, or answer legal questions, or prevaricating, shall, upon certificate under the hand of the president, be liable to be attached in the High Court, as if they had been summoned and subpœnaed in that Court. In the case of a naval witness, the court-martial may punish non-attendance, or refusal to give evidence, or prevarication, with not longer than three months' imprisonment, and not longer than one month for behaving with contempt of the Court (s. 66).

Perjury before a court-martial is punishable as in other cases (s. 67).

In the case of a sentence of death, four at least of the officers present where the number does not exceed five, and in other cases a majority of not less than two-thirds, must concur (s. 53, subs. (2)).

If the sentence is one of penal servitude, it has the same effect as a like sentence by a civil Court; and the prisoner is to be taken to some prison in which a convict sentenced by a civil Court can be confined (s. 3 of Act of 1884).

Sentences may be passed to take effect on the conclusion of a previous sentence, but this is not to cause a person to undergo imprisonment for exceeding two consecutive years (s. 4).

The place of imprisonment may be in one of the naval prisons under the Acts, or any common gaol, house of correction, or military prison (*q.v.*) within Her Majesty's dominions (s. 74 of the Act of 1866, and s. 5 of 1884).

By sec. 81 of the Act of 1866, the Admiralty may set apart any buildings or vessels, or any parts thereof, as naval prisons, which are to be deemed naval prisons within the meaning of the Act; and sec. 6 of the Act of 1884 provides that the Admiralty shall have the same power in respect to them as a Secretary of State has in relation to military prisons (*q.v.*).

If a prisoner becomes insane, he may be removed under warrant of the Admiralty to a lunatic asylum for the unexpired term (s. 80).

In regard to approval and confirmation of sentences, and remission, mitigation, alteration, or commutation; the control of the High Court over courts-martial; and generally as to these Courts, see article Courts-Martial.

See Admiral; Admiralty; Courts-Martial; Desertion; Enlistment; Judge Advocate; Military Law; Martial Law.

[*Authorities.*—Thring, *Criminal Law of the Navy*; article "Navy," *Encyc. Brit.*]

Neutrality.

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The condition of a State not a party in a dispute between other States : *qui neutrarum partium est.*

I. History.

The conditions of antiquity did not develop any organised resistance to inter-belligerent operations. There were no essential economic interests of powerful rival nations otherwise indifferent to disputes of their neighbours. Nor was there any balance of power which a number of States had an interest, if need be, in combining to maintain. Weaker States, moreover, hardly dared to speak up for rights which there was neither a public opinion to sanction nor a standing army to enforce.

Thus we read of Gito, the tyrant of Syracuse, who suspended his inclination in the war betwixt the Greeks and Barbarians, keeping a resident ambassador with presents at Delphos, to lie and watch to see which way fortune should incline, and then take occasion to fall in with the victors.

Still the idea of neutrality did exist, as we see from the treaty concluded between the Romans and Jews, described in the First Book of the Maccabees, ch. viii., by which neither party was to give anything to the other's enemy, or "aid them with victuals, weapons, money, or ships," though such a stipulation shows that a treaty was necessary to prevent a third State from helping a belligerent—in fact, that neutrality was not otherwise viewed in antiquity as an international obligation.

Nor do the terms found in Roman writers, and afterwards borrowed by publicists who wrote in Latin: *amici*, *socii*, *pacati*, *medii*, convey the idea of neutrality. Grotius uses *medius in bello*, and *extra bellum positus*. "I call *non hostes*," says Bynkershoek, "those who take part with neither party, and who are not bound to either by any alliance." If they are so bound, they are *fœderati*, not simply *amici* (*Quæst. jur. pub.* i. 9).

It was probably first in connection with the Crusades that there were reasons why a systematised usage in respect of neutrality should grow up. We know that the supplying of arms and assistance to the Saracens was placed under the ban of the Church; and, according to Alberic Gentilis, persons taken in the act were "capientiam fieri servos censemus." The rise and active intercourse of the maritime republics of the Mediterranean would be another circumstance promoting its development. It was probably owing to these two causes that the *Consolato del mare* (*q.v.*) contains a chapter (273), regulating with a certain minuteness the procedure of capture, acknowledges the right to search the neutral vessels, and lays down the well-known rules—

That (1) an enemy's cargo on a friend's vessel is liable to confiscation; and (2) a friend's cargo on an enemy's vessel is not so liable.

These rules became in time more or less universal.

Meanwhile in treaties of peace and amity, clauses were often inserted as to the observance of neutrality similar to that we have mentioned above between the Romans and Jews. Thus in a treaty of 1303 between England and France we read: "Accorde est que l'un ne receptera ne sonstendra ne confortera, ne fera confort, ne ayde aus enemis de l'autre; ne ne souffera qu'ilsaient confort secours ne ayde soit de gent d'armes, ou de vitailles ou d'autres choses queles quels soient, de ses terres ne de son poiar" (Rymer, vol. ii. p. 927). See also the treaty between Henry VIII. and Francis I. of 1515, and the Treaty of Münster between the Emperor and France of 1648.

On the development of maritime commerce and the rise of several great naval States, consequent upon the discovery and colonisation of the American continent, neutrality questions acquired a new importance.

The rivalry of the English and Dutch, and the Spanish wars, gave rise to warm controversies on the right of search. In 1576 England viewed the

stoppage of her ships by the Dutch, as belligerents, as an insult to her flag, though a few years later (1588), as a belligerent herself, she found it necessary to insist on a stricter observance of neutral obligations.

A precise regulation of the laws of neutrality, different from the rules of the *Consolato del mare*, was included in the French Ordinance of 1584, which provided that a friend's goods in an enemy's ship, and the ship of a friend having enemy's goods on board, were liable to confiscation. This was re-enacted in the Ordinance of 1681; but by treaties with different Powers, as with Holland in 1646 and the Hansa in 1655, France relaxed these rules in favour of those of the *Consolato*. The clause in which she did so, in the Treaty of Navigation and Commerce of Utrecht, 1713, with England, is interesting. It provided that it should be lawful for the subjects of the Queen of Great Britain and of the Most Christian King to sail with their ships with all manner of liberty and security, no distinction being made as to who were the proprietors of the merchandises laden thereon, from any port to the places of those who were now or should be thereafter at enmity with the Queen of Great Britain or the Most Christian King.

> And as it is now stipulated concerning ships and goods, that *free ships shall also give a freedom to goods*, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading or any part thereof should appertain to the enemies of either of their majesties, contraband goods being always excepted (Art. 17).

England on her side, in 1674 (Dec. 11), in agreement with Holland, and in 1787 with France, waived or abated the right of search. In 1740 Prussia disputed without offering actual resistance to it, and in 1762 Holland disputed the right to search vessels under convoy. The facts show until how recently ideas of neutrality remained in a vacillating condition.

In Molloy's *De jure maritimo et navale* (edition of 1688) there is an interesting passage showing the state of feeling on the subject at the close of the seventeenth century.

"Neutrality," he says, "may be of two sorts: the one with alliance with either part; the other without alliance, or so much as the least tie, to the one or other, which is that which may properly be called neutrality.

"The first is governed by the Treaty of Neutrality, the latter by the discretion of the neuter prince, whose carriage ought always to be such as that he may not give the least glimpse of inclining more to one than to another.

"The advantages of neutrality are, that the neuter prince or republic is honoured and respected of both parties; and by the fear of his declaring against one of them, he remains arbitrator of others and master of himself.

"And as a neuter neither purchases friends nor frees himself from enemies, so commonly he proves a prey to the victor; hence it is held more advantage to hazard in a conquest with a companion than to remain in a state wherein he is in all probability of being ruined by the one or the other.

"But princes that are powerful have used generally to preserve a neutrality; for while petty princes and States ruin themselves by war, he fortifies himself with means, and in the end may make himself judge of their differences.

"On the other hand, it has been conceived that republics that are weak, what part soever they take it will be dangerous to them, especially if they are in the midst of two more powerful States than themselves; but experi-

ence hath made it appear to the contrary: that neutrality is more beneficial to a weak prince or republic, so that they are at war be not barbarous or inhumane. For though neutrality does not please either party, yet in effect it wrongs no man; and as he does not serve, so he does not hurt; besides, his declaration is reserved till the issue of the war, by which means he is not obliged, by siding with either party, to gain or lose by the war."

A great advance was made in 1744. France adopted the *Consolato* rule purely and simply, and the practice of neutrality now reached a condition in which generalisation was possible. The term "neutral" took the place of the old one of "friend."

Soon after this (1759), Lee published his analysis of Bynkershoek, Vattel his great book on the law of nations (1758), in which he dealt fully with the rights and duties of neutrals, and Hübner his famous work (1759) on neutrality as an independent subject.

Vattel set out systematically the existing practice; Hübner vindicated the rights of neutrals, contending, with a prophetic vision of what would follow a century later, for the principle that, a neutral ship being assimilated to neutral territory, enemy's goods are covered by the neutral flag.

He also devoted a large part of his book to arguing that the prize Courts of the captors are incompetent to decide on the capture of neutral vessels, and proposed to substitute for them mixed tribunals, composed of the consul of the neutral and a commissioner of the belligerent State. Will this be the next advance made?

At length, in 1780, neutral nations found an opportunity of asserting their rights against the pretensions of the then great maritime Powers. England was at war with France and Spain. She, in particular, had carried to extreme limits the rights claimed by belligerents. All trade with the enemy was forbidden to the neutral; the theory of contraband of war was beyond reasonable justification extended; paper blockades became habitual (Rivier, ii. p. 372); the rule of 1756, which forbade subjects of a neutral State to carry on in time of war any trade from which they were excluded in time of peace—a provision against the transfer of the coasting trade of a country at war with England to neutral bottoms—these constraints upon neutrals were as vexatious as if they were at war themselves.

On April 3, 1780, a memorial was presented to the States-General by Prince Gallitzin on the part of the Empress of Russia, accompanied by a copy of a declaration which she had made to the belligerent Powers, purporting that she was determined to maintain the free trade and navigation of her subjects, and not to suffer either to be hurt by those Powers: that her definition of the limits of a free trade was founded upon the clearest notions of natural right . . . : that she invited the States-General to make common cause with her, and had addressed the same invitation to the Courts of Copenhagen, Stockholm, and Lisbon, in order that by their united endeavours a natural system, founded on justice, might be established and legalised in favour of the trade of neutral nations, and serve as a rule for future ages (Beawes, *Lex Mercatoria Rediviva*, 1745, ii.).

