# MANUAL

OF THE

# LAW OF SCOTLAND.

By JOHN HILL BURTON, Advocate,
Author of a Treatise on the Law of Bankruptcy, Insolvency, and Mercantile Sequestration in Scotland.

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## PUBLIC LAW:

LEGISLATIVE, MUNICIPAL, ECCLESIASTICAL, FISCAL, PENAL, AND REMEDIAL;

WITH A

COMMENTARY ON THE POWERS AND DUTIES OF JUSTICES OF PEACE AND OTHER MAGISTRATES.

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# ADVERTISEMENT.

A VERY large impression of the Manual of the Law of Scotland having been disposed of, the Author was called upon to consider the propriety of preparing a Second Edition for the press. The work was projected at an early period of professional life, and was the occupation of several years, during which the Author had few other pursuits to engross his attention. A work necessarily involving so much abridgment and compilation, is not the species of professional book in which he would at the present time have felt inclined to engage, but having once laid the fruit of his labours before the public, he considered it his duty, both to his own reputation and to the interests of those who do him the honour of consulting the Manual as a book of reference, thoroughly to revise the whole, to incorporate with it some branches of the law which had been overlooked in laying out the plan of the First Edition, and to bring down the law to the present day, by embracing the substance of the later statutes and the principles of recent decisions.

As the bulk of the work thus gradually enlarged on the Author's hands, he felt that it arranged itself into two distinct departments which might severally answer the wants of different classes of the community; and that it would be convenient to place it before the public in the shape of two separate books, having only as a bond of union the circumstance that they are intended between them to embrace the whole body of the law.

The present Volume comprehends that department of the

law in which the public at large, or individuals as members of the body politic, are interested. It relates to the public institutions, so far as the citizen is called on to act in reference to them within Scotland, from parliament and the superior courts of law down to public companies and friendly societies; to the various regulations by which the legislature has from time to time, on the grounds of public expediency, or from other motives, made regulations restricting trades and occupations, or dictating the manner in which they are to be conducted,—a branch embracing within one common principle the markedly separate provisions of the factory regulations on the one hand and the game laws on the other. The poor law demanded a place as an important feature in local taxation, and if it had not been thus assigned to the fiscal department of the work, would, as the machinery for protecting the impoverished part of the population from destitution, have demanded attention in the part dedicated to the law of police, in which the several precautionary and remedial measures for protecting the citizen from calamities and inconveniencies caused by accident or design are set forth. The public laws relating to the means of conveyance both by land and water demanded a special place, and the criminal code had undoubted claims to be embraced within the scheme of the Volume.

The powers and duties of magistrates and officers of the law—a matter more or less connected with every department of the work—required to be kept continually in view. In the absence of any new edition of Mr Tait's excellent "Justice of the Peace," or of any other late work calculated to continue it down to the present day by embodying a notice of the multitudinous statutes by which new functions have within these past few years been conferred on the unpaid magistracy, the author has had in view the object of making this volume supply the place, in so far as its limits may permit, of the sort of digest which is generally termed a "Justic of Peace."

In a work within so small a compass the practising ma gistrate must not expect to find anything to supersede th statutes, by the letter of which he is bound, and the expres

terms of which he ought to consult on every occasion on which he enforces them. Burn's Justice of Peace, which professes to embody in full all the clauses of the acts giving power to justices of peace in England, occupies about seven thousand very closely printed pages. Although a smaller bulk would contain all the statutes with which Justices of Peace in Scotland have to deal, a work embodying them verbatim, and supplying the place of the statutes themselves, would be many times the size of this small volume. It is almost unnecessary, however, to say, that the Justice of Peace, like every other Judge, must find use in digests and commentaries. They place before him the general result of the complex and apparently conflicting clauses of various acts,—show the relation of different parts to each other,—condense the meaning of long involved enactments into brief propositions,—illustrate the operation of the act by decisions,—and, probably the most important function of all, afford a means of reference to the statute law on particular heads, and indicate the acts which have been from time to time passed for the purpose of repealing, altering, amending, explaining or consolidating previous enactments. The Author will have failed in the end he had in view, if there be any important general statute affecting Scotland which he has omitted to notice; and as a guide to the legislation for this part of the empire, not only in the departments just alluded to, where the Magistrate is called on to act, but in those in which any considerable portion of the Public may be interested, he hopes that his book may be easily and safely consulted.

EDINBURGH, *April* 1847.

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# MANUAL

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# PUBLIC LAW OF SCOTLAND.

## PART I.

## COURTS OF LAW.

### CHAPTER I.

### The Court of Session.

#### Sect. 1.—*Rise and Progress of Jurisdiction.*

The Court of Session, in its origin and constitution, represented the judicial authority of the Scottish Parliament. The principal judge, criminal as well as civil, under our earlier monarchs, was the king's Justiciar, although in Scotland as well as in England there were certain remedies which the Chancellor or keeper of the king's conscience gradually assumed the function of administering. In the mean time a practice arose of litigants, discontented with decisions of the ordinary courts, appealing to the king and his great council or parliament. During the fourteenth and fifteenth centuries these appeals became numerous, and inconvenient to a legislative body; and methods were frequently adopted to discourage them. Vari-

ous committees of parliament were then from time to time appointed.[1] These bodies had all the inconvenience of fluctuating assemblies; but in 1503 a more permanent committee was appointed, under the designation of "The Daily Council."[2] The powers of this body, however, were undefined and vague, and the justiciar still retained his jurisdiction. Lastly, in 1532, the present Court of Session was established, consisting of fifteen judges, of whom one was a President, who acted as chairman in absence of the Chancellor.[3] Thus the Court of Session, as representing the Parliament or great jury of the nation, united to the functions of the judge those which, in the criminal courts of Scotland, and the common law courts of England, came to be administered by the jury. In the origin of the Court of Session, we thus possess the historical reason why the judges have inquired both into the law and the fact without the intervention of a jury; and it is a characteristic circumstance that the former number of the judges (fifteen) corresponds with that which custom had fixed as the number of the jury in criminal trials.

At the union of the kingdoms in 1707, there ceased to be a Lord Chancellor of Scotland, a great seal for public transactions being prepared for the United Kingdom; while a keeper was appointed to hold a separate great seal for Scotland, to be attached to those private writs which might require its sanction.[4] In 1808, the Court of Session was divided into two divisions; the one presided over by the Lord President, the other by the Lord Justice Clerk.[5] At a later period, the system of jury trial was incorporated with the practice of the Court. (*See below*, *Sect.* 4.) At the union with England, the Court acquired jurisdiction as a commission of teinds. (*See Part* IV. *Chap.* IV.) In 1830, the number of judges was reduced to thirteen.[6]

*Admiralty Court.*—In 1830, the Court of Admiralty was abolished. The nominal head of this court was the Lord High Admiral, whose legal authority was enforced by a deputy, termed the Judge of the High Court of Admiralty. There were inferior admiralty jurisdictions, in which the law was administered by admirals-depute. The civil authority of the Admiralty Court extended to certain questions arising out of contracts connected with shipping and commerce.

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[1] Glassford on the Scottish Courts of Law, 68, and Appendix I. Ivory's Form of Process, i. 7.—[2] 1503, c. 58.—[3] Act of 1532 (in some editions, by mistake, made 1537). Beveridge's Forms of Process, Introduction. D. P. ch. i.—[4] 5 Anne, c. 8, art. 24.—[5] 48 Geo. III. c. 151.—[6] 11 Geo. IV. & 1 Wm. IV. c. 69.

The decrees of the admiral were liable to review in the Court of Session.[1] The cases formerly peculiar to this court may now be prosecuted in the Court of Session, or in that of the Sheriff, in the manner of ordinary civil causes.[2] The jurisdictions of the inferior admiralties, not dependent on the High Court of Admiralty, were not abolished.[3]

*Commissaries.*—The jurisdiction of the Commissary Court has been gradually conjoined with that of the Court of Session. The commissaries represented the chancellors or judges of the bishops' ecclesiastical courts, and each continued attached to a district which was, with a few exceptions, commensurate with the episcopal diocese, until the year 1823, when the Sheriffs were appointed commissaries of their respective counties.[4] The Supreme Commissary Court was held by the four commissaries of Edinburgh, who had jurisdiction in actions of divorce, declarators of marriage, or of nullity of marriage, &c.; while the jurisdiction of the others, who were termed inferior commissaries, was generally restricted to the execution of testaments.[5] By the above-mentioned act of 1830, all actions of declarator of marriage, or of nullity of marriage, or of legitimacy, or of bastardy, and actions of separation, were removed to the Court of Session,[6] and the Commissary Court of Edinburgh was deprived of any jurisdiction which it possessed beyond that of the inferior commissariats, except the function of confirming testaments of persons dying out of Scotland.[7] In 1836, this court was abolished, and its remaining powers vested in the Sheriff of Edinburgh.[8]

The Lord Justice General, the Lord Justice Clerk, and five other judges of the Court of Session, form the Court of Justiciary; and two of the judges are appointed to perform the functions of the Court of Exchequer.[9] (*See below, Chaps.* III. and IV.)

### SECT. 2.—*Present Jurisdiction.*

All cases of civil right, which admit of being decided in Scotland, may be brought before the Court of Session, with the exception of cases specially excepted by act of parliament, and of those involving a pecuniary claim not exceeding £25, which must be carried on, in the first instance, before an

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[1] E. i. 3, 34.—[2] 11 Geo. IV. & 1 Wm. IV. c. 69, § 21-28.—[3] Ibid.—[4] E. i. 5, 26, 28. 4 Geo. IV. c. 97.—[5] E. i. 5, 29, 31.—[6] 11 Geo. IV. & 1 Wm. IV. c. 69, § 33.—[7] Ibid. § 31.—[8] 6 & 7 Wm. IV. c. 41.—[9] 2 & 3 Vict. c. 36, §§ 2, 4.

inferior court. But all actions relative to Heritable property, or for Reduction of writs, or of Declarator, or for the restitution of minors, &c., and actions against foreigners not resident in this country, whatever may be the extent of the interest at stake, are competent only before the Court of Session;[1] and causes in which members of the College of Justice are interested, however trivial, may be there tried, unless they be excepted by statute.[2]

*Court of Review.*—The Court of Session acts as a tribunal of appeal against the proceedings of inferior jurisdictions. It cannot, however, review judgments which are interlocutory or intermediate, and not final, except in particular cases.[3] It may, however, review the final decisions of all inferior civil courts, except where it is expressly excluded by statute.

*Advocation.*—When a final judgment has been pronounced, and no farther steps taken, it is brought under the consideration of the Court by "Advocation." Leave to advocate was formerly obtained by presenting a Bill (*see next section*) containing a copy of the Summons or Petition on which the action commenced, and of the Defences or Answers, and the Interlocutors complained of.[4] By the present practice, however, the bill is dispensed with, and the presentation of a Note, setting forth the remedy craved, is sufficient.[5] Advocations, where the sum at issue does not exceed £12 sterling, are incompetent, except to members of the College of Justice,[6] who may advocate a cause from any inferior civil court, on the simple ground of their privilege, unless it be excluded by statute, as in small debt cases.[7]

*Suspension.*—When a decree has been pronounced and extracted, for the purpose of being enforced, the proper method of bringing the judgment before the Court of Session for review is by a Suspension, which now likewise proceeds on a Note. It must be presented in the Bill-chamber; a certificate of the presentment has the effect of an interim Sist, or suspension of proceedings.[8]

*Reduction.*—Where the decree has been put in force, or where it is of such a nature that it does not compel the party complaining of it to pay or perform any thing, it can only be brought before the Court of Session by a Reduction, which is a process in the form of an ordinary action.[9]

Even in those cases in which its jurisdiction is excluded by statute, the Court of Session has the power of interfering,

[1] D. P. 11.—[2] Ibid. 5, 7.—[3] 50 Geo. III. c. 112, § 36.—[4] 6 Geo. IV. c. 120, § 41. D. P. 276.—[5] 1 & 2 Vict. c. 86.—[6] D. P. 277.—[7] Ibid. 83.—[8] 1 & 2 Vict. c. 86, § 4.—[9] D. P. 283, 366.

to protect the citizen from arbitrary or unauthorized proceedings.[1] On this principle, it assumes control over the proceedings of ecclesiastical courts whenever they affect the civil interests of individuals or of the public.[2] It has a very limited jurisdiction in crimes, chiefly restricted to those which occur in the course of and as connected with law proceedings.[3] It has a jurisdiction in actions of damages, &c., arising from the commission of crimes.[4] Actions against any member of a court-martial, or other person, for any act done in pursuance of the mutiny acts, must be raised before the Court of Session.[5]

*Administrative Power.*—The Court of Session possesses certain administrative powers, coming under the title of its *nobile officium*, which are of a more vague description, and in the times of arbitrary power were liable to serious abuse. In virtue of this authority, when a vacancy occurs in any office, the duties of which cannot be safely interrupted, the court generally appoints a person to hold it temporarily.[6] Before the establishment of the Prison Board, when a jail was erected, the court declared it to be a legal prison.[7] Of the same description is the power invariably exercised by the court of providing for the care of pupils, imbeciles, &c., not supplied with custodiers by the ordinary course of law.

*Acts of Sederunt.*—The Court is entitled to pass acts for the regulation of judicial proceedings. These are published from time to time, and are termed "Acts of Sederunt." In this duty, the court, of old, frequently took occasion to trespass on the province of the legislature. Some of the acts so passed have become law from general usage. It is now usual for an act of Parliament, which makes any considerable alteration on forms of procedure, to contain a clause, authorizing the court to pass acts of sederunt in pursuance of its provisions, for the more minute regulation of the practice as established by the statute, and directing copies of such acts to be laid before both Houses of Parliament.

### SECT. 3.—*Arrangement of Business in Ordinary Cases.*

It has already been mentioned that the court is partitioned into two Divisions, coequal in jurisdiction. It is likewise divided into an Outer and Inner House, the latter being a

[1] D. P. 15.—[2] Ibid. 18. See the various actions in the Court of Session in relation to the Veto Act, as cited farther on.—[3] Ibid. 21.—[4] Ibid. 23.—[5] 7 & 8 Geo. IV. c. 4, § 156. 9 & 10 Vict. c. 11, § 77. 1 & 2 Vict. c. 17, § 75.—[6] D. P. 27. See below, Part III. Chap. I.—[7] Ibid.

tribunal of appeal from the decision of the former. The Inner-House of each Division consists of four judges. In case of an equality of voices, or of the necessary absence of a judge of the Inner-House, one of the Outer-House judges may be called in to give his opinion and vote.[1] In cases of great difficulty, the opinion of the whole court may be taken by either Division.[2] No ordinary action can come before the Inner-House until it has previously been decided in the Outer. Some cases, however, on account of the extensive exercise of discretionary power involved in their decision, are brought in the first instance before the Inner-House, such as Ranking and sale, Aliment, &c. All summary applications, or petitions for redress in extraordinary cases, must likewise come immediately before the Inner-House, during session.[3]

*Lords Ordinary.*—The Outer-House consists of five Lords Ordinary, each of whom holds a separate court. Until the act of 1838, altering the arrangement of business in the Court of Session, there were two Ordinaries attached to each Division, while the judge who had been last appointed, called the Junior Lord Ordinary, superintended, as he still does, a distinct class of cases, and was connected with either Division indiscriminately. Each of the four senior Ordinaries was in his turn Lord Ordinary of the week, an Ordinary of the First and one of the Second Division taking the duty alternately. The Lord Ordinary for the week called the Outer-House roll, or the rolls of causes entered for the first time. The whole causes enrolled or brought into court for one week thus went into the hands of the Lord Ordinary of the week, and remained with him till they were decided. By the later arrangement, causes may be at any time enrolled before any one of the five Lords Ordinary, and these are not particularly attached to either Division.[4] At the time of enrolling, a note is given, of the Ordinary before whom the party wishes the case to proceed, and of the Division to which he wishes it to belong in case it should be carried to the Inner-House.[5] After such enrolment is made, the case continues with the same Ordinary, and all steps in it, such as debates, motions for lodging documents, &c., are transacted before him.

*Bill-Chamber.*—Besides his share of ordinary cases, the junior Lord Ordinary has distinct duties to perform, and

[1] 48 Geo. III. c. 151, § 8.—[2] D. P. 37.—[3] Ibid. 457.—[4] 1 & 2 Vict. c. 118, §§ 3, 4.—[5] A. S. 24th December 1838, § 2.

holds a separate court, termed the Bill-Chamber, where he passes Bills in the cases where that form still continues in use, or the Notes which now have generally superseded that more cumbrous ceremony. A bill is an application to the court to allow a writ to pass the signet. The greater number of diligences for attaching person or property, until lately, passed through this ordeal, and it was a necessary preliminary, as already explained, in opening up the decisions of inferior courts. Some actions cannot commence without the sanction of a passed bill. A note is a simple application, desiring the court to exercise its summary functions, according to a statement of facts appended to it. The decision in the Bill-Chamber is either admitting or refusing the terms of the bill or note, or modifying them. In the majority of cases, the clerk marks the bill as passed, as a matter of course, without the Lord Ordinary seeing it, but in other cases there are long litigations before him.[1] Until the act of 1838, the junior Ordinary was Outer-House judge in all actions for the reduction of documents, decrees of courts, &c.; but these may now be brought before any ordinary.[2] During vacation and recess, the functions of the Lord Ordinary on the bills are performed in rotation by those six judges of the Court of Session who are not judges of Justiciary.[3] The person who thus acts on these occasions is considered the representative of the court, and authorized to exert its remedial power on urgent occasions.[4]

Every judgment of a Lord Ordinary is final in the Outer-House; but it may be brought under review of the Inner-House by a reclaiming note presented within twenty-one days after its date.[5]

### SECT. 4.—*Arrangement of Business in Jury Cases.*

Trial by jury in civil causes was introduced in 1815 to a limited extent,[6] which was enlarged in 1819,[7] and afterwards in 1825.[8] The acts passed at these periods had reference to a special court created for jury causes, presided over by a chief commissioner. In 1830 the separate establishment was abolished, jury trial being united with the ordinary jurisdiction of the Court of Session.[9] Jury causes are brought into court in the usual manner (*see preceding section*), being

[1] Beveridge on the Bill-Chamber.—[2] 1 & 2 Vict. c. 118, § 2.—[3] 2 & 3 Vict. c. 36, § 7.—[4] Beveridge on the Bill-Chamber.—[5] 6 Geo. IV. c. 120, § 17.—[6] 55 Geo. III. c. 42.—[7] 59 Geo. III. c. 35.—[8] 6 Geo. IV. c. 120.—[9] 11 Geo. IV. & 1 Wm. IV. c. 69.

put to a separate roll, called by the Lords Ordinary, termed the jury roll, as soon as appearance is made for the defender, if they be cases specially appropriated to jury trial.[1]

Jury causes are tried in Edinburgh by the presidents of the Divisions, or, in the unavoidable absence of a president, by another judge of the Division.[2] Jury trials may proceed at any expedient time during session or vacation;[3] and at the termination of the winter and summer sessions, and during the Christmas recess, all causes ready for trial are generally proceeded with, unless cause be shown for delay. Causes may be tried at circuit, before the justiciary judge, or any other judge of the Court of Session.[4]

*Questions tried by Jury.*—The actions specially appropriated to jury trial, are,—actions on account of injury to the person, whether verbal (as by defamation) or real, injury to moveables, or to land when the title is not in question. Actions of damages on account of breach of promise of marriage, seduction, or adultery. Actions founded on delinquency, or *quasi* delinquency (where the conclusion is for damages), and on the responsibility of shipowners, innkeepers, &c. Actions for nuisance. Reductions on account of insanity, idiocy, facility and lesion, and force and fear. Actions on policies of insurance and contracts for the conveyance of goods, and actions for the wages of masters and mariners of vessels.[5] In other causes the court have a discretion to remit in whole or in part to a jury.[6] In reviewing the decisions of inferior courts, the Court of Session may remit questions of fact, which do not seem to have been exhausted in the court below, to a jury; and in a case proceeding in an inferior court for an interest exceeding £40, when an interlocutor has been pronounced allowing a proof, either party may advocate, and have the question tried by a jury.[7]

*Issues.*—When it is decided that a case goes to a jury, the court remits it to the clerk to frame the "issues," or the questions to which the jury is to return an answer. They are generally adjusted by the agents and counsel of the parties in presence of the clerk, and sent to the Lord Ordinary for approval.[8] The matter in dispute may be exhausted by one issue, called "the General Issue," or by several issues applicable to different respective branches of the question,—these are termed Special Issues.[9]

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[1] 6 Geo. IV. c. 120, § 29. Macfarlane's Practice in Jury Causes, 27.—[2] 11 Geo. IV. & 1 Wm. IV. c. 69, § 3.—[3] Ibid. § 9.—[4] Ibid. § 11.—[5] 6 Geo. IV. c. 120, § 28.—[6] Macfarlane, 42.—[7] 6 Geo. IV. c. 120, § 40.—[8] Macfarlane, 65.—[9] Ibid. 68.

*The Jury.*—The case may be tried either before a common jury or a special jury.* A common jury is summoned to the number of not less than thirty-six and not more than fifty, in the same manner as to the Court of Justiciary.[1] A special jury can only be resorted to in cases of importance, with the permission of the court. Thirty-six special jurymen are returned by the Sheriff, who are reduced to twenty by the agents for the parties alternately striking off a name. These twenty are summoned to the trial, and from them the twelve who are to act are chosen.[2] In a common jury the individuals are chosen by ballot; any one may be set aside on cause shown, such as enmity or interest, and each party is allowed to challenge four without showing cause.[3] Jurymen are paid for their attendance, and it is the practice to give £1 to each for a trial of one sitting, and £2 where there is an adjournment.[4]

*Trial.*—The proceedings commence with the pursuer's counsel stating what he intends to prove. He then leads his proof, after which the defender's counsel enters on the defence.[5] If the defender lead evidence, the pursuer is entitled to reply; when both parties have concluded, the judge charges the jury. Either party may object to legal matter in his charge, and have the objections afterwards discussed in a Bill of Exceptions.[6] The jury must be unanimous in their verdict, and in cases of damage must assess the amount. The verdict is announced by the chancellor, who is chosen by a majority, the juryman first sworn having a double voice in case of equality. If the jury remain enclosed twelve hours without giving a verdict, they are discharged, unless they unanimously apply to the court for farther time.[7]

## SECT. 5.—*Officers of the Court.*

The establishment of clerks of the Court of Session was, until lately, divided into three chambers, each of which consisted of two principal clerks, two depute-clerks, and four assistant clerks and closet-keepers. These were equally allotted between the two divisions of the court, so that each division had three principal, three depute, and six assistant clerks. By the present arrangement there are four Principal clerks, with their Assistants, whose duties lie in the Inner-

* See the difference explained under the head of Criminal Practice.—[1] 55 Geo. III. c. 42, § 20.—[2] Ibid. §§ 26, 27. Macfarlane, 95.—[3] 55 Geo. III. c. 42, § 21.—[4] Ibid. § 30. Macfarlane, 241.—[5] Ibid. 122-126.—[6] Macfarlane, 236, 275.—[7] Ibid. 238, 239.

House; and instead of the deputes being attached to divisions, there is a depute attached to each of the five Lords Ordinary.[1] There was formerly an establishment of four principal clerks in jury causes; but their duties now devolve on the principal clerks of session.[2]

The Principal clerks have control over the Deputes and Assistants. They sit in their respective divisions in the Inner-House, and write out the interlocutors or judgments of the court as they are pronounced. The depute-clerks attend in the same manner in the Outer-House, and write out the interlocutors of the Lords Ordinary. In this duty each depute is aided by his assistant. The assistants both of the principal and depute-clerks attend regularly at their respective chambers in the Register-House, where they receive papers connected with the processes of which they have charge, lend them out to and receive them back from the agents, and keep a minute of the proceedings in each process.[3] When a process is sent from the Outer-House to the Inner-House, it must be sent to the office of that principal clerk to whom the depute in the Outer-House is attached in terms of the late act.[4] There are two clerks who, under the superintendence of the principal clerks, transact the business of the Bill-Chamber, the one acting in the same capacity as the ordinary depute-clerks of the Outer-House, the other performing in the Register-House the functions of an assistant clerk,[5] and there is a clerk and depute-clerk in teind cases.[6]

*Judges' Clerks.*—Each judge has a clerk, whose duty it is to take charge of his papers. Those of the Lord President and Lord Justice-Clerk keep the Inner-House rolls of causes, and those of the other judges of the Inner-House keep the Outer-House printed rolls. Each Lord Ordinary's clerk keeps his hand-roll, or roll of cases in which motions are to be made or debates heard.[7] When a process is taken to avizandum, or taken home for private consideration by a Lord Ordinary, his clerk writes the interlocutor or judgment.[8]

There are several other officials in the Register-House connected with the Court of Session. The duty of giving extracts of the judgments of the court for the purpose of enforcing them, belongs to an Extractor and assistant, under the superintendence of the junior principal clerk.[9] The extractor is likewise keeper of the records, having the

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[1] 1 & 2 Vict. c. 118, § 12.—[2] Ibid. § 6.—[3] D. P. 64-66.—[4] 1 & 2 Vict. c. 118, § 15.—[5] Ibid. § 14.—[6] Ibid. § 26.—[7] D. P. 68.—[8] Ibid.—[9] 1 & 2 Vict. c. 118, § 17.

custody for a time of all concluded processes.[1] The entries made by the assistant clerks in their minute-books are collected and periodically published by a keeper of the Minute-book.[2] The Recording of Deeds with clauses of Registration for execution, which on being so registered, are in the position of decrees of a court, and may be enforced without raising an action, is under the direction of a Keeper.[3] There is an Auditor, who examines and taxes the accounts of agents when law-costs are awarded by the court, and a collector of the Fee-fund, which is a tax on litigants, to assist in meeting the expense of the judicial establishment.[4] It was considerably reduced by the act of 1838.

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## CHAPTER II.

### Appeals, and Jurisdiction of the House of Lords.

An appeal from the Court of Session to the old Scottish Parliament was considered an anomalous process, because, as already explained, the Court of Session was, in the principle of its establishment, the representative of a committee of the Parliament. During the reign of Charles II., however, an appeal to Parliament was considered a protection from the arbitrary measures of the court; and an attempt that was made to secure the privilege in a particular instance, occasioned a renowned struggle between the crown and the bar, in which the latter were compelled to submit. The right of the subject to seek "remeid of law" in Parliament, was urged in the Claim of Rights, and conceded at the Revolution; and after the Union, the standing orders of the House of Lords, as to English appeals, were made applicable to those from Scotland.[5]

The right of appeal placed in the hands of a litigant a powerful engine of annoyance to his adversary, which was considerably weakened when it was enacted that no judgments should be liable to appeal but final judgments of the Inner-House, exhausting the whole merits of the cause, unless (in the case of its issuing an interim or interlocutory

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[1] 1 & 2 Vict. c. 118, § 20.—[2] D. P. 69.—[3] 55 Geo. III. c. 70, § 4.—[4] D. P. 70, 71.—[5] Form of Procedure upon Appeals, 13.

judgment) leave is given by the court, or the judges have differed in opinion.[1] When an interlocutory judgment is appealed from, either of these reasons must be certified by two counsel who conducted the case in the Court of Session.[2] When final judgment, however, has been pronounced, the appeal may be directed against all or any preceding interlocutors in the case;[3] an opinion that there is good ground for appeal must be certified by two of the counsel, who conducted the case, as above.[4]

The time within which an appeal must be entered is two years from the day of signing the last judgment complained of, or fourteen days after the first day of the session of Parliament next following the two years.[5] Persons appealing must enter recognizances to the extent of £400 to settle the costs incurred.[6] When an appeal is alleged to be incompetent or irregular, the preliminary question of its admissibility is referred to an Appeal Committee, whose opinion is always followed by the house.[7] Where the House of Lords finds that its judgment will depend on the settlement of some incidental point not clearly enough brought forward in the pleadings before the Court of Session, it frequently remits the case to that court, with instructions. In other cases, having declared its judgment speculatively on the point of law, it remits to the Court of Session the application of it to the particular case.[8]

The House of Lords has an original jurisdiction in questions regarding the dignity of a peer of the realm, or regarding claims on peerages, separated from patrimonial questions. Such a question may be brought before the House, either in a disputed election of one of the Scottish Peers, or by a claim on any particular peerage. It seems to be pretty clear that a simple question of a right of peerage cannot be tried in the Court of Session. But that court is competent to try genealogical and other questions, the result of which may affect a title of Peerage, and it is not easy to draw a precise line at the point where the absolute jurisdiction of the House of Lords is bounded.[9]

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[1] 48 Geo. III. c. 151, § 15.—[2] Beveridge's Forms of Process, 636. Form of Procedure, 21.—[3] 48 Geo. III. c. 151, § 15.—[4] Form, &c. *ut supra*.—[5] 6 Geo. IV. c. 120, § 25.—[6] Beveridge's Forms of Process, 643.—[7] Form of Procedure, &c. 56. Palmer's Practice on Appeals, 44.—[8] Form, &c., 64. Palmer, 69.—[9] Wight on Elections, 125. Campbell *v.* Crawford, 25th July 1824.