The armed neutrality which ensued was the first open declaration of resistance by neutral Powers to the old system of maritime rights of war. By the treaty instituting it, Russia, Sweden, and Denmark proclaimed the principles: (1) That all neutral ships were to navigate freely from port to port, and on the coasts of nations at war; (2) that articles belonging to the subjects of the warring Powers were to be free in all neutral vessels, except contraband merchandise; (3) that only certain articles were to be deemed contraband, namely, those which were mentioned in certain clauses of the

Russian treaty of commerce with Great Britain; (4) that a port was only to be deemed validly blockaded when the blockade was maintained by such a force that it was dangerous to enter it; (5) that these principles were to serve as rules for determining the legality of captures and prizes.

It is true that the confederated States, and more particularly Russia, sacrificed, at a later date, some of the principles for which they had so strenuously contended. Still the armed neutrality marked a new era in the conduct of maritime war. Neutrals had henceforth to be reckoned with.

The second armed neutrality (1800), marking no advance, but rather the contrary, is only historically interesting.

To the United States falls the merit of the first move to recognise the duties of neutrality. Mr. Hall gives an excellent account of the events which led to the first restraints placed on foreign enlistment. On the outbreak of war in Europe in 1793, a French Minister, M. Genêt, granted commissions to American citizens, who fitted out privateers, and manned them with Americans, to cruise against British trade. Immediate complaints were made by the English Minister, who expressed his "persuasion that the Government of the United States would regard the act of fitting out these privateers in its ports as an insult offered to its sovereignty." Mr. Jefferson thereupon wrote to M. Genêt: "That it is the right of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the duty of a neutral nation to prohibit such as would injure one of the warring Powers; that the granting military commissions within the United States by any other authority than their own is an infringement of their sovereignty, and particularly so when granted to their own citizens to lead them to commit acts contrary to the duties they owe to their country." He wrote further to the American Minister in Paris: "That the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign person can levy men within its territory without its consent; that if the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right, and to prohibit such armaments and enlistments." See *International Law*, p. 615.

The existing law, however, proved inadequate on the trial of one of M. Genêt's privateers (see Wharton's *State Trials, Gideon Henfield's* case). Hence the first Foreign Enlistment Act, an enactment for securing the neutrality of American citizens. Great Britain followed the example of the American Republic by adopting a similar measure. See FOREIGN ENLISTMENT.

After the Napoleonic wars there was no occasion to again raise questions of neutral right and duty until the Crimean war, when the two principal maritime Powers were allied against Russia. It was at once seen that though practice had lain dormant, theory and public feeling had stridden forwards, and before the commencement of hostilities it was found necessary to revise and reform some of the neutrality rules. England still adhered to the principle of the *Consolato del mare*, in virtue of which enemy property could be seized under the neutral flag; France, to the provisions of the Treaty of Utrecht, which permitted neutral property to be seized if sailing under the enemy's colours. It was evident that if these two principles had been applied by each Power as they had been in the habit of doing, the commerce and navigation of neutrals would have suffered more than ever; for neither their flag nor their property would have been respected (Kleen, *Neutralité*, p. 41).

The two States allied in a joint operation of war could not, says M. Kleen, risk compromising their unity and harmony, and therefore the chances of success of their combined action, by applying opposing systems as to prize. Unity of operations exacted common rules for capture and confiscation; and as an agreement was not possible except on condition of each ally making sacrifices as regards its own usages, England, on the one hand, renounced her traditional custom of seizing enemy property under a neutral flag, and, on the other hand, France discontinued the seizing of neutral property under the enemy flag. Neutrals were thus simultaneously delivered from two ancient and vexatious customs owing to the alliance of those who had practised them.

The Declaration of Paris finally put the new rules on a permanent footing.

To this Declaration several Powers, and in particular the United States and Spain, have not given their assent, the former standing out for the assimilation of naval to territorial warfare, and the immunity of private property from capture; but in the recent war between these two States both declared their intention to observe it.

There are other questions connected with neutrality upon which there is still disagreement. See CONTRABAND OF WAR.

II. DEFINITION AND SCOPE.

It is almost impossible to give a succinct definition of neutrality which can serve to determine its full scope. Several authors have nevertheless grappled with the difficulty. Thus Hübner says—

> Neutrality consists in complete inaction with reference to the war, and in an exact and perfect impartiality, manifested by facts, with regard to belligerents, so far as this impartiality relates to the war and to the direct and immediate means of making it (*De la Saisie des batiments neutres*, vol. i. part 1, ch. ii. s. 1).

Azuni says—

> Neutrality is the exact continuation of the peaceful state of a Power which, when a war breaks out between two or more nations, abstains absolutely from taking part in their quarrel (*Droit Maritime de l'Europe*, ch. i. art. 3, s. 1).

Hautefeuille, while thinking it impossible to give an adequate definition of so complex a position as that of neutrality, prefers Hübner's to Azuni's description (*Neutres en temps de guerre maritime*, i. p. 165).

Phillimore, Twiss, and Hall make no effort to condense the subject into a definition.

The objection to the definitions quoted above is that they deal with only one side of neutrality, namely, the duty of the neutral, and omit the duty of the belligerent towards the neutral, which forms just as much a part of the subject.

M. Kleen, the author of the latest work published on neutrality, endeavours in his definition to embrace its two aspects.

"Neutrality," he says, "is the juridical relation in which, as far as possible, a State at peace is left untouched by the hostilities between the belligerent States, and itself abstains from all participation in or interference with their quarrel, with strict impartiality towards both" (*La Neutralité*, i. p. 73).

Viewed in this twofold aspect of both rights and duties, neutrality is the general position of States not at war in relation to other States which are at war. Even this definition is incomplete, the words "as far as possible" covering much that is thus left undefined, and we think that all the

aspects of neutrality can only be covered by some such subdivision as here follows:—

1. Absolute duty of a neutral State to abstain in its corporate capacity from all acts which may help the one belligerent to the disadvantage of the other.
2. Relative duty of a neutral State as regards prevention of its subjects from helping either belligerent.
3. Contingent duty of a neutral State to grant impartially to one and the other belligerent any rights, advantages, or privileges which, according to the usages recognised among nations, are not considered as an intervention in the struggle.
4. Rights of each belligerent State against the subjects and citizens and their property of each non-belligerent State which, by the usage of nations, the one is entitled to enforce and the other bound to suffer during the continuance of war.

We shall follow this subdivision in our treatment of the subject.

III. Absolute Duties of Neutral States.

It is the duty of the neutral State in its corporate capacity to take no side in a war between two Powers with which it is in amity. It must, therefore, abstain from supplying either belligerent with troops, arms, ships, munitions of war, money, or anything which may aid either belligerent in its operations of war. This applies whether the war be just or unjust, and to all persons in a responsible or representative position in the service or employment of the neutral State. (See art. 454 of the Queen's Regulations and Admiralty Instructions.)

The same applies, within the scope of their functions and even in their individual capacity, to sovereigns and diplomatic and consular agents. Thus a gift of money by a neutral sovereign to his daughter, Queen Regent of a belligerent State, might be considered as a breach of neutrality.

For private loans to and commercial transactions with belligerents, see *infra*.

Diplomatic intercourse and negotiations upon matters which, though of advantage to either belligerent, do not assist him in the prosecution of the war, are unaffected by its existence. Thus there would be no ground of objection in principle to the conclusion during the war of an ordinary treaty of commerce between a neutral and a belligerent State.

IV. Relative Duties of Neutral States.

(*a*) *Prevention of Breaches of Neutrality by Persons within the Neutral Jurisdiction—Foreign Enlistment—Neutral Subjects on Belligerent Territory.*—The duty of a State as such to forbear from committing any act which might be of assistance to either belligerent, cannot in reason be equally absolute as regards the persons within its jurisdiction. These persons are nevertheless bound to observe the same neutrality as the neutral State itself, and some kind of an obligation exists to repair the damage done to the belligerent through infringements committed by them. The difficulties of giving effect to this obligation were so great, that the practice of leaving it to the belligerent himself to insure by visit and search, capture and confiscation, abstention by the subjects of neutral States, was long the only course of requital allowed by the law of nations to belligerents.

In more recent times, with the development of means of communication, it has become possible for States to exercise a more definite control over the acts of their subjects and citizens, and the responsibility of the neutral has correspondingly increased.

A reasonable description of the present position of States as regards

their responsibility for acts of those within their jurisdiction would therefore be that a neutral Government is bound to exercise such diligence as is consistent with its institutions, to prevent its subjects and others within its jurisdiction from making its territory a base for belligerent operations.

It would be contrary to the principle of the independence of States to seek to hold a State responsible for acts of infringement of neutrality by those within its jurisdiction which it does not possess a machinery to repress. Several States, as a fact, have no enactments which specifically punish infringements of neutrality; in their case it is left to the belligerent himself to enforce such remedy as the law of nations permits. Other States treat certain violations of neutrality according to their consequences in causing damage or difficulties to themselves. This is the case with France, as to the clauses of whose declaration of neutrality, see Louis, *Neutralité*, *Journ. de Droit Inter. Priv.* 1877, p. 286; Clunet, *Gaulois*, April 25, 1898.

The grounds of the decision in the *Alabama* case cannot be taken as showing any change in international law, inasmuch as the Court of Arbitration was bound by the principle laid down in the Treaty of Washington as to "due diligence." To meet the requirements of this new principle, the British Parliament has passed enactments of a more far-reaching character than international law can be said as yet to require. By an Act to regulate the conduct of Her Majesty's subjects during the existence of hostilities between foreign States with which Her Majesty is at peace, enlistment, shipbuilding, and expeditions undertaken by any person within British jurisdiction to assist a belligerent are punishable, as substantive offences, by fines and imprisonment (33 & 34 Vict. c. 90, 1870). See FOREIGN ENLISTMENT.

Neglect of a State to enforce the laws it possesses, to the extent of the vigilance consistent with its institutions, may entail responsibility for the consequences of such neglect, but the absence of reciprocity would be a reasonable answer to a claim by a State whose laws were less stringent.

The relations between Great Britain and the United States of America, in particular, are regulated by the rules laid down in the Treaty of Washington of May 8, 1871, which the high contracting parties agreed to observe as between themselves in future.

They have therefore been reproduced as the basis of the proclamation of neutrality in the recent war (see *infra*).

Under them the neutral Government is bound to use "due diligence," where it has "reasonable ground" to believe that any acts have a belligerent character, in "preventing" them. The acts which it is to prevent are as follows:—

(1) Fitting out, arming, or equipping any vessel;

(2) The departure from its jurisdiction of any vessel having been specially adapted in whole or in part within such jurisdiction to warlike uses;

(3) The making use by a belligerent of its ports or waters as the base of naval operations against the other; or

(4) for the purpose of the renewal or augmenting of military supplies or arms; or

(5) the recruitment of men.

The contracting States undertook to bring the rules to the knowledge of other maritime Powers, and to invite them to accede thereto (Art. vi.), a step which, it seems, has never been taken (Macdonell, *Nineteenth Century*, May 1898). Nor are the rules likely to find favour among other States, except as part of a general scheme for the regulation of the position of neutrals for their benefit.

Rules of neutrality apply to all persons within the jurisdiction of the neutral State, whether subjects of the neutral Power or not. This is a consequence of the territoriality of States: all persons within the boundaries of the State must respect its laws, and are subject to the ordinary penalties provided by them for cases of infringement.

In like manner, the subjects of neutral States on the territory of a belligerent State can claim no immunity from its ordinary laws. It may even be doubted whether, in the absence of a treaty, subjects of a neutral State in time of war are entitled to exemption from military service in defence of a belligerent attack.

In like manner, again, inhabitants called upon for requisitions, who are subjects of a neutral State, are liable in the same way as natives. They follow the fortune of the country in which they are established. In 1870 notice was given in France that

> English subjects having property in France have no right to any special protection for such property, or to be exempt from military contributions to which they may be subjected together with the rest of the inhabitants at the place either of their residence or of the situation of their property; and, furthermore, they have no right, in justice, to complain to the French authorities because their property has been destroyed by an invading army

(Calvo, vol. iv. s. 2200; Bonfils, 1217; Rivier, ii. p. 325).

(*b*) *Enforcement of Respect for Neutral Territory.*—The passage of belligerent forces through neutral territory, whether by permission of the neutral State or against its will, is a distinct infringement of neutrality. In this respect international law has imposed a new duty upon neutrals since the time of Vattel, who held that a belligerent had no ground of complaint if the neutral granted passage to the enemy's troops across his territory, especially when he, the neutral, would be obliged to support his refusal with the sword; for, says he, "no sovereign can require that I should take up arms in his favour unless thereunto by treaty bound" (Vattel, s. 127).

To-day, not only are belligerents bound to respect the territory of neutrals, but the neutral is bound to insure respect for it by belligerents. Thus during the Franco-German war of 1870–71, Belgium and Switzerland, as immediate neighbours of the scene of war, were obliged to keep large military forces on their frontiers to prevent the use of their territory by either belligerent. International law does not, however, forbid the neutral to receive isolated fugitives or even armies of a belligerent, provided they are disarmed and proper measures are taken to prevent their taking any further part in the war.

In 1871 (Feb. 1), when the entire Eastern army of France passed into Switzerland, a convention was concluded at Les Verrières between the Swiss and French generals, under which the fugitive army surrendered their arms, equipments, and munitions to the neutral State, to be retained by the latter until the restoration of peace and final settlement of the expenses incurred by Switzerland. The French army was thus detained till the preliminaries of peace had been signed (March 13–21, 1871). The expenses amounted to eleven millions of francs (Rivier, ii. 397).

As regards the transport over neutral territory of wounded soldiers, the neutral State must be guided primarily by its duty not to assist either belligerent to the detriment of the other. This may even prevail against considerations of humanity, for instance, where the transport of the wounded beyond the area of war operations would relieve the rear of belligerent forces. The Belgian Government had to take some such conditions into

account when, after the surrender of Metz, Germany wished to transport the wounded over Belgian territory. On France protesting, Belgium refused. There does not appear to have been the same objection to the transit through Luxemburg, where it was granted. Great Britain was consulted by Belgium as to the proper course to follow, and her refusal seems to have been due to British counsel (Rivier, ii. 399).

The ports of a nation are a part of its territory. Territorial waters (*q.v.*) are assimilated to the territory, except that the ships of all nations have an innocent right of passage through them. This right of innocent passage is possessed by all, including belligerent vessels. Hostilities within territorial waters are an infringement of the neutrality of the adjacent State.

The neutral State is bound to insure respect for its ports, that is to say, it must prevent hostilities being carried into waters within its dominions. This was brought out in the case of *The General Armstrong*, an American privateer, which, during the war between the United States and Great Britain in 1814, put into a Portuguese harbour in the Azores. From there it fired upon some passing boats from a British warship at anchor in the same port, killing several of the men on board. The British warship attacked the American vessel. The United States made a claim against Portugal for a breach of neutrality. The matter was not settled till, by the Treaty of Washington of February 26, 1851, it was referred to the arbitration of Louis Napoleon, President of the French Republic. He decided in favour of Portugal.

It is manifestly impossible to expect from a neutral State the same vigilance in its territorial waters as in its territory proper, though it is its duty to do what it reasonably can to prevent hostilities within them.

The following rules to prevent as far as possible the use of harbours, ports, coasts, and waters within Her Majesty's territorial jurisdiction in aid of the warlike purposes of either belligerent, were issued by the British Government, April 23, 1898, in connection with the recent war between the United States and Spain:—

Rule 1. During the continuance of the present state of war, all ships of war of either belligerent are prohibited from making use of any port or roadstead in the United Kingdom, the Isle of Man, or the Channel Islands, or in any of Her Majesty's colonies or foreign possessions or dependencies, or of any waters subject to the territorial jurisdiction of the British Crown, as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities for warlike equipment; and no ship of war of either belligerent shall hereafter be permitted to leave any such port, roadstead, or waters from which any vessel of the other belligerent (whether the same shall be a ship of war or a merchant ship) shall have previously departed, until after the expiration of at least twenty-four hours from the departure of such last-mentioned vessel beyond the territorial jurisdiction of Her Majesty.

Rule 2. If there is now in any such port, roadstead, or waters subject to the territorial jurisdiction of the British Crown, any ship of war of either belligerent, such ship of war shall leave such port, roadstead, or waters within such time not less than twenty-four hours as shall be reasonable, having regard to all the circumstances and the condition of such ship as to repairs, provisions, or things necessary for the subsistence of her crew; and if after the date hereof any ship of war of either belligerent shall enter any such port, roadstead, or waters subject to the territorial jurisdiction of the British Crown, such ship shall depart and put to sea within twenty-four hours after her entrance into any such port, roadstead, or waters, except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew, or repairs; in either of which cases the authorities of the port, or of the nearest port (as the case may be), shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been allowed to remain within British waters for the purpose of repair shall continue in any such port, roadstead, or waters for a longer period than twenty-four hours after her necessary

repairs shall have been completed. Provided, nevertheless, that in all cases in which there shall be any vessels (whether ships of war or merchant ships) of both the said belligerent parties in the same port, roadstead, or waters within the territorial jurisdiction of Her Majesty, there shall be an interval of not less than twenty-four hours between the departure therefrom of any such vessel (whether a ship of war or merchant ship) of the one belligerent, and the subsequent departure therefrom of any ship of war of the other belligerent; and the time hereby limited for the departure of such ships of war respectively shall always, in case of necessity, be extended so far as may be requisite for giving effect to this proviso, but no further or otherwise.

Rule 3. No ship of war of either belligerent shall hereafter be permitted, while in any such port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, to take in any supplies, except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel to the nearest port of her own country, or to some nearer destination, and no coal shall again be supplied to any such ship of war in the same or any other port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters as aforesaid.

Rule 4. Armed ships of either belligerent are interdicted from carrying prizes made by them into the ports, harbours, roadsteads, or waters of the United Kingdom, the Isle of Man, the Channel Islands, or any of Her Majesty's colonies or possessions abroad.

The "twenty-four hours rule," to which the first and second of the above rules relate, is not applied with the same rigour by all States.

The French proclamation of neutrality confines its warning to the following:—

The Government further declares that no warship of either belligerent will be permitted to enter and remain with its prizes in any of the ports or roads of France, or its colonies and protected countries, for a longer period than twenty-four hours, except in case of stress of weather (*relâche forcée*) or justifiable detention.

Conversely, the following are the rules provided by the Queen's Regulations and Admiralty Instructions for the government of Her Majesty's ships when as belligerent vessels they visit the ports of a neutral State:—

592. Subject to any limit which the neutral authorities may place upon the number of belligerent cruisers to be admitted into any one of their ports at the same time, the captain by the comity of nations may enter a neutral port with his ship for the purpose of taking shelter from the enemy, or from the weather, or of obtaining provisions or repairs that may be pressingly necessary.

593. He is bound to submit to any regulations which the local authorities may make respecting the place of anchorage, the limitation of the length of stay in the port, the interval to elapse after a hostile cruiser has left the port before his ship may leave in pursuit, etc.

594. He must abstain from any acts of hostility towards the subjects, cruisers, vessels, or other property of the enemy which he may find in the neutral port.

595. He must also abstain from increasing the number of his guns, from procuring military stores, and from augmenting his crew even by the enrolment of British subjects.

Nor may the commander of a British warship take a capture into a neutral port against the will of the local authorities (see Holland, *Manual of Naval Prize Law*, 1888, s. 299).

V. Duty of Impartiality.

While certain acts as between a neutral and a belligerent State are forbidden absolutely, and the neutral State, according to circumstances, is under a relative obligation to prevent the commission by those within its jurisdiction of certain other acts, there is a third class of acts which the usage of nations allows, on condition that both belligerents be permitted to benefit by them to the same extent.

Subject to the right of a belligerent to capture and confiscate

contraband of war (*q.v.*), no purely mercantile act is a violation of neutrality. During the Franco-German war there was correspondence between the Prussian Ambassador in London and Earl Granville as to exports of arms and munitions of war by British merchants to France; and the question of their legality was the subject of an interesting interchange of opinions between the two countries.

Earl Granville asserted that the export of arms to a belligerent country by private citizens of a neutral one was not forbidden by the law of nations, and recalled that Prussia herself during the Crimean war had done nothing to prohibit the copious supply of arms and contraband of war to Russia by the States of the Zollverein—in fact, that the Prussian Government, when this state of things was brought to its notice, affirmed that it could not interfere with the course of trade. Earl Granville further pointed out the difficulty of making any alteration of this rule of free export, inasmuch as any prohibition could easily be evaded by giving a neutral destination to the prohibited articles. The suggestion of exacting a bond from shippers would be "most onerous to the mercantile community, would be easily evaded, and at the best would be no security against ultimate destination" (*Franco-German War*, No. 1, 1871, p. 80).