# CHAPTER III.

## COURT OF JUSTICIARY.

*Origin and Progress.*—THE High Court of Justiciary was constituted according to its present form in the year 1672.[1] Its president is the Lord Justice-general, an official whose jurisdiction was moulded from the authority in crimes which remained with the Justiciar after the erection of the College of Justice.[2] This office was, until lately re-constituted, the last instance of an important judicial situation held by an unprofessional person, and it became inconsistent with the safe administration of justice that the Lord Justice-general should sit in judgment. The last instance in which he is known to have done so during the former constitution of the office, was at the trial of James Stewart at Inverary in 1752.[3] The office is now conjoined with that of the Lord President of the Court of Session.[4] The Lord Justice Clerk is deputy-president of the Court of Justiciary. Five Lords of Session are appointed to act as Lords Commissioners of Justiciary, and the crown may by commission appoint any other of the judges to act as a commissioner of justiciary on circuit, or in the High Court in questions certified from a circuit on which he has acted.[5]

*Jurisdiction.*—This court has jurisdiction in all offences against the public, except high treason, which is tried, according to the English manner, by a special Commission of Oyer and Terminer, in which three Lords of Justiciary must be included, one of whom must always be of the quorum.[6] Since the abolition of the High Court of Admiralty in 1830 (*see above*, *Chap.* I. *Sect.* 1), the Court of Justiciary has become the tribunal for the more important class of maritime offences. No appeal lies from a decision of the Court of Justiciary. Appeals have been often entered before the House of Lords; but that Court declined the jurisdiction, except in one instance, where the decision on the crime depended on a question of civil right, which was at the same time under the consideration of the House of Lords by appeal from the Court of Session.[7] The Court of Justiciary

[1] 1672, c. 16.—[2] H. C. ii. 18.—[3] Arnot's Criminal Trials, 192.—[4] 11 Geo. IV. & 1 Wm. IV. c. 69, § 18.—[5] 2 & 3 Vict. c. 36, § 2.—[6] 7 Anne, c. 21, § 1.—[7] Proc. of the Church *v.* Magistrates of Elgin, 9th February 1713; and the King *v.* Murdison, January and March 1773. Maclaurin's Cr. Cases, 55, 557.

cannot review its own decisions. It has the power of reviewing the decisions of all inferior criminal courts. Excepting in those crimes which are punishable with death, or to which statute has attached a particular punishment, the power of the Justiciary Court is arbitrary, in applying such punishment, from fine to transportation, as may seem fitting.

The Court have frequently asserted that they possess the power of punishing any new crime, or anything which may be determined to be a crime, though not previously known as such, without the aid of statute. They are said likewise to possess "the exclusive power of providing a remedy for all extraordinary or unforeseen occurrences in the course of criminal business, whether before themselves or any inferior court."[1] The Court of Justiciary sits at Edinburgh during the time of session, on such days as are found convenient, for the trial of cases from all parts of the country.

*Peers.*—British peers, and Scottish peers whether elected to sit in Parliament or not, are tried before the peers, presided over by the lord high steward, in all "treasons, misprisions of treason, murders, and other crimes which infer a capital punishment by the law of Scotland, and all felonies and other crimes for which, if committed in England, a peer of the United Kingdom would be tried by his peers."[2] For these offences (treason excepted) committed in Scotland, peers are, after the finding of a bill by a grand jury, to be tried by the court of the Lord High Steward in the Scottish form, and by the Scottish rules of evidence, any of the judges of the Court of Session, who may be summoned for the purpose, sitting with the English judges to give their opinion on matters of law;[3] for minor offences peers may be tried before the Court of Justiciary.

*Where Jurisdiction excluded.*—In offences against the mutiny acts, or against the discipline of the church, the Court of Justiciary has no jurisdiction, in the same manner that it has no authority to punish those infringements of the legally adopted and enforceable orders and rules of particular societies, when these infringements do not interfere with the public law; but when, in the act by which a breach of regulation is committed, a public crime is involved, as, where a soldier, in committing the military offence of insubordination, stabs his officer, then the Justiciary Court can try the crime, to the superseding of any trial before the court competent to punish the breach of regulation. When the court finds it

[1] Alison's Practice, 23.—[2] 6 Geo. IV. c. 66, § 1.—[3] Ibid. §§ 6, 14.

necessary to protect a witness from trial on the matters concerning which he is to be examined, that he may the more readily give his evidence, the protection will extend to any proceedings which may be instituted against him by a court-martial or any other authority for breach of duty.[1] Where any other court is appointed by act of Parliament to judge a particular crime, the Court of Justiciary will be understood to have a cumulative jurisdiction with it, if not specially excluded.

*Circuit Courts.*—In spring and autumn the court deputes two judges to each of three several districts, who hold Circuit Courts of Justiciary. The southern circuit is held at Jedburgh, Ayr, and Dumfries; the western at Glasgow, Inverary, and Stirling; and the northern at Perth, Aberdeen, and Inverness. An additional circuit court is held at Glasgow during the Christmas recess. The circuit court is empowered to hear appeals from the decisions of inferior judges in criminal cases, where the sentence does not infer death or demembration, a needless exception, as such punishments are not now inflicted by inferior courts.[2] This appeal is seldom known in practice. In civil questions, the judges on circuit may hear appeals, where the matter at issue does not exceed in value £25.[3] No appeal lies from the circuit court to the High Court of Justiciary; but a circuit judge, if he think fit, may certify, for the consideration of the High Court, any question as to the relevancy of the indictment (*see* Index, *Libel*), or any doubtful matter connected with the process before it goes to the jury, or any doubt which may occur as to the proper sentence or otherwise after the verdict of the jury has been returned.

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## CHAPTER IV.

### COURT OF EXCHEQUER.

*Origin and Progress of Jurisdiction.*—THE older Scottish law books, and many early acts of Parliament, make provision for all the collectors of the revenue, and other debtors

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[1] Hume on Crimes, ii. 34, 367.—[2] 20 Geo. II. c. 43, § 34.—[3] 54 Geo. III. c. 67, § 5.

of the crown, accounting in the "chequer" for all moneys received by them. As these sums chiefly arose from casualties and other feudal taxes collected by the sheriffs, the lords of the exchequer became the king's representatives in acknowledging the titles of his vassals, as the counterpart of *their* obligation to pay.[1] The Exchequer was the instrument through which the treasury was supplied, and the Lord Treasurer and his deputies were members of the Court of Commission of Exchequer.[2] As commerce increased, and the revenue from that source grew considerable, the exchequer gradually became a court for enforcing the collection of the taxes on commodities.

By the nineteenth article of the treaty of Union the old exchequer was preserved until a new court should be constituted on the model of that of England,—an object which was accomplished in 1707.[3] Besides the officers necessary for superintending the feudal property of the crown in Scotland, the several offices then existing in the Exchequer Court in England were adapted to Scotland.[4] The court received full jurisdiction on all questions respecting the revenue and property of the crown in Scotland, and was authorized to proceed according to the forms of the Court of Exchequer in England, with a jury of twelve men having heritable property of the yearly value of £5, or worth £200 in moveables;[5] but there was one exception to the adaptation of the powers of the English exchequer, viz. that heritable property should not be attached in Scotland for debts to the crown otherwise than by the law of Scotland.[6] Judgments in the Court of Exchequer are appealed to the House of Lords by the English form of Writ of error.[7]

The authority of the exchequer was thus divided into three parts. *First*, It was a court of justice for deciding on cases respecting the collection of the revenue. *Second*, It acted as the king's representative in revising and passing the titles of his feudal vassals; and, *Third*, It acted as a board for controlling, auditing, and enrolling the accounts of the revenue.

*Alterations in the Structure of the Court.*—The last branch of its duties, in as far as respects the controlling and auditing of the customs and excise accounts, was in 1832 transferred to England, and the accounts have thenceforward been

[1] Act 1540, c. 96. Clerk and Scrope's Historical View of the Court of Exchequer, 98, *et seq.*—[2] Sixth Report of Commissioners on the Courts of Scotland, 1819, 5.—[3] 6 Anne, c. 26.—[4] Ibid. §§ 2, 3.—[5] Ibid. § 6.—[6] Ibid. § 8.—[7] Ibid. § 12.

controlled and audited as the accounts of the revenue in England have hitherto been.[1] By the act making this alteration, the judicial authority of the Court of Exchequer is left unaffected.[2]

The Court of Exchequer still retained its authority in the collection and management of the assessed taxes and land-tax, and the power of issuing instructions regarding the collection of the revenue, and of superintending the expenditure on public offices and works, criminal prosecutions, &c. These powers, along with the ministerial duties of the court in granting leases of crown property, &c. were removed in 1833, and vested in the treasury.[3] In 1832, the management of the land revenue was appointed to be transferred under warrant from the treasury, and whenever it should be expedient, from the barons of exchequer to the commissioners of woods and forests.[4] It was in the same year enacted, that vacancies occurring in the Court of Exchequer should not be filled up, and that after the retirement or death of the last baron, the duties of the court should be performed by a judge of the Court of Session.[5] A judge of the Court of Session now performs the duties, which chiefly consist in issuing writs of extent, and other judicial matters connected with the revenue, and revising signatures on crown charters.[6] Two of the judges, who are not commissioners of justiciary, are appointed, according to a routine and regulations made by the court, to perform these duties alternately.[7]

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## CHAPTER V.

### SHERIFFS.

### SECT. 1.—*Historical Notice.*

THE Sheriff anciently administered justice as the king's principal officer within the district, and his office was hereditary. He is now the principal local judge in his county; but the formality of his being the king's steward or bailie is still preserved, and he, in that capacity, attended to the feudal sources of royal revenue, which by an act of 1845, were appointed to be paid directly to the Exchequer.[8]

[1] 2 & 3 Wm. IV. c. 103.—[2] Ibid. § 5.—[3] 3 & 4 Wm. IV. c. 13, § 1.—[4] 2 & 3 Wm. IV. c. 112.—[5] Ibid. c. 54.—[6] 5 & 6 Wm. IV. c. 46. 7 Wm. IV. and 1 Vict. c. 65.—[7] 2 & 3 Vict. c. 36, § 4.—[8] 8 & 9 Vict. c. 35, § 6.

A practice existed until lately of giving those who were virtually Sheriffs Principal the title of "Sheriff-depute." This appears to have arisen from a notion that the Sheriff was a depute to some official holding a like position with the High Sheriff in England, and seems to have rested on a clause in the Jurisdiction Act, to the effect that "It shall not be lawful for any Principal, or High Sheriff, or Stewart in Scotland, personally to judge in any cause, civil or criminal, within his shire or stewartry in virtue of such his office, any law or usage in any ways to the contrary notwithstanding."[1] The commissioners who reported on the courts of law in 1818, stated that though there had been, soon after the Jurisdiction Act, some instances of the temporary appointment of such an officer, they could not discover any functions which it was his duty or privilege to perform, except those of the Lord Lieutenant, who was the person to whom the commission was generally given.

By the Jurisdiction Act, sheriffs were directed to reside four months during each year in their respective counties, but this regulation is repealed, and sheriffs appointed after 31st December 1838 (those of Edinburgh and Lanark excepted) must remain in attendance on the Court of Session.[2]

### SECT. 2.—*Civil Jurisdiction.*

The civil jurisdiction of the Sheriff extends to all actions upon contracts, bonds, bills, or other personal obligations to any extent, actions of damages, and the like. He cannot judge in declaratory or rescissory actions, or in those involving a right to heritable property. The Sheriff has jurisdiction, however, in all questions as to nuisance or damage arising from the undue exercise of the right of property, and as to servitudes when no other right is involved with the question.[3] Jurisdiction in cases of *Cessio Bonorum* was added to that of the Sheriff in 1836.[4] A considerable portion of the inquiries and other operations by which public companies acquire right to property for conducting railways and other public works devolve on the Sheriffs; and every year adds to the functions for the preservation of the public peace which are committed to them by statute. The following pages will be found to explain under their several heads the functions thus devolved on the principal local judge. Each Sheriff must hold eight courts during the year, four between 1st December and 12th

[1] 20 Geo. II. c. 43, § 30.—[2] 1 & 2 Vict. c. 119, §§ 1, 2.—[3] Ibid. § 15. Brown *v.* Currie, 1st February 1843.—[4] 6 & 7 Wm. IV. c. 56.

May, and other four between 1st June and 12th November. The Sheriff of Orkney has to hold eight courts between 1st December and 12th November, four in Orkney and four in Shetland.[1]

*Substitutes.*—Each sheriff has one or more substitutes, by whom the greater part of the duty is performed. These are appointed by the respective sheriffs, but are not removable, except with the consent of the Lord President and Lord Justice Clerk.[2] The sheriff-substitute must not be absent from the county more than six weeks in one year, or more than two weeks at a time, unless with the consent of the sheriff, who must then act personally, or appoint another substitute. No substitute can act as a law-agent, conveyancer, factor, or banker.[3] Cases in the Sheriff Court are, in the first instance, decided by the sheriff-substitute, and a litigant discontented with such decision may appeal to the sheriff, by a simple note, without any new pleading.

The methods by which the decision of the sheriff is brought under review by the Court of Session are treated above.

*Procedure.*—The form of process in the Sheriff Court resembles that in the Court of Session. The defender is in ordinary cases brought into court by a summons, in the name of the Sheriff, and subscribed by the clerk of court. In the majority of cases the "*inducice*," or the period elapsing between citation and the time for entering appearance, is six free days.[4] Until the act of 1838 regulating the jurisdiction of sheriffs, they could not compel the appearance of witnesses, holders of documents, &c., residing beyond their respective counties, except by letters of supplement from the Court of Session; but the citations and warrants granted in one county are now available in any other county, on being indorsed by the sheriff-clerk thereof.[5] By another act of the same date, for amending the law in matters of diligence, sheriffs are authorized to imprison for civil debt, a power which they did not formerly possess. The warrant to that effect may be executed in another sheriffdom by a concurrence from the Sheriff Court there.[6]

### SECT. 3.—*Criminal Jurisdiction.*

The criminal jurisdiction of the Sheriff within his county is, with the exceptions noticed below, concurrent with that

[1] 1 & 2 Vict. c. 119, § 2.—[2] Ibid. §§ 3, 4.—[3] Ibid. § 5.—[4] Maclaurin's Form of Process before the Sheriff Courts. M'Glashan's Practical Notes on Act of Sederunt 12th November 1825.—[5] 1 & 2 Vict. c. 119, § 24.—[6] Ibid. c. 114.

of the Court of Justiciary over the country. The Sheriff anciently exercised the power of trying for murder; but jurisdiction in the four pleas of the crown—murder, robbery, rape, and wilful fire-raising—is now considered as exclusive to the Court of Justiciary, and the power of the Sheriff to condemn to death has long been practically abolished. Having no jurisdiction beyond the limits of his county, he cannot transport, nor can he banish, except from his county.* He frequently, however, tries such crimes as might in strict law be, but are not in general, punished with death or transportation by the superior court, awarding the punishment of imprisonment. He cannot try a crime created by statute, and declared punishable by transportation, or by such inferior punishment as may by law be inflicted on persons convicted of a "transportable offence."[1] The Sheriff tries with or without a jury, according to the nature of the case; and the circumstances in which the one or the other system is to be adopted, along with the forms to be used, are regulated by an act of Parliament, and corresponding act of Adjournal.[2]

*Jury.*—In the case of trial by jury the form is in all essentials the same as that of a trial before the Supreme Court (see Index, *Jury*), with the exception that the judge must keep an authenticated note of the evidence, that, if necessary, it may be produced in the Supreme Court.[3] There are some slight distinctions in the manner of commencing the prosecution, which will be found under the head of *Prosecutors.* In trials by jury, the *inducice*, or period elapsing between the day of citing the prisoner and his appearance, must be fifteen free days.[4]

*Without Jury.*—If the Sheriff is to try without a jury, he may do so on *inducice* or notice of not less than six days, or summarily. In the former case the punishment is limited to "fine, imprisonment, and banishment, or any of them,"[5] and there appears to be no definite distinction between the cases which require a jury, and those which do not, as the Sheriff scarcely ever exceeds these punishments. In such trials without jury, it would appear that the evidence must be taken down and authenticated.[6] Where the trial is in

* By statute, banishment from Scotland, or from any district in it, is prohibited, excepting in cases enacted to be so punished by acts of the Scottish Parliament, 11 Geo. IV. & 1 Wm. IV. c. 37, § 10.—[1] A. Prac. 37.—[2] 6 Geo. IV. c. 23. Act of Adjournal, 17th March 1827, Shaw's Justiciary Reports, 180.—[3] 9 Geo. IV. c. 29, § 17.—[4] Act of Ad. 17th March 1827, chap. i. § 2.—[5] Ibid. § 3.—[6] 9 Geo. IV. c. 29, § 18.

what is termed, "a summary way," it is not necessary that the accused should receive previous warning; but if he have not, he may, on being brought before the sheriff, require a copy of the libel against him, and demand that the trial shall be postponed for forty-eight hours.[1] The punishment cannot exceed a fine of £10, with expenses, or imprisonment for sixty days, accompanied with caution for good behaviour for not more than six months, under a penalty not exceeding £20. If the accused plead "not guilty," a record must be preserved of the charge, the judgment, and the names of witnesses as examined on oath.[2] To prevent a demand for delay, the approved practice is to give the accused forty-eight hours' warning, by putting a copy of the libel or accusation into his hands. By the act regulating the jurisdiction of sheriffs, their warrants against criminals for offences within their counties may be executed in any part of Scotland by a messenger-at arms, or an officer of the court which issues the warrant.[3]

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## CHAPTER VI.

### CORPORATION COURTS.

### SECT. 1.—*Burgh Courts.*

*Royal Burghs.*—THE magistrates of royal burghs have been in the practice of deciding, through one of their number, in minor civil actions between the inhabitants, and though their jurisdiction is not very clearly defined, "it is the general opinion that royal burghs have as extensive a civil jurisdiction within the burgh, as the Sheriff hath in his territory."[4] The above rules as to procedure in crimes, as well as the rules for civil processes, established by act of sederunt of 12th November 1825, apply to the courts held by the magistrates of royal burghs;[5] while at the same time some of the larger burghs are sheriffdoms, and their magistrates have a jurisdiction cumulative with that of the Sheriff of the county. Magistrates may thus try for crimes

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[1] 11 Geo. IV. & 1 Wm. IV. c. 37, § 4.—[2] 9 Geo. IV. c. 29, § 19.—[3] 1 & 2 Vict. c. 119, § 25.—[4] E. i. 4. 21.—[5] 6 Geo. IV. c. 23, § 7.

by jury, but the practice has become very unusual.[1] Magistrates of royal burghs may imprison for civil debts.

Burgh courts, whether held by magistrates in virtue of their office, or as police judges appointed by act of parliament, have the power of punishing by fine or imprisonment, summarily and without juries, in all police offences, or those tending to disturb, by violence or irregular habits, the peace of the town.[2] These offences may be generally enumerated under brawls, assaults, or outrages on the streets, in which no very serious or permanent injury has been inflicted, the keeping disorderly houses, &c. No definition appears to exist either as to the precise extent of crime which may be so tried, or as to the exact amount of punishment which may be inflicted, and it seems to lie with the discretion of magistrates to restrict their trials to petty offences, and to make the punishments moderate and correctional.

*Regalities and Baronies.*—The magistrates and councils of royal burghs are frequently superiors of burghs of regality and barony, exercising within their bounds powers somewhat similar to those which they enjoy in their own burghs.[3] The authority exercised by individual superiors of regalities and baronies was nearly altogether abolished by the Jurisdiction act of 20th Geo. II. (*See Part* III.) The magistrates of such burghs were, however, permitted to retain such authority as they might hold, not as stewards of the superior, but in their own corporate capacity.[4] The extent of the jurisdiction they thus hold it is not easy to define. In civil questions it is probably inferior to that of royal burghs; in matters of police it would appear to be similar.

### SECT. 2.—*Dean of Guild.*

The authority of this officer, whose position as a member of the municipal corporation is considered further on, is generally exercised in a court, of which he is either the sole or the principal judge, according to usage. The proceedings, when they are not of a simply routine character, are generally suggested by the legal assessors of the burgh. Some deans are assisted by a council, who inspect premises, and act somewhat in the manner of a jury on a view. In Edinburgh, and probably in some other towns, it is unusual for private parties to prosecute:—there is a procurator fiscal, or public prosecutor, attached to the court, who

[1] A Prac. 61.—[2] Ibid.—[3] 20 Geo. II. c. 43, § 26.—[4] Ibid. § 27.

hears complaints, and prosecutes them if he thinks fit. "It belongs to the Dean of Guild to take care that buildings within burgh be agreeable to law, neither encroaching on private property nor on the public streets or passages; and that houses in danger of falling be thrown down."[1]

By an act of the reign of Charles II. the magistrates of burghs are authorized to enforce the repairing or rebuilding of ruinous houses, and are invested with powers (on the owners dissenting or not being forthcoming) to dispose of the buildings to persons who will obey their injunction, or to execute the repairs and levy the cost on the owners.[2] The application of this statute, so far as it is enforced, rests with the Dean of Guild, partly as a judicial, partly as an executive officer. The Dean of Guild of Edinburgh is entrusted with the enforcement of the act (1698, c. 8) which prospectively restricts the height of buildings in the city to "five stories above the causeway," and contains other building regulations, which, like the old building acts of London, have chiefly in view the protection of the city from fire.

In conformity with the practice of the city of Edinburgh, no building can be erected, or taken down, or materially altered, without a warrant from the Dean of Guild Court, which is only granted when the immediate neighbouring proprietors of the applicant, and others *ex facie* interested in the alteration, are cited, and have an opportunity of being heard for their interest.*

This court cannot easily enforce its jurisdiction when it is resisted; and it is difficult to give any distinct view of the extent of its authority, which is chiefly of a traditionary character, sanctioned by sufferance and habit.

It has been decided that the authority of the Dean is limited to questions in which the construction of buildings is involved, and does not extend to the purposes for which they are used.[3] Where there was both a Dean of Guild's and a Magistrate's Court, it was held in the particular circumstances, and appears to have been laid down as a general rule, that the Dean of Guild's jurisdiction was not exclusive of that of the Bailie Court in questions as to the taking down of party walls.[4]

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[1] E. I. iv. 25.—[2] 1663, c. 6.—* See an inquiry by the author regarding the functions of the Dean of Guild in a report to the Poor Law Commissioners of England on the state of the law for the preservation of the public health in Scotland, 1841.—[3] Donaldson *v.* Pattison, 14th November 1834.—[4] Milne *v.* Melville, 27th November 1841.

# CHAPTER VII.

## JUSTICES OF THE PEACE.

### SECT. 1.—*Constitution.*

JUSTICES of the Peace are officers appointed by commission passing under the great seal, who are empowered to keep the peace, and decide in certain matters of law within their districts, and to certify certain acts (such as the making of affidavits) over the whole country. They were introduced by act 1587, c. 82, and, after various improvements, were, immediately after the Union, vested in general terms with the same powers held by justices of the peace in England.[1] Some of these are, however, incompatible with the judicial system of Scotland.

*Qualification.*—No pecuniary or property qualification is requisite for holding this office in Scotland, though certain restrictions are generally observed in the commissions of the different counties.[2] No procurator before an inferior court can act as a justice of peace.[3]

*Oath.*—Before entering on their office, justices must make oath faithfully to perform their duties, and must likewise take the oaths imposed on persons in public trust.[4] The parchment roll containing the oaths and the subscriptions is kept among the records of the sessions.[5] An individual is not compelled to take the oaths twice in the same reign, though named in a second commission.[6] Those who have delayed to take the oaths are indemnified by the annual act of indemnity, which does not, however, exempt justices of the peace from the penalties to which they are subject, "for acting as such without being possessed of the qualification required by the laws now in force,"[7]—a condition which would seem only applicable to England, where there is a money qualification.

Each commission of the peace, which would in course of law fall with the death of the sovereign who granted it, is appointed by statute to endure for six months thereafter, unless revoked by the successor.[8] Certain officials are in-

[1] 6 Anne, c. 6, § 2.—[2] Hutch. J. P. i. 42. Tait's J. P. 264.—[3] 6 Geo. IV. c. 48, § 27.—[4] Hutch. J. P. i. 44. Tait's J. P. 265.—[5] Hutch. J. P. i. 49.—[6] 7 Geo. III. c. 9.—[7] 1 & 2 Vict. c. 16, § 4.—[8] English Act, 1 Anne, st. i. c. 8, § 2. 6 Anne, c. 6, § 2.

cluded in all the commissions,—these are, all privy councillors, the Judges of the Court of Session and Justiciary, and the Lord Advocate and Solicitor General for the time being; the other names are those of persons connected with the respective counties.[1] Justices of the peace perform their duties gratuitously. By old statutes, they were appointed to receive 40s. Scots for every day of their abode (provided they did not exceed three) at sessions; but these acts have fallen into desuetude.[2] Justices are remunerated for their pecuniary disbursements by the exchequer, or from the rogue money.[3]

*Liabilities.*—Justices of the peace may be prosecuted, either civilly or criminally, for malversation. It has been said that "they are not liable in damages, still less in punishment, although they act illegally, unless they likewise act corruptly;"[4] but, unless in as far as they are protected by statute, there is no doubt that they are responsible for illegalities.[5] For their special protection from the consequence of mere informalities, it is enacted that, in case a conviction or other act of justices is quashed, the pursuer can have no higher damages (besides the recovery of any penalty that may have been levied on him) than twopence, and no costs, unless the action be grounded on malice, and want of probable cause;[6] and that he will not be entitled to recover any penalty that may have been levied against him, or any costs, if the justice prove him to have been guilty of the offence, and not to have received any greater punishment than that assigned by law.[7] Where a justice stated, during a trial for poaching, that the defender had committed thefts, it was decided by the House of Lords, that any action of damages must be founded on a charge of malice, and that the malice cannot be inferred from the language employed, but must be separately proved.[8] Justices are liable to penalties for mistakes in the application of the liberation act 1701. (*See* Index, *Liberation, Bail.*)

## SECT. 2.—*Jurisdiction.*

The Commission, in the first place, authorizes the justices to enforce the statutes for the preservation of the peace, and

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[1] Tait's J. P. 6241.—[2] 617, c. 8, § 25. 1661, c. 38.—[3] Hutch. J. P. i. 50. Tait's J. P. 272.—[4] Hutch. J. P. i. 65.—[5] Rae *v.* Sinclair, 12th July 1838. Macfarlane, 73. See the Law of Private Rights, Part XIV. Chap. II. § 4.—[6] 43 Geo. III. c. 141, § 1, (found to extend to Scotland in Gibsons *v.* Murdoch, &c., 18th June 1817.)—[7] Ibid. § 2.—[8] Allardyce, &c. *v.* Robertson, 8th April 1830. 4 W. & S. 102.

to cause all persons who have used threats to others to give security for their good behaviour. This gives power to a single justice, either on the requisition of a party entitled to prosecute, or on information, to grant warrants for searching for stolen goods, apprehending offenders, &c.,* and to bring before him persons who threaten to commit any breach of the peace, and compel them to find security to keep the peace.

The Commission, following the form of that of England (which was accommodated to the peculiar usages of that country) next gives jurisdiction to the justices, or any two of them, in "all and singular capital crimes, poisonings, enchantments, sorceries, arts magic, trespasses, forestallings, regratings, engrossings, extortions, &c.;" and authority to punish "by fines, ransoms, amerciaments, forfeitures, and other means."[1] In England, it is held that they "have jurisdiction over all misdemeanours, except forgery and perjury, by the common law; as these two offences were not considered to be breaches of the peace, which it was the chief object of the institution of the commission of the peace to preserve."[2] In Scotland, the jurisdiction of the justices has been in practice much more limited, and they have never judged in such offences as require the intervention of a jury.[3] "They seem, however, competent to judge in all petty crimes tending to the disturbance of public tranquillity (except defamation not accompanied by a threatening of a breach of the peace), where the libel concludes only for fine or imprisonment, or perhaps banishment from the county,† particularly breaches of the peace, and petty acts of theft or pickery."[4]

*Limits of Authority.*—Mr Baron Hume considers the precise limits of the powers of justices very doubtful.[5] The commission provides that, in cases of difficulty, the justices shall decide only in presence of a supreme criminal judge; but in Scotland it has been usual to consider this precaution unnecessary, on account of the supposed unimportance of the questions decided by justices.[6]

*Jurisdiction by Statute.*—Independently of the powers thus conferred on them by the commission, the justices hav jurisdiction in many cases, by special act of parliament, *e. g.* to Planting and enclosing, Customs, Excise, Highways, Publ houses, Theatres, Stage-carriages, Weights and measure Cruelty to animals, Game, Fishings, Nuisances, the Sale

* See Index, Warrant, Commitment.—[1] Hutch. J. P. iv. 3.—[2] F c. (1830) iv. 271, n.—[3] Hutch. J. P. i. 163.—† See above, p. 20.—[4] Ta J. P. 268.—[5] H. C. ii. 70.—[6] Tait's J. P. 269.

bread, Licensed Hawkers, Factory regulations, Public Works, the rules as to Shipping and the employment of mariners, &c. The statutes of every session of parliament make considerable additions to the functions of justices of peace, and their powers in the matters above enumerated, as well as in others where special statutory authority is conferred on them, will have to be considered in the following pages. By virtue of the commission, no case can be tried without the presence of two justices; but by the special provisions, one justice is often made competent. The justices judge in cases of aliment to natural children, and in disputes between master and servant.[1] In civil matters, justices have jurisdiction to the extent of £5, exclusive of expenses,[2] provided the decision do not involve a question of heritable right, or as to the validity of a will or contract of marriage, or any gambling debt, or the price of spirituous liquors.[3] The exercise of their functions in the small debt courts belongs properly to the department of private rights.* Justices have no power as judges in litigated cases beyond their counties; but they exercise ministerial duties, such as taking affidavits of the truth of certain statements.