Similar representations were made to the United States Government as to shipments of men, arms, and ammunition to France by *The Lafayette*. As regards the arms and ammunition, the United States Government contended they were articles of legitimate commerce with which the United States could not interfere, although the vessel might run the risk of being detained by the cruisers of North Germany on her voyage to France (*ibid.*, p. 128).

The German contention in these controversies was that it was incompatible with strict neutrality that French agents should be permitted to buy up in the neutral country, under the eyes and with the cognisance of the neutral Government, "many thousands of breechloaders, revolvers, and pistols, with the requisite ammunition, in order to arm therewith the French people, and make the formation of fresh army corps possible after the regular armies of France have been defeated and surrounded" (*ibid.*, p. 131).

In the present state of international usage, there is no absolute rule for the guidance of the neutral State as regards trade in arms and munitions of war between private citizens within its jurisdiction and the belligerent State. It is quite conceivable that this trade might take such proportions, owing to circumstances favourable to one belligerent as against the other, that the impartiality would remain merely one of principle.

The same remarks apply also to loans of money raised within the jurisdiction of a neutral State. It is quite conceivable that the greater credit of one of the belligerent States would enable it more freely than the other to procure money in neutral countries for the purposes of war. The general practice of States, however, has shown itself unfavourable to imposing any restriction which might in turn be set up against a complaining State. Neutral States did not prevent the issue on their territory of the Russian war loan of 1876–77. In the recent war between China and Japan, no opposition was made by Japan to the raising of a Chinese loan in London. In 1870 both France and Germany made free use of the English money market. Protests have nevertheless been heard. Thus in 1854 France expressed herself strongly on the loans raised by Russia at Berlin, the Hague, and Hamburg.

As a matter of municipal law, that is to say, how far the English Courts will recognise as valid transactions arising out of loans to a belligerent or

insurgent Government, a careful examination of the authorities will be found in Pitt Cobbett's *Leading Cases* (p. 247). The general conclusion to be drawn from them is, that loans made to insurgent forces may not be upheld by our Courts as legal engagements. "Beyond this point they are neither sufficiently explicit nor direct to warrant our extending their principle to commercial loans on behalf of a fully-recognised belligerent Power" (*ibid.*, p. 249).

The arguments against prohibition of the export of arms and munitions of war by private merchants apply of course with still greater force to articles which may or may not, according to circumstances, be considered contraband of war. Thus coal may or may not be contraband. Its character is dependent upon its destination. In reply to an inquiry on the subject, the Foreign Office has declared that—

> Coal is an article not *per se* contraband of war, but if destined for warlike, as opposed to industrial, use, it may become contraband. Whether in any particular case coal is or is not contraband of war is a matter *primâ facie* for the determination of the Prize Court of the captor's nationality, and so long as such decision, when given, does not conflict with well-established principles of international law, Her Majesty's Government will not be prepared to take exception thereto

(Letter of Hon. F. Villiers, Assistant Under-Secretary at the Foreign Office, to the Newport Chamber of Commerce, May 5, 1898).

As regards the historic "rule of 1756"—

> It was held, down to the early years of the present century, that neutral vessels were liable to detention for engaging in a trade which in time of peace was closed to vessels other than those of the enemy State. The colonial and coasting trades at one time customarily closed to foreign vessels are, however, now so generally open to the ships of all nations, that the rule in question has perhaps lost its practical importance. Its operation would also be interfered with by the second clause in the Declaration of Paris of 1856, to the effect that the neutral flag covers enemy's goods with the exception of contraband of war. In any case the rule is not to be enforced by commanders of British cruisers without special instructions

(Holland, *Manual*, p. 41).

VI. Rights of Belligerents affecting Subjects of Neutral States.

(*a*) *Visit and Search.*—Neutral private or merchant vessels are bound to submit to the exercise of this belligerent right. As between the Powers bound by the Declaration of Paris, privateering (*q.v.*) is abolished. Several Powers, including the United States and Spain, however, are not parties to it, and are still entitled to grant letters of marque. Neutral merchant ships are therefore still exposed to visit and search by privateers commissioned by these Powers.

(*b*) *Blockade* (*q.v.*).

(*c*) *Capture and Confiscation of Neutral Private or Merchant Vessels and Goods.*—See Prize Law.

VII. Proclamations of Neutrality.

A proclamation of neutrality is binding as between the State issuing it and its subjects or citizens, so far as its laws sanction it. As between States, it may be used against the State issuing it as an acknowledgment of liability. On the other hand, it serves as notice to belligerents on any doubtful point it may mention. Great Britain issues a very full proclamation, France a short one, and Germany and Austria none at all. There are good arguments in favour of all three systems. The British view is that all persons within the British jurisdiction should at once and as fully

as possible be informed of any exceptional duties and liabilities with which they cannot be familiar.

A recent British proclamation issued will be found in the *London Gazette*, Extraordinary, of April 26, 1898.

VIII. Neutralisation of Territory.

Treaties have been concluded from time to time by which the contracting States have agreed to consider certain territories as neutral. Such States are supposed to be guaranteed against dismemberment by the contracting States, and they are debarred by their neutrality from taking part in any hostilities except for the purpose of resisting attempted violations of their territory.

Switzerland, Belgium, Luxemburg, and the independent State of the Congo, are instances of Neutralised Territory (see a full exposition of the subject in Rivier, i. 108).

[*Authorities.*—Hall, *The Rights and Duties of Neutrals*, London, 1874; Kleen, *Lois et Usages de la Neutralité*, Paris, 1898; Gessner, *Le Droit des Neutres sur Mer*, 2nd ed., Berlin, 1876; Hautefeuille, *Droits et Devoirs des Nations Neutres en Temps de Guerre Maritime*, 3rd ed., Paris, 1868; Godchot, *Les Neutres*, Algiers, 1891; Bergbohm, *Die Bewaffnete Neutralität*, Berlin, 1884; Ward, *Treatise on the Relative Rights and Duties of Belligerent and Neutral Powers in Maritime Affairs*, London, 1801, reprinted 1875; Vattel, *Law of Nations*, London, 1795, ch. vii.; Hosack, *The Rights of British and Neutral Commerce*, London, 1854; Katchenowsky, *Prize Law: particularly with reference to the Duties and Obligations of Belligerents and Neutrals*, trans. Pratt, London, 1867; Ortolan, *Règles Internationales et Diplomatie de la Mer*, 4th ed., Paris, 1864; Phillimore, *International Law*, vol. iii. 2nd ed., London, 1873; Twiss, *Law of Nations in Time of War*, 2nd ed., London, 1875, chs. xi. and xii.; Wharton, *Digest of the International Law of the United States*, ch. xxi., Washington, 1886; Holtzendorff's *Handbuch des Völkerrechts*, Hamburg, 1889, vol. iv. (Geffcken, *Die Neutralität*, pp. 605 *et seq.*); Perels, *Manuel de Droit Maritime*, trad. Arendt, Paris, 1884, pp. 237 *et seq.*; Woolsey, *Introduction to the Study of International Law*, 5th ed., London, 1879, Part ii. ch. ii.; Holland, *A Manual of Naval Prize Law*, London, 1888; Rivier, *Principes du Droit des Gens*, Paris, 1896, ss. 68 and 69; Guelle, *Précis des Lois de la Guerre*, Paris, 1884, Appendix; Holland, *Jurisprudence*, p. 357, 8th ed., Oxford, 1896; Pitt Cobbett, *Leading Cases and Opinions on International Law*, 2nd ed., London, 1892; Risley, *The Law of War*, London, 1898, Part iii.]

Passport—A sea brief, sea letter or pass, granted by the supreme authority of a nation in time of war, declaring that a ship sails under the authority of such nation. With the flag, it is the principal proof of neutrality (*The Success*, 1 Dod. 132; *The Vrow Elizabeth*, 5 Rob. C. 4; *Vegetentia*, 1 Rob. C. 1; *The Vreede Sholtys*, 5 Rob. C. 5; see Abbott, *Merchant Shipping*, 12th ed., p. 296 *n.*).

The more familiar sense of the term is that of a document delivered by the Foreign Office, or under its authority, requesting foreign Governments to afford aid and protection to the holder. Such passports are granted to all persons either known to the Secretary of State or recommended to him by some person who is known to him; or upon the application of any banking firm established in London or in any part of the United Kingdom; or upon the production of a certificate of identity signed by any mayor, magistrate,

justice of the peace, minister of religion, physician, surgeon, solicitor, or notary resident in the United Kingdom. In certain cases the applicant's certificate of birth must be produced, in addition to the certificate of identity.

There are some special rules as regards naturalised British subjects, who, if resident in London, or in the suburbs, must *inter alia* apply personally for their passports at the Foreign Office.

Persons abroad applying for a passport should address themselves to the nearest British mission or consulate. A passport cannot be issued abroad to a colonial naturalised British subject, except for a direct journey to the United Kingdom or to the colony where he has been naturalised.

British subjects are now free to enter Belgium, France, Holland, Italy, Denmark, Sweden, and Norway without passports (*Foreign Office List*, 1897).

In diplomacy, when a diplomatic agent demands or receives his passport, it is a mark of displeasure, and generally the first step in a rupture.

Sheriff-Clerk.—The Sheriff-Clerk is the clerk to the Sheriff's Court. His powers and duties are to act as clerk in every matter in which the Sheriff and Sheriff's-Substitute have jurisdiction. He is appointed by the Crown, and he holds office *ad vitam aut culpam*. Professor Dove Wilson says: "Although the counties which have been united into Sheriffdoms have, under the Act of 1870, disappeared as separate jurisdictions, it is still usual to appoint a separate clerk to act for each of them; and doubtless the Crown might, if it saw cause, make separate appointments for sub-divisions of single counties" (*Sheriff-Court Practice*, p. 39). The Sheriff-Clerk is bound to discharge the duties of his office *personally* (6 Geo. IV. c. 23, s. 6). He may, however, appoint deputies to assist him and to act for him during his necessary absence (*Heddle*, 1827, 5 S. 503). For his deputy he is responsible; but, it would seem, not for the illegal acts of his deputy (*Watt*, 1874, 1 R. (H. L.) 21, per Ld. Chelmsford, p. 26). Sheriff-Clerks and their deputies are prohibited from practising, either directly or indirectly, before their own Courts (A. S., 10th July 1839, s. 160; A. S., 6th March 1783; *Smith*, 1827, 5 S. 848; but see, as to unpaid deputy who acts only occasionally, *Edie*, 1879, 17 S. L. R. 36). Where the Sheriff-Clerk is personally interested in the suit, the Sheriff ought to appoint a clerk for the particular suit (*Manson*, 1871, 9 M 492; *Macbeth*, 1873, 11 M. 404).