There can be no other general rule for the conduct of justices of the peace, than that they are bound to observe to the letter the statutes under which they act, and that whatever discretion they must sometimes find it necessary to adopt in interpreting the enacting terms in the body of a statute, when there are schedules, containing forms of conviction or other styles, the very words dictated by the legislature must be employed, because the form of a schedule is adopted with the intention of superseding all discretion as to the method of procedure. However useful law-books and other commentaries may be to the justice of peace, in leading him either to the knowledge of the existence of an act, or to its right interpretation, they should not supersede the act itself, which ought to be in his hands on the occasion of every commitment or conviction founded on statute. It is of essential importance to know, though it is sometimes not easy to discover, how far statutes have been altered and amended by others; and this is one of the points, on which digests of the law, if executed with proper skill and industry, are mainly serviceable to justices of the peace. If a statute set forth alternative circumstances under which a conviction may take place, the record must state which of them has taken place—so where it was enacted that they might convict on their own view, or on

[1] Tait's J. P. 271.—[2] 6 Geo. IV. c. 48, § 2.—[3] Ibid. § 25.—* See the Law of Private Rights, &c. Part XIV. Chap. IV.

confession, or on proof on oath, an objection that the conviction did not bear that it rested on any one of these grounds, was sustained.[1] It would at any time render a conviction, whether proceeding on statutory or ordinary law, questionable, that it does not state the ground on which it has proceeded. Action had been raised before certain justices for a statutory penalty. On the appointed day the case was not called, and there was no adjournment pronounced. It was taken up on a subsequent day, and a penalty was imposed, which not being satisfied by a poinding, imprisonment followed. The Court of Justiciary granted suspension and liberation, on the ground that the justices had given decree and granted their warrants when there was in reality no prosecution before them. It was found, however, that unless malice could be averred, the irregularities were no sufficient foundation for an action of damages.[2]

In proceedings under an act, which authorized a summary conviction, it was found to be no objection to a conviction that the evidence was taken down in writing. In the same case, where two were made a quorum by the act, it was found not to invalidate the decision, that besides two who were present during the whole proceedings, other justices concurred in the judgment, which was unanimous.[3]

*Affidavits.*—An affidavit, properly speaking, is the oath of any person cognizant of certain matters, to the truth of which he speaks, uttered before a magistrate, by whom it is certified as having been so. In the cases where an oath is required, quakers or separatists may make a solemn declaration. The instances, however, in which oaths are required or permitted, are now limited in number. By the custom-house acts, declarations are in general substituted for them. In 1835 an act was passed, authorizing the Lords of the Treasury to substitute declarations for oaths in transactions connected with the different departments of the revenue and public offices.[4] By the same act, justices are prohibited from administering oaths "touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being;" but the provision does not extend to "any oath, affidavit, or solemn affirmation before any justice, in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings be-

[1] M'Donald *v.* Gray, 15th June 1844.—[2] Malonie *v.* Walker, 21st Jannary 1841.—[3] Somerville *v.* Hemmans, 25th June 1844.—[4] 5 & 6 Wm. IV. c. 62, § 2.

fore either of the houses of parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country, to give validity to instruments in writing, designed to be used in such foreign countries respectively."[1] The statute is declared not to extend to judicial ratifications by married women, of deeds executed by them.[2] A form of declaration is substituted, and the taking such declaration falsely renders the offender liable to fine and imprisonment.[3]

In reference to affidavits, it may be mentioned that by statute the Lord Chancellor is authorized to appoint masters extraordinary in Chancery, to take in Scotland those affidavits to be used in England, which, according to the practice of that part of the empire, require to be taken before a master in Chancery.[4]

### SECT. 3.—*Courts.*

*Quarter Sessions.*—The principal court of the Justices of Peace is, "the General Quarter Sessions," which consist of meetings of the justices of the whole county, appointed to be held on the first Tuesdays of March, May, and August, and the last Tuesday of October, with power of adjournment.[5] Two justices form a quorum.[6] The Quarter Sessions can meet only at the head burgh of the shire,[7] though they may adjourn to another place. "The adjourned meetings are commonly called General Sessions. Sometimes they are for a special piece of business, in which case they are generally termed Special Sessions."[8] The Quarter Sessions have some ministerial duties specially assigned to them. They act as a court of appeal from the decisions of justices in Petty Sessions.[9]

*Petty Sessions.*—The Petty Sessions are the occasional meetings of two or more justices, before whom the majority of ordinary cases are tried.[10] Counties are generally divided into districts, for each of which sessions are held; the decisions of which are valid over the whole county.[11] By the small debt act, the justices at Quarter Sessions may make and alter divisions of districts, and appoint times and places of meeting for Petty Sessions, acting under the statute.[12] If there be but one justice present at such a session, he may call the roll of causes, pronounce decrees in absence, and receive returns of the execution of citations.[13]

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[1] 5 & 6 Wm. IV. c. 62, §§ 13, 15.—[2] 6 & 7 Wm. IV. c. 43.—[3] 5 & 6 Wm. IV. c. 62, §§ 18, 20.—[4] 6 & 7 Vict. c. 82.—[5] 1661, c. 38, Hutch. J. P. i. 76.—[6] Commission.—[7] Hutch. J. P. i. 77.—[8] Tait's J. P. 469.—[9] Ibid.—[10] Ibid.—[11] Ibid. 109.—[12] 6 Geo. IV. c. 48, § 21.—[13] Ibid. § 16.

*Prosecutors, Clerks, &c.*—In the ordinary case of an offence, the party injured and the procurator-fiscal only can prosecute; but it is specially enacted in many of the statutes for the preservation of the peace, that any informant may prosecute. The procurator-fiscal, or public prosecutor, is appointed by the justices, generally from among the agents practising before them.[1] The clerk of the peace is chosen by the Secretary of State, and generally for life.[2] Besides preparing the rolls, writing out warrants and decrees, &c., he has other ministerial duties peculiarly assigned to him. Each district has generally a depute-clerk and procurator-fiscal, who are appointed by their respective superiors.[3]

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[1] Ninth Report of Commissioners on Courts of Law in Scotland, 1821, p. 18.—[2] Ibid. p. 17.—[3] Tait's J. P. 109.

# PART II.

## THE MEMBERS OF THE LEGISLATURE.

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### CHAPTER I.

#### Election of Representative Peers.

The peers of Scotland, by the Treaty of Union, elect sixteen of their number to be their representatives in the House of Lords.[1] These sixteen peers enjoy all the privileges of the peers of England, and are entitled to sit on the trial of peers.[2] The other peers of Scotland have all the privileges of members of the House of Peers, except the legislative and judicial powers.[3]

At the summoning of a new parliament, a proclamation is issued, calling on the peers to meet at Edinburgh or elsewhere, to choose their representatives, which must be published at the market-cross of Edinburgh, and at all the county towns of Scotland, five and twenty days before the meeting for election.[4] English peers possessed of Scottish titles at the time of the Union, or who have since succeeded to them, and peers of Scotland who have obtained British peerages, have votes, but no other peers created since the Union, though their titles should be nominally Scottish, can vote.[5] No peer can vote or be elected who is not of the age of 21.[6] Each protestant peer must subscribe the oath of supremacy in 6th Anne, c. 23, that of allegiance in 1st Geo. I., c. 13, and that of abjuration, in 6th Geo. III. c. 53.[7] Roman Catholic peers have to subscribe the oath appointed by the Catholics' Emancipation act.[8]

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[1] Articles of Union, art. 22.—[2] Ibid. art. 23.—[3] Ibid.—[4] 6 Anne, c. 23, §§ 1, 2.—[5] Wight on Elections, 113. Connell on Elections, 11. Robertson's Proceedings relating to the Peerage, 414.—[6] Wight, 117.—[7] 6 Anne, c. 23, § 3. 1 Geo. I. stat. 2, c. 13, § 3. 6 Geo. III. c. 53, § 1. 2 & 3 Wm. IV. c. 63.—[8] 10 Geo. IV. c. 7, §§ 2, 5.

Peers are entitled to empower others to vote for them in their absence, by proxy. The proxy must be directed to a peer entitled to vote, and must be signed in the presence of two subscribing witnesses.[1] No peer can act as proxy for more than two peers at a time.[2] Peers may likewise vote in their absence by signed lists. The lists must be subscribed by witnesses, but it is not necessary that the writer's name should be mentioned.[3] Those who grant proxies, or vote by signed lists, must take the oaths in presence of a judge; it is generally done before the sheriff.[4]

The peers are directed under penalties to appear at the place of meeting with their ordinary attendants only.[5] They are prohibited from taking into consideration any other subject or business than that for which they are convened, under the penalty of what is in England termed "*præmunire*,"[6] involving partial outlawry and imprisonment.[7] * The business of collecting and recording the votes is performed by the lord-clerk-register, or two principal clerks of session.[8]

When a peer whose name is on the roll proffers his vote, it cannot be refused, and no question as to title can be discussed. An objecting peer may, however, enter a protest, and prefer a petition to the House of Lords complaining of the return.[9] When two claim the same title, both must be allowed to vote.[10] The roll is the same which was called at the last Scottish parliament, with the deductions which have been made by attainders, and the additions which have been made by order of the House of Lords, in consequence of rights to Scottish peerages having been established before them.[11]

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## CHAPTER II.

### ELECTION OF MEMBERS OF THE HOUSE OF COMMONS.

#### SECT. 1.—*Voters in Counties.*

*Freeholders.*—ALL persons who were on the roll of freeholders, or entitled to be placed on it at the passing of the

[1] 1707, c. 8. Wight, 120.—[2] 6 Anne, c. 23, § 6.—[3] 1707, c. 8.—[4] Connell on El. 15.—[5] 6 Anne, c. 23, § 8.—[6] Ibid. § 9.—[7] Bl. iv. 118.—[8] Robertson's Proceedings, 27. Wight, 125.—[9] Ibid. 126.—[10] Ibid.—[11] Ibid. 125, n. †.

* As a *præmunire* is known only in English law, and is an offence for which a peer is not tried by his peers, there would undoubtedly be many questions of difficulty were a peer brought to trial on the act.

act 2d and 3d Wm. IV. c. 65, or who before 31st March 1831 became proprietors or superiors of lands which would have entitled them to be enrolled after the expiry of the necessary period,* retain their right to vote so long as they hold their qualification, but it cannot be transferred by them, and is not descendible to their heirs.[1]

*Proprietors.*—Owners of lands, houses, feu-duties, and all other heritable subjects (except debts heritably secured), of the yearly value of £10, whether they have made up their titles or not, are entitled to be registered, if they have been proprietors for six months previously to the 31st July, in the year in which the claim is made;[2] but where the property has been acquired by inheritance, marriage, marriage settlement, or *mortis causa* disposition, or by appointment to any place or office, the proprietor is entitled to be registered on the first occasion of making up the list, though before the expiry of the six months.[3] The property must be worth £10 annually, after deduction of any feu-duty, ground-annual, or other consideration, forming a condition of the right; but though the returns do not arise annually, but at longer intervals, their average annual amount may be estimated.[4] Debts heritably secured are not deducted. Liferenters vote to the exclusion of fiars.[5] Joint-owners may vote where the interest of each amounts to £10 annually, and husbands vote on property in right of their wives, and after the death of their wives, on their right of courtesy.[6] Every person enrolled as a proprietor must be in the actual occupancy, or in receipt of the rents, &c.[7]

*Evidence of Proprietorship.*—As the act admits the proprietor to the franchise "whether he has made up his titles or is infeft or not," regular feudal titles are not required as evidence in the registration court. As to the extent of evidence necessary to prove proprietorship, there have been doubts, some courts insisting that the claimant should show a personal title at least, *i. e.* such a title as he can immediately convert into a regular feudal one by infeftment, others having received ordinary evidence of admitted ownership, "such as entry of the name of the party in the superior's rental-book; entries in such book of payments of feu-duty by him; separate receipts for feu-duty; or one or more of such written adminicles, accompanied by parole proof of

[1] 2 & 3 Wm. IV. c. 65, § 6.—[2] Ibid. § 7.—[3] Ibid.—[4] Ibid.—[5] Ibid. § 8.—[6] Ibid.—[7] Ibid. § 7.

* A year elapsed between the infeftment of a freeholder and his enrolment. Wight on Elections, 212.

building houses or of possession."[1] The evidence must in all cases show absolute ownership, and where documents are produced from which the contrary may be inferred, their effect must be counteracted by conclusive evidence.[2] The right should be indefeasible, and so when the title produced gave power to another person to burden, sell, or dispone, the claim was rejected.[3]

*Trust-deed.*—A trust-deed has been held not to exclude the truster, though it bare to be absolute, and it was averred that there would be no residue after fulfilling the objects of the trust.[4] The claims of persons benefited by trust-settlements have given rise to a variety of decisions, the leading principles of which appear to be, that where the trustees are merely empowered to sell heritable property for the purposes of the trust, those for whose benefit it is held may vote so long as it is unsold,[5] but, that where they are enjoined to sell and divide the proceeds, the persons for whose benefit they act have a mere personal right to a share of the proceeds, and though the property be unsold, and the rents are divided among them, they have no qualification.[6]

*Partnership.*—Partners have been found entitled to vote on heritable property belonging to the company;[7] and that even though the contract declared the property of the company, as represented by its shares, to be personal property.[8] The members of a corporation holding property in trust, as the town-council of a burgh, cannot qualify. It is matter of doubt whether the members of a commercial corporation can.[9]

*Liferenters.*—There is no clause expressly enfranchising liferenters, but it has been inferred from that giving them a qualification to the exclusion of fiars (§ 8) that they were intended to be included, and that they should have the qualification without requiring to make up titles, as if they had been specified in the enfranchising clause.[10] In general, they have been found entitled to claim as proprietors. An irredeemable liferent annuity has constituted such a claim, the court holding "the distinction between heritable burdens and liferent to consist in the defeasibility, at the option of the party burdened, by payment"[11] in the case of the former; but the decisions on the subject are not uniform.[12]

*Office Holders.*—Persons holding property by virtue of their office, are held enfranchised by the clause which dis-

[1] Cay's Analysis of the Reform Act, par. 119.—[2] Cay, 62, e, f, g, h.—[3] Ibid. 54, c.—[4] Ibid. 52, a.—[5] Ibid. 61, a, j.—[6] Ibid. b to i.—[7] Ibid. 72, b.—[8] Imlach, 1838. Cairnie, 1838. Swinton's Digest, 32.—[9] Cay, 72.—[10] Ibid. 81.—[11] Ibid, 87, d.—[12] Ibid. 152.

penses with the six months' possession in the case of such persons (§ 7). The privilege has been chiefly applied to clergymen and schoolmasters. A distinction has been made between clergymen of the establishment and parish schoolmasters on the one hand, and dissenting clergymen and the teachers of privately endowed schools on the other; the former holding the subject of their claims by the operation of law on entering on their offices, and therefore not being required to produce proof of possession, the latter holding them by private agreement, and liable to produce evidence as in ordinary claims.[1] It has generally been held in the case of a dissenting clergyman, that he must show, "first, the title to the subject in the congregation, and that they hold it by a right such as *enables them to convey* to him a liferent interest. Second, his own title to the subject, viz. that the congregation *have* conveyed a liferent interest to him indefeasibly."[2] If the congregation hold only on lease, he will generally require to make out a qualification as liferent tenant.[3] A parish minister has been held not to have a qualification through the teinds to which he has a right by a decree of locality.[4] Some appeal courts have admitted parish schoolmasters claiming on their school-houses, but "the majority of appeal courts have been of opinion that the subjects on which alone the schoolmaster can claim as attached to his office, are the dwelling-house and garden, to the exclusion of the school-house and play-ground, and that neither the salary nor the allowance made where there is no garden, can be taken into account."[5] Parish ministers and schoolmasters belong to the class of "proprietors," to whom occupancy is not deemed necessary; and so the claim of a schoolmaster was admitted where he let his house for part of the year to people frequenting a watering-place, and the rent so obtained was admitted as an ingredient in the value.[6]

*Tenants not in Occupancy.*—Tenants, whether joint or several, are entitled to be registered where, in a lease for not less than 57 years (exclusive of all breaks at the option of the landlord), or for life, their interest, after paying the rent or other consideration, is not less than £10 annually; or where, in a lease of not less than 19 years, their interest is not less than £50.[7] The tenant must have held the subject for a year previous to the last day of July (unless it have fallen by succession, &c., as in the case of a proprietor), on a written title.[8]

[1] Cay, 99-107.—[2] Ibid. 101. Swinton, 49.—[3] Cay, 103.—[4] Ibid. 151, c. Shirra, Jedburgh, App. 1837.—[5] Cay, 93.—[6] Ibid. 98, b.—[7] 2 & 3 Wm. IV. c. 65, § 9.—[8] Ibid.

*Tenants in Occupancy.*—Tenants who do not hold by written titles, or for a fixed period, or with a fixed yearly interest, are entitled to be registered after being a year in personal occupancy, if their yearly rent is not less than £50; or if they have paid a grassum of not less than £300[1]: it is questioned, however, whether occupancy is required in this last case. Sub-tenants and assignees to sub-leases, for 57 years, with an annual interest of £10, or for 19 years, with an interest of £50, must be in occupancy.[2]

Where any rent is payable in grain, the average of the fiars for the three preceding years is taken, and when in any other produce, the average of the market-price for the same period.[3]

*Decisions as to Tenants.*—By some courts, long leases, as for 99 years, have been held equivalent to property, and the claimant has been admitted as a proprietor, without reference to the quality in which he may have claimed, in virtue of § 46 of the act, which obviates vitiation from misnomers.[4] A committee of the House of Commons decided that lessees for 999 years were not proprietors, but that they were entitled to vote though they had claimed in that capacity.[5] Where tenants had been long in possession, but had only obtained their written title within the year, their claims were rejected;[6] in cases, however, where the title bore that the tenant entered before the running of the year, and this has been supported by proof, it has been usual to sustain. Where an assignation, except with consent of the landlord, is prohibited, an assignee has been held not qualified without it.[7] Where one of two joint occupants, whose joint rent was upwards of £50, but less than £100, claimed, he was rejected.[8] A five years' lease of a shooting-lodge, with the right of shooting over moors, for a rent of £50, was sustained on appeal, as a qualification;[9] but in general, such a lease has not been viewed as one of an heritable subject.[10] A lease which was held by a wife as her father's heiress, was held not to qualify her husband.[11] Persons otherwise qualified as "tenant and occupant" have been found to disqualify themselves by letting grass parks, to such an extent as to reduce their actual rent below the statutory amount—but it was especially noticed in these cases, that the tenant's following the trade of admitting cattle to graze for a night at

[1] 2 & 3 Wm. IV. c. 65, § 9.—[2] Ibid.—[3] Ibid.—[4] Cay, 114.—[5] Linlithgowshire, 1833, Perry and Knapp's Cases, 281.—[6] Selkirkshire, 1832.—[7] Smith, Ayr, 1835. M'Kerrow, ditto.—[8] Jedburgh, 1832.—[9] Cay, 158, c.—[10] Ibid. 158, a, b, d.—[11] Mitchell, Jedburgh, App. 1837.

a time, on their way to market, would not affect the qualification.[1]

The subjects on which tenants may qualify are "lands, houses, or other heritable subjects." It will be observed that feu-duties are not included, as in the case of proprietors.

### SECT. 2.—*Voters in Burghs.*

Those entitled to be enrolled in burghs are,

1st, *Occupants* within the bounds of the respective burghs, as laid down in schedule M of the act 2d and 3d Wm. IV. c. 65, in the quality of proprietor, tenant, or liferenter, of any house, warehouse, counting-house, shop, or other building, which, taken by itself, or along with any other such building, or along with any land within the bounds owned and occupied by the occupier of the building, or held by him under the same landlord, is of the yearly value of £10. The occupancy must have lasted for twelve months previous to the last day of July of the year of enrolment; and all assessed taxes in respect of the premises payable before the 6th of April preceding, must have been paid before the 20th of July.[2] Persons may be registered on successive premises, if they have fulfilled the regulation as to assessed taxes, &c., and where premises are of the yearly value of £20 or upwards, one or more joint occupants, each having an interest of the yearly value of £10, may be registered.[3]

2d, *Proprietors* of similar premises of the yearly value of £10, though they do not occupy premises within the bounds, or occupy premises of a less annual value than £10.[4] The husbands of such owners are entitled to vote in right of their wives, and after the death of the latter, in their right of courtesy.[5]

*Residence.*—No one can be registered who has not resided in the burgh or within seven statute miles of it for six months previous to the last day of July, or who has been in receipt of parochial relief at any time during twelve months previous to the same period.[6]

*Decisions as to Burghs.*—There is a generic distinction between county and burgh qualifications in this, that the former are derived from land or tenements; the latter are derived from tenements—lands merely forming an accessory. Claims on land within burgh on which no houses are built,

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[1] Swinton p. 58.—[2] 2 & 3 Wm. IV. c. 65, § 11.—[3] Ibid. § 12.—[4] Ibid. § 11.—[5] Ibid.—[6] Ibid.

have therefore been rejected.[1] Feu-duties ground a claim in counties (§ 7), not in burghs. On the other hand, it has been held that feu-duties are not to be deducted in estimating burgh qualifications.[2] Though the clause giving the liferenter a preference to the fiar does not apply to burghs, fiars within burgh have generally been found excluded by liferenters.[3] It has been held in one case that a tenement belonging to a claimant, but not occupied by him, cannot be added to one which he occupies as tenant, to make up a qualification;[4] and the same decision was given in an attempt to constitute a claim by joining two tenements occupied under different landlords, one of them having land attached to it.[5] There has been much difference of opinion as to the admission of lodgers as joint tenants. In Edinburgh they have been admitted. It seems not to be doubted that a lodger who pays a rent of £10 or upwards for mere houseroom, without furniture or attendance, has the franchise, and that the sum he pays must be deducted from any rent on which the keeper of the lodgings may desire to qualify.[6] Where a son was his father's partner to the extent of buying and selling, but was not entitled to dispose of his interest, he was found not to have a qualification as a joint tenant.[7] Joint proprietors have been found not to be qualified in burghs unless they be also occupants.[8]

### SECT. 3.—*Claims.*

*Counties.*—In counties, schoolmasters furnish, for 6d. each, blank printed forms, on which the claims must be filled up and signed by claimants or their agents; and forms on which objections may be written for voters or claimants, and subscribed by them or their agents, are provided at the same cost.[9] The claims are made according to the form in schedule F of the Act. One of the departments in the schedule is the claimant's "designation," and it has been accordingly found that where he has a calling it should be specified, and that if he has none, some general term indicative that he has none, such as "Residenter," must be used.[10] The claimant must set forth the particular character in which he claims the franchise, and if he either claim in a wrong character, or is materially inaccurate or incomplete in the

[1] Ayr, 1832.—[2] Wood, Ayr, App. 1835.—[3] Cay, 50 a.—[4] Cairnie, Ayr, App. 1836.—[5] Wigton, 1832.—[6] Swinton's Digest, p. 37.—[7] Leith, 1832.—[8] Swinton's Digest, p. 66.—[9] 2 & 3 Wm. IV. c. 65, § 13.—[10] See Decisions in Swinton's Digest, 14, 15.

statement, the claim will be bad. Thus claimants in burghs, who use the word "tenant," without adding "and occupant," are always rejected.[1] The subject on which the vote is claimed must be described in such a manner as to give any objector an opportunity of discovering it. It is obvious that the same species of description which may suffice for a county qualification will not generally be sufficient in burghs, and that a claim not on occupancy must be more specific than one which indicates that the claimant resides on the premises. It is generally expedient, for claimants on property in burghs, not only to mention the street or quarter of the town, but to give the name of an occupant of the premises.[2] Both in county and burgh claims, the parish must be set forth.[3]

Between the 10th and 20th June annually, the sheriff-clerk advertises (by intimation on the various churches, or, if he see cause, through a newspaper), that claims and titles, and any objections to voters previously put on the register, must be given in to the parish schoolmasters before the 20th July. Claimants are at liberty to lodge their written titles with the sheriff-clerk on any day previous to the 10th August.[4]

The schoolmaster, on receiving each filled up claim (which must be accompanied with a fee of 2s. to the sheriff-clerk, § 39), marks on it the day of its being presented. He makes up an alphabetical list of claimants within his parish, with their designations and places of abode, and affixes it to the church-door (except in certain island parishes in the counties of Inverness, Ross, Argyll, and Orkney and Shetland, § 43), on or before the 24th of July. The schoolmaster annexes to the list a note of the times when, and the places where, the Sheriff is to examine those claims to which no objections are lodged, and directs all objections to claims to be lodged before the 5th August.[5] Every objector must give notice to the party objected to within two days, by intimation delivered or sent through the post to him, or his known agent; and proof of notice must be made before an objection is considered by the Sheriff.[6] Whether a party already on the roll can be objected to, where there is no change of circumstances in his qualification, has been disputed; there have been decisions on both sides, and in some courts the question

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[1] See Decisions in Swinton's Digest, p. 22. Fleming, Glasgow, 1838.—[2] Ibid. 39.—[3] Ibid. 88.—[4] 2 & 3 Wm. IV. c. 65, § 13.—[5] Ibid. §§ 13, 22.—[6] Ibid. § 13.

whether the enrolment was opposed or not, has been allowed to weigh. The claims and objections are to be delivered by the schoolmaster to the sheriff-clerk on or before the 8th August, and the whole must be lodged with the Sheriff on or before the 12th of that month, who is to decide on their merits by the 15th of September.[1]

*Burghs.*—In burghs, the town-clerks perform, to a certain extent, the duties both of sheriff-clerks and schoolmasters in counties. They give out and receive the claims and objections, as above described. The lists of new claimants must be intimated on the church-doors on or before the 26th of July; the objections must be given in on or before the 10th August, and the claims and objections are laid before the sheriff on or before the 12th of August, he deciding on them on or before the 15th of September.[2] There is no provision for receiving the titles of burgh claimants at a later period than their claims.

### SECT. 4.—*Registration Court.*

The sheriff separates the claims objected to from those which are not so. He proceeds, in the first place, to the consideration of the latter, and having first admitted those which are accompanied by a satisfactory title, he examines those supported by no written title, or an imperfect one, hears parties and takes proof, and admits or rejects according to circumstances, returning the rejected claims to the clerk to be delivered to the parties.[3] The sheriff, in the next place, examines the claims objected to, hears parties, and decides on them.[4]

No written pleadings are allowed; but in cases where claims are rejected without being objected to, or when parties have been heard on claims objected to, the sheriff takes a note of the statements, pleas, and witnesses' names, and attests the documents; and no other statements, pleas, witnesses, or documents, but those so minuted or attested, can be founded on in appeals.[5]

*Appeals.*—Appeals from the district comprised within each circuit, lie to the sheriffs liable in attendance at the circuit courts, who must begin to hold their court between the 15th and 25th of September (one week's notice of the day being given by advertisement), and conclude their sittings on or before the 20th October. The sheriffdom of Orkney and

[1] 2 & 3 Wm. IV. c. 65, §§ 13, 22.—[2] Ibid. § 22.—[3] Ibid. § 17.—[4] Ibid. § 18.—[5] Ibid. § 19.