In the case of a vacancy the Court of Session may, on the application of the Lord Advocate, make an interim appointment (*Lord Advocate*, 1880, 8 R. 13).

Territorial Waters (French, *Mer territoriale*; German, *Küstengewässer*), also called *Jurisdictional Waters*.

The territory of a State comprises its ports and harbours, the mouths of its rivers, and its landlocked bays. By the usage of nations the territorial jurisdiction extends also a marine league seawards. This belt of sea is known as *territorial waters*.

The present limits of territorial waters are practically a reduction to reasonable dimensions of claims made by different States to much greater parts and belts of the high sea. After claiming a hundred miles, sixty miles, two days' journey, range of sight, etc., governments and authors in

the middle of the seventeenth century began to see that the real criterion of sovereignty over water was the ability to make it felt effectively from the coast.

Starting from the usual respect paid to forts and castles, and from the actual effective occupation which certain States had been able to exercise over parts of the sea, Bynkershoek, in his famous *De dominio maris* (1702), worked out the idea that occupation ought to be acknowledged where it can in fact be exercised, that the range of cannon was the distance to which from the adjacent territory a State could assert its dominion, and that therefore the territorial waters extended to this distance and no farther (*terræ dominium finitur ubi finitur armorum vis*). This provided reasonable ground for the claim to the margin of sea which had become necessary, more particularly for the protection of national fisheries. The three-mile limit seems to have been first adopted by the United States when in 1793 Jefferson, then Secretary of State, wrote to the British Minister (November 8) that the limit of a sea league had been provisionally taken as the limit of the territorial waters of the United States. A sea league was supposed at the time to be about the range of cannon. Since then different international treaties and conventions have sanctioned this distance; it was adopted in the North Seas Fisheries Convention (*q.v.*), and it may be said to be the more generally accepted limit at the present day.

The nature of the jurisdiction exercised by the sovereign of the adjacent territory has been the subject of much discussion. The *Franconia* case (*q.v.*), officially entitled *R.* v. *Keyn*, 1876, 2 Ex. D. 63, was the occasion of a full examination of the subject, and led two years later to the adoption of the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), fixing—

> The law relating to the trial of offences committed on the sea within a certain distance of the coasts of Her Majesty's dominions.

Sec. 7 provides that—

> Any part of the open sea within one marine league of the coast, measured from low water mark, shall be deemed to be open sea within the territorial waters of Her Majesty's dominions;

and any offence committed within this zone, even in a foreign ship by a person whether a subject of Her Majesty or not,

> is (s. 2) an offence within the jurisdiction of the admiral . . . and the person who has committed such an offence may be arrested, tried, and punished accordingly.

It has been doubted whether this jurisdiction claimed by the Act over *passing* foreign vessels is in accordance with the law of nations (see *supra*). Probably in anticipation of such an objection, the Act provides in effect—

> That proceedings for the trial and punishment of a person not being a subject of Her Majesty shall not be instituted in any Court of the United Kingdom except with the consent of one of Her Majesty's principal Secretaries of State, nor in any of the dominions out of the United Kingdom except with the leave of the governor thereof (s. 3).

As regards the territorial waters of foreign States, a provision is inserted in the Queen's Regulations and Admiralty Instructions for their due recognition by naval officers and men. It runs as follows:—

> The *territorial limits* of foreign Powers in amity with Her Majesty are to be scrupulously respected. No exercise of authority over the persons, the ships, or the

goods of another nation is permissible within such limits, nor is great gun practice to take place whether at floating targets or at objects on shore within such limits without the permission of the authorities (s. 455).

It is very generally agreed that the three-mile limit no longer meets contemporary requirements. A Select Committee appointed in 1893 "to consider the expediency of adopting measures for the preservation and improvement of the sea fisheries in the sea around the British islands . . . the protection of defined areas, and other like regulations, international or otherwise," in their report made the following suggestion:—

Your committee are sensible of the difficulties of making international regulations, but are nevertheless of opinion that the best method for effectively governing the operations of the various classes of fishermen, and, at the same time, for securing, so far as it may be found possible, the proper protection of spawning and immature fish, would be to throw the responsibility of these duties, so far as the waters immediately adjacent to the various countries are concerned, on those various countries; that, for the effective realisation of this object, the present territorial limit of three miles is insufficient, and that, for fishery purposes alone, this limit should be extended, provided such extension can be effected upon an international basis, and with due regard to the rights and interests of all nations. Your committee would earnestly recommend that a proposition on these lines should be submitted to an international conference of the Powers who border on the North Sea.

The *Institute of International Law* in 1894 drew up a series of rules which express the almost unanimous opinion of specialists in international law. The chief point in the rules adopted, namely, a distinction between the fishery limit and that for other sovereign rights and neutrality, is explained in the following passage from a report to the *International Law Association* on the same subject by Mr. T. Barclay, to whose initiative the distinction was due:—

Text-book writers are agreed that cannon-shot range from shore was the original basis of the existing three-mile rule, and they are also agreed that this distance falls very far short of contemporary cannon range. There are thus practically two limits from shore known, at least historically, to international law for the determination of a State's jurisdictional zone seawards, namely, the distance within which the State can *de facto* exert its authority by the use of artillery on shore, and the other a fixed distance of three marine miles, which most States in practice apply. These two distances being no longer identical, it has become a question whether there is not in reality a distinction of principle between them; whether the varying and uncertain cannon-shot limit can be a proper basis for sovereign rights; and, if it cannot, whether, on the other hand, it may not have a juridical basis in respect of the right of the neutral not to be molested by acts between belligerents. When the modern idea of territorial waters came into existence, neutral States were protected against acts between belligerents within a distance which was the then cannon range. Why should they no longer be protected within that range? No change has taken place in the opinions of men which would abridge the rights of neutrals. Quite the contrary. My proposal to the Institute, therefore, is to reaffirm the limit of cannon range as the public law of Europe, but to confine its application to the right of the neutral as founded in reason.

(See Report of Brussels Meeting of Association, 1895, p. 4.)

If States are not yet agreed whether the proper limit is three miles (Great Britain, France, United States), or six miles (Spain), or cannon range (Germany), they are all agreed that whatever the limit be, fisheries within it are reserved to the subjects and citizens of the adjacent State exclusively, that all States have a right of innocent passage through territorial waters but are subject to the jurisdiction of the adjacent State if they cast anchor or hover in them, and that if the adjacent State be neutral, acts of war committed within them are an infringement of its neutrality.

As regards waters which the adjacent State can physically close against navigation, but which are in communication with the high sea, States practically recognise the following distinctions:—

1. Inland waters surrounded by the territory of the same State, and serving only as a means of access to ports of the State by whose territory they are surrounded, though communicating with the high sea, if the breadth of the channel of communication by its narrowness and the configuration of the coast practically severs such waters from the open sea, are classed with national rivers, and their estuaries as inland waters. [The Zuidersee, the North German Haffs, the Sea of Azov are instances of such waters.]

2. Bays, the headlands of which, though wider asunder than twice the ordinary distance seawards of territorial waters, project so as to place them unquestionably beyond the line of what may be called "inter-foreign" communication are territorial waters. Such bays are the Bay of Cancale in France (seventeen miles wide) and the Scotch firths. It is difficult, however, to reconcile the practice in these instances with general practice as regards fishery limits.

3. Channels between territory of the same State, though they can be used in "inter-foreign" communication, if not indispensable or even very useful for such navigation, or if they serve *de facto* only for communication with ports of the adjacent State, are territorial or inland as the case may be. The St. George's Channel is an instance of the one, the Solent of the other.

4. Channels indispensable or of extreme utility for "inter-foreign" communication, both shores of which belong to the same State, however narrow, may be held to be territorial waters. Such are the Straits of Messina and the Dardanelles (subject to treaty stipulations).

5. Channels serving for international communication between shores belonging to different States, such as the Straits of Gibraltar, the Sound, the Lymoon Pass, etc., are also territorial waters.

For bays under the Conventions between Great Britain and France, as well as under the North Sea Fisheries Convention, the three-mile limit is measured from a straight line drawn from headland to headland at the points where they are ten miles across.

[*Authorities.*—Boroughs, *The Sovereignty of the British Seas*, 1633; Selden, *Mare Clausum*, 1635; Bynkershoek, *De dominio maris*, 1702; Rayneval, *De la liberté des mers*, Paris, 1811; Hall on the *Rights of the Crown and the Privileges of the Subject in the Seashores of the Realm*, London, 1830; Bona Christave, *Du rivage de la mer en droit romain et en droit français*, Poitiers, 1872; Guéret-Desnoyers, *De la mer et ses rivages*, Caen, 1876; Twiss, *The Law of Nations in Time of Peace*, ss. 180–186, Oxford, 1884; Perels, *Droit Maritime International*, tran. by Arendt, p. 24, Paris, 1884; Stoerk, *Das Seegebiet* and *Das offene Meer*, in Holtzendorff's *Handbuch des Völkerrechts*, vol. ii., Hamburg, 1887; Imbart-Latour, *La mer territoriale*, Paris, 1889; Visser, *De territoriale Zee*, Amersfoort, 1894; Godey, *La mer cotière*, Paris, 1896; Schücking, *Das Küstenmeer im internationalen Rechte*, Gottingen, 1897. See also *Journal de droit international privé*, Phillimore, vol. iv. (1877), p. 161; Renault, "De l'exercice de la juridiction criminelle d'un etat dans la mer territoriale," vol. vi. (1879), p. 238; Wharton, "Des eaux territoriales ou de la zone maritime," vol. xiii. (1886), p. 72; also Fedozzi, "Des délits à bord des navires marchands dans les eaux territoriales etrangères," in the *Revue de droit international public*, vol. iv. (1897), p. 202; in the same Review, vol. v. (1898), Lapradelle, "Le droit de l'etat sur la mer territoriale," and (1894), Martens, "Le tribunal d'arbitrage de Paris et la mer territoriale," vol. i.; Barclay, "Territorial Waters," Report read at Seventeenth Conference of the International Law Association, Brussels, 1895; also Barclay, "Report and Conclusions of the Territorial Waters Committee of the Institute of International Law, 1892" (see *Annuaire de l'institut de droit international*, vol. xii.), and "Definition and *régime* Territorial Waters, 1894" (*Annuaire de l'inst.* vol. xiii.).]