Shetland is for this end considered in Inverness. Where there are not three sheriffs present at the circuit, the number is to be filled up, by special appointment, by the judges at the circuit. Appeals from the counties of Edinburgh, Haddington, and Linlithgow, lie with the sheriffs of these three counties jointly, sitting at Edinburgh.[1]

### SECT. 5.—*Proclamation of Writ.*

Each sheriff, on receiving a writ for the election of a member, indorses on it the day on which he received it. He then appoints a day for the election, which (except in the insular parishes, &c., above referred to) must be intimated on the church-door.[2] In counties, and in the Wick and Ayr districts of burghs, the announcement must be made within three days, and the day fixed on must be not less than ten, or more than sixteen, from the day of receiving the writ.[3] In the other districts of burghs, the time is to be announced within two days, and must be not less than four, or more than ten, from that of receiving the writ.[4] In Orkney and Shetland, the sheriff of Orkney, who receives the writ at Kirkwall, within twenty-four hours issues a precept to the sheriff-substitute in Shetland, fixing a day not less than twelve or more than sixteen after receipt of the writ.[5]

On the day fixed, the sheriff proclaims the writ at the market cross; and if there is no opposition, declares, on a show of hands, the candidate proposed duly elected.[6] If there is opposition, and a poll is demanded, the election must be adjourned for a period not exceeding two free days in counties, and three free days in towns, exclusive of Saturdays and Sundays.[7] In Orkney and Shetland, the adjournment is for not less than ten or more than fourteen days; and in the Wick district of burghs it may be extended to seven days.[8] When a voter, in a district of burghs, proposes a candidate, the hustings not being in that burgh for which he is enrolled, he must satisfy the sheriff of his qualification, by producing an extract from the register, and he may be required to make oath that he is qualified.[9]

### SECT. 6.—*Polling.*

By the reform act, sheriffs were appointed to divide the

[1] 2 & 3 Wm. IV. c. 65, § 27, and 5 & 6 Wm. IV. c. 78, § 12.—[2] 2 & 3 Wm. IV. §§ 28, 43.—[3] Ibid. § 28. 5 & 6 Wm. IV. c. 78, § 2.—[4] 5 & 6 Wm. IV. § 1.—[5] 2 & 3 Wm. IV. § 31.—[6] Ibid. §§ 29, 30.—[7] Ibid. §§ 29, 30.—[8] Ibid. §§ 30, 31.—[9] Ibid. c. 65, § 30.

counties, and town-clerks the burghs, into polling places;[1] and by a later act, the sheriff may, if required on the part of a candidate, or if it appear to himself expedient, alter the polling districts in burghs, so that no more than 300 electors may poll at each,—such alteration being intimated on the church door.[2] At the requisition of a candidate or elector paying the expense, the booths may be so divided, that not above 100 can poll in each department.[3]

In counties, the poll continues for two days, viz.: between the hours of nine and four of the first, and of eight and four of the second day;[4] in burghs, for one day, viz. between eight o'clock and four o'clock.[5] Each voter proceeds to the booth of his district (freehold voters being entitled to vote in the county town polling district), where a sheriff-substitute and clerk attend, to whom the candidates pay,—to the former a sum not exceeding three guineas, and to the latter one guinea, per day.[6]

A certified alphabetical copy of the register must be in possession of the clerk, who, under the sheriff's inspection, records and numbers the votes as they are given.[7] At the termination of the poll, the books are sealed and transmitted to the returning sheriff, who proclaims the successful candidate (if there be an equality of votes, making a double return), not later than two o'clock of the day next but one, in counties,[8] and before four o'clock of the day after the polling-books are received in burghs.[9]

In the case of riot or violence, either the nomination, or the taking of the poll at any particular place may be adjourned.[10] The poll may be terminated before the expiry of the fixed period, if the candidates or their agents agree, and if a burgh poll be so closed, the sheriff may, if there is time, forthwith proclaim the successful candidate before two o'clock of the day.[11]

No voter can be subjected to an inquiry, except as to his identity, his still possessing the qualification, his not holding it in trust or for behoof of another, and his not having previously voted at the election, which may be put to his oath, or if he be a quaker, to his solemn affirmation. He may also be compelled to take the oath against bribery.[12] A claimant whose claim has been rejected, may tender his vote

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[1] 2 & 3 Wm. IV. c. 65, § 27.—[2] 5 & 6 Wm. IV. c. 78, § 3.—[3] Ibid. § 4.—[4] 2 & 3 Wm. IV. § 32.—[5] 5 & 6 Wm. IV. § 5.—[6] 2 & 3 Wm. IV. §§ 27, 40. 5 & 6 Wm. IV. § 9.—[7] 2 & 3 Wm. IV. § 32.—[8] Ibid. § 33.—[9] 5 & 6 Wm. IV. § 8.—[10] 2 & 3 Wm. IV. § 32. 5 & 6 Wm. IV. § 5.—[11] Ibid. § 5.—[12] 2 & 3 Wm. IV. c. 65, § 26.

and have it recorded for the consideration of an election committee.[1] The candidates, or the persons proposing them, pay the expense of all polling-booths (each of which must not cost more than £30 in counties, or £20 in burghs), and of transmitting intimations, poll-books, &c.[2]

### SECT. 7.—*Disqualifications.*

The following persons are incapable of electing or being elected:—Sheriffs and their substitutes, sheriff-clerks and town-clerks, in the respective elections in which they have to officiate,[3] and minors.[4]

*Aliens.*—Aliens were disqualified by our old practice, and are so by the practice of England, unless they be made denizens by letters-patent, or naturalized by act of parliament.[5] It has in general been decided in Scotland that an alien cannot qualify, but in one registration court, alien tenants were admitted, while proprietors were not, on the ground that the only foundation on which the exclusion of aliens rested, by our old law, was their inability to hold the feudal qualification,—that by the new law there was no express exclusion of aliens, and that as they were entitled to hold the qualification, they must hold it with all its privileges.[6] There is a clause in the late Alien Act which may be perhaps held to remove all doubts on the subject, and to exclude aliens from the right to vote even on tenancy, although, on the other hand, as the expressions are not absolutely exclusive, but intended to leave the law as it stood, the clause may be held only to prevent the act from interfering with the fixed law in England as to aliens. Its terms are, "Every alien now residing in, or who shall hereafter come to reside in any part of the United Kingdom, and being the subject of a friendly state, may by grant, lease, demise, assignment, bequests, representations, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or of occupation, by him or her, or his or her servants, or for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one years, as fully and effectually, to all intents and purposes, and with the same rights, remedies, exemptions, and privileges, except the right to vote at elections of members of Parliament, as if he were a natural born subject of the United Kingdom."[7] An alien has

[1] 2 & 3 Wm. IV. c. 65, § 26.—[2] Ibid. § 40.—[3] Ibid. § 36.—[4] Connell on Elections, 256.—[5] Wordsworth on Elections, 127. Rodgers on Elections, 81.—[6] Cay, 23, d.—[7] 7 & 8 Vict. c. 66, § 5.

been found not entitled to be registered in right of his wife.[1] Certain privileges of British subjects, and among others that of voting, accrue to foreigners in the following circumstances:—Foreign seamen, on their serving in time of war two years on board a British ship, in pursuance of royal proclamation.[2] Foreign protestants and Jews, on their residing seven years in any American colony, without being absent above two months at a time, who subscribe the declaration of fidelity and affirm the effect of the abjuration oath;[3] and foreign protestants serving two years in a military capacity there, or being three years employed in the whale-fishery, and not afterwards absenting themselves from the British dominions for more than one year.[4] It is questioned whether, since the catholics' emancipation act (10th Geo. IV. c. 7) foreign Roman catholics may not, by such means, acquire the privilege.[5] It would appear that Roman catholics, before being registered, require to have taken the oaths prescribed by that act.[6]

A person who has been cognosced as insane or an idiot cannot be registered. Whether one who has not been cognosced can be rejected, on proof of his condition, is doubtful.[7] Conviction of any crime inferring infamy would appear to be a disqualification.[8]

*Office-holders.*—The following officers connected with the levying of the revenue are disqualified:—Commissioners, collectors, supervisors, gaugers, searchers, or other officers of excise or customs; officers connected with the management or distribution of stamps; collectors and managers of the assessed taxes, &c.; officers of the post-office, including the masters and mates of post-office packets,[9]—this has been held to extend to assistant postmasters, letter-carriers, keepers of receiving-boxes, &c.[10] Persons voting during their tenancy of any one of the above offices, or within twelve months after having held it, forfeit £100, and their votes are void.[11] A retired officer of customs enjoying a pension, a collector of cess (though by 5th and 6th Wm. IV. c. 64, § 10, his office is in the patronage of the Lords of the Treasury), and a storekeeper of a fort who held a house as part of his salary, have been found not to be disqualified.[12] In terms of the act, those only "who are subject to no legal incapacity" are entitled to be registered. All the above disqualifications have been generally held, therefore, as objections to enrolment,[13] and

[1] Cay, 23, c.—[2] 13 Geo. II. c. 3.—[3] Ibid. c. 7. 20 Geo. II. c. 44.—[4] 2 Geo. III. c. 25. 22 Geo. II. c. 45, § 8.—[5] Wordsworth, 127, n.—[6] 10 Geo. IV. c. 7, § 8.—[7] Connell, 256. Cay, 21.—[8] Connell, 260.—[9] 22 Geo. III. c. 41, § 1.—[10] Cay, 24.—[11] 22 Geo. III. c. 41, § 1.—[12] Cay, 24, l, q, t.—[13] 2 & 3 Wm. IV. c. 65, §§ 7, 11. Cay, 16.

an officer of the post-office was not allowed to be enrolled in a burgh, to the effect of voting at the municipal elections.[1]

### SECT. 8.—*Bribery and Treating.*

Two acts have lately been passed for the purpose of providing more efficient remedies against these practices,—viz. 4 & 5 Vict. c. 57, and 5 & 6 Vict. c. 102. By the former it is rendered unnecessary, in prosecuting any charge of bribery before an election committee, to prove agency before proving the facts; and the committee are to receive evidence on the whole matter, stating in their report, 1*st*, Any facts of bribery that are proved; and, 2*d*, Whether any member of the house was cognizant of them. By the other act, election committees are authorized to follow up charges of bribery, though they be abandoned by the parties, and to examine members, candidates, agents, &c. (as witnesses subject to the ordinary rules of evidence) regarding the circumstances which have occasioned the abandonment of such charges (§ 1). It is bribery if a sum of money be paid before, during, or after an election, to an elector or to his relations, in consideration either of his voting or his abstaining from voting (§ 20). The entertaining of electors with meat and drink, with the view of influencing their votes, is declared to render the party who either directly or indirectly authorizes it, incapable of sitting for the constituency to which such electors belong in the parliament in relation to which he so acts (§ 22).

### SECT. 9.—*Controverted Elections.*

The whole arrangements for the trial of controverted elections, both in respect to the constitution of the election committee and the procedure before it, was remodelled by the temporary act 4 & 5 Vict. c. 58, and the provisions of this statute, with little alteration, were made perpetual by the 7 & 8 Vict. c. 103. As nearly all the proceedings under this act must necessarily take place in England, a full account of its provisions will not be expected to be given in a work devoted to the local laws of Scotland. Its more prominent features are, that election petitions are only to be received when coming from some person who claims to have a right to vote at the election, or claims to be returned, or

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[1] Pow, Edinburgh, 1835. Cay, 24.

alleges himself to be a candidate. Recognizances must be entered into—by the petitioners to the extent of £1000, and by sureties for them to the same general amount, in portions not less than £250 for each individual surety. There are arrangements for enabling voters to become parties in support of a return, in the case of the sitting member declining to defend it, or otherwise ceasing to act. Six members, selected from among those who are not themselves parties in controverted elections, are to be appointed at the commencement of each session, by the speaker's warrant, to act as the "General Committee of Elections." Petitions are referred to the General Committee, who are, under the provisions of the act, to choose the Select Committee which is to try the petition. The General Committee have the nomination of certain members whose office it is during the session to act as chairmen of select committees. The members qualified to act on select committees are divided into panels, which, being ranged in order by lot, are to act in succession, as the cases present themselves.

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## CHAPTER III.

### PRIVILEGES OF MEMBERS OF PARLIAMENT.

THE members of the House of Lords and the peers of Scotland are privileged from arrest on civil process. In cases of treason, murder, and other crimes punishable with death, they can only be brought to trial before the peers of parliament, assembled in the Court of the Lord High Steward. (*See farther on this subject, Part* I., *Chap.* III.) Members of the House of Commons are privileged from arrest for forty days after the prorogation of parliament, and forty days before its reassembling. The privilege thus continues during the whole existence of a parliament, as it is not the practice to prorogue for more than eighty days at a time.[1] It has not been decided how long the privilege lasts after a dissolution;[2] it is said that the members should have "reasonable time to return," and privilege was successfully pleaded where arrest took place two days after a dissolution.[3]

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[1] Blackst. i. 165.—[2] Opinion, 2 Levinz's Reports, 72.—[3] Haliday *v.* Pitt. 2 Strange, 985.

Formerly, the property and servants of members of parliament were exempt from legal execution, and the privilege of exemption extended not only against enforcement of decrees of courts, but against all actions at law; these latter privileges, however, have been abolished.[1] There are special provisions for subjecting persons enjoying privilege of parliament, to the bankrupt law, along with persons abroad, or protected by sanctuary, &c.[2] It is enacted, that if a commission of bankruptcy issue against a member of the House of Commons, he shall be incapable of sitting and voting for twelve months, and if the commission is not superseded or the debts paid within that time, the speaker is to issue his warrant for a new election. Though the phraseology of the act is applicable to the English bankrupt law, it would probably be extended to sequestration in Scotland.[3]

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[1] 11 Geo. II. c. 24, and 10 Geo. III. c. 50.—[2] 54 Geo. III. c. 137, § 1.—[3] 52 Geo. III. c. 144.

# PART III.

## PUBLIC CIVIL INSTITUTIONS.

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## CHAPTER I.

### Corporations in General.

#### Sect. 1.—*Constitution.*

A corporation is a body of individuals entitled to certain privileges, and not liable to change in the eye of the law, from any alteration among the persons constituting it. No corporation can exist without legislative authority, or a royal charter;[1] but where corporate privileges have been exercised from time immemorial, the original authority of a charter is presumed.[2] In England the charter must be under the great seal;[3] in Scotland this does not seem to be considered necessary.[4] Incorporations may include within them smaller ones which they have the power of constituting as magistrates of burghs incorporate trades by Seals of Cause.[5] This is a practice much at variance with the strictness which regulates corporate rights in England, where it seems to be questioned whether the crown can specially bestow on a subject the right of conferring a charter of incorporation.[6] The mayor and commonalty of London may, it is true, make a fraternity or company within the city; but it appears that such a body cannot act on its

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[1] E. i. 7, 64.—[2] Wrights of Glasgow *v.* Crosse, 8th March 1765, M. 1961, *Nota.* Skirving *v.* Smellie, 19th January 1803, M. 10,921.—[3] Bl. ii. 346. Opinion of Lord Brougham in University *v.* the Faculty of Physicians of Glasgow, App. 24th August 1835, Scot. Jurist, viii. 100.—[4] Opinion of the Judges in the above. Ibid. ix. 360.—[5] Connell on Elections, 533. Fleshers of Canongate *v.* Wight, 11th December 1835.—[6] Bl. i. 474.

own intrinsic right, but merely as a branch of the general corporation.[1] In England a charter of monopoly cannot be granted without an act of Parliament,[2] and the same law has been held to apply to Scotland.[3]

The object of incorporating any body of men is, to give to the whole, for the purposes for which they are united, the powers and privileges which an individual has in transacting his private business, and to avoid the inconvenience of doing things in the name of the several individuals. Corporations may thus sue and be sued, grant and receive property, &c. by the corporate name, and through the proper office-bearers.[4] The acts of the majority of members are binding on a corporation, and it requires a majority to constitute a quorum,—unless it be otherwise provided in the constitution.[5] As the members die out, others will succeed to them according to the principles of the constitution, by succession, election, the choice of individuals, or otherwise.[6] Corporations may hold courts or meetings, choose office-bearers, and frame by-laws, provided they do not infringe on the laws of the land.[7] Corporations may be extinguished, not only by the authority of the legislature, but by the expiry of the time to which their existence is either expressly or by implication limited, or by forfeiture, on account of abuse of power and breach of the conditions on which they are established.[8]

There is a distinction which in practice becomes material between the functions of a body which has obtained the privileges of a corporation for trading or manufacturing purposes, and an incorporation which is presumed to be the depository of public property, and bound to act for the public good. Some bodies—such as the corporations which members of a particular trade have been under an obligation to join, while they have enjoyed corresponding privileges from the obligation—partake partly of both characters. The members are not trustees for the public at large, nor are they entitled to use the property and powers committed to their charge for their own personal benefit. The members of such corporations cannot divide the funds among themselves. It was found illegal for the corporation of goldsmiths in Edinburgh to divide among the members a *bonus* declared on stock in a public company belonging to the body. In the same case, it was not decided whether or not

[1] Kyd on Corporations, i. 47.—[2] 21 Jac. I. c. 3.—[3] B. P. 2168.—[4] E. i. 7, 64.—[5] Iv. Er. 215, n. 262.—[6] E. i. 7, 64.—[7] Ibid.—[8] Ibid.

such bodies might at their discretion establish a system of pensions or retiring allowances for superannuated members.[1]

The managers of a public fund, to which the mariners belonging to the vessels of a port had been obliged to contribute, on the condition of deriving corresponding superannuation and other rights, entered into an agreement that thenceforth the society should consist exclusively of shipowners who were practical sailors, and masters. The managers were subsequently about to dissolve the society and divide the funds. Though they engaged to provide for all existing claims on the society according to its old constitution, they were found not entitled to alter it.[2]

The Court of Session has jurisdiction over charitable foundations, and other bodies of a corporate character in which the public have an interest, to check peculation or irregularity, and to enjoin such proceedings as are legitimately in accordance with the foundation: thus, when in terms of the foundation of Heriot's Hospital, a youth had been presented to whom the description applied, as being "a poor fatherless boy, the son of a freeman and burgess of the town of Edinburgh," and the application was refused by the governors who admitted boys whose fathers were alive, the court found that the boy was eligible and ought to have been elected.[3]

### SECT. 2.—*Responsibility of Members.*

In England it appears to be essential to the nature of a corporation, that the individual members are not responsible for any act done by them in their corporate capacity.[4] The manner in which the corporation transacts business facilitates the development of this principle, for it is held that the body can only contract through its common seal. It may be usual to add the signature of an office-bearer; but this is a matter of form for the satisfaction of those interested, that they may know that the contract has been transacted by the proper officers, or for some like purpose. It appears to be the seal only that is acknowledged by the courts of law, as binding that ideal person, called the corporation, as party to a contract.[5] The separation of the body itself from the individuals

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[1] Howden *v.* Goldsmiths' Corporation, 2d June 1840. See also Henderson *v.* Solicitors' Society, 13th January 1842.—[2] Steedman *v.* Malcolm, 23d June 1842, and see Alexander *v.* Crabb, 17th November 1842.—[3] Ross *v.* Heriot's Hospital, 14th February 1843.—[4] Bacon's Ab. Corporations (E.), § 2.—[5] Bl. i. 475. Kyd on Corporations, i. 267.

composing it, is by no means so clearly made in Scotland. It is still an open question, how far the members of a corporation, as such, are individually liable; and should the matter come to be finally fixed, it is probable that a distinction might be made between corporations for the mere purpose of administration (such as royal burghs), and trading, or other companies, the object of which is profit. The law on the subject is settled as to charters subsequent to the 5th July 1825, in which by 6th Geo. IV. c. 91, the limits of responsibility may be fixed by the crown. A great portion of the law regarding the powers and responsibilities of members of corporations, as it affects mere questions of Partnership, belongs to the department of Private Rights. In other respects it will be found to be materially connected with the laws affecting railways and other public works.

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## CHAPTER II.

### CONSTITUTION AND ADMINISTRATION OF BURGHS.

#### SECT. 1.—*Constitution of Royal Burghs.*

ROYAL burghs are erected by crown charter, those which can produce no charter being "presumed" to have once possessed one. The oldest genuine charter known to be extant is that of Malcolm IV. (who ascended the throne in the year 1153), in favour of the burgesses of St Andrews. The usual privileges of old granted to burgesses of royal burghs, were, freedom from tolls and other exactions, and from liability to be distrained for the debts of their lords, and license to hold markets. The burgesses are considered as holding their fees of the crown. The feudal imposts were collected by the Lord Chamberlain, who, on account probably of his thus having to settle questions of right to the privileges of burgessship, had jurisdiction over the royal burghs, at which he held "ayres" or circuits at intervals. The chamberlain likewise presided in a court of appeal, called "the court of the four burghs," from its being attended by deputies from Edinburgh, Stirling, Berwick, and Roxburgh.

*Convention.*—The above institution seems to have merged into the "Convention of Royal Burghs," which still meets

at Edinburgh, annually, on the second Tuesday of July. This court had a partial jurisdiction in questions as to the general regulation of trade, and other matters affecting the interests of the burghs; along with a legislative authority over their constitution not very well defined, but which, previously to the passing of the burgh reform act, included the right to adjust the "sets" or constitutions of the respective burghs, according to the act 1469, c. 30. The operations of this body are now generally limited to the discussion of those legislative measures which it may be expedient to apply for to Parliament, proportioning the land-tax, and granting supplies to assist the poorer burghs.

*Magistrates and Council.*—Each burgh has, from time immemorial, been regulated by a town-council and magistrates. By the old system of election the old council chose the new; while the old and new council together chose the magistrates and other office-bearers. The system is now altered. (*See Chap.* III.) The town-council and magistrates have legislative authority to pass by-laws, provided they do not infringe the public law.[1] The community can only be bound by the acts of the council.[2]

*Taxes.*—The portion of the land-tax payable by the royal burghs is apportioned among the inhabitants by stentmasters chosen by the council.[3] (*See* Index, *Land-tax.*) In the majority of the burghs, certain customs and other duties have been levied by the town-council from time immemorial, and a prescriptive title has thus been created, which is held to give full right to the town-councils to continue them; but it is not clearly decided how far a community may become liable to new taxes without the consent of Parliament. In a great many instances the crown, arrogating to itself the right of assessing and collecting transit duties, made over by charter to the burghs the right of levying the petty customs, or duties on articles admitted within the burgh, while it reserved as part of the royal prerogative the great custom, or import duty on goods brought from abroad. It was formerly the practice for the burgesses and others to meet annually in a "head court," presided over by the chief magistrate, where they granted the annual supplies.[4] In 1678, it was found that "the magistrates might stent for the

[1] See the Introduction to the Report of the Commissioners appointed to inquire into the state of Municipal Corporations in Scotland.—[2] Muirhead *v.* the Town of Haddington, 30th June 1748, M. 2506.—[3] 1633, c. 2. —[4] General Report of Commissioners, 46.

utility of the burgh; but then only upon calling the whole incorporation, and proceeding with the consent of the major part of those who should happen to convene."[1] In the burgh of Banff the practice of holding an annual head-court is still observed. "The court is deemed to possess the power of thus imposing a tax for any purpose whatever connected with the burgh, and to any amount; and such, accordingly, has been the practice. For example, an assessment for cleaning and lighting, or erecting public buildings, would be deemed to be included." The assessment is collected by poinding and sale, the legality of the practice never having been questioned in a court of law.[2] It has lately been recognised in a local statute. The later decisions, having any reference to burghal taxation have related to attempts, on the part of town-councils by their own authority, to levy new taxes, and these have been decided to be illegal.[3] The charters in favour of the burgh of Glasgow, containing a grant "of the small customs of the ports, and of the bridge, and of the meal-market," &c., "together with all other duties of which they *are*, and formerly *were*, in possession, or which *may* happen *to be imposed*, with consent of the council and community of the said burgh," it was found that, on the introduction of potatoes, the magistrates were entitled to levy a regulated duty on them, as on other vegetables brought to market.[4] But it was finally decided in 1828, in a case where magistrates, in respect of certain "improvements made by them," urged their right "to increase the amount" of certain "duties and customs," that without an act of Parliament they could not do so.[5]

The magistrates cannot alter the incidence of a tax so as to make it press unequally, on the plea that the inequality is balanced by the incidence of other taxes.[6] But they may change the method of levying a tax so as to make it apply to alterations in the use of the subjects on which it is charged. So when a custom was imposed on ale as conveyed on men's backs, it was allowed to be levied when carts were used as the means of conveyance.[7] The Court of Session will not interfere to alter a burgh tax, on the allegation that the

[1] Town of Aberdeen *v.* Lesk, 11th January 1678. M. 1866. See Magistrates of Inverness *v.* Forbes, 14th February 1672. B. Sup. ii. 700 and M. 1895.—[2] Local Reports of the Commissioners, i. 106, 107.—[3] Boog, &c. *v.* Magistrates of Burntisland, 22d February 1775. M. 1991.—[4] Ferguson, &c. *v.* Magistrates of Glasgow, 29th June 1786. M. 1999.—[5] Cowan, &c. *v.* Magistrates of Edinburgh, 22d February 1828.—[6] Stewart *v.* Isat, 13th July 1775. M. 1993.—[7] Magistrates of Edinburgh *v.* the County Brewers and Heritors, 17th July 1711. Br. Sup. v. 74.

system operates partially and unequally.[1] In one case, where magistrates had levied duties in the mistaken notion of their being authorized by custom or act of Parliament, they were found liable to repay them.[2]

*Powers and Responsibility of Magistrates, &c.*—The community, and its available property, are responsible for the authorized acts of the magistrates.[3] They cannot charge the community with the expense of defending themselves against a prosecution for malversation in office, in which they are unsuccessful.*[4] The magistrates, as the office-bearers of the community, are the persons in whose name actions are raised and defended. They are, conjunctly with the sheriffs, the executors of the law within their bounds.† They were formerly under the obligation of providing prisons, and were in some respects liable for the safe custody of the prisoners; but these functions have been removed by the Prison Discipline Act.

*Exclusive Privileges.*—Formerly, in the several burghs, there were certain sub-corporations which possessed exclusive trading or manufacturing privileges within specific limits. These privileges have now been abolished; but in the statute enacting the abolition, it is provided that they are to retain their corporate character, and any other privileges, not involving the exclusive right of trading, which they may have possessed. As the fees obtained for participation in the exclusive privileges generally constituted the funds of these societies, the act provides, that to make arrangements for meeting their altered circumstances they may make by-laws, subject to the approval of the Court of Session.[5]

## SECT. 2.—*Property, Revenue, and Expenditure of Royal Burghs.*

The property of royal burghs consists of lands, houses, mills, feu-duties, and other descriptions of heritage; of personal property, such as shares in joint-stock companies, debts, &c.; and of the annual revenue derived from these sources, and from assessments, entry-money of burgesses, &c. The above property is like that of an individual, capable of being disposed of, and liable for the debts of the

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[1] Gibson and others, petitioners, 13th November 1810.—[2] Magistrates of Dunbar *v.* Kelly, 26th November 1829.—[3] See Cases, M. 2510-12.—* As to the responsibility of royal burghs for damage done by riot, see Index—*Riot.*—[4] Magistrates of Pittenweem *v.* Alexanders, &c. 15th July 1774. M. 2527.—† See above, p. 21.—[5] 9 & 10 Vict. c. 17.

community.[1] There is another description of property which the magistrates and council are understood not to hold as administrators, but as mere custodiers,—such as churches, town-houses, and other public buildings.[2] It is understood that property of this nature cannot be disposed of, or rendered liable for debt. In the case of Auchtermuchty, where all the ordinary heritable property was adjudged, it was held that the jail, the town-hall, the public bell, and the right of levying petty customs, could not be included in the adjudication.[3] It has been held that "the right vested in the magistrates of burghs of presenting to churches, seats in universities, &c., in their own burghs, is a privilege which they have no power to alienate; and this right is in quite a different situation from the patronage of an unconnected parish which the burgh may have acquired."[4]

*Examination of Accounts.*—The powers of the great chamberlain (*see preceding section*) in auditing the accounts of the burghs was transferred in 1535 to the auditors of Exchequer, and continued with the Court of Exchequer as established at the Union.[5] In 1787, however, it was found that this jurisdiction had fallen into desuetude, and the court refused to exercise it.[6] In 1820 it was farther decided that, except where the action was brought on the act 1693, c. 45 (which required magistrates to obtain an act of council before incurring any debt), the Court of Session had no jurisdiction, and that burgesses had no title to complain of acts of mismanagement which did not directly affect their private and patrimonial rights.[7]

In terms of 3d Geo. IV. c. 91, an account of the common good and revenues of each burgh, specifying the debt, property, each branch of revenue, with receipts and arrears, loans, sales, and expenses, and distinguishing the ordinary from the casual expenditure, must be made up to the day preceding the annual election of magistrates. This account must be signed by the acting chief magistrate.[8] The magistrates and councillors neglecting are liable to a penalty not exceeding £50 each, and costs, which may be recovered in exchequer, at the suit of any three or more burgesses.[9] The account must be deposited in the town-clerk's office for inspection, within three months after the election, and re-

[1] General Report of Commissioners, 32.—[2] Ibid.—[3] Phin *v.* Magistrates of Auchtermuchty, 22d May 1827.—[4] Wallace, &c. *v.* Magistrates of St. Andrews, 27th Feb. 1824.—[5] 1535, c. 26.—[6] General Report of Commissioners, 29.—[7] Burgesses of Inverury *v.* the Magistrates, 14th Dec. 1820.—[8] 3 Geo. IV. c. 91, § 1.—[9] Ibid. § 2.

main for thirty days, and if, on a correspondence, no satisfactory explanation is given of any part complained of, action may be commenced at any time within three calendar months.[1]

Separate accounts must be made up for charitable trusts and mortifications.[2] Feus, alienations, or tacks for more than a year, of heritable property forming part of the common good, or of the common good in general, must proceed by public roup, on twenty-one days' previous advertisement.[3] The advertisement must proceed on an act of council, and be issued twelve days before the end of an exchequer term, that objections may be discussed. Magistrates or councillors contravening are liable to a penalty not exceeding £50 and costs.[4] Magistrates and councillors cannot bind themselves as a body, or their successors, without an act of council, and they become personally liable for whatever engagements they may otherwise contract.[5] Collectors of burgh taxes must state in their receipts for what purpose, by what authority, at what rate, and by what rule the assessment is charged, under a penalty of £10 for each omission.[6] Owing to the forms adopted in exchequer processes, many impediments have been found to lie in the way of the enforcement of these provisions.[7]

### SECT. 3.—*Burghs of Regality and Barony.*

The chief distinction between burghs of regality and barony, and royal burghs, arose from the latter being exclusively entitled to send members to parliament, as holding directly of the crown. By the parliamentary reform act, several burghs of the former class have become entitled to choose, or to unite in choosing, representatives (*see Part* II. *Chap.* II.), while some royal burghs of diminished extent have been merged in their respective counties.[8]

Burghs of regality and burghs of barony were erected by the sovereign in favour of subjects who generally enjoyed the property or superiority of the lands on which they stood. The right of electing magistrates was in some instances vested in the inhabitants; in others, in the respective lords of regality, or barons.[9] These were the feudal superiors of their respective burghs, and whatever jurisdiction the magistrates might have, they enjoyed a cumulative jurisdiction to

[1] 3 Geo. IV. c. 91, § 3.—[2] Ibid. § 4.—[3] Ibid. § 5.—[4] Ibid. § 6.—[5] Ibid. § 11.—[6] Ibid. § 7.—[7] General Report, 30.—[8] 2 & 3 Wm. IV. c. 65, §§ 2, 4.—[9] E. i. 4, 30.

the same extent.[1] The distinction between burghs of regality and burghs of barony chiefly consisted in the extent of the jurisdiction enjoyed by their superiors.

*Regalities.*—The lord of regality had a jurisdiction in civil matters equal to that of the sheriff. In criminal questions his jurisdiction was greater than that of the sheriff, and cumulative with that of the supreme criminal court. The judge of regality was entitled to vindicate his authority, by "repledging" any person brought to trial before the king's courts.[2] The lord of regality exercised his jurisdiction by a steward or bailie, whom he appointed as his deputy.[3] The power of lords of regality was abolished with the other heritable jurisdictions in 1748.[4]

*Baronies.*—The authority of the baron extended merely to questions of debt within the barony, and to certain minor offences.[5] By the jurisdiction act, it was limited to the power of levying his own rents or feu-duties, of deciding questions of debt to the extent of 40s., and of punishing for petty riots, by a fine not exceeding 20s.[6] Where regalities or baronies are held by royal burghs, their privileges remain unimpaired.[7]

*Municipal Authority.*—The magistrates of burghs of regality and barony have to administer the common property, and may frame by-laws and general police regulations, like magistrates of royal burghs, for furthering the ends contemplated in their charters.[8]

The crown may erect free and independent burghs of barony on those parts of the seacoast in which the fisheries are carried on,—the magistrates of such burghs exercising the power of justices of the peace cumulatively with those of the county.[9]

*Income and Expenditure.*—In those burghs which are empowered to elect town-councils by 3d and 4th Wm. IV. c. 77, the magistrates must make up a state of income and expenditure annually, to lie for inspection from the 15th October to the time for electing councillors.[10] (*See next Chapter, Sect.* 5.)

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[1] E. i. 4, 30.—[2] E. i. 4. 7, 8.—[3] Ibid.—[4] 20 Geo. II. c. 43.—[5] E. i. 4, 25.—[6] 20 Geo. II. c. 43, § 17.—[7] Ibid. § 26.—[8] See Armstrong *v.* Moffat, 9th July 1800. M. Jurisdiction, Ap. 8.—[9] 35 Geo. III. c. 122, § 1.—[10] 3 & 4 Wm. IV. c. 77, § 31.

## CHAPTER III.

### Municipal Elections.

#### Sect. 1.—*Qualifications and Claims in Royal Burghs.*

The persons entitled to vote in the election of a town-council in the royal burghs included within the operation of the act, are,—in those burghs which send, or join in sending, members to parliament, the registered voters; in those which do not, the persons who possess such qualifications as would entitle them to the parliamentary franchise were the burgh represented in parliament. (*See Part* II. *Chap.* II.) The elector must have resided within the royalty, or within seven miles of it, for the space of six calendar months next previous to the last day of June. He must not have been a pensioner of any corporation, or in receipt of parochial relief, at any time during twelve months previous to the election.[1]

*Claims.*—In burghs not sending members to parliament, each person claiming to vote in the election of the town-council, must give in to the town-clerk, on or before 21st July, a claim signed by himself or his agent, along with the documents on which he founds. Within four days after the last day for receiving claims (having first consulted with the chief magistrate), the town-clerk affixes to each parish church door a list of the claimants, and a notice specifying a period (which must be at least fourteen days afterwards) when the claims are to be considered. The notice bears that objections must be lodged with the town-clerk, and intimated to the parties, seven days before the day appointed for deciding on them. The claims and objections must lie in the town-clerk's office for inspection, without fee, extracts being demandable at the rate of 6d. for every seventy-two words.[2]

#### Sect. 2.—*Making up Lists.*

In those burghs which do not send members to parliament, the chief magistrate, if required by any three claimants or objectors, must appoint a person who has been three years counsel or agent before some court as his assessor. The assessor is to act as judge, hearing pleadings and

[1] 3 & 4 Wm. IV. c. 76, § 1.—[2] Ibid. § 2.

evidence, but receiving no written pleadings, and taking no record, except a note of the names of witnesses. He is to authenticate with his signature any documents produced, and no witnesses or documents can be founded on in any court of review, but those so noted or authenticated. The assessor notes and subscribes, on the back of each claim, the word "admit" or the word "reject," as he may decide.[1] The town-clerk transfers those admitted, to the roll, which he must make up before 16th September.[2]

In the burghs returning members, the roll is made up by simply transferring the names from the parliamentary register.[3]

From 1st to 10th August, the roll remains open to inspection, without fee; and in the burghs which do not return members to parliament, objections to the continuance of names on the roll are received within five days after 10th August. After these have been considered, the clerk corrects the list before 10th September. The clerks in burghs returning members are to correct their lists by the 16th September. Within two days after any decision, an appeal may be entered to the court of review for the district, appointed by the parliamentary reform act (*see Part* II. *Chap.* II. *Sect.* 4), notice to parties having been given within the two days.[4]

### SECT. 3.—*Election of Councillors.*

*Qualification.*—The persons eligible as town-councillors are, the electors residing within the boundaries fixed by the reform act, or carrying on business or residing within the royalty.[5] No person can be inducted as a councillor who cannot produce, on the occasion, evidence of his having been elected a burgess (not merely honorary) of the burgh; but any person elected is entitled to be entered as a burgess, on payment of the ordinary fees.[6] Any person retiring, according to the rotation, may be re-elected.[7]

*Proceedings.*—The number of councillors to be elected is limited to the smallest number which the ancient set of the burgh admitted. All town-councils are divided into three parts, as nearly equal as possible. The members of one such division retire each year, and the rotation of retiring is so arranged, that each councillor is entitled to remain in office

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[1] 3 & 4 Wm. IV. c. 76, § 3.—[2] Ibid. §§ 3, 4.—[3] Ibid. § 4.—[4] Ibid. §§ 5, 6.—[5] Ibid. § 8.—[6] Ibid. § 14.—[7] Ibid. § 16.

for three years.[1] Those who go out being, however, those who "have been longest in office," if a councillor should resign within the three years, his successor at the next annual election does not merely take up the unexpired period of his tenure, but may remain until at an annual election he is one of the third who have been longest in office.[2] The election takes place on the first Tuesday of November.[3] The larger burghs, viz. Edinburgh, Glasgow, Aberdeen, Dundee, Perth, Dunfermline, Dumfries, and Inverness, are divided into wards, and have the number of councillors to be elected by each ward, fixed according to the decision of the burgh-commission, appointed 15th July 1833, as ratified by proclamation.[4] In the burghs divided into wards, the time of election must be intimated on the church doors ten days previously. The election takes place by open poll, at which the chief magistrate, or an appointed substitute, presides, the town-clerk, or an appointed substitute, attending, with a certified copy of the roll as applicable to the ward. A poll-book is kept, each page of which is subscribed by the clerk and the person presiding.[5] No polling-place is to be kept open more than one day, from eight o'clock, A. M., to four, P. M.; but the number of booths is not limited.[6] At the close, the poll-books, sealed up, are transmitted to the chief magistrate, who, between the hours of twelve and two next day, breaks the seals publicly in the town-house, and declares the result.[7]

In the burghs not divided into wards, the election proceeds in the town-hall, each elector giving up a signed list to the town-clerk, and the chief magistrate presiding and declaring the result.[8]

The identity of the person, his still holding the qualification, his not having previously voted, and his being free from bribery, may be put to the oath of any elector, on the requisition of another, but no other inquiry can be instituted.[9] After having declared the result, the chief magistrate sends notice to the persons elected, who must declare on the second lawful day whether they accept; and in case of non-acceptance, or double return, or of a person failing to appear and accept without sending an explanation, a new election must be declared, at the distance of not more than four or less than two days.[10]

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[1] 3 & 4 Wm. IV. c. 76, § 16.—[2] Scott *v.* Magistrates of Edinburgh, 21st December 1838.—[3] 3 & 4 Wm. IV. c. 76, § 15.—[4] Ibid. §§ 7, 15.—[5] Ibid. § 8.—[6] Ibid. § 9.—[7] Ibid. § 10.—[8] Ibid. § 11.—[9] Ibid. §§ 8, 11.—[10] Ibid. §§ 10, 11, 13.

## SECT. 4.—*Choice of Office-bearers.*

The councillors meet on the third lawful day after the election, and fill up by majorities those offices vacated by councillors retiring.[1] The chief magistrate and the treasurer remain in office for three years.[2] In general, the official distinctions of councillors, by the titles of Deacon, and of Convener, and Dean of Guild, and of Old Provost and Old Bailie, were abolished by the burgh reform act, along with the distinction between Trades Bailies and Merchant Bailies, or Trades Councillors and Merchant Councillors; and it is provided that the duties previously performed by the Dean of Guild be performed by a member of the council, chosen by the majority.[3] But there are exceptions to this rule in favour of the following officers, viz., the Dean of Guild and the Deacon Convener of Edinburgh and Glasgow respectively, and the several Deans of Guild of Aberdeen, Dundee, and Perth, who continue to be members of the respective councils as formerly.[4]

Certain members of the council are appointed to fulfil any trusts or managements vested in the offices abolished.[5] The rights of trades, crafts, and guildries to elect their officers, according to use, is not interfered with,[6] any trusts or managements vested in such officers continuing in their hands, whether they are of the council or not; while in the cases in which trades councillors, or merchant councillors have been *ex officio* such trustees or directors, the convenery or trades house, and the guildry or merchant house, must elect an equal number from their own bodies respectively, to be such trustees or directors.[7]

When by reason of non-election, or irremediable defect in the right of those who appear to be elected, to act, offices are not filled up, the Court of Session will appoint managers to perform the duties attached to them.[8] The managers of a burgh so appointed are "bound to conform themselves to the rules and regulations that would be binding on the magistrates, and are only entitled to interfere in the administration of its affairs at meetings of the managers duly called or authorized."[9] When there were doubts as to the validity of an election, the court, on application of those who stood

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[1] 3 & 4 Wm. IV. c. 76, § 24.—[2] Ibid.—[3] Ibid. § 19.—[4] Ibid. § 22.—[5] Ibid. § 20.—[6] Ibid § 21.—[7] Ibid. § 23.—[8] Greig *v.* Greig, 21st January 1842.—[9] Greig *v.* Miller, 11th February 1842.

ostensibly in the position of the magistrates and council, there being no opposition, authorized them to perform the functions attached to the offices they professed to hold.[1]

A vacancy in any office occurring between elections is filled by the council from their own body, until the next election. If the vacancy decrease the number of councillors, a new councillor is chosen by them. The person so appointed an office-bearer or councillor retires at the immediately ensuing annual election.[2] Any one may resign an office, or his seat in the council, on three weeks' notice to the chief magistrate, or the town-clerk; and if a councillor, not bound to retire in rotation, intimate that he will resign at the annual election-meeting, an additional councillor must be elected in his stead.[3]

N. B. The following small royal burghs,—Dornoch, New Galloway, Culross, Lochmaben, Bervie, Wester Anstruther, Kilrenny, Kinghorn, and Kintore, are specially excepted from the operation of the act.[4]

### SECT. 5.—*Towns not Royal Burghs.*

In those larger towns, which are not royal burghs, a magistracy is appointed, according to the following allotment, viz. to Paisley, Greenock, Leith, and Kilmarnock, respectively, sixteen councillors, among whom are, a provost, four bailies, and a treasurer. These burghs are divided into wards, as fixed by the burgh-commissioners, and their respective councils are chosen as in the royal burghs divided into wards. In Falkirk, Hamilton, Peterhead, Musselburgh, and Airdrie, there are respectively twelve councillors, among whom are a provost, three bailies, and a treasurer. In Port-Glasgow, Cromarty, and Portobello, there are respectively nine councillors, among whom are a provost and two bailies. In Oban there are six councillors, of whom two are bailies. The electors are the registered voters for members of parliament. The elections are to proceed in all respects as in the royal burghs;[5] and there are similar provisions for the management of charities, and the appointment of the office-bearers of trades and other bodies, where there have been any such officials by the old constitution of any of the burghs.[6]

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[1] Forbes and others, petitioners, 22d December 1838.—[2] 3 & 4 Wm. IV. c. 76, § 25.—[3] Ibid. § 26.—[4] 2 & 3 Wm. IV. c. 76. Sch. F.—[5] 3 & 4 Wm. IV. c. 77.—[6] Ibid. §§ 17, 19.

# CHAPTER IV.

## EDUCATIONAL INSTITUTIONS.

### SECT. 1.—*Universities.*

THE universities of Scotland are corporations, and, as such, can sue and be sued, in the persons of their proper officers, and are bound by the votes of the majority of the managers, according to the foundation, whose lawful acts likewise bind their successors.[1] The church courts have on various occasions passed regulations regarding the management and system of instruction pursued in the universities,[2] which can only be stated as law when sanctioned by the legislature or the law courts. "These universities," says the report of the late Royal Commission of visitation, "are not now of an ecclesiastical character, or, in the ordinary acceptation of the term, ecclesiastical bodies. They are connected, it is true, with the Established Church of Scotland, the standards of which the professors must acknowledge. Like other seminaries of education, they may be subject to the inspection of the church, on account of any religious opinions which may be taught in them. The professors of divinity, whose instructions are intended for the members of the Established Church, are, in their character of professors, members of the presbytery of the bounds, and each university returns a member to the General Assembly of the Church of Scotland. But in other respects, the universities in Scotland are not ecclesiastical institutions, not being more connected with the church than with any other profession."[3]

By a temporary act of William and Mary, appointing visiters to the universities, it is enacted, "that from this time forth, no Professors, Principals, Regents, Masters, or others bearing office in any University, College, or School within this kingdom, be either admitted, or allowed to continue in the exercise of their said functions, but such as do acknowledge and profess, and shall subscribe to the Confession of Faith, ratified and approven by this present parliament: and also swear and subscribe the oath of allegiance to their majesties, and withal shall be found of a pious, loyal, and

[1] Park v. University of Glasgow, 10th December 1675, M. 2535.—[2] See Ass. 1707, act 6, 1711, act 14, 1719, act 12, &c.—[3] Report, 7th October 1831, Introduction, p. 8.

peaceable conversation, and of good and sufficient literature and abilities for their respective employments, and submitting to the government of the church now settled by law."[1] By another act of the same reign "it is declared, that all schoolmasters, and teachers of youth in schools, are, and shall be liable to the trial, judgment, and censure, of the presbyteries of the bounds for their sufficiency, qualifications, and deportment in the said office."[2] By the act of union, it is provided, that "no professors, principals, regents, masters, or others bearing office in any university, college, or school within this kingdom, be capable to be admitted, or allowed to continue in the exercise of their said functions, but such as shall own and acknowledge the civil government, in manner prescribed, or to be prescribed by acts of parliament; as also, that before, or at their admissions, they do and shall acknowledge and profess, and shall subscribe to the foresaid Confession of Faith, as the confession of their faith, and that they will practise and conform themselves to the worship presently in use in this church, and submit themselves to the government and discipline thereof, and never endeavour, directly or indirectly, the prejudice or subversion of the same, and that before the respective presbyteries of their bounds, by whatsoever gift, presentation, or provision they may be thereto provided."[3] These statutes have not recently been the subject of reported decisions in the courts of law, at least in so far as they respect universities.

*Visiter.*—The crown, probably as succeeding to the patronage of the pope, retains the right of visiter of the universities,[4] and with it the power to make certain internal arrangements, but to what extent seems not very well defined. It appears that visiters appointed by the crown have on occasion made important changes in the constitution of the universities, and exercised the power of suspension and deprivation.[5] In England, the visiter of a corporation is an official whose powers are clearly recognised by law. In lay corporations (among which are by later law included the universities), the person appointed by the foundation is the visiter, failing whom, the sovereign, who is said to exercise the power of visitation in the Court of Queen's Bench. The decision of a visiter, in all matters of internal arrangement, is final.[6] The conflicting authority of the patrons, the church

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[1] 1691, c. 17.—[2] 1693, c. 22.—[3] 5 Anne, c. 8, art. 25, § 3.—[4] 1691, c. 17.—[5] Report, *ut supra*, 13.—[6] Bl. i. 483.

and the crown, seems not at present to admit of a clear definition of the powers of the visiter in Scotland being given.

*Administration.*—The patronage and internal administration of universities remain with the officials named in the act of parliament, charter, or other title of erection. Where the officials in whom the patronage is vested have ceased to exist, and their duties are performed by other persons, the right of these latter to continue in the exercise will generally be sanctioned by the court: thus, where by the constitution the election of a professor was in the principal, licentiate, and bachelor, and the two latter offices had become extinct after the Reformation, an election by two of the three regents (the other declining to vote) was preferred to the nomination of the principal, as being the choice of the majority of the electors.[1]

Any attempt by the principal or other officers of a university to exceed the powers given them by the constitution will be checked by the civil courts;[2] and it is at any time competent to bring an action of declarator for the purpose of ascertaining the constitution of a university.[3] By an old decision, it appears, that where the ruling body is appointed by charter, it is at any time in the power of the crown to add to its numbers.[4] In a later case, it was found that the crown could appoint an additional professor, who might sit and vote at the meetings of the *comitia* and *senatus*, and might lay claim to a share of a surplus fund, not appropriated to definite objects, but left in the hands of trustees, to be applied "for the advancement of learning in the university;" but it was found that the new professor was not entitled "to infringe upon, or participate in the patronage and patrimonial and other rights of the [then] professors and their successors in office."[5] When a university is, as in the case of Edinburgh, under the patronage of another corporation, the members of the university are not entitled to do any acts of management in opposition to the patrons, but their by-laws and regulations are binding, if not objected to or recalled by the patrons. From the circumstances of the case in which this was decided, it would appear that the town-council have the unlimited power of framing regulations and by-laws for the university of Edinburgh; that they

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[1] Halden *v.* Rymer, &c. 22d July 1707, M. 2387.—[2] Gordon *v.* Black, 19th February 1712, M. 2397. Arnot *v.* Hill, 21st January 1807, M. College Ap. No. 3.—[3] Liechman *v.* Trail, 22d Nov. 1770, M. Ibid. No. 1.—[4] Burnet, &c. *v.* Simpson, &c. 24th January 1711, M. 2389.—[5] Muirhead *v.* Glasford, &c. 16th May 1809.

can regulate the course of study, decide what are the necessary *curricula* for obtaining university honours, and the like.[1]

*Degrees.*—It is chiefly in cases regarding the rights of medical practitioners that the power of universities to grant honorary distinctions has been the subject of litigation before courts of law. The faculty of physicians and surgeons of Glasgow were found to be a corporation, existing from the year 1599. They held a monopoly of the practice of medicine and surgery over certain bounds, being entitled to exclude all but their own licentiates, and persons holding qualifications from universities, who, however, were entitled to practise medicine only. The university of Glasgow had been long in the practice of granting degrees in medicine, but granted none in surgery till the year 1816, when a chair of surgery was established. It was found by the Court of Session, that neither a degree of doctor of medicine, nor a degree of surgery from the university of Glasgow, entitled the possessor to practise surgery within the bounds of the faculty of physicians and surgeons. The case being appealed, it was remitted to the Court of Session to consider whether the faculty were a legal corporation, entitled to the rights they claimed, and the court found that they were.[2] It was expressed as an opinion by Lord Moncreiff, that (exclusive privileges of other bodies excepted) "the art of surgery is a branch of the general science of medicine, which it is perfectly competent for any royal university to teach, and in which, upon due examination, they may grant degrees; which will be equally effectual, as licenses for practice generally, as any other medical degree which it is in their power to grant."[3]

## SECT. 2.—*Schools.*

*Parish Schools.*—The acts above cited as to the rights of the church in connexion with the universities, appear to have unlimited reference to all places of education; but how far they would be considered applicable to other than parish schools is a matter of doubt. It has been asserted by an act of assembly, that presbyteries have "an indubitable right to examine schools of every description within their bounds."[4] Private schools, however, seem liable to no interference,

[1] Magistrates of Edinburgh *v.* the College, 15th January 1829.—[2] Fac. of Physicians, &c. *v.* University of Glasgow. Court of Session, 12th November 1834, and 3d March 1837. House of Lords, 28th August 1835, 2 S. and M'L. 275.—[3] 2 S. and M'L. 292.—[4] Ass. 1817, act 5.

except from the civil power, in terms of the act of Geo. II., below referred to. It was for some time questioned whether the right of presbyteries to superintend parish schools was ecclesiastical, so as to infer appeal to the higher ecclesiastical courts, or civil, admitting an appeal to the Court of Session, —it was finally decided by the House of Lords in favour of the former.[1] Where, however, the church courts proceed to consider matters beyond the powers conferred on them, or act in a manner contrary to law, the civil court will give relief by reducing their decisions.[2] The powers of church courts in the superintendence of the parish schools are bounded and defined by 43 Geo. III. c. 54, which enacts, that "the superintendence of schools shall continue with the ministers of the Established Church as heretofore, according to the several acts of parliament respecting the same, except in so far as altered by this present act."[3] And power is given to presbyteries to judge in the following matters:— When they disapprove of the hours of teaching or the length of vacations, either on their own observation or on complaint, they may make regulations which the schoolmaster must obey, under pain of censure, suspension, or deprivation.[4] On complaint against a schoolmaster by the heritors, minister, or elders, for neglect of duty, immorality, cruelty, &c., the presbytery may serve him with a libel, and, on proof, may pass a judgment, "which shall be final, without appeal to or review by any court, civil or ecclesiastical."[5] The evidence adduced must be taken down in writing, and in the case above alluded to, the want of this formality was the ground of reduction.[6]

*Burgh Schools.*—This act does not extend to royal burghs, where powers have been exercised and acknowledged in the magistrates, inconsistent with any extensive right of management in the church courts. Magistrates hold the power of choosing and removing the schoolmasters; but the Court of Session will afford a remedy in the case of a capricious or unjust use of the power.[7]

*Miscellaneous Schools.*—A power somewhat similar to the above is in the hands of the directors of any academy established by royal charter.[8] Where the trustees of an endowed school have ceased to exist, the Court of Session can nomi-

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[1] M'Culloch v. Allan, 26th November 1793, M. 7471.—[2] Brown v. Heritors of Kilberry, 1st February 1825. App. 12th June 1829. 3 W. & S. 441.—[3] § 19.—[4] § 20.—[5] § 21.—[6] Brown v. Heritors of Kilberry, *ut supra*. —[7] Magistrates of Montrose v. Strachan, 18th January 1710, M. 13118. —[8] D. P. L. 532.

nate administrators.[1] In some institutions generally founded by endowment, education is united with other benefits or privileges, which, from the limitations in the classes of persons entitled to receive them, or from the nature of the management under which they are placed, hold a species of corporate character. The law in relation to these establishments has been in some measure examined in the preceding chapter. By the act 4 & 5 Vict. c. 38, provision is made for enabling heirs of entail, and other persons holding property by a limited title, to convey small portions of land as sites for schools and schoolmasters' houses, either for a consideration or gratuitously. By the act 19 Geo. II. c. 39, severe penalties are enacted against schoolmasters (other than professors, teachers of parish schools, and of schools established by the Society for Propagating Christian Knowledge, and the General Assembly) who do not register their places of teaching, and take the oaths to government.[2]

## SECT. 3.—*Maintenance and Patronage of Parish Schools.*

*Master's Salary.*—By early acts of the legislature, the heritors are compelled to provide for a school in each parish.[3] By the act of 1696, it was provided that each schoolmaster should receive from the heritors a salary not under 100 merks or above 200, which has since been raised to the value of two chalders of oatmeal as the highest, and one chalder and a-half as the lowest, calculated on an average of the fiars for the twenty-five years preceding.[4] The last period of taking an average (twenty-five years after the passing of the act in June 1803) having fallen in the year 1828, the next will fall in 1853, when the sheriffs will have to determine from the average fiars for the twenty-five years preceding the average price of the chalder of oatmeal, and make their returns to the remembrancer in exchequer, by whom they will be laid before the treasury, where the average prices for all Scotland will be struck.[5] The amount of salary within the limits, to be paid to the schoolmaster for the next period of twenty-five years, is decided on by the heritors of the parish (no heritor being entitled to vote who has not an estate of £100 scots valued rent) and the minister, subject to the review of

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[1] D. P. L. 533.—[2] § 21.—[3] 1633, c. 5. 1696, c. 26.—[4] 43 Geo. III. c. 54, § 4.—[5] Ibid. § 3, and 3 & 4 Wm. IV. c. 13, § 1.

the justices at the next quarter sessions, whose decision is final.[1]

The schoolmaster receives from the preses of the meeting a copy of the resolution fixing the amount of his salary, which is his authority for levying it on the heritors, according to the proportions set forth in a stent-roll provided by them, specifying their respective valued rents.[2] The heritors have relief against their tenants for a half of their proportion of salary.[3] The salary is payable by equal portions, at Whitsunday and Martinmas; and if an heritor allow two terms of his portion to run into the third unpaid, he is liable to double the sum due, and the double of every term's payment falling due thereafter, until he have paid up all arrears.[4] Where portions of a parish are detached from each other by arms of the sea, &c., or are in separate islands, the heritors and minister may stent a salary to the extent of three chalders, to be divided among two or more teachers,—subject to appeal to the quarter sessions.[5]

*Schoolhouse.*—The heritors having to pay such additional salaries are exempt from providing schoolhouses, dwelling-houses, and gardens.[6] In other parishes, if the schoolmaster have not a suitable house and garden, the heritors must provide a house, which need not consist of more than two apartments, including the kitchen, with one-fourth of an acre of garden-ground, taken from fields used for ordinary agricultural purposes, and enclosed with the common fence used in the district. The heritors, if it is very inconvenient to allot a garden to the schoolmaster, may, with the authority of the justices at the quarter sessions (to whom appeals from the decisions of the heritors lie), commute it into a money payment.[7] The heritor whose ground is appropriated has relief against the others.[8]

*Additional Schools.*—By a late act provision is made for supporting schools in those districts which are made detached parishes in terms of 5 Geo. IV. c. 90. Wherever the heritors in such districts provide a schoolhouse and garden, of the nature above described (with this difference, that there must be two rooms *besides* the kitchen), the treasury may endow the school, to an extent not exceeding the maximum as above ascertained.[9] The schoolhouse being built, the

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[1] 43 Geo. III. c. 54, §§ 4, 5, 22.—[2] 1696, c. 26. 43 Geo. III. c. 54, § 4.—[3] 1696, c. 26.—[4] Ibid.—[5] 43 Geo. III. c. 54, § 11.—[6] Ibid.—[7] Ibid. §§ 8, 9.—[8] Ibid. § 10.—[9] 1 & 2 Vict. c. 87, § 3.

heritors are bound to support it in the same manner as a regular parish schoolhouse, and the regulations as to parish schools and schoolmasters apply to the schools so endowed.[1] The patronage of such schools is in the heritors, and the minister of the parish where the school is situated, and failing an appointment by them, in the commissioners of supply.[2] It has been found that it is the minister of the original parish, and not of the *quoad sacra* parish, to which the school is attached, who votes under the act.[3]

*Choice of Master.*—The right of electing the schoolmaster is vested in the minister and the heritors, qualified as above. They meet on the minister's advertising the vacancy from the pulpit, and sending written notice to the non-resident heritors.[4] If the election is not made within four months after the vacancy has occurred, the right devolves on the commissioners of supply.[5] It was originally provided that the commissioners were to exercise their right on the application of the presbytery; but by a late act it is provided, that if the presbytery do not make application within twenty-one days after the expiry of the four months, any heritor may make intimation of the vacancy by letter to the convener, requiring him to call a meeting of the commissioners on thirty days' notice, and the commissioners or any five of them assembled at the meeting may proceed to fill the vacancy.[6] The person elected presents himself, with a copy of the minute of election and a certificate of having taken the oath of allegiance, before the presbytery, where inquiry is made into his moral character, and his proficiency in such branches of literature as to the majority of the heritors and the minister may seem necessary. He then signs the confession of faith, &c., and the judgment of the presbytery, as to his qualifications, is final.[7]

The schoolmaster often performs the duty of precentor and session-clerk, but he is not bound to do so, as it was decided, where a sum was mortified to the holder of his office, on the evident understanding that all who succeeded to it were to act as precentors.[8] The schoolmaster is bound to teach gratuitously poor children recommended by the heritors and minister at any parochial meeting. The heritors and minister have the power of fixing, from time to time, the fees to

[1] 1 & 2 Vict. c. 87, § 6, *et seq.*—[2] Ibid. § 7.—[3] Riddell *v.* Mackenzie, 9th February 1841.—[4] 43 Geo. III. c. 54, § 14.—[5] Ibid. § 15.—[6] 8 & 9 Vict. c. 40.—[7] 43 Geo. III. c. 54, § 16.—[8] Kirk-session of Monimail *v.* Espline, 21st November 1828.

be charged for other children.[1] By the local act 47th Geo. III. sess. 2, c. lxxxv., schoolmasters are obliged to contribute in some one of five separate proportions to a fund for the relief of the widows and children of those deceased.

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## CHAPTER V.

### PUBLIC COMPANIES AND PUBLIC WORKS.

#### SECT. 1.—*General View.*

WHEN men associate themselves together to transact business as a public company, and do not possess an act of Parliament, a charter, or a patent, or come, like friendly societies, within any of the general statutory rules applicable to unions for certain assigned purposes, the law considers them in their relation to the public as private partnerships, and thus they belong to the department of Private Rights and Obligations.* The stock of such companies is sold in the market somewhat after the manner of the government securities, and the holders of the stock generally have little concern in the internal management of the business, which is conducted by persons whose position and functions very nearly resemble those of public officers; yet this close imitation of a public institution is produced by the private obligations of the individual stockholders to each other as partners, and though individual responsibility as a member of a trading firm may thus be prevented from appearing, it becomes visible when the misfortunes of the company break through the rules and obligations intended to keep the members from interference, and preserve them from responsibility.