Tramway.

NOTE.—*The sections and rules referred to in this article are the sections of the Tramways Act*, 1870, *and the rules made by the Board of Trade under that Act.*

Authority to construct and work a tramway may, in England or Wales, be obtained either by special Act of Parliament or by a Provisional Order made by the Board of Trade under the Tramways Act, 1870 (33 & 34 Vict. c. 78), and confirmed by Act of Parliament. Where a tramway was laid down in a public road, without statutory authority, it was held to be a public nuisance, though it was constructed under a contract with the road authority, and though it was for the conveyance of the public generally (*R.* v. *Train*, 1863, 2 B. & S. 640).

The Tramways Act, 1870, does not extend to Ireland (s. 2). The law relating to tramways in Ireland is to be found in the Tramways (Ireland) Act, 1860, and the Tramways (Ireland) Amendment Act, 1861, as amended by the Act of 34 & 35 Vict. c. 114, the Act of 39 & 40 Vict. c. 65, the Act of 44 & 45 Vict. c. 17, the Tramways and Public Companies (Ireland) Act, 1883, the Tramways and Public Companies (Ireland) Amendment Act, 1884, the Public Works Loans (Tramways, Ireland) Act, 1886, the Tramways (Ireland) Amendment Act, 1891, the Transfer of Railways (Ireland) Act, 1891, and the Tramways (Ireland) Act, 1895.

As to the construction of tramways for the purposes of the War Department, see the Military Tramways Act, 1887.

Part I. of the Tramways Act, 1870 (ss. 4–21), relates to the obtaining of Provisional Orders authorising the construction of tramways; and Parts II. and III. (ss. 22–64) contain provisions with respect to the construction and working of tramways. The provisions of Parts II. and III. apply to every tramway authorised after the passing of the Act, whether by Provisional Order or by special Act, and are deemed to be incorporated with every such Provisional Order or special Act, except so far as they are expressly varied or excepted thereby (s. 22). Any person, persons, corporation, company, or local authority authorised by Provisional Order or by special Act to construct a tramway, are, in the Act and in this article, referred to as "the promoters" (ss. 4, 24).

Provisional Orders.—Provisional Orders authorising the construction of tramways in any district may be obtained by the local authority of such district; or by any person, persons, corporation, or company, with the consent of such local authority, or of the road authority of such district where such district is, or forms part of, a highway district formed under the provisions of the Highway Acts; but where in any district there is a road authority distinct from the local authority, the consent of such road authority is also necessary in any case where power is sought to break up any road subject to its jurisdiction (s. 4; rr. 1 and 2). Where it is proposed to lay down a tramway in two or more districts, and any local or road authority having jurisdiction in any of such districts does not consent thereto, the Board of Trade may, nevertheless, make a Provisional Order authorising the construction of the tramway if it is satisfied, after inquiry, that two-thirds of the length of the tramway is proposed to be laid in districts the authorities of which do consent thereto (s. 5).

The promoters intending to apply for a Provisional Order must, during the month of October or November next before their application, publish notice of such intention by advertisement, according to the regulations in Part I. of the Sched. B. to the Act; and must, on or before the 15th

of December, serve notice of such intention, in accordance with the Standing Orders of both Houses of Parliament for the time being in force with respect to bills for the construction of tramways. They must also, on or before the 30th of November, deposit a copy of the advertisement published by them, and a plan and section of the proposed works, according to the regulations in Part II. of the Sched. B.; and on or before the 23rd of December, the documents described in Part III. of such Sched., according to the regulations therein contained (s. 6; see rr. 3–15). If it appears expedient to the Board of Trade, after having considered any such application, and any objections thereto that may have been lodged, that the application should be granted, with or without addition or modification, or subject or not to any condition or restriction, the Board of Trade may settle and make a Provisional Order accordingly; but no such Provisional Order may authorise the acquisition of land otherwise than by agreement, or the acquisition of lands, even by agreement, except to an extent therein limited, or the construction of a tramway elsewhere than along or across a public carriageway, or upon land taken by agreement (ss. 7, 8; and see rr. 16 and 17).

Every tramway in a town which is authorised by Provisional Order must be constructed and maintained as nearly as may be in the middle of the road; and no tramway may be authorised by any Provisional Order to be so laid, that for a distance of 30 feet or upwards a less space than 9 feet 6 inches may intervene between the outside of the footpath on either side of the road and the nearest rail of the tramway, if one-third of the owners or occupiers of the houses or shops abutting on that part of the road express their dissent from the tramway being so laid (s. 9; see r. 15). The special Act of the Edinburgh Tramways Co. departed from this rule requiring an intervention of 9 feet 6 inches between the tramway rail and nearest footpath, and it was held that the frontagers of a certain narrow thoroughfare, who had abstained from opposing the bill in reliance upon certain preliminary agreements, were excluded by the Act, though it authorised precisely what they had been most anxious to prevent (*Edinburgh Street Tramways Co.* v. *Black*, 1873, 11 M. (H. L.) 57).

The Provisional Order must specify the nature of the traffic for which the tramway is to be used, and the tolls and charges which may be demanded and taken by the promoters in respect of the same, with such regulations relating to such traffic, tolls, and charges as the Board of Trade deems necessary and proper (s. 10). As to the form of the draft Provisional Order required by the Board of Trade, see r. 16.

After the Provisional Order is ready, and before it is introduced by the Board of Trade into a confirming bill, the promoters, unless they are a local authority, must, if they are not possessed of a tramway already open for public traffic, which has during the previous year paid dividends on their ordinary share capital, pay into Court as a deposit not less than 5 per cent. on the estimated expense of the construction of the tramway, or an equivalent sum of bank annuities, or of stocks, funds, or securities in which cash under the control of the Court is permitted to be invested (s. 12; r. 20).

When a Provisional Order has been made and delivered to the promoters, they must forthwith publish it by deposit and advertisement according to the regulations in Part IV. of the Sched. B. to the Act; and if any alteration of the plan and section originally deposited has been made, a copy of such plan and section, showing the alteration, must also be deposited (s. 13; r. 18). Upon proof of such deposit and advertisement, the Board of

Trade must procure a bill to be introduced, for an Act to confirm the Provisional Order; and such bill may be opposed, as in the case of a bill for a special Act (s. 14; r. 19). The provisions of the Lands Clauses Acts are deemed to be incorporated with every such Provisional Order, except so far as they are expressly excepted or varied thereby, and except with respect to the purchase and taking of lands otherwise than by agreement, and to the entry upon lands by the promoters (s. 15). The Board of Trade, on the application of the promoters, may from time to time revoke, amend, extend, or vary any such Provisional Order by a further Provisional Order, to be applied for, made, and confirmed in like manner and subject to the like conditions as the former Provisional Order (s. 16).

When a tramway has been completed under the authority of a Provisional Order by a local authority, or where a local authority has acquired possession of any tramway under the provisions of the Act, such authority may, with the consent of the Board of Trade, from time to time grant leases, for terms not exceeding twenty-one years, of the rights of user of the tramway, and of demanding and taking the tolls and charges authorised; or such authority may leave the tramway open to be used by the public, and may, in respect of such user, demand and take the tolls and charges authorised; but the Act does not authorise any local authority to place or run carriages on any tramway, and to demand and take tolls and charges in respect of the use of such carriages (s. 19). Notice of the intention to make any such lease must be advertised, and a copy of the lease deposited, according to the regulations contained in Part I. of the Sched. C to the Act; and every such lease must be approved by the Board of Trade (*ibid.*).

If the promoters, empowered by Provisional Order to make a tramway, do not, within two years from the date of such Order, or within any shorter period prescribed therein, complete the tramway and open it for public traffic; or if within one year, or such shorter period as may be prescribed, the works are not substantially commenced, or, if having been commenced, they are suspended without sufficient reason, the powers given by the Provisional Order to the promoters cease, unless the time be prolonged by the special direction of the Board of Trade (s. 18; see rr. 1–5). As to the penalties for non-completion of the tramway, and the application of the deposit made under sec 12 and rule 20, see rr. 21–24; *In re Lowestoft, etc., Tramways Co.*, 1877, 6 Ch. D. 484; *In re Tynemouth Tramway Co.*, 1873, 33 L. T. 8; *In re Bradford Tramways Co.*, 1876, 4 Ch. D. 18; *Ex parte Bradford Tramways Co.*, [1893] 3 Ch. 463; *In re Dudley Tramways Co.*, 1893, 63 L. J. Ch. 108.

Construction of Tramway.—The tramway must be constructed on such gauge as may be prescribed by the Provisional Order or special Act, and if no gauge is there prescribed, on such gauge as will admit of the use of carriages constructed for use upon railways of a gauge of 4 feet 8½ inches, and must be laid and maintained in such manner that the uppermost surface of the rail is on a level with the surface of the road (s. 25). The deposited plans and sections are binding so far, and only so far, as they are incorporated in the Provisional Order or Special Act (*Edinburgh Street Tramways Co.* v. *Black*, 1873, L. R. 2 H. L. Sc. 336; *North British Rwy. Co.* v. *Tod*, 1846, 12 Cl. & Fin. 722). Before opening the tramway for public traffic, the promoters must give fourteen days' notice to the Board of Trade, and must not open it until it has been inspected and certified by the Board of Trade to be fit for such traffic (s. 25, r. 25).

The promoters may from time to time open and break up any road, for the purpose of making, maintaining, and renewing the tramway, but before

commencing to do so, must give at least seven days' notice to the road authority, specifying the time at which they will commence the work, and the portion of the road proposed to be opened or broken up; and they may not open, break up, or alter the level of any road (see *St. Luke's Vestry* v. *North Metropolitan Tramways Co.*, 1876, 1 Q. B. D. 760), except under the superintendence and to the reasonable satisfaction of the road authority, unless that authority neglects to give such superintendence at the time specified in the notice, or discontinues it during the work. The promoters may not, without the consent of the road authority, open or break up at any one time a greater length than 100 yards of any road not exceeding a quarter of a mile in length, and in the case of a road exceeding that length, must leave an interval of at least a quarter of a mile between any two places at which they open or break up the road, and must not open or break up at any such place a greater length than 100 yards. And where any work which the promoters are empowered to construct affects or in any way interferes with the structural works of any bridge vested in any person or company distinct from the road authority, or with any railway or tramway crossing the road on the level, such work must be constructed and maintained under the superintendence and to the reasonable satisfaction of such person or company, or the person or company owning the railway or tramway, as the case may be, unless after notice given seven days before the commencement of the work such superintendence is refused or withheld (s. 26). The promoters must pay the expenses of the superintendence of any road authority, person, or company under this section (*ibid.*).