If a public company desire not only to hold the individual consenting members bound to respect it as a corporate institution, but to make it assume this position towards the public at large, it must be invested with the precise powers it requires, by an act of Parliament. The limitation of the

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[1] 43 Geo. III. c. 54. § 18.—* See the Law of Private Rights and Obligations, Part VI. Chap. III.

responsibility of the members, or the right to sue and be sued in the name of an officer and other minor privileges, sometimes tempt trading and insurance companies to apply for local acts. It is, however, when the scheme of the operations of the company requires that they should obtain possession of the property of owners of whose willingness to part with it they are not assured, and when their operations are on so extensive a scale, and come so much in contact with the community as to demand a peculiar administrative and judicial system with a special police force—that local acts are imperatively required. The establishment of harbours, docks, and canals, has thus long been the object of local legislation, while in later years the great advance of the railway system has prodigiously increased the formation of these small internal engineering republics. A large portion of the law of public works will thus fall to be considered in the portion of this work devoted to the means of internal transit.* In 1845, an act was passed for the establishment of constables in connexion with public works, which will have to be noticed under the head of Public Police.†

### SECT. 2.—*Local Acts.*

*Standing Orders.*—There are certain standing orders of both houses of Parliament, altered and amended from time to time, the terms of which must be complied with by all promoters of local acts, to secure the bills being passed through their several stages in the respective houses of Parliament by which the orders are passed. In so far as respects their own right to pass or reject a measure, the respective houses are understood to have the power of requiring such preliminary notices to be made, and such other rules to be followed as they may think proper to order. As it has sometimes, however, been found that parties cannot get these rules obeyed unless they are entitled to compel others to co-operate with them, the standing orders have been in some measure aided by statute. Thus, in 1837, an act was passed requiring all sheriff-clerks, clerks of the peace, town-clerks, schoolmasters, postmasters, and other persons, in whose hands either house of Parliament required documents to be lodged, to receive them, and keep them accessible under certain reasonable restrictions to parties requiring to consult them.[1] By other acts, arrangements are made for the payment of

* See Part VII.—† See Part VIII.—[1] 7 Wm. IV. and 1 Vict. c. 83.

deposits, required by the orders of either house as preliminary to applications for local acts, into one of the chartered banks, "in the name and with the privity of the Queen's remembrancer."[1]

*Preliminary Inquiry.*—In 1846, an act was passed "for making preliminary inquiries in certain cases of application for local acts."[2] In the case of projects "for the establishment of any water-works, or for draining, paving, cleansing, lighting, or otherwise improving any district or place, or for making, maintaining, or altering any burial-ground or cemetery," the act directs that a notice of intention to bring in any such measure shall be made to the office of the Woods and Forests on the last day of the November preceding, or if that day should be a Sunday, on the day before.[3] When the proposed act is to affect any port or harbour, tidal water or navigable river, such a notice is to be sent to the Admiralty.[4] The notice must contain an account of the project, along with copies of all such documents as require to be deposited by the standing orders of the two houses.[5] The commissioners before taking steps for making an inquiry, may require security to be found for payment of the expense of doing so.[6] The inquiry is conducted by a surveying officer appointed by the commissioners, who repairs to the spot, and after notice by publication in the newspapers and otherwise, takes evidence and examines documents.[7] He may issue summonses for the attendance of witnesses, and if a witness neglect or refuse to attend, or refuse to exhibit any document, he becomes liable to a penalty not exceeding £5.[8] The penalty is recoverable before two or more justices, who may levy it by distress and sale; it goes to the fund for the relief of the poor.[9] The expenses of the investigation must be borne by the promoters of the measure.[10]

*Consolidating Acts.*—Ever since the quantity of legislation for local purposes was found to be so rapidly increasing, it was felt that a certain portion of almost every local act, being intended for the accomplishment of the same end to which the clauses in many other local acts were directed, was a repetition, which not only caused redundancy in legislation, but was productive of much confusion and litigation, by giving one public company a different method of accomplishing the same ends from another. Thus, there might be two railways forming one line, but regulated by different local

[1] 1 & 2 Vict. c. 117. 9 & 10 Vict. c. 20.—[2] 9 & 10 Vict. c. 106.—[3] Ibid. § 1.—[4] Ibid. § 7.—[5] Ibid. § 1.—[6] Ibid. § 6.—[7] Ibid. § 4.—[8] Ibid.—[9] Ibid. § 5.—[10] Ibid. § 6.

acts, and as the acts were not drawn with any reference to each other, what was an offence on the one was no offence on the other, and the method of recovering penalties under the one act might be as distinct from that under the other as the law of Scotland from the civil code of France.

To remedy this defect, three acts were passed in 1845, applying to three different classes of local acts, and each embodying certain clauses which every local act of that class would naturally contain. The first of these, "to consolidate in one act certain provisions usually inserted in acts with respect to the constitution of companies incorporated for carrying on undertakings of a public nature in Scotland,"[1] and called the "Companies' Clauses Consolidation Act," is essentially a joint stock company's act, containing the clauses essential to any trading, insurance, or banking establishment. It contains rules relating to the election, functions, and responsibility of directors, the powers of general meetings, the responsibility of officers, the declaring, making, and enforcing of calls, the auditing of accounts, the creating and limiting of stock, and the winding up and adjustment in case of bankruptcy. It thus embodies nearly all the clauses usually contained in the deed of settlement or contract of copartnership of such a body, and cannot fail to furnish what must necessarily be the most approved style for such a document, applicable even to those Joint Stock companies which do not aim at procuring an act of Parliament.

Another of these acts "for consolidating in one act certain provisions usually inserted in acts authorizing the taking of lands for undertakings of a public nature in Scotland,"[2] is commonly cited as "The Lands' Clauses Consolidation Act." It contains, in 144 sections, the usual clauses for enabling the promoters of public works either to purchase and become proprietors of lands for the purposes of their undertaking, or judicially to compel unwilling proprietors, or those demanding terms supposed to be unjust, to part with their property at a valuation fixed by a jury. It contains all the clauses necessary for making arbitrations effectual, and for rendering valid conveyances made by heirs of entail and other individuals whose titles are limited. Not the least important portion of the measure, is a series of provisions for reinvesting the purchase-money in these cases according to the destinations of the original title, and for preserving the interest of creditors and lessees.

[1] 8 & 9 Vict. c. 17.—[2] Ibid. c. 19.

The third in number of these statutes "for consolidating in one act certain provisions usually inserted in acts authorizing the making of Railways in Scotland,"[1] is usually called "the Railways' Clauses Consolidation Act." It contains, in 155 sections, the clauses which practice and experience have, during the past twenty years, established as provisions which are peculiar to railways, as distinct from other public works. They relate to the rules that must be obeyed in the structure of the railway; the precautions that must be adopted for the safety of other works, such as water and gas pipes; the engineering arrangements to be adopted as to the crossing of roads, bridges, &c.; the temporary use of neighbouring lands during the construction of the works; the safety and sufficient working of mines under or near the railway; the powers of the directors to make by-laws affecting the public; the services which the directors are bound to give to the public for the statutory powers conferred on them; the charges for the conveyance of goods and persons so far as these are regulated by statute; and the rules and restrictions as to carriages and engines. In the internal management, the distribution of stock, and other matters in which the shareholders are more particularly concerned as partners of a company, railway acts will have to embody a portion of the Companies' Clauses Consolidation Act; and the powers for taking lands will have to be adopted from the consolidation act for that purpose.

In each of these statutes there is this general clause, "and all the provisions of this act, save so far as they shall be expressly varied or excepted by any such act [that is by any local act] shall apply to the undertaking authorized thereby, as far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other act which shall be incorporated with such act, form part of such act, and be construed together therewith as forming one act."

These acts are considered of so much public importance, as embodying a great part of the substance of all local legislation subsequent to the year 1845, that they are printed at length in an appendix to this volume.

*Actions on Local Acts.*—As part of the general statutory law on local legislation, an act was passed "to amend the law relating to double costs, notices of action, limitations of actions, and pleas of the general issue, under certain acts of

[1] 8 & 9 Vict. c. 33.

parliament."[1] In so far as it can have any application to Scotland, this act merely affects the practice in trials by jury in the Court of Session, arising out of local acts.

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## CHAPTER VI.

### Savings Banks.

On the 9th September 1835, an act was passed declaring the provisions of 9th Geo. IV. c. 92 (then applicable only to England and Ireland), and of 3d and 4th Wm. IV. c. 14, to apply to all savings banks thereafter established in Scotland.[2] The old act (59th Geo. III. c. 62) still applies to those savings banks previously established, which have not taken advantage of the new regulations.

#### Sect. 1.—*Banks Established under the Old Act.*

It will be unnecessary to describe the method of establishing a bank under the old law, as it is only applicable to banks in existence. The chief alteration made on it by the new system, which was farther amended in 1844, is in the organization for converting the deposits into government securities. (*See below.*) On the other hand, however, there is no limitation to the sums which may be deposited under the old system. Extracts, receipts, securities, law proceedings, advertisements, bonds by treasurers, &c., are not subject to stamp-duty.[3] The property is vested in the trustees appointed according to the rules, who may pursue and be pursued in courts of law in their own name. Deposits may be bequeathed by a writing, with a signature or mark attested by witnesses, or holograph.[4] Where the sum does not exceed £20, confirmation is unnecessary, and where it does not exceed £50, no stamp or legacy duty is charged. Deposits are to be paid to representatives, if there be no special claimant within six months after the holder's decease.[5] Disputes are finally decided by the Sheriff without appeal.[6]

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[1] 5 & 6 Vict. c. 97.—[2] 5 & 6 Wm. IV. c. 57.—[3] 59 Geo. III. c. 62, §§ 4, 6.—[4] Ibid. § 7.—[5] Ibid. §§ 7, 8.—[6] Ibid. § 9.

## SECT. 2.—*Establishment of a Savings Bank.*

No savings bank can be formed without the sanction of a barrister appointed for the revisal of the rules, and of the commissioners for the reduction of the national debt.[1] The objects for which such a bank may be established are, the accumulation of sums at compound interest, and the purchase of government annuities for the depositors.[2] Where no savings bank exists, a society may be established for the latter purpose, provided the minister of the parish, "or elder for the time being," or a resident justice of the peace, be one of the trustees.[3]

*Rules, &c.*—Institutions claiming the privileges of savings banks must have all their rules entered in a book open to depositors.[4] All rules (except they extend merely to an alteration of the hours of attendance) before being acted on must be certified by a barrister appointed for the purpose,* after being signed by two trustees. The barrister gives a certificate on the rules if they are in conformity to law, returns one copy, and deposits the other in the National Debt Office.[5] The rules are binding on the members, officers, and depositors (including purchasers of annuities), without farther notice.[6]

*Privileges.*—All documents directed by and prepared in terms of the act, are exempt from stamp-duty, and where the estate of a deceased depositor does not amount to £50, there are no duties of any kind charged on the succession to his claims on the bank.[7] The property is vested in the trustees for the time being, in whose name all actions can be raised and defended.[8] Savings banks have, on the application of two trustees, the same preference to other creditors over the funds of their office-bearers as that possessed by friendly societies.[9] (*See next Chapter, Sect.* 2.)

*Disputes.*—By the act of Geo. IV., disputes between banks and depositors are to be referred, in the first place, to two arbiters, one chosen by either party, and if they do not agree, to the barrister appointed to revise the laws, who charges a

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[1] 9 Geo. IV. c. 92, § 2.—[2] Ibid. 3 & 4 Wm. IV. c. 14, § 1.—[3] Ibid. § 27.—[4] 9 Geo. IV. c. 92, § 3.—[5] Ibid. § 4. 3 & 4 Wm. IV. c. 14, § 26. 7 & 8 Vict. c. 83, § 19.—[6] 9 Geo. IV. c. 92, § 5.—[7] Ibid. § 40-44. 5 & 6 Wm. IV. c. 57, § 4. 3 & 4 Wm. IV. c. 14, § 19.—[8] 9 Geo. IV. c. 92, § 8.—[9] 3 & 4 Wm. IV. c. 14, § 28.

* There is no provision in 5 & 6 Wm. IV. c. 57 for appointing an Advocate in Scotland, as in the case of the Registrar of friendly societies. Rules must consequently be transmitted for certification to the barrister appointed for England.

fee not exceeding a guinea, and whose decision is final.[1] There is a provision of the act of 1844 by which *every* dispute must be referred in writing to the revising barrister in London, who finally determines it, and has power to inspect books and examine witnesses on oath; but it is difficult to see how this clause, prepared solely with a view to England, can be practically applied in Scotland.[2] All documents, such as receipts, orders, certificates, &c., must be in the forms assigned by the commissioners for the reduction of the national debt, who are entitled to appoint officials for carrying the system into execution.[3]

### SECT. 3.—*Deposits and Interest.*

The interest to be paid for deposits is limited by the act of 1844 so as not to exceed £3, 0s. 10d. per cent. per year.[4] Minors may deposit and grant receipts, and transactions with depositors who are or may become married women are valid, without the interference of the husband, unless he give notice and require payments to be made to him.[5] With the consent of the managers, savings banks may receive deposits from charitable institutions to the amount of £100 a-year, and £300 on the whole, exclusive of interest, and from friendly societies, constituted in terms of 10th Geo. IV. c. 56, and 4th and 5th Wm. IV. c. 40, to any amount.[6] No anonymous deposits can be received, and the names and designations of depositors must be entered in the books.[7]

*Restrictions on Depositors.*—No person who has made a deposit in or is entitled to any benefit from one savings bank, is entitled to open a new account, or to subscribe to any other savings bank; and depositors must, before making a first deposit, and at such other times as the managers may require, make, either personally, or,—in the case of infants under the age of seven, by some person to be approved of by the managers,—a declaration that the party has no interest in any other savings bank. Persons contravening the regulation forfeit all the interest they may have in savings banks, and the sums in their name are paid to the account of the commissioners for the reduction of the national debt. A printed notice of the regulation must be affixed to the place for receiving deposits in each bank, and must be printed at the

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[1] 9 Geo. IV. c. 92, § 45.—[2] 7 & 8 Vict. c. 83, §§ 14, 15.—[3] 9 Geo. IV. c. 92, §§ 59, 61.—[4] 7 & 8 Vict. c. 83, § 2.—[5] 9 Geo. IV. c. 92, §§ 25, 26. 7 & 8 Vict. c. 83, § 12.—[6] 9 Geo. IV. c. 92, § 27-29. 10 Geo. IV. c. 56, § 30. 4 & 5 Wm. IV. c. 40, § 9.—[7] 9 Geo. IV. &c. § 32.

beginning of the deposit book.[1] Members of charitable bodies and friendly societies are not subjected to the penalties of this regulation, on account of such societies depositing in savings banks;[2] nor are trustees of depositors, who may be depositors on their own account in any other bank.[3] No savings bank can receive more than £30 from any depositor within one year, ending on the 20th November, nor above £150 on the whole; and whenever the whole sum, principal and interest, amounts to £200, no farther interest must be paid.[4] There must be a rule that every depositor is to produce his book once a-year for examination.[5] When a deposit is made in trust, it cannot be uplifted without the receipt both of the trustee and the beneficiary, if both be alive and competent to act.[6]

*Transfers.*—Depositors may transfer their whole interest in one savings bank to another, but not a portion of it. The person transferring receives a certificate, which he indorses in presence of a manager of the bank to which he transfers his deposit, who attests the indorsement; on the transfer being effected, the depositor is in the same situation with an original subscriber.[7]

*Interest.*—Interest on deposits must be calculated half-yearly, to the 20th May or 20th November, or yearly, to the 20th November, "or up to such period nearest" to these, "as such interest shall be payable according to the rules and regulations of such savings banks respectively;"[8] and the managers may direct the interest to be computed yearly or half-yearly, and added to the principal sum as if it were a new deposit.[9]

### SECT. 4.—*Succession to Shares.*

When a person dies leaving money in a savings bank, exceeding £50, it cannot be paid to his representatives without a confirmation;[10] but where the whole sum belonging to the deceased does not exceed £50, the managers, if no confirmation or administration to the estate have been made within one month, or if a month have elapsed without their receiving any notice of an intention to administer, or if they have received notice, but two months have elapsed without the notice having been acted on, may pay the sum

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[1] 9 Geo. IV. &c. § 34. 7 & 8 Vict. c. 83. § 3.—[2] 9 Geo. IV. &c. § 30.—[3] Ibid. § 33.—[4] Ibid. § 35. 3 & 4 Wm. IV. c. 14, § 29.—[5] 7 & 8 Vict. c. 83. § 5.—[6] Ibid. § 7.—[7] 9 Geo. IV. c. 92, § 39.—[8] Ibid. § 49.—[9] Ibid. § 17.—[10] Ibid. § 40. 5 & 6 Wm. IV. c. 57, § 4.

according to the rules of the institution. If no rules have been made on that point, they are to divide the sum among the next of kin, according to the law of succession in moveables.[1] The payment of money according to this rule precludes the claim of any party professing a preferable right as against the bank, leaving him all legal recourse against the individuals who have obtained payment.[2] Payments to persons appearing to have title by confirmation are likewise good in as far as respects the bank, against the claim of any other person as lawful representative, leaving him recourse against the individual who has obtained payment.[3] When the deceased depositor is illegitimate, the managers may, with the approval of the revising barrister, pay his deposit to the persons who, if he were legitimate, would have succeeded.[4] Terminable annuities, purchased under the act 3d and 4th Wm. IV. c. 14 (*see next section*), are, when not upon the life of the person entitled thereto, moveable property, and descendible to executors.[5]

### SECT. 5.—*Annuities.*

A savings bank may contract with depositors for annuities, either immediate or deferred; and in either case, for life, or for a term of years. They are chargeable on the consolidated fund, all sums deposited on account of such annuities being paid over to the Bank of England.[6] No annuity is to be contracted for where the nominee is under fifteen, and none is to be of less than £4 or more than £30 a-year; persons holding annuities from savings banks exceeding, on the whole, the legal sum, forfeit them.[7] There are fees that may be charged on the transaction of annuities, varying from £1, 5s. to 5s.[8] The holder of an annuity may remove the payment of it from one savings bank to another.[9] The tables on which the annuities are calculated are those, from time to time, authorized by the treasury, and published in the Gazette.[10] Fractional parts, less than sixpence, are deducted from annuities.[11] No life annuity can be contracted for without proof of the age and existence of the nominee.[12]

Annuities are paid half-yearly, on the 5th January and the 5th July, or on the 5th April and the 10th October.

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[1] 9 Geo. IV. § 41. 5 & 6 Wm. IV. § 4. 7 & 8 Vict. c. 83, §§ 10, 20. —[2] 9 Geo. IV. § 42.—[3] Ibid. § 43.—[4] 7 & 8 Vict. c. 83, § 11.—[5] 3 & 4 Wm. IV. c. 14, § 17.—[6] Ibid. § 1.—[7] Ibid. § 2. 7 & 8 Vict. c. 83, § 8.—[8] 3 & 4 Wm. IV. c. 14, § 3. 7 & 8 Vict. c. 83, § 9.—[9] 3 & 4 Wm. IV. c. 14, § 4.—[10] Ibid. §§ 5, 6.—[11] Ibid. § 7.—[12] Ibid. § 13.

The terms of payment depend on the period of completing the purchase by lodging the money. The 5th January will be the first term's payment of an annuity, purchased during the quarter ending 10th October preceding, and an annuity bought during any other quarter is similarly regulated, *i. e.* a *whole* quarter intervenes before the first payment. On the death of an annuitant, a quarter of the year's annuity becomes payable (besides all half-yearly arrears) to the executor, provided certificate of the party's death be presented within thirty days preceding some one of the days of payment, and within two years after the death. No quarterly payment is to be made in respect of a deferred life-annuity, unless the nominee has lived so long that a half-yearly payment has been made, or has become due.[1]

Annuities are not transferable, except in the case of bankruptcy or insolvency, when they may be made good with the insolvent's other property, and will be repurchased by the commissioners, according to the tables on which they were purchased.[2] Where a person has purchased a deferred annuity for periodical payments, if he fail to continue the payments, or die before the annuity becomes payable, the sums will be returned, but without interest.[3]

### SECT. 6.—*Officers and their Duties.*

It must be provided by the rules, that no officer of the savings bank shall derive benefit from or have any interest in its funds, except to the extent of his salary; but treasurers, trustees, and managers, or others having direction, can have no salary, and are entitled to nothing but their actual outlay.[4] Every officer intrusted with money, or receiving a salary, must find security (to be approved of by two trustees and three managers) to the Comptroller General of the national debt office, by a bond which may be pursued on by the bank.[5] Trustees and managers are not personally liable, except in cases of wilful neglect or default, or for any money they may have received, unless they agree to take a portion of responsibility.[6] Officers and others, having the custody of the property of a savings bank, may, on the order of two trustees and three managers, be called upon to account and deliver up all money and documents; and in

[1] 3 & 4 Wm. IV. c. 14, § 11.—[2] Ibid. § 16.—[3] Ibid. § 18.—[4] 9 Geo. IV. c. 92, § 6.—[5] Ibid. § 7. 7 & 8 Vict. c. 83, § 17.—[6] 9 Geo. IV. c. 92, § 9. 7 & 8 Vict. c. 83, § 6.

default a petition may be presented to the next quarter sessions, and summarily dealt with.[1] An officer failing to pay over any deposit lodged in his hands, becomes liable to imprisonment for an offence.[2]

*Accounts.*—The trustees of each savings bank must cause a general statement of the funds invested in the Bank of England to be made up on the 20th November annually, stating the balance in favour of depositors, and in whose hands it is remaining, with the expense incurred. The statement must be attested by two persons each of whom is either a manager or trustee, countersigned by the secretary, and certified by every person who appears from the return to have money of the bank in his hands. It must be transmitted, within six weeks after the 20th November, to the national debt office.[3] On failure to make the return, the commissioners of the national debt may advertise the circumstance, and in such case, or on failure by the bank to obey their authorized directions, the account of the bank with the Bank of England may be closed.[4] A duplicate of the last annual statement must always be hung up in the bank office, and depositors are entitled to a copy for the sum of 1d.[5]

### SECT. 7.—*Investment of Property.*

All money deposited in savings banks, except what is necessary for the management, must be invested in the Bank of England, where it may be deposited in sums not less than £50, on a declaration that the money belongs exclusively to the institution, and an order, both signed by any two or more trustees.[6] Central savings banks may make the investments for their branches; the treasurers of the latter certifying that the deposits of subscribers do not exceed the limited amount.[7] If an order or declaration contains any thing untrue, the sum accompanying it may be forfeited.[8] The money, with the interest from time to time arising on it, is to be invested in government annuities or exchequer bills.[9] The interest is £3 5s. per cent. per annum.[10] On the 20th of November and 20th of May each year, or within sixty days after either of these terms, the interest of the invested sums is to be computed and added to the principal.[11]

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[1] 9 Geo. IV. c. 92, § 10.—[2] 7 & 8 Vict. c. 83, § 4.—[3] 9 Geo. IV. c. 92, § 46. 3 & 4 Wm. IV. c. 14, § 32.—[4] 9 Geo. IV. c. 92, § 46. 3 & 4 Wm. IV. c. 14, § 30.—[5] 9 Geo. IV. c. 92, § 47.—[6] Ibid. § 11.—[7] Ibid. § 13.—[8] Ibid. § 14.—[9] Ibid. § 15.—[10] 7 & 8 Vict. c. 83, § 1.—[11] 9 Geo. IV. c. 92, § 17. 7 & 8 Vict. c. 83, § 13.

To enable them to draw invested money, the trustees must execute an appointment to an agent, signed by two of them, and attested by two managers, produced fourteen days before payment, and deposited with the Bank of England.[1] Drafts presented by the agent must have been signed by two trustees, and attested by two other trustees or managers, or credible witnesses, and if they be for more than £5000, by four trustees, each signature being attested by one manager or witness. Drafts for more than £10,000 must not be paid till the expiration of fourteen days. Any trustees not being parties to a draft may obtain payment of it in person.[2] Where the property of any savings bank is increased through the interest received beyond that paid to depositors, the trustees must, within six months after the 20th November annually, pay it over, deducting what may be necessary to meet current expenses, to the Bank of England, where it will be discharged from the account of the savings bank, and kept in a separate account, and open to the operations of the trustees for the purposes of the savings bank.[3]

## CHAPTER VII.

### FRIENDLY SOCIETIES.

#### SECT. 1.—*Constitution.*

THE purposes for which Friendly Societies may be established are declared by the act of 1846 to be the following:—

1. "For the lawful insurance of money to be paid on the death of the members to their husbands, wives, or children, kindred or nominees, or for defraying the expenses of the burial of the members, their husbands, wives, or children; provided that no person under the age of six shall be allowed to become a member of such society, and that no insurance shall be effected on the life of any child under six years of age:

2. "For the relief, maintenance, or endowment of the members, their husbands, wives, children, kindred, or nomi-

[1] 9 Geo. IV. c. 92, § 18.—[2] Ibid. § 18-21.—[3] Ibid. § 23.

nees, in infancy, old age, sickness, widowhood, or any other natural state of which the probability may be calculated by way of average:

3. "Toward making good any loss sustained by the members by fire, flood, or shipwreck, or by any contingency of which the probability may be calculated by way of average, whereby they shall have sustained any loss or damage of their live or dead stock, or goods or stock in trade, or of the tools or implements of their trade or calling:

4. "For the frugal investment of the savings of the members for better enabling them to purchase food, firing, clothes, or other necessaries, or the tools or implements of their trade or calling, or to provide for the education of their children or kindred with or without the assistance of charitable donations: Provided always, that the shares in any such investment society shall not be transferable, and that the investment of each member shall accumulate or be employed for the sole benefit of the member investing, or the husband, wife, children, or kindred of such member, and that no part thereof shall be appropriated to the relief, maintenance, or endowment of any other member or person whomsoever, and that the full amount of the balance due according to the rules of such society to such member shall be paid to him or her, on withdrawing from the society, and that no such last-mentioned society shall be entitled or allowed to invest its funds, or any part thereof, with the commissioners for the reduction of the national debt.

5. "For any other purpose which shall be certified to be legal in England or Ireland by Her Majesty's Attorney or Solicitor General, and in Scotland by the Lord Advocate, and which shall be allowed by one of Her Majesty's principal Secretaries of State as a purpose to which the powers and facilities of the [acts relating to friendly societies] ought to be extended; provided that the amount of the sum or value of the benefit to be assured to any member, or any person claiming by or through him or her, by any society for any purpose so certified and allowed as herein-before mentioned, shall not exceed in the whole two hundred pounds; and that this limitation shall be inserted in the rules of every society established for any purpose so certified and allowed; and that no such last-mentioned society shall be entitled or allowed to invest its funds, or any part thereof, with the commissioners for the reduction of the national debt."[1]

[1] 9 & 10 Vict. c. 27, § 1.

*Building Societies.*—By a special act, it is provided, that societies may be established for the purpose of raising by periodical subscriptions, not exceeding twenty shillings per month, shares not exceeding £150, for the purpose of enabling the holder of a share to receive the value, and therewith erect or purchase a dwelling-house, or other real estate, to be secured by mortgage to the society, till the amount of the share and all expenses have been paid, with interest;[1] it being competent for such building societies to receive a *bonus* from any member, in consideration of his receiving his share in advance, and to appoint forms of conveyance for the sale and mortgaging of the property.[2]*

When a society is formed for any purpose in addition to that of providing relief, maintenance, or endowment in cases of sickness, old age, widowhood, or other natural state, the contributions must be kept distinct, unless the charges are defrayed by extra subscriptions at the time of the contingencies.[3]

*Dissolution.*—No such society, when once regularly constituted, can be dissolved before the purposes for which it was instituted have been carried into effect, without the consent of five-sixths in value of the members, and of *all* the individuals entitled to relief. For ascertaining the proportion of five-sixths, each member has one vote, with an additional vote for every five years that he has been a member; no one member having more than five votes on the whole. Dissolutions without such sanction, and votes for the appropriation of any funds otherwise than as the certified rules of the society sanction, are null, and those engaged in such transactions are liable in the penalties of fraud.[4] (*See this head in Index.*)

## SECT. 2.—*Privileges.*

*Recovery of Money.*—If the person who, as treasurer, or other officer, has any of the property of the society in his hands, die, or become bankrupt, or be pursued by diligence, or be obliged to compound with his creditors, the person

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[1] 6 & 7 Wm. IV. c. 32, § 2.—[2] Ibid. §§ 2, 3.—[3] 9 & 10 Vict. c. 27, § 3.—[4] 10 Geo. IV. c. 56, § 26.

* The regulations as to Friendly Societies, in general, only apply to Benefit Building Societies in so far as they may be applicable to the peculiar purposes of the latter. As the phraseology of the act is entirely English, it may be questioned how far it is capable of being safely applied in Scotland. 6 & 7 Wm. IV. c. 32, § 4.

having as executor, creditor, or otherwise, access to the estate, must, within forty days after a demand made in writing, pay whatever is due to the society in preference to any other claims.[1] The preferable right of the society exists though the office-bearer be the mere holder of securities for the money in his own name.[2] In England the opinion has been held, that the preference will not extend to money lent to an office-bearer of the society on security, unless it be the proper duty of his office to take charge of the funds.[3] All the property of a society is vested in the treasurer or trustee for the time being, without any conveyance from predecessor to successor, except a transfer in the case of public stock; and such office-bearer may sue or be sued in his capacity of office-bearer, and may bring or defend actions when sanctioned by a majority of the society.[4] A society may subscribe its funds, whatever be their amount, to a savings bank established in terms of 9th Geo. IV. c. 92.[5] * Any society may lodge a sum not less than £50 with the Bank of England, on a declaration by two or more treasurers or trustees, that the money exclusively belongs to the society, and with the same formalities in other respects as are followed by savings banks.† If such declaration is untrue, the interest is forfeited.[6] A minor, with consent of parents and guardians, may be a member of a friendly society, and enjoy all its privileges.[7]

By the act of 1829, it was provided that when the officer in whose name any landed or funded property of a society stands is out of the way, or will not or cannot act, the Court of Session may give a remedy, and no fee is in such cases chargeable by any officer of court, or by counsel and agent named by the court.[8] The act of 1846 provides additional remedies to the effect that, whenever any one invested with real property as a trustee for a society, is out of the jurisdiction of the courts, or an idiot, or lunatic, or not known to be alive, the registrar may convey the property to a person duly nominated trustee in his stead, the conveyance being as effectual as if executed by the former trustee; and that when every person, in whose name as trustee the property of any

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[1] 4 & 5 Wm. IV. c. 40, § 12.—[2] Miller *v.* Brand, 10th February 1825.—[3] *Ex parte* Ross, 1802, 6 Ves. 802.—[4] 10 Geo. IV. c. 56, § 21.—[5] 4 & 5 Wm. IV. c. 40, § 9.—* See the previous Chap. Sect. 3.—† Ibid. Sect. 7.—[6] 10 Geo. IV. c. 56, § 31.—[7] Ibid. § 32.—[8] Ibid. §§ 15, 16, 17.

society is transferable at the Bank of England, is out of Scotland, or bankrupt, insolvent, or lunatic, the registrar may direct the transfer to be made in the name of such persons as the society may appoint, to whom dividends are to be paid. When it happens that one or a proportion only of the trustees are disqualified, the registrar may direct the other trustees to make the transfers to the successor of each person disqualified.[1] No fee is exigible for an affidavit taken before a magistrate by a claimant on a society.[2] Societies established previous to the passing of 10th Geo. IV. c. 56 (19th June 1829), not having conformed to the new act, may adhere to the arrangements of the previous ones; but any alteration must be made in terms of 10th Geo. IV. c. 56, and the subsequent statutes.[3]

### SECT. 3.—*Rules.*

The rules before being certified must specify the purpose of the society, and embody directions for the application of the funds for such purpose, in terms of the provisions of the acts, and in consistency with the privileges conceded by them.[4] When rules are made or altered, two copies, signed by three members, and countersigned by the clerk or treasurer (in the case of alteration, with an affidavit from an officer of the society, that the act under which the rules of the society have been enrolled has been complied with), must be sent to the Advocate, or as he is appointed to be termed by the act of 1846 the Registrar, appointed to certify the rules, whose duty it is to see that they are according to law and tend to further the purposes of the society, and to certify on each copy that they are so, or in what respect they are not so. Formerly one copy was returned to the society, and the other was sent to the clerk of the peace, to be confirmed by the justices at next quarter sessions, and filed by the clerk.[5] By the act of 1846, the duplicate is kept by the registrar, to whom all the copies previously filed by the clerks of the peace are appointed to be transmitted.[6] The rules are binding from the time of their being certified by the Registrar. He is prohibited from certifying any rule where the benefits depend on sickness or mortality, unless the society adopt a table certified to be a suitable one by the actuary of

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[1] 9 & 10 Vict. c. 27, § 14.—[2] 4 & 5 Wm. IV. c. 40, § 11.—[3] Ibid. § 14.—[4] 10 Geo. IV. c. 56, § 3.—[5] Ibid. § 4. 4 & 5 Wm. IV. c. 40, § 4.—[6] 9 & 10 Vict. c. 27, § 12.

the national debt commissioners, or some one who has been five years actuary of a life insurance company in London, Edinburgh, or Dublin.[1] The registrar is entitled to a fee not exceeding one guinea, but to no second fee for alterations made within three years, and no fee is chargeable for certifying rules accompanied with an affidavit that they are copied from the rules of another society, established according to the acts of Geo. IV. and Wm. IV.[2]

The rules must be kept at all reasonable times patent to the members.[3] No authorized rule can be altered except by a general meeting called by requisition of seven or more members, and notice (both to be read at two several meetings, before the meeting for making the alterations), or by a committee appointed at such a meeting. The concurrence of three-fourths of those present is required in either case.[4] The rules must specify the place of meeting of the society (which may be changed to any other within the county on notice signed by the secretary and other three members, to the clerk of the peace, within seven days before or after removal), and must contain provisions as to the powers and duties of the members at large, and of the committees and office-bearers.[5] They must provide that books be kept to enter each fund in a distinct account.[6] The rules must provide that the treasurer shall make out an annual statement of the income and expenditure, and of the property in the possession of the society, to be attested by two or more members, as auditors; each member to receive a copy, for such sum not exceeding sixpence, as the rules may specify.[7] The rules must likewise specify whether disputes between the society and the office-bearers, members, or claimants, are to be referred to the justices of the peace or to arbiters.[8] (*See Sect.* 6.)

Where the rules do not prescribe any conditions on which members can retire, they are to be entitled to do so on giving notice in writing to the secretary, and paying up arrears.[9]

### SECT. 4.—*Office-bearers, Committees.*

Every person appointed to an office connected with the receipt or payment of money must (if required by the rules), before admission, become bound by a bond, according to the

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[1] 9 & 10 Vict. c. 27, § 13.—[2] 4 & 5 Wm. IV. c. 40, § 5.—[3] 10 Geo. IV. c. 56, § 7.—[4] Ibid. § 9.—[5] Ibid. § 10.—[6] 9 & 10 Vict. c. 27, § 4.—[7] 10 Geo. IV. c. 56, § 33.—[8] Ibid. § 27.—[9] 9 & 10 Vict. c. 27, § 2.

form prescribed in 10th Geo. IV. c. 56, with two securities, in such sum as may be fixed on by the society, to the faithful fulfilment of his duties. The deed will have the effect of a bond with a clause of registration, and must be placed in the hands of the clerk of the peace, who may sue in case of forfeiture.[1]

The treasurer, trustee, steward, or other principal officer of the society who is bound by the rules to make up the annual state, must send to the registrar, at the end of every five years, a return of the rate of sickness and mortality, and a report of the assets and liabilities of the society; and a rule to this effect must be inserted in the rules. An office-bearer failing to make the return, is liable to a penalty not exceeding £5, recoverable with costs before two justices by distress and sale.[2]

*Committee.*—The full powers and privileges of a society may be delegated to a committee, if it is so provided in the certified rules. Societies may appoint committees with full delegated power to effect particular purposes, which must be entered by the secretary in a book. The transactions of the committee must be recorded, and are liable to the review of the society.[3]

*Property.*—The office-bearers, as provided by the rules, are to invest the money in heritable property, government securities, savings banks, the chartered banks, or the Commercial Bank of Scotland.[4] Any person having charge of money, must, on notice authorized by the society, at any time, account, and pay over any balance, and transfer vouchers, &c., to any person appointed by the society, and on failure a summary decision may be given by the Court of Session on petition.[5] When office-bearers will not convey property belonging to the society in their names, or are absent, or bankrupt, or become idiots or insane, there are provisions for vesting the property in successors without expense to the society.[6]

*Responsibility.*—Office-bearers are not liable to make good deficiencies in the funds, unless they have declared their willingness to be responsible, either to a limited extent or generally, in a writing registered with the rules of the society; but they are liable for all sums actually received by them.[7]

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[1] 10 Geo. IV. c. 56, § 11.—[2] 9 & 10 Vict. c. 27, §§ 5, 6.—[3] 10 Geo. IV. c. 56, § 12.—[4] Ibid. § 13.—[5] Ibid. § 14.—[6] Ibid. §§ 15, 16, 17.—[7] Ibid. § 22.

### SECT. 5.—*Payments.*

When the proper office-bearer of a society has, on the decease of a member, paid any sum to those who appear to have the proper claim, the claim is extinguished as against the society; but any person professing a preferable right has remedy against the individual who has received payment.[1] When a member dies, entitled to a sum not exceeding £20, the office-bearer, if assured that he has left no Will, and that no Confirmation is to be taken out in Scotland or Letters of administration in other parts of the empire, may apply the sum according to the rules; or if there are no rules on the subject, may divide it among the persons entitled to succeed to the effects of the deceased, without confirmation.[2] Where a person makes a fraudulent claim, or fraudulently retains the money of the society, in the absence of any special provision in the rules of the society, he may be summoned by one justice of the peace on the oath of an officer of the society, and on appearance, or in default, on proof of the service of the summons, two justices may convict, and award double the amount of the sum to be paid to the society, with costs not exceeding 10s., to be levied by distress and sale. In default, the party may be imprisoned for a period not exceeding three calendar months.[3]

### SECT. 6.—*Settlement of Disputes.*

If disputes are appointed by the rules to be referred to arbiters (*see Sect.* 3), they must be elected at the first meeting of the society, or general committee (from persons who have no beneficial interest in the fund), and entered in the book containing the rules. Not less than three of these are to be selected by ballot on occasion of each dispute. When an arbiter dies, or ceases to act, another must be chosen in his stead. Whatever decree-arbitral is pronounced in conformity with the rules, and in the form prescribed by 10th Geo. IV. c. 56, is final, and not subject to appeal; and if a party refuse to obey it on the summons of one justice, any two justices may give such order as may seem just. If the sum awarded by them, along with costs (not exceeding 10s.), be not paid, it may be levied by distress of the goods of the party or society; and in default of sufficient property belonging to a society being available, distress may be made

[1] 10 Geo. IV. c. 56, § 23.—[2] Ibid. § 24.—[3] Ibid. § 25.

of the goods of the office-bearer neglecting or refusing to obey the decree, who has indemnity against the society.[1] If it is directed by the rules that disputes are to be referred to the justices, any two of these may, on the party being summoned by one justice, decide the case in conformity with the rules, and then proceed as in the case of applying the decision of arbiters.[2] The sentences and orders of justices are final, and not liable to review.[3] When the rules provide for a reference to arbiters, if it appear to any justice, on the oath of a party, that application has been made to the proper officer to have a dispute settled by arbitration, and that the application has not been complied with within forty days, or that the arbiter has neglected or refused to make award, the justice may summon the officer, and the matter may be decided by two justices, as if the rules of the society had so directed.[4] If the arbiters or justices order a member expelled to be reinstated, they may direct a sum of money to be paid in default of reinstatement, and to be levied in the same manner as any other sums awarded against societies.[5]

There are farther provisions for the settlement of disputes in the act of 1846. As there is some difficulty in understanding their exact intention and effect, the clause is here given in full.

"Every dispute between the trustees or managers of any friendly society and any member or officer thereof, or any executor, administrator, or next of kin of any such trustees, managers, member, or officer, or any creditor or assignee of any trustees, managers, member, or officer of any such society who may become bankrupt or insolvent, or any person claiming to be such executor, administrator, next of kin, creditor, or assignee, or to be entitled to any money paid to such society, or to any benefit arising therefrom, or with respect to the management of the affairs of such societies, for the settlement of which, according to the laws now in force, recourse must be had in England or Ireland to one of her Majesty's superior courts of law or equity, and in Scotland to the Court of Session or sheriff court, may be referred in writing to the registrar of friendly societies in England, Ireland, and Scotland respectively; and where the value of such subject matter in dispute does not exceed £20, every such dispute shall be so referred, unless in England or Ireland her Majesty's Attorney or Solicitor General, or in Scot-

[1] 10 Geo. IV. c. 56, § 27.—[2] Ibid. § 28.—[3] Ibid. § 29.—[4] 4 & 5 Wm. IV. c. 40, § 7.—[5] Ibid. § 8.

land the Lord Advocate, shall certify in writing under his hand that such dispute ought to be decided by the judgment of a superior court of law or equity; and the said registrar shall have power to proceed *ex parte* on notice in writing to the said trustees or managers left or sent by the said registrar to the office of the said institution, or to the last known place of residence of such trustees, managers, members, or officers; and whatever award, order, or determination shall be made by the said registrar, shall be binding and conclusive on all parties, and shall be final to all intents and purposes, without any appeal; and all payments, assignments, sales, and transfers made in pursuance of any such order shall be good in law; and no submission to, or award or determination of the said registrar, shall be subject or liable to, or charged with any stamp duty whatever."[1]

It is then provided that, "on any such reference the said registrar shall be authorized to inspect and to require the production before him of any book or books belonging to the said institution relating to the matter in dispute, and to administer an oath to any witness appearing before him; and every person who, upon such oath, shall wilfully and corruptly give any false evidence before such registrar shall be deemed to be guilty of perjury."[2]

The Secretary of State is to fix the fees payable on such references. They are to be met at first by the particular society, the registrar deciding as to the ultimate liability of parties. For the enforcement of these provisions it is enacted "that any one justice of the peace residing within the county within which such society shall be held, or within which the party resides against whom such award is made, upon complaint made upon oath by the party desiring to have the benefit of the award, or, in case of the managers or trustees of any such society, by an officer of such society appointed for that purpose, may summon the person against whom such award shall be made to appear at a time and place to be named in such summons; and upon his or her appearance, or in default thereof upon due proof upon oath of the service of such summons, any two justices residing within the county aforesaid, upon due proof of the execution of such award, may order payment of the fees and money thereby awarded to be paid to the party appearing to be entitled thereunto, with such costs as shall be awarded by the said justices, not exceeding the sum of ten shillings; and in case the person against

[1] 9 & 10 Vict. c. 27, § 15.—[2] Ibid. § 16.

whom such order shall be made shall not pay the sum of money so ordered to the person, and at the time specified in the said order, such justices shall, by warrant under their hands and seals, cause the same to be levied by distress and sale of the goods of the person on whom such order shall have been made, or by other legal proceeding, together with such costs as shall be awarded by the said justices, not exceeding the sum of ten shillings, and also the costs and charges attending such distress and sale or other legal proceeding, returning the overplus (if any) to the owner: Provided always, that in Scotland it shall be competent to enforce payment of such fees, and of any sum of money so awarded to be paid, by proceeding before the sheriffs in the same manner as is by the law of Scotland competent for the recovery of any debt of the like amount."[1]

[1] 9 & 10 Vict. c. 27, § 19.

# PART IV.

## INSTITUTIONS CONNECTED WITH RELIGION AND THE CHURCH.

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## CHAPTER I.

### Church Courts and Ecclesiastical Divisions.

#### Sect. 1.—*General Assembly.*

*Members.*—The General Assembly consists of representatives from presbyteries, royal burghs, and universities; and from the churches in the East Indies connected with the Church of Scotland. Presbyteries consisting of not more than twelve ministerial charges send two ministers and one ruling elder; those having more than twelve and not more than eighteen, send three ministers and one ruling elder; those having more than eighteen and not more than twenty-four, send four ministers and two ruling elders; those having more than twenty-four and not more than thirty, send five ministers and two ruling elders; those having more than thirty and not more than thirty-six, send six ministers and three ruling elders; those having more than thirty-six and not more than forty-two, send seven ministers and three ruling elders; those having more than forty-two and not more than forty-eight, send eight ministers and four ruling elders; those having more than forty-eight and not more than fifty-four, send nine ministers and four ruling elders; those having more than fifty-four, send ten ministers and five ruling elders. Where a principal or professor of divinity is entitled to a seat in a presbytery, his office is to be calculated as an additional ministerial charge.[1] There are two members for Edinburgh, and one for each of sixty-five other royal burghs,

[1] Ass. 1694, act 5, 1712, act 6, 1835, act 19, and 1839, act 7.

one from each of five universities, and two from the churches in India.[1] By certain acts of assembly, ministers of chapels of ease and of *quoad sacra* parishes, might elect and be elected, but after a series of legal procedure, which showed that these acts were incompetently passed, they were rescinded in 1843.* The object which these acts had in view,—the increase of representation in the General Assembly, concurrent with that of ministerial charges,—was subsequently provided for by the act 7 & 8 Vict. c. 44, for the division of parishes. Commissions to representatives from royal burghs must receive the approval of the ministers and kirk-session of a parish in the burgh, and of the presbytery of the bounds.[2]

*Sessions.*—The Assembly meets annually in the month of May, and continues its sittings for ten days, always commencing them on Thursday.[3] A commissioner is appointed by the crown to be present at the Assembly. He takes no share in the debates. It has been maintained that the Assembly may convene of its own accord, and proceed to business without the sanction of the civil magistrate.[4] Care

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[1] Hill's Practice of the Judicatories of the Church, 90. Styles and Forms of Procedure in the Church Courts of Scotland, by the Church Law Society of Edinburgh, 257.—[2] Ass. 1718, act 9, and 1788, act 9.—[3] Hill's Practice, p. 90.—[4] See the Histories of Sessions 1638 and 1692.

* Ass. 1843, act 10. By the acts of Assembly here alluded to, supernumerary churches, whether they were denominated chapels of ease, or, as being built in terms of the additional churches acts (4 Geo. IV. c. 79 ; 5 Geo. IV. c. 90), were called parliamentary churches, were declared to be capable of having districts assigned to them as parishes *quoad sacra*, giving their ministers, in relation to church courts and other privileges of their spiritual character, the same position as parish ministers. This act remitted to presbyteries to assign districts to such churches and chapels within their respective bounds (Ass. 1833, act 6, Ass. 1834, act 9). An act was passed in 1839, extending this privilege to such congregations of the secession church as should conform to the rules there laid down. (Ass. 1839, act 8.) In a series of cases, it was found that the addition of such members through the authority of the General Assembly to the constituted church courts was illegal, that persons deriving their title as ministers of chapels of ease, parliamentary churches, &c. were not entitled to sit in church courts, and that any party interested could obtain a suspension and interdict against the proceedings of a church court on the ground of such a person acting as a member. (Livingstone, 20th July 1841. Wilson *v.* Presbytery of Stranraer, 27th May 1842. Smith *v.* Presbytery of Abertarff, 2d July 1842.) An interdict was also granted on the application of the patron and several heritors of the parish, out of which a district was proposed to be allocated as a *quoad sacra* parish. (Cunningham *v.* Presbytery of Irvine, 20th January 1843.) It was left doubtful whether the presence of such unauthorized persons as members vitiated the proceedings of church courts, so as to render them reducible if otherwise within the competency of such courts. (Campbell *v.* Presbytery of Kintyre, 21st February 1843.) But in 1846 it was decided that proceedings not questioned at the time remain valid. (Livingstone *v.* Presbytery of Hamilton, 26th June 1846.)

is now taken to prevent collision. When the commissioner is to be absent, it has been usual for the Assembly to resolve itself into a committee, and have its proceedings reported and approved of on his return.[1] At the termination of the sittings, the moderator appoints another assembly to be held on a day certain in the following year, "in the name of the Lord Jesus Christ, the king and head of the church," and the commissioner appoints the same day, in the name of the sovereign.[2]

*Procedure.*—The moderator of the previous year opens the proceedings with prayer. A new moderator (who must be a minister) is then chosen, and various committees are appointed for transacting business.[3] On private questions, the Assembly, as a court of church judicature, hear counsel.[4] Measures of church legislation are introduced in the form of overtures, which may originate with a member, a presbytery, or a synod, or with the Assembly itself, which may require a committee to meet and frame an overture.[5] An overture for any alteration in the rules and constitution of the church, if not dismissed, is, in virtue of "the Barrier act," transmitted to the several presbyteries for their consideration, with injunctions to forward their opinions to the next General Assembly, by which it may be passed into a standing law, only if it have obtained the concurrence of the majority of the presbyteries.[6] Where it is deemed expedient, however, that the new law should be immediately put in force, the Assembly are in the practice of converting the overture into an "Interim act," binding until the ensuing meeting of the Assembly.[7] Where a measure, favoured by the Assembly, does not receive the assent of presbyteries after being first passed, it is not unusual virtually to continue the measure as "an interim act" from year to year. The General Assembly exercises supreme legislative and executive authority over all other church judicatories, which are subject to its directions, so far as they do not infringe on the civil law.[8]

*Commission.*—The Assembly refers to a Commission the business it is not able to complete during the ten days of its session. The commission consists of all the members of Assembly, with the addition of one minister named by the moderator. Thirty-one members (of whom twenty-one

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[1] Hill's Practice, p. 91.—[2] Ibid. 101. See the concluding act of each session.—[3] Hill, 93. Styles of Writs, &c. 258.—[4] Hill's Practice, 98.—[5] Ibid. Styles of Writs, 241.—[6] Ass. 1697, act 9.—[7] Hill's Practice, 99.—[8] Hill's Theological Institute, 243.

must be ministers) make a quorum. The stated periods of meeting are,—the first day after the dissolution of the Assembly, the second Wednesday of August, the third Wednesday of November, and the first Wednesday of March; and though meetings may be held at other times, yet no decision on a private process can take place except at these sessions. The commission appoint their own moderator. Their proceedings are submitted to the review of the ensuing Assembly. The inferior judicatories are responsible to the Assembly, and not to the commission, for obedience to the sentences of the commission.[1]

### SECT. 2.—*Synods.*

There are sixteen provincial synods in Scotland, consisting of aggregate meetings of the members of the respective presbyteries of which they are composed.[2] The General Assembly exercises the right of dividing the country into synods, and it lately constituted a new synod, viz. that of Shetland.[3] Their time and place of meeting are fixed by the same authority,—they usually meet twice a-year.[4] Neighbouring synods are in the practice of sending to each other a minister and an elder as corresponding members, who vote in the synods to which they are sent.[5] The synod choose a moderator, who must be a minister. Committees may be appointed. Each presbytery must produce its records to the synod, to be examined by a committee consisting of those who are not members of the presbytery.[6] The synod is the immediate court of appeal from the presbytery, from which no case can be sent to the General Assembly without passing through it, unless by special authority from the Assembly, or in the circumstance of no meeting of synod intervening between the decision of the presbytery and the meeting of Assembly.[7]

### SECT. 3.—*Presbyteries.*

There are at present eighty-two presbyteries. The General Assembly has the right of altering, and of increasing or diminishing, the number of presbyteries. A presbytery consists of the ministers of the parishes, and parliamentary churches within the bounds, of the professors of divinity (if

[1] Hill's Practice, 92.—[2] Pardovan's Collection, i. 14. 1. Hill's Practice, 75.—[3] Ass. 1830, act 8.—[4] Pardovan, i. 14. 1. Hill's Practice, 75.—[5] Pardovan, i. 14. 1.—[6] Ibid. i. 14. 4. Hill's Practice, 76.—[7] Styles of Writs, 246.

they be ministers) of any universities within the bounds, and of one ruling elder chosen from the several elders of each kirk-session. It is usual to elect each minister in rotation moderator, for six months.[1] The duty of each presbytery is "to judge in the references for advice, the complaints and appeals that come from the kirk-sessions within the bounds; to examine schoolmasters on their appointments; to provide for the annual examination of the parochial and other schools of the district; and to make an annual report on this subject to the General Assembly. It belongs to presbyteries to grant licenses to preach the gospel, and to judge of the qualifications of those who apply for them."[2] (*See Chap.* II.)

They have the duty of receiving and considering complaints against ministers or probationers, which cannot be instituted in the inferior court of the kirk-session.[3] Proceedings against a minister must be founded on a specific complaint given in "by some person or persons of good report, males of full age, heritors or inhabitants of the parish, and in communion with the church," who will undertake to resolve it into a libel, or on such a "*fama clamosa*, or general scandal," that the presbytery find it necessary to commence the process "for their own vindication." Previous inquiry may settle either the innocence of the accused or the necessity of a prosecution; but no proceedings involving penalties can be pursued, until the accused is served with a libel, specific as to the circumstances of the charge, and the time and place.[4] The minister must be cited ten free days before the day of trial; if he fail to appear, a new citation is given him in his church, in presence of his congregation, and if he then fail to appear, he is held as confessed. Sentence of deposition is not in use to be pronounced by a presbytery in absence of the accused.[5]

*Presbyterial Visitations.*—It was the practice for presbyteries to hold presbyterial visitations of parishes, on notice from the parish pulpit ten free days before the visitation. On such occasions, the minister, heritors, elders, and heads of families, convened in church, and were subject to questions regarding the conduct of each other.[6]

Presbyteries may meet as often as they appoint; but it is necessary, before a meeting is closed, to adjourn to a day

[1] Hill's Practice, 41. Styles of Writs, 52. Ass. 1833, act 6, and 1834, act 9.—[2] Hill's Practice, 47.—[3] Ibid. 50.—[4] Pardovan, iv. 4, 9. Hill's Practice, 52. Styles of Writs, 97, *et seq.*—[5] Hill's Practice, 57.—[6] Pardovan, i. 13.

named, otherwise the presbytery ceases to exist, till restored by the General Assembly.[1]

### SECT. 4.—*Kirk-Sessions.*

The kirk-session consists of the minister or ministers of the charge, and of lay elders, whose numbers are regulated by the exigencies of the parish, but of whom there must always be at least two. The session elect a new elder when a vacancy occurs, or when they consider that the number should be increased. A person qualified to become an elder must have attained the age of twenty-one, and must either be an inhabitant of the parish, residing within it six weeks annually, or an heritor, or apparent heir to an heritor.[2] At a period of ten days before the ordination of an elder, his "edict must be served" by his name being publicly proclaimed in church. The ordination takes place before the congregation, on the person elected having given satisfactory answers to questions relating to his opinions in religion and discipline.[3] The minister of the parish is the moderator of the kirk-session, and when there are two ministers, they are both members, and preside in rotation. A minister and his ordained assistant cannot both sit as members of the session.[4]

The duties of the kirk-session are said to be "to superintend and promote the religious concerns of the parish, in regard to both discipline and worship;—to appoint special days for the worship of God, when it considers such days to be for the spiritual advantage of the parish;—to settle the time for dispensing the ordinances of religion;—to judge of the qualification of those who desire to partake of them;—to grant certificates of character when persons are about to remove from the parish; to take cognizance of such as are guilty of scandalous offences;—and to cause them to undergo the discipline of the church."[5] Kirk-sessions exercised powers in the administration of the Poor Law, which, by the late Poor Law Amendment Act, of which a digest will be found farther on, have been considerably modified.

### SECT. 5.—*Parishes.*

The territorial division of the country into parishes, is recognised for certain civil purposes, in relation to taxation and

[1] Hill's Practice, 82.—[2] Ibid. 1, *et seq.* Styles of Writs, 2, *et seq.*—[3] Hill's Practice, 1, *et seq.* Styles of Writs, 2, *et seq.*—[4] Ibid.—[5] Hill's Practice, 9.

otherwise, as well as for those which are purely ecclesiastical. Districts may be separated and erected into parishes purely in the latter capacity, and then they are called parishes *quoad sacra*. The principal application of the parochial division for civil purposes will have to be noticed under the subject of the Poor Law. By the act of 1844, for disjoining parishes, to be presently noticed, it is enacted, that provision may be made by the judgment of division or disjunction, for the old parochial bounds remaining for the purposes of the Poor Law,[1] and that no division or disjunction shall affect the management of the commutation roads.[2]

*Union of Parishes.*—The power of uniting two or more parishes into one rests with the Court of Session, acting as the Commission of Teinds,[3] and they exercise the power on cause being shown, as in the case of Kirknewton, where "the reasons urged by the pursuers were the contiguity of the situation of the two parishes, and the smallness of the stipend of Kirknewton. It was also stated, that the churches of both parishes were in bad repair, and inconveniently situated; and that it would be much for the advantage of both parishes that a new central church should be built, capable of holding the inhabitants of both, for which the heritors of Kirknewton were willing to advance £300."[4]

*Disjunction and Division.*—Parishes may be divided, or portions of parishes disjoined and formed into new parishes by the Court of Session as Commission of Teinds. By the old act, such a proceeding required the consent of the heritors of three-fourths of the valued rent in the parish;[5] but by the act of 1844, the consent of the heritors of a major part of the valuation is made sufficient.[6] The largeness of the population of a parish is a sufficient reason for disjunction without reference to superficial measurement.[7] There are provisions for requiring the heritors, in the course of the process, judicially to state assent or dissent.[8] A district may be disjoined as a parish without reference to the consent of the heritors, if it be shown that there is within it a sufficient place of worship, and if the Titulars of Teinds, or others who have to pay no less than three-fourths of the additional stipend do not object.[9] Without reference to a disjunction of a parish, any district in which there is an endowed church on the scale fixed by the act may be erected into a parish *quoad sacra*, with minister and elders, and a kirk-session, for all

[1] 7 & 8 Vict. c. 44, § 6.—[2] Ibid. § 7.—[3] 1707, c. 9.—[4] Connel on Parishes, 162.—[5] 1707, c. 9.—[6] 7 & 8 Vict. c. 44, § 1.—[7] Ibid. § 2.—[8] Ibid. § 3.—[9] Ibid. § 4.

purely ecclesiastical purposes.[1] Endowed Gaelic congregations in the large towns of the Lowlands may be erected into parishes, without having districts assigned to them, and though their congregations be dispersed through the rest of the community.[2] Districts in which churches are endowed under the Highland Churches' Acts may be disjoined as parishes *quoad sacra*, on the application of the presbytery, or of one or more heritors holding a fourth of the valuation.[3]

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## CHAPTER II.