The portion of any road opened or broken up must, with all convenient speed, and in all cases within four weeks (unless the road authority otherwise consents), be restored to the satisfaction of the road authority, and all surplus material and rubbish cleared away, by the promoters, and in the meantime must be fenced and watched, and properly lighted at night; and the promoters must pay the expenses of the repair of the road for six months after it is restored, so far as such expenses are increased by the opening or breaking up (s. 27). For every offence against this section the promoters are liable to a penalty not exceeding £20, and a further penalty not exceeding £5 for each day during which the offence continues after the first day (*ibid.*).

The promoters must at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority directs, so much of any road on which the tramway is laid as lies between the rails and (where two tramways are laid at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends 18 inches beyond the rails on each side of the tramway; and if the promoters abandon any part of their undertaking, and take up any part of the tramway, they must restore the road, and clear away all surplus material and rubbish, within six weeks at the most, unless the road authority consents to extend the time (s. 28). If the promoters fail to comply with the provisions of this section, the road authority, after seven days' notice, may itself do the works necessary for the repair and maintenance or restoration of the road, to the extent mentioned, and the promoters must repay the expense incurred (*ibid.*). These provisions are usually supplemented by clauses in the Provisional Order or special Act, requiring the promoters, under penalties, to construct and maintain the tramway in good condition, and also providing for the application of excavated materials.

The road authority and the promoters may from time to time enter into,

and alter or renew, contracts or arrangements with respect to the paving and keeping in repair of the whole or any portion of any road on which the tramway is laid, and the proportion to be paid by either of them of the expense of such paving and keeping in repair (s. 29). Where a road authority enters into a contract under this section, by which it undertakes the repair of the road, the effect of the contract is to transfer to the road authority any liability for damage caused by the non-repair of the road which would, but for such contract, be cast on the promoters (*Alldred* v. *West Metropolitan Tramways Co.*, [1891] 2 Q. B. 398; *Howitt* v. *Nottingham Tramways Co.*, 1883, 12 Q. B. D. 16).

The promoters are empowered by sec. 30, subject to the provisions and restrictions therein contained, where it is necessary for the purpose of constructing, repairing, or renewing the tramway, or where it is expedient for the purpose of preventing frequent interruption of the traffic by repairs or works in connection with the same, to alter the position of any gas or water mains or pipes, or any telegraphic or other tubes, wires, or apparatus.

Sec. 31 contains provisions for the protection of sewerage and drainage works where such works are in any way interfered with or affected by the tramway or works connected therewith; and sec. 32 provides that nothing in the Act shall take away or abridge any power to open or break up any road upon which the tramway is laid, or any other power vested in any local or road authority for any of the purposes for which such authority is constituted, or in any company or person for the purpose of laying down, repairing, altering, or removing any gas or water pipe, or any telegraphic or other tube, wire, or apparatus; and that no such authority, company, or person shall be liable to pay compensation to the promoters or lessees for injury done to the tramway, or for loss of traffic or other injury occasioned by the reasonable exercise of any such powers; but such powers must be exercised so as to cause as little detriment or inconvenience to the promoters and lessees as circumstances admit, and before the commencement of any work whereby the traffic on the tramway will be interrupted, at least eighteen hours' notice must (except in cases of urgency) be given to the promoters and lessees (s. 32; see *Wolverhampton Tramways Co.* v. *Great Western Rwy. Co.*, 1887, 56 L. J. Q. B. 190). If any difference arises between the promoters or their lessees on the one hand, and any such authority, company, or person, or any authority to whom any sewer or drain belongs on the other hand, with respect to any matter or thing regulated by or comprised in the Act, such difference must be settled by a referee, to be nominated by the Board of Trade on the application of either party (s. 33; see *R.* v. *Croydon, etc., Tramways Co.*, 1887, 18 Q. B. D. 39; *Bristol Tramways Co.* v. *Mayor of Bristol*, 1890, 25 Q. B. D. 427).

The rights of the owners or occupiers of any mines or minerals lying under or adjacent to any road on which the tramway is laid are not affected by the Act, nor are such owners or occupiers liable to make good or pay compensation for any damage occasioned to the tramway by working such mines or minerals in the usual and ordinary course (s. 59).

Working of Tramway.—The promoters and their lessees may use carriages with flange wheels, or wheels suitable only to run on the rails of the tramway; and, subject to the provisions of the Provisional Order or special Act, they and the licensees of the Board of Trade under the Act are entitled to the exclusive use of the tramway for such carriages (s. 34); but the right of the public to pass along or across every part of any road upon which the tramway is laid, whether on or off the tramway, with carriages

not having flange wheels, or wheels suitable only to run on the rails, is not taken away nor abridged by the Act, or by any by-law made under it (s. 62); and the promoters do not acquire any right other than that of user of any road upon which the tramway is laid (s. 57). Nor does the Act take away or affect any power which any road authority, or the owners, commissioners, undertakers, or lessees of any railway, tramway, or inland navigation, may have by law to widen, alter, divert, or improve any road, railway, tramway, or inland navigation, nor the powers of the local authority or police in any district to regulate the traffic of any road upon which the tramway is laid down; and such authority or police may exercise their authority as well on as off the tramway, and with respect as well to the traffic of the promoters and their lessees as to the traffic of other persons (ss. 60, 61).

No carriage used on any tramway authorised after 1870 may extend beyond the outer edge of the wheels of such carriage more than 11 inches on each side; and except where otherwise provided by the Provisional Order or special Act, all carriages must be moved by animal power only (s. 34). The use of mechanical power is sometimes authorised by a Provisional Order, subject to such regulations as are therein prescribed, and to any further regulations made from time to time by the Board of Trade. Steam engines authorised to be used on a tramway are not locomotives within the meaning of sec. 32 of the Highways and Locomotives (Amendment) Act, 1878, and do not require to be licensed by the county authority (*Bell* v. *Stockton Tramways Co.*, 1887, 51 J. P. 804).

The promoters or lessees may demand and take, in respect of the tramway, tolls and charges not exceeding the sums specified in the Provisional Order or special Act, subject to the regulations therein specified. A list of the tolls and charges authorised to be taken must be exhibited in a conspicuous place inside and outside each of the carriages used on the tramway (s. 45). The Provisional Order or special Act generally provides that the tolls for passengers shall not exceed one penny a mile, and sometimes requires workmen's cars to be run, between certain specified times, at fares not exceeding a halfpenny a mile. Where it was provided that the tolls, etc., should be paid to such persons, and at such places upon or near to the tramway, and in such manner and under such regulations as the promoters should by notice appoint, it was held that a by-law requiring every passenger upon demand to pay the fare legally demandable for the journey was valid and reasonable, and that a passenger travelling on the tramway was liable to pay the fare whenever it was demanded by the conductor, though the journey had not been completed (*Eggington* v. *Pearl*, 1873, 33 L. T. 428).

Sec. 55 provides that the promoters or lessees, as the case may be, shall be answerable for all accidents, damages, and injuries happening through their act or default, or through the act or default of any person in their employment, by reason or in consequence of any of their works or carriages, and shall save harmless all road and other authorities, companies, or bodies, and their officers and servants, from all damages and costs in respect of such accidents, damages, and injuries. It has been held, however, that the section applies only to a wrongful act or default, and does not make the promoters or lessees answerable for mere accident caused without negligence by their use of tramcars (*Brocklehurst* v. *Manchester Tramways Co.*, 1886, 17 Q. B. D. 118; but see *Sadler* v. *South Staffordshire Tramways Co.*, 1889, 23 Q. B. D. 17). As to the liability of the promoters or lessees for assaults committed by their servants, see *Smith* v. *North Metropolitan Tramways Co.*,

1891, 55 J. P. 630; *Seymour* v. *Greenwood*, 1861, 30 L. J. Ex. 327; *Dyer* v. *Munday*, [1895] 1 Q. B. 742.

As to the duty of the promoters or lessees to carry Her Majesty's mails, see the Conveyance of Mails Act, 1893.

Licences to use Tramways.—If at any time after a tramway has been for three years opened for public traffic in any district, it is represented in writing to the Board of Trade by the local authority of such district, or by twenty inhabitant ratepayers of such district, or by the road authority of any road in which the tramway is laid, that the public are deprived of the full benefit of the tramway, the Board of Trade may direct an inquiry by a referee, and if the referee reports that the truth of the representation has been proved to his satisfaction, the Board may from time to time grant licences to any company or person to use the tramway, or any part thereof, in addition to the promoters or their lessees, for such traffic as is authorised by the Provisional Order or special Act, with carriages to be approved by the Board, and may at any time revoke, alter, or modify any such licence for good cause (ss. 35, 63). Every such licence must be for not less than one year nor more than three years from the date thereof, but may be renewed by the Board; and the licence must direct the number of carriages to be run by the licensee, and the mode in which, and times at which, they shall be run; and must specify the tolls to be paid to the promoters or to their lessees by the licensee for the use of the tramway (s. 35).

Every licensee must, on demand by a duly authorised officer or servant of the promoters or their lessees, give an account in writing of the number of passengers conveyed by the carriages used by him on the tramway; and if on demand any licensee fails to pay the tolls due, the promoters or their lessees, to whom the tolls are payable, may detain and sell the licensee's carriages, and retain out of the proceeds the tolls payable (ss. 36, 37). If any licensee fails to give such account to such officer or servant demanding the same, or with intent to avoid payment of any tolls gives a false account, he is liable for every such offence to a penalty not exceeding £5, such penalty to be in addition to any tolls payable (s. 38). If any dispute arises concerning the amount of the tolls due, or concerning the charges occasioned by any detention or sale of any carriage, it may be settled by two justices (s. 39).

A licensee is answerable for any trespass or damage done by his carriages or horses, or by any of the servants or persons employed by him, to or upon the tramway, or to or upon the property of any other person; and, without prejudice to the right of action against the licensee or any other person, every such servant or other person may be convicted of such trespass or damage before two justices, and the justices may assess the amount of damages to be paid by the licensee to the promoters, lessees, or persons injured, provided the amount does not exceed £50 (s. 40).

Discontinuance of Tramway.—If at any time after the opening of a tramway for traffic the promoters discontinue the working of such tramway or any part thereof for the space of three months, the Board of Trade may by order declare that the powers of the promoters in respect of such tramway or the part thereof so discontinued shall be at an end, and thereupon such powers of the promoters cease and determine, unless they are purchased by the local authority (s. 41). This does not apply where the discontinuance is occasioned by circumstances beyond the control of the promoters, but the want of sufficient funds is not considered a circumstance beyond their control for this purpose (*ibid.*). Where any such order has been made, the road authority of the district may at any

time after the expiration of two months from the date of the order, under the authority of a certificate from the Board of Trade, remove the tramway or part of the tramway discontinued, and the promoters must pay the expenses of such removal and of the making good of the road, the certificate of the clerk or other authorised officer of the road authority to be final and conclusive as to the amount of such expenses (*ibid.*).

Insolvency of Promoters.—If at any time after the opening of a tramway for traffic it appears to the local authority or the road authority of the district that the promoters of the tramway are insolvent, so that they are unable to maintain the tramway, or work the same with advantage to the public, and such road authority makes a representation to that effect to the Board of Trade, the Board of Trade may direct an inquiry by a referee, and if the referee finds that the promoters are insolvent, the Board of Trade may, by order, declare that the powers of the promoters shall, at the expiration of six months from the making of the order, be at an end, and the powers of the promoters cease and determine accordingly, unless they are purchased by the local authority; and thereupon the road authority may remove the tramway in like manner, and subject to the same provisions as to the expenses of such removal, as in the case of the discontinuance of a tramway (s. 42).

Purchase of Tramways.—Where the promoters of a tramway in any district are not the local authority, the local authority may, within six months after the expiration of twenty-one years from the time when the promoters were empowered to construct the tramway, and within six months after the expiration of every subsequent period of seven years, or within three months after any order made by the Board of Trade under sec. 41 or sec. 42 (*supra*), with the approval of the Board of Trade, require such promoters to sell their undertaking, or so much of it as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials, and plant of the promoters suitable for the purposes of such undertaking, such value to be in case of difference determined by a referee nominated by the Board of Trade on the application of either party, and the expenses of the reference to be borne and paid as the referee directs (s. 43: as to the basis of valuation, see *Edinburgh Tramways Co.* v. *Lord Provost; London Tramways Co.* v. *L. C. C.*, [1894] App. Cas. 456, 489). The local authority has power under this section, within six months after the expiration of twenty-one years from the time when the promoters were authorised to construct the tramway, to require the promoters to sell such portions of their system of tramways as are within the district of such authority, though the tramways were constructed under powers of different dates, and as to some of them no right of purchase has risen (*North Met. Tramways Co.* v. *L. C. C.*, 1896, 60 J. P. 23).

Where a tramway in any district has been opened for traffic for a period of six months, the promoters may, with the consent of the Board of Trade, sell their undertaking to any persons, corporation, or company, or to the local authority of such district; and when any such sale has been made, all the rights, powers, and obligations of the promoters in respect to the undertaking sold, are vested in, and may be exercised by, and attach to the purchasers, in like manner as if such tramway had been constructed by such purchasers under powers conferred upon them by Provisional Order or special Act (s. 44).

By-Laws.—Subject to the provisions of the Provisional Order or special

Act, the local authority of the district in which the tramway is laid down may make regulations as to the rate of speed to be observed in travelling upon the tramway; the stopping of carriages using the tramway, and the distances at which they shall be allowed to follow one after the other; and the traffic on the road in which the tramway is laid; and the promoters and their lessees may make regulations for preventing the commission of any nuisance in or upon any carriage, or in or against any premises belonging to them, and for regulating the travelling in or upon any carriage belonging to them. And for better enforcing the observance of such regulations, the local authority and promoters respectively may make by-laws, and from time to time alter or repeal such by-laws, and make new by-laws, provided that such by-laws be not repugnant to the law. Notice of the making of any such by-law must be duly advertised, in accordance with the regulations contained in Part II. of Sched. C. to the Act; and not less than two months before the by-law comes into operation, a copy thereof must be sent to the Board of Trade, and be delivered to the promoters if made by the local authority, and to the local authority if made by the promoters; and the Board of Trade may disallow any such by-law at any time before the expiration of the two months (s. 46). Any such by-law may impose reasonable penalties for offences against the same, not exceeding 40s. for each offence, with or without further penalties for continuing offences, not exceeding 10s. for every day during which the offence continues (s. 47).

A by-law made by the promoters, requiring that every passenger shall deliver up his ticket when required to do so, or pay the fare for the distance travelled, and imposing a penalty for breach thereof, is a valid and reasonable by-law; and a passenger who refuses to show his ticket, or refuses to deliver it up on the ground that his journey has not terminated, or who, having lost or inadvertently destroyed his ticket, refuses to pay the fare for the distance travelled, is liable to the penalty imposed by such by-law (*Heap* v. *Day*, 1885, 34 W. R. 627; *Hanks* v. *Bridgman*, [1896] 1 Q. B. 253; *Lowe* v. *Volp*, [1896] 1 Q. B. 256).

The local authority has the like power of making and enforcing rules and regulations, and of granting licences with respect to all carriages using the tramway, and to all drivers, conductors, and other persons having charge of or using the same, and to the standings for the same, as it is for the time being entitled to make, enforce, and grant in the case of hackney carriages (s. 48). It is competent to the local authority to make and enforce a by-law under this section, for regulating the number of passengers to be carried, and the extent of accommodation to be afforded to them; and the assent of the promoters or their lessees is not necessary to the validity of such by-law (*Smith* v. *Butler*, 1885, 16 Q. B. D. 349). A passenger who is incommoded by an excessive number of passengers may prosecute a conductor for breach of any such by-law, whether made by the local authority or by the promoters (*Badcock* v. *Sankey*, 1890, 54 J. P. 564).

Where the Provisional Order authorises the use of mechanical power, it usually empowers the Board of Trade from time to time to make by-laws for regulating the use thereof. As to the liability of the driver of an engine on the tramway, for breach of a by-law enacting that no steam shall be emitted from the engine, see *Hartley* v. *Wilkinson*, 1885, 49 J. P. 726.

Offences.—If any person wilfully obstructs any person acting under the authority of the promoters in the lawful exercise of their powers in setting out or making, repairing, or renewing the tramway, or defaces or destroys any mark made for the purpose of setting out the line of the tramway, or

damages or destroys any property of the promoters, their lessees or licensees; or, without lawful excuse, wilfully interferes with, removes, or alters any part of the tramway or works connected therewith, or places or throws any stones, dirt, or other material on any part of the tramway, or does or causes to be done anything in such manner as to obstruct any carriage using the tramway, or to endanger the lives of persons therein or thereon, he is liable for every such offence (in addition to any proceedings by way of indictment or otherwise to which he may be subject) to a penalty not exceeding £5 (ss. 49, 50).

If any person travelling or having travelled on any tramway avoids or attempts to avoid payment of his fare, or, having paid his fare for a certain distance, wilfully proceeds beyond such distance, and avoids or attempts to avoid payment of the additional fare, or wilfully neglects on arriving at the point to which he has paid his fare to quit the carriage, he is liable for every such offence to a penalty not exceeding 40s. (s. 51); and any officer or servant of the promoters or their lessees may seize and detain any person discovered either in or after committing or attempting to commit any such offence, and whose name or residence is unknown, until such person can conveniently be taken before a justice (s. 52). As to the liability of the promoters or their lessees for an unjustifiable prosecution or detention by their officers or servants of a passenger under these sections, see *Furlong* v. *South London Tramways Co.*, 1884, 48 J. P. 329; *Charleston* v. *London Tramways Co.*, 1888, 36 W. R. 367; *Rayson* v. *South London Tramways Co.*, [1893] 2 Q. B. 304; *Knight* v. *North Met. Tramways Co.*, 1898, 14 T. L. R. 286.

No person is entitled to carry or to require to be carried on any tramway any goods of a dangerous nature, and any person sending by a tramway any such goods without distinctly marking their nature on the outside of the package, or otherwise giving notice in writing to the book-keeper or other servant with whom they are left at the time of such sending, is liable to a penalty not exceeding £20 for every such offence (s. 53). There must be guilty knowledge on the part of the sender to constitute an offence under this section (*Hearne* v. *Garton*, 1859, 2 El. & El. 66).

If any person (except under a lease from or by agreement with the promoters, or under licence from the Board of Trade, as provided by the Act) uses a tramway or any part thereof with carriages having flange wheels or other wheels suitable only to run on the rail of such tramway, he is liable for every such offence to a penalty not exceeding £20 (s. 54). Where an omnibus proprietor attached to his vehicle a lever with arms having a small revolving roller which the driver might drop into the groove of the rail at the side of each forewheel when on the tramway, such rollers operating when down as a flange at the point of contact with the rails, but when withdrawn by means of the lever, leaving the vehicle free to travel over any part of the road, it was held that the use of such contrivance, though it did not cause an obstruction to the tramway, was an offence under the section (*Cottam* v. *Guest*, 1880, 6 Q. B. D. 70).

Law Agent, vol. vii. p. 307.—By A. S. dated 11th July 1899, it is enacted and declared: "(1) The first examination in general knowledge shall be taken before the commencement of apprenticeship, and no person shall be admitted as apprentice under indenture to a law agent until he shall have passed the said first examination, provided that any candidate

who has already entered on his apprenticeship, or who may become an apprentice before this Act comes into operation, may offer himself for such examination within one year subsequent to the commencement of his apprenticeship, and subject to all the conditions of Acts of Sederunt in force at the date hereof. (2) The second examination in general knowledge may be taken at any time after the candidate has passed the first examination. (3) A candidate who fails to pass the first or second examination may again offer himself for examination, and shall be re-examined in all the subjects, or such part thereof as the examiners may determine. It shall be in the power of the examiners to fix a time before which a candidate who has failed to pass any examination shall not present himself again for examination. (4) No candidate shall be examined in law until he has passed the second examination in general knowledge. (5) This Act shall come into operation upon 1st January 1900, and thereupon all provisions of the A. S. anent the admission of law agents of 18th March 1893, inconsistent herewith, shall be repealed, except as to anything that has been done in pursuance thereof."

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