### PRESENTATION AND COLLATION OF MINISTERS.

### SECT. 1.—*Patronage.*

THE right of patronage may exist in the hands of individuals as an accessory of land, or as a separate estate. In the latter case it is in its nature a personal right, but it is capable of being feudalized, and if it has been so, it can only be transferred by infeftment, in the same manner as any other heritable estate.[4] Individuals who hold patronage, do so in the capacity of representatives of the original founders. Where no individual could produce a title, the right devolved to the pope before the Reformation, and after that event to the crown.[5] During the Roman Catholic ascendency many patronages belonged to ecclesiastical establishments, and others were appropriated to them, so as to be extinguished, the establishment providing a stipendiary to perform the duties of the cure.[6] At the Reformation both these descriptions of right devolved on the crown, and, along with rights of patronage, formerly in the hands of archbishops, bishops, and chapters, they are now in the hands of the sovereign, or of those who hold them by hereditary grant from the crown.[7] A reducible title to patronage may be protected by prescription, to accomplish which it would appear to be sufficient that two presentations have been made, and that a period of

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[1] 7 & 8 Vict. c. 44, § 8.—[2] Ibid. §§ 12, 13.—[3] Ibid. § 14.—[4] E. i. 5, 15. D. P. L. 205.—[5] D. P. L. 188. Con. P. L. 452.—[6] D. P. L. 189. Con. P. L. 453.—[7] 1587, c. 29. 10 Anne, c. 12, § 4. D. P. L. 207. Con. P. L. 456.

forty years has elapsed after the prior in date, during which there has been no interruption of the possession of the right.[1] Where the right of patronage is jointly vested in more than one individual, each exercises it in turn. United parishes, and parishes formed out of portions of others previously to the passing of the act of 1844, are in this situation;[2] the patron of the largest benefice being entitled to the first exercise of the right.[3]

*Churches in Disjoined Parishes.*—When there has been a disjunction or division of a parish, in terms of the 7 & 8 Vict. c. 44, the patronage of the new parish belongs to the patron of the original parish, but if the disjunction or division affect more than one parish having different patrons, the right is to be exercised jointly or by rotation as they may agree, or as the Court of Session failing such agreement may fix. The patronage of the new parish can, however, in such circumstances, only be held along with the burden of a portion of the minister's stipend. To enjoy the full right, the patron must pay at least half the stipend. If he be a joint-patron, he cannot keep his joint share as to the new parish without paying a quarter of the stipend. When original patrons do not so reserve their right, the patronage belongs to the person who takes burden for the whole stipend, or if the burden be partitioned between two or among three, it is exercised by them successively. If the number of persons be greater, their right is vested in three trustees.[4]

*Churches Endowed by Contribution.*—Where churches endowed by voluntary contributions, and which do not come within the application of the act of 1844, are erected into parochial churches, the patronage must be exercised under the direction of the church courts establishing the churches.[5]

During the pupillage of a patron, his tutor may present to the charge on a vacancy.[6] A presentation by a married woman must have the concurrence of her husband.[7] "A patron," says Mr Dunlop, "cannot, it would seem, present himself to the benefice; but there does not appear any grounds for holding that he might not, with us, present his son or other near relation."[8]

Every patron who has not taken the oath of the sixth of Queen Anne, in favour of the Hanover line, must do so on

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[1] D. P. L. 210.—[2] Ibid. 219.—[3] Ibid. 234.—[4] 7 & 8 Vict. c. 44, § 5.—[5] 4 & 5 Wm. IV. c. 41, § 1.—[6] D. P. L. 234.—[7] Ibid.—[8] Ibid. 225, but see Lord Pres. in Macdonell *v.* Gordon, 26th February 1828.

signing a presentation, otherwise the presentation is void, and the right devolves on the crown, failing a presentation from which, within six months, on the presbytery.[1] A Roman catholic, or one who, suspected of being so, refuses to sign the formula against popery, appointed by the act 1700, c. 3, when tendered by the sheriff, or any two or more justices, renders void his presentation in a similar manner.[2]

When the church authorities sanction the appointment of an assistant and successor to a disabled clergyman, the person who would be entitled to present a successor, had he died, is entitled to present the assistant.[3] If the patron do not present to a benefice within six months after the occurrence of the vacancy, the right devolves on the presbytery, who are then said to present *jure devoluto*.[4]

## SECT. 2.—*Licentiates.*

*Qualifications.*—The person presented to a ministerial charge must have been licensed as a probationer by a presbytery.[5] To sanction the license, the church has required the student to undergo the following curriculum of study and conduct:—Before being enrolled as a student of divinity, he must produce a certificate of having attended a Latin class in one of the universities for at least one session;[6] he is examined by the presbytery where he resides, in Latin, Greek, literature, science, and philosophy;[7] and, on his "knowledge of the Christian religion, as it is exhibited in the catechetical standards of the church;" and if his attendance at the divinity hall is not regular for more than one year, he must be examined during the fourth year of the course, in divinity, church history, Greek, and Hebrew.[8] If the student's attendance at the divinity hall is regular for three sessions, his course may be completed in a fourth, and if for two sessions, in a fifth. It must be regular for *one* session, and this one must be in the first, second, or third year; but if it is only so for one, the full period is not completed in less than six years.[9] The student must have attended a class of Hebrew, and one of church history (if there be one in the University he has attended), during each

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[1] 10 Anne, c. 12, § 6. (N. B.—This is properly chapter 21, and is so printed in the authoritative edition of the Statutes; but in the ordinary copies it is chapter 12.)—[2] Ibid § 7.—[3] D. P. L. 226.—[4] 10 Anne, c. 12, § 3.—[5] Hill's Practice, 61. Styles of Writs by Church Law Society, 52.—[6] Ass. 1843, ch. 14.—[7] Ass. 1827, act 7, and 1837, act 9.—[8] Ass. 1827, act 7.—[9] Ibid. 1813, act 8, § 2; 1826, act 8.

of any two sessions which he claims as sessions of regular attendance.[1] He must be annually examined by the presbytery in which he resides as to his progress.[2]

Besides a statement of regular attendance, &c., the student's certificate from the professor of divinity must bear that he has delivered an exegesis in Latin, a homily in English, an exercise and addition, a lecture on some portion of Scripture, a critical Hebrew exercise on some portion of the original text of the Old Testament, and a popular sermon.[3] If the student has lived during the year preceding chiefly within the bounds of the presbytery to which he applies for license, they will satisfy themselves from their own knowledge of his moral character; if he has lived elsewhere, he must produce testimonials from the presbytery where he has resided.[4]

After the secession of 1843, a portion of these requisites was temporarily suspended for the purpose of immediately supplying vacancies.[5]

*Trials.*—The presbytery privately examine the candidate on his knowledge of Greek, Latin, philosophy, and theology.[6] If they are satisfied, letters are written to the other presbyteries of the synod, intimating compliance with the regulations, and the intention of the presbytery to take the student on public trials.[7] The synod having granted permission, the student undergoes an examination in divinity, chronology and church history, Greek, and Hebrew, and delivers an exegesis, a homily, an exercise and addition, a lecture, and a popular sermon, on the matters discussed in which the presbytery may examine him.[8]

The presbytery being satisfied, require answers to the questions appointed by act 10th of Assembly 1711 (importing a belief in Scripture and the Confession of Faith, and a recognition of the presbyterian discipline and church establishment), and require him to sign a formula to the same effect. Having then read the act 8th Assembly 1759 against simony, the presbytery appoint the moderator to license the student.[9] No student can be proposed for trials until he has completed his twenty-first year.[10]

*Oaths.*—Every student, before being licensed, must take the oath of allegiance, under pain of disqualification; and

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[1] Ass. 1833, act 9.—[2] Ibid. 1837, act 8.—[3] Ibid. 1813, act 8, § 2; 1836, act 10.—[4] Ibid. 1813, act 8, § 5.—[5] Ass. 1843, act 16; 1845, act 9; 1846, act 19.—[6] Ass. 1813, act 8, § 5.—[7] Ibid.—[8] Ibid. § 9.—[9] Ibid. § 10.—[10] Ibid. § 5.

the oath of abjuration, under pain of six months' imprisonment, and incapacity to enjoy any benefice until the lapse of a year after he shall have taken the oath.[1] By the interpretation of the act, it has been found sufficient compliance if the presentee take the oath before ordination.[2] The presentee lays his letter of presentation before the presbytery, along with his license, and a letter of acceptance, and the presbytery being satisfied that all formalities have been complied with, pronounce sentence (liable to the review of the Court of Session), sustaining the presentation; questions as to fitness for the pastoral office being reserved for after-consideration.[3]

### SECT. 3.—*Admission to a Charge, and Discussion of Objections.*

The system of giving a call to a minister which came in practice when patronage was abolished, is still followed as a form; a written call is submitted to the parishioners, and the presbytery have been in use to pronounce a formal judgment concurring with it, however few may be the signatures.[4] The presbytery next proceed to the ordination (if the presentee has not been previously ordained), before which he must undergo an examination similar to that requisite for obtaining a license. He is required to subscribe the formula of the act 10th of Assembly 1711. Independently of the objections under Lord Aberdeen's Act, as considered below, objections by parishioners to the presentee on the ground of morality, or any other ground which, according to the ecclesiastical and civil law, would disqualify him from holding the office of the ministry, are heard and decided on, and he has to answer the questions appointed by act 10, 1711, in presence of the congregation. After the ordination the presentee is formally admitted minister of the parish by the presiding minister.[5]

The law having left the right of presenting to benefices in the hands of patrons, while the church has had to judge of the fitness of those chosen, it has been a subject of much debate how far the latter can adopt rules tending to disqualify presentees; and, in particular, how far it can admit the dissatisfaction of the congregation as a ground of disqualification. The practice of the church courts, for a long

[1] 1 Geo. I. st. 2, c. 13, § 3. 5 Geo. 1. c. 29. 6 Geo. III. c. 53.—[2] D. P. L. 254.—[3] Ibid. 256-260.—[4] Ibid. 289.—[5] Ibid. 291-296.

time previous to 1834, was, not to attempt to give effect to any dissent by the congregation. The conflict between the ecclesiastical and civil courts which followed an attempt by the General Assembly to give effect to the dissents of a certain proportion of the male heads of a congregation, and the memorable partition of the Church of Scotland in which the conflict terminated, are too well known in their general outlines to require to be narrated. The legal proceedings, however, connected with this discussion throw so much light on the authority of the civil courts in relation to the Established Church, and are so important as precedents by which the boundaries of the authority which the church courts can hereafter exercise may be marked, that it is deemed expedient to append in a note an outline of the leading particulars, both of the proceedings on which the litigations were founded, and of the decisions pronounced by the courts.*

* In 1834, the General Assembly passed two interim acts, jointly known by the name of "The Veto Act," which were transmitted to presbyteries for their approval, in terms of the Barrier Act (*see* p. 96). The former was called an "Overture and Interim Act on Calls," and contained a declaration to the effect that "it is a fundamental law of this church, that no pastor shall be intruded on any congregation contrary to the will of the people;" enacting that the method of putting this principle in force should be by giving effect in each presentation to the dissents of the male heads of families in communion with the particular charge. The other interim act was called "Regulations for carrying the above act into effect."

At the assembly of 1835, assents to the interim act on calls were received from the majority of the presbyteries (Ass. 1835, act 9); and it thus, in terms of the barrier act, became a law of the church so far as it could be made so by the church itself. The overture, with regulations for carrying the act into effect, never received the assents of a majority of presbyteries, but was annually renewed as an interim act with slight variations.

*Auchterarder Case.*—On 14th September 1834, Lord Kinnoull, as patron of the parish of Auchterarder, issued a presentation to the Rev. Robert Young. The presentation was laid before a meeting of presbytery, and the minutes of the meeting bore "that all the documents usually given in in cases of this kind have already been laid on the table, along with the presentation." The same minute stated that the presbytery found that they must proceed to fill up the vacancy in terms of the regulations and relative act of assembly anent calls. An opportunity was given to the male heads of families in communion with the church to give in special objections, but no such objections were given in. At the proceedings of the presbytery Mr Young appeared through his procurator, and took objections to the roll of the male heads of families, which were

After the secession of the Free Church, an act was passed, commonly called Lord Aberdeen's Act (6 & 7 Vict. c. 61),

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overruled. The presbytery then determined to proceed according to the regulations of the act of assembly; and against this and the previous proceedings the presentee protested, intimating his intention to appeal to the synod. The presbytery proceeded to receive the dissents, and out of a roll of 330 these amounted to 287. On the proceedings being adjourned in terms of the act of assembly, the persons dissenting were found to adhere to their dissents.

The presentee appealed to the synod, where the proceedings of the presbytery were confirmed, and thence to the General Assembly, where, with a finding against certain collateral and immaterial proceedings of the presbytery as irregular, they were confirmed on the merits. The case was remitted to the presbytery, who pronounced a deliverance by which they "rejected Mr Young, the presentee to Auchterarder, so far as regards the particular presentation on their table, and the occasion of this vacancy in the parish of Auchterarder, and do forthwith direct their clerk to give notice of this their determination to the patron, the presentee, and the elders of the parish of Auchterarder."

The patron and presentee brought an action in the Court of Session, to have it found that the presbytery acted illegally and *ultra vires* in not taking the presentee on trial. An objection was taken to the jurisdiction of the court, and was repelled. After a hearing in presence, in which there were opinions expressed—in favour of the presentee by the Lords President (Hope) and Justice-Clerk (Boyle), and by Lords Gillies, Meadowbank, Mackenzie, Medwyn, Corehouse, and Cuninghame—against the presentee by Lords Glenlee, Moncreiff, Fullerton, Jeffrey, and Cockburn, a judgment, sanctioned by a majority of eight to five, was pronounced on 5th March 1838, by which the court repelled the objections to its jurisdiction, and found that the patron had legally and validly exercised his right; and that the presbytery, in rejecting the presentee on the sole ground that a majority of the male heads communicants had dissented without reason assigned, acted to the hurt and prejudice of the pursuers, illegally, in violation of their duty, and contrary to statute. The process was then remitted to the Lord Ordinary to proceed farther as might seem just. (Earl of Kinnoull and Rev. R. Young *v.* Presbytery of Auchterarder.)

This judgment was affirmed by the House of Lords. (3d May 1839.)

On the ground of these decisions, a memorial was presented to the presbytery, in which they were desired to take Mr Young on trials; and a motion having been made to accede to the memorial, a counter motion was carried by a majority. The patron and presentee then brought an action of damages against the majority of the presbytery as individuals; and it was found that their con-

for the expressed purpose of marking and fixing, by a legislative provision, the effect which the church courts were in

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duct was a good ground for a claim of damage, and that it was not necessary to allege that they acted maliciously. (Earl of Kinnoull and Rev. R. Young *v.* Ferguson and others, 5th March 1841.) This judgment was affirmed on appeal. (11th July 1842.)

An action was afterwards brought, in the shape of a Declarator, to have it found that the minority of the presbytery willing to obey the law could competently put on trials and admit the presentee, and of interdict to prohibit the interference of the majority. In a consultation of the whole judges, it was found that the court had jurisdiction in such an action. (Earl of Kinnoull *v.* Ferguson and others, 10th March 1843.)

*The Lethendy Case.*—On the 8th June 1835, Mr Clark was presented by the crown to the united parishes of Lethendy and Kinloch. On dissents by 53 out of 89 male heads communicants, the presentee was rejected in terms of the veto act. He then raised an action of declarator, to have it found that he had been validly and effectually presented, and that the presbytery were bound to take him on his trials, and if found qualified to ordain him. In the mean time the crown issued a second presentation to Mr Kessen, who sisted himself as a defender in the action. Mr Clark brought a suspension and interdict, and the court granted interdict prohibiting Mr Kessen "from presenting himself to the said presbytery for induction to the office of minister," &c., and likewise prohibiting the presbytery and individual members thereof from inducting Mr Kessen. The presbytery applied to the General Assembly for instructions; the assembly directed them to proceed with the induction of Mr Kessen without delay, and the presbytery acted accordingly. Mr Clark then, with concurrence of the Lord Advocate, presented a petition and complaint against Mr Kessen and those of the presbytery who had ordained and admitted him, praying that they might be found guilty of breach of interdict and contempt of court, and punished by fine, imprisonment, or otherwise. Objections taken to the jurisdiction of the court were overruled, and it was found that the respondents had been guilty of a breach of the interdicts and of a contempt of the authority of the court. Thereafter they were brought to the bar of the court, and being told that they had rendered themselves liable to punishment, and that a repetition of the offence would be followed by imprisonment, they were dismissed with a reprimand from the Lord President. (Clark *v.* Stirling and others, 14th June 1839.)

In the action of declarator raised by Mr Clark, the court found his rejection illegal, on the same principle on which they decided the Auchterarder case. (Clark *v.* Stirling, Kessen, &c., 4th March 1841.)

*Daviot Case.*—In a case where there was reason to suppose that seven out of ten male heads of families in communion intended to

future to be entitled to give to the dissent of the congregation in the collation of ministers. In the preamble this act an-

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dissent from an induction, in terms of the veto act, interdict was prayed for and obtained to prohibit these parties individually from so acting. (Mackintosh *v.* Rose, 17th December 1839.)

*The Strathbogie Case.*—In June 1837, Mr Edwards had received a presentation by the trustees of the Earl of Fife to the church of Marnoch, and he laid it before the presbytery of Strathbogie. A majority of the male heads having dissented in terms of the veto act, and the above decision in the Auchterarder case by which that act was pronounced illegal intervening, the presbytery applied to the synod for instructions, and were directed to put the veto act in force. From this direction they appealed to the General Assembly, which affirmed the judgment of the synod and dismissed the appeal. The presbytery passed a sentence rejecting Mr Edwards. A second presentation was granted, and Mr Edwards obtained an interdict against the second presentee or the presbytery taking any farther steps in connexion with the second presentation. Mr Edwards then raised an action of declarator, with conclusions the same as those of the summons in the Auchterarder case. The interim interdict and the summons were laid on the table of the presbytery, which, after consulting with the procurator, decided by a majority to delay procedure until the questions in dispute were legally settled. The minority appealed to the synod, who referred the matter to the ensuing assembly. Before the meeting of the assembly the judgment in the Auchterarder case was affirmed in the House of Lords. The assembly remitted the matter to their commission, with power to determine; enjoining the presbytery, in the case of any change of circumstances, to report to the commission. The commission instructed the presbytery to suspend farther proceedings till next assembly. On minutes presented by Mr Edwards in the action of declarator, interim decrees were issued, to the effect that the continuance of the refusal to take him on trials was to his hurt and prejudice, illegal, in violation of duty, &c.; and likewise to the effect that the presbytery were still bound to make trial of his qualifications and admit him, &c. The presbytery, having these and other documents before them, intimated them to the commission of assembly, in virtue of the direction by the previous assembly to report any "change of circumstances" to that body. They likewise reported that they felt themselves compelled to obey the decrees of the Court of Session. The presbytery then, by a majority, appointed the trial of Mr Edwards to be proceeded with in ordinary form. The matter having been brought before the commission of assembly, that body issued a deliverance purporting to suspend the members of the presbytery who had acted as above, from their ministerial functions, and instructed the other members of the presbytery to take measures for the supply of ministerial services

nounces that provision has been made by certain statutes "for securing to the church the exclusive right of examining

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in their parishes. The commission farther granted warrant to intimate their resolutions to the individuals concerned, and appointed certain ministers to preach in their churches on a specified Sabbath. The majority of the presbytery presented a note of interdict and suspension. The court granted interim interdict, in terms narrower than those claimed by the note; but prohibiting the intimation of the sentence, and the use of the parish churches, churchyards, or school-houses, for any of the purposes contemplated in the deliverance of the commission. (Presbytery of Strathbogie, 20th January 1839.)

The court, in pronouncing this interlocutor, ordered answers. No answers were lodged, and the suspenders moved the Lord Ordinary to grant interdict in the wider terms craved by the note. His lordship simply continued the interdict in its restricted form, and the suspenders reclaimed. The question came to be, whether the court, in giving its remedy, was limited to the mere protection of the persons of the suspenders, and of the churches and their appurtenances, from interference on the part of unauthorized persons; or was on the other hand bound to look to the position of the majority of the presbytery as ministers of the Established Church, who were entitled to be protected from attempts by other ministers of the Establishment to perform their parochial duties without due authority. The court adopted the latter alternative, and interdicted the parties complained against "from holding any meeting of the presbytery of Strathbogie, for the purpose of supplying ministerial services, or otherwise exercising the functions of the complainers in their respective parishes, or otherwise acting on the foresaid sentence and deliverance" of the commission. (Presbytery of Strathbogie, 14th February 1840.) The principle on which the court proceeded was, that the church judicatories have a limited jurisdiction assigned them by law; that in so far as they go beyond these limits, their proceedings are illegal; and that it belongs to the supreme court to protect parties wherever they can show that they are in person or privilege liable to be affected by such illegal proceedings. This decision, as bringing out the nature of the jurisdiction possessed by the supreme courts of law in relation to the church, is the most important of the series, in its reference to any disputes which may hereafter arise regarding the proceedings of the Established Church.

The ensuing assembly confirmed the finding of the commission, and amid a variety of other procedure, of new suspended the majority of the presbytery, instructed the commission to prepare a libel against them, if they should continue to act contrary to the finding of the assembly, and appointed certain persons a special commission to furnish the ordinances of religion to the parishes of the majority. (Ass. 1840, c. 12.) The court in this case granted interim

and admitting any person who may be presented to a benefice having cure, by the patron of such benefice." The

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interdict in the same manner as above, prohibiting interference with the parochial churches and their appurtenances. (Cruickshank and others suspenders, 11th June 1840.) This interdict, on being made perpetual, was enlarged as above. (Cruickshank and others suspenders, 11th July 1840.)

In Mr Edwards' action of declarator, as above mentioned, the majority of the presbytery having, in virtue of the resolution they had adopted, declined defending the action, the minority appeared and pleaded that the court had no jurisdiction to declare a presbytery bound to take a presentee on trials, and that the majority of the presbytery, having been suspended by the church courts, were barred from acting; but the court repelled the defences, decerning against the presbytery and the consenting majority. (Edwards *v.* Cruickshank, 18th December 1840.) At the ensuing assembly of 1841, two sentences were pronounced, the one deposing those members of the presbytery who had previously been suspended, the other depriving Mr Edwards of his license as a probationer. The court, at the application of the parties interested, granted interdicts against these respective decisions being enforced. (29th May 1841, and 17th July 1841.)

In the ensuing election of members of the General Assembly, the majority of the presbytery, being the persons to whom these suspensions and depositions by the ecclesiastical courts and corresponding interdicts by the Court of Session applied, elected one set of persons to be commissioners to the assembly, and the minority elected another. At the application of the former, the court granted interdict against the latter taking their seats in the assembly. (Majority of Presbytery of Strathbogie *v.* the Minority, 27th May 1842.) The majority raised an action of reduction and declarator, for the reduction of the above sentences of the church courts in relation to which the interdicts had been granted. The question was first considered, and opinions taken on preliminary defences which denied the jurisdiction of the court. It was found that the court had jurisdiction in the case. (Cruickshank, *v.* Gordon, 10th March 1843.) No farther proceedings were had in the case; the General Assembly of 1843 resolving that the suspensions and depositions were *ab initio* null and void. (Acts Ass. 1843, p. 43.)

*Case of Culsalmond.*—On the occasion of this presentation, the majority of the presbytery, for the purpose of ascertaining whether a majority of the male heads in communion were prepared to dissent, and with the view of avoiding a dispute if that should not turn out to be the case, allowed the preliminary arrangements in terms of the veto act to proceed under protest. A majority of the male heads, however, dissenting, they sustained the call, and admitted and received the presentee. The minority of the presbytery complained to the commission of assembly, which interdicted

statutes to which reference is made are the acts of the Scottish Parliament, 1567, c. 7, and 1592, c. 114. By the former it was provided, "that the examination and admission of ministers within this realm be only in the power of the kirk now openlie and publicly professed within the samin, the presentation of laick patronage alwaies reserved to the just and auncient patrones;" and by the latter it was ordained, that all presentations be directed to the respective presbyteries which are to have the power of collation according to the discipline of the kirk, "provided the foresaids presbyteries be bound and astricted to receive and admit whatsumever qualified minister presented by his Majesty or laick patrones." Reference is next made to two acts of the British Parliament, viz. 10 Anne, c. 12, commonly called the act for the restoration of patronage, and 5 Geo. I. c. 29, for imposing the oaths to the government on ministers and preachers. The preamble then subsumes that "it is expedient to remove any doubt which may exist as to the powers and jurisdiction of the church as by law established in Scotland in the matter of collation, and as to the right of the church to decide that no person be settled in any parish or benefice having cure, against whom or whose settlement in such parish or benefice there exists any just cause of exception" (§ 1).

It has to be observed, that the application of the act is limited to "parishes or benefices having cure." This expression has reference to distinctions in church polity which do not exist in this part of the island. There can be no doubt, however, that the act embraces every clerical charge connected with the establishment, and that the circumstance of there being persons prepared to take advantage of the act, would establish the requisite of the benefice having "cure."

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and prohibited the presentee from officiating, and authorized the majority of the presbytery to make provision for the duties of the parish. A note of suspension and interdict was presented against this decision, and the interdict was granted. (Middleton *v.* Anderson, 10th March 1842.)

In the General Assembly of 1843, the interim act and regulations was not renewed, and the act on calls was rescinded, on the ground that "the same infringes on civil and patrimonial rights; with which, as the church has often declared, it is not competent for its judicatories to intermeddle, as being matters incompetent to them and not within their jurisdiction." And it is ordained, "that all the presbyteries of this church shall proceed henceforth in the settlement of parishes, according to the practice which prevailed previously to the passing of that act" (Ass. 1843, act 9).

The method in which a presbytery is authorized to proceed on a presentation being laid before it is thus defined.

*Preaching and Intimation of Objections.*—"It shall and may be lawful for the presbytery, as part and as the commencement of the proceedings in the examination and admission of the person so presented for the cure of that parish, and of the trial of his gifts and qualities, to appoint him to preach in the church of the said parish at such times as the presbytery may direct, or as may be directed by any regulations of the General Assembly to that effect; and after the presentee shall have preached in the parish church according to the directions of the presbytery, the presbytery, or a committee of their number, shall meet, after due notice, at the said church, and shall intimate that if any one or more parishioners being members of the congregation have any objection to the individual so presented, in respect to his ministerial gifts and qualities, either in general or with reference to that particular parish, or any reason to state against his settlement in that parish, and which objections or reasons do not infer matter of charge against the presentee to be prosecuted and followed out according to the forms and discipline of the church, the presbytery are ready, either then or at their next meeting, to receive the same in writing, or to write down the same in their minutes in the form and manner which such parishioners may desire" (§ 1).

It has to be observed, that the first step in the procedure under the act, the appointment of the presentee to preach, is left entirely to the discretion of the presbytery. There is no express power given to the higher church courts to legislate in this matter, and it may be questioned whether they can, by any imperative instructions, whether of a general character or in relation to any particular case, deprive a presbytery of this discretion. In the case of the General Assembly passing an act rendering it compulsory on all presbyteries to do that which is here left to their discretion, there is no doubt that one of the reasons for which the court protected the presbytery of Strathbogie against the General Assembly —that the latter body required the presbytery to do an unlawful act—would not apply, because the supposed step is specially made lawful by the present act. The act, however, distinctly invests the presbytery with the privilege of a discretion, and it is questionable if any other power than that of the legislature can deprive it of its discretion. With regard to the times at which the presentee is to preach, if it be determined that his admission is to be regulated by the

act, the discretion of the presbytery may be superseded by general instructions from the assembly.

It is difficult to say who are included under the term "parishioners being members of the congregation." Perhaps it would be held to include communicants solely.

*Disposal of Objections.*—"The objections or reasons aforesaid shall be fully considered and disposed of by the presbytery by whom they are to be cognosced and determined on judicially, or shall be referred by the presbytery to the superior judicatory of the church for decision, as the presbytery may see cause, the presentee and all parties having interest being heard in either case on the same" (§ 2.)

The expression, "objections or reasons aforesaid," refers to the definition in the previous section, which excludes objections or reasons which "infer matter of charge against the presentee to be prosecuted and followed out according to the forms and discipline of the church." If any objection or reason, therefore, of this character—such as a statement that the presentee is of immoral character—be proffered, it will be illegal to receive and give effect to it.

It is in the option of the presbytery to "cognosce and determine on judicially" the objections or reasons, or to refer them to a higher church judicatory. This option seems, as to any controlling authority on the part of the assembly, to be in the same position with that regarding the appointment to preach.

*Cognizance of Objections, &c.*—"The presbytery or other judicatory of the church to whom the said objections or reasons shall be stated or referred, as aforesaid, shall, in cognoscing and determining on the same judicially, have regard only to such objections and reasons so stated as are personal to the presentee in regard to his ministerial gifts and qualities, either in general or with respect to that particular parish, but shall be entitled to have regard to the whole circumstances and condition of the parish, to the spiritual welfare and edification of the people, and to the character and number of the persons by whom the said objections or reasons shall be preferred" (§ 2).

There is here an important limitation. The church court can by the act have before them, as the materials for coming to a judgment, only such objections and reasons "as are personal to the presentee in regard to his ministerial gifts and qualities, either in general, or with respect to that particular parish." It thus appears, that though the members of the congregation may *give in* objections so wide as to

embrace "any reason to state against" the presentee's "settlement in that parish," none can be considered but such as come within the above limited definition. If they go beyond this limitation in receiving objections and reasons, and the infringement be not checked in the superior church courts, it would appear that the recourse for a remedy must be to the Court of Session. But see below as to the extent to which this definition may be stretched.

*Decision and Intimation.*—"And if the presbytery or other judicatory of the church shall come to the conclusion, as their judgment on the whole matter, that the said objections or reasons, or any of them, are well founded, and that in respect thereof the individual presented is not a qualified and suitable person for the functions of the ministry in that particular parish, and ought not to be settled in the same, they shall pronounce a deliverance to that effect, and shall set forth and specify in such deliverance the special ground or grounds on which it is founded, and in respect of which they find that the presentee is not qualified for that charge, in which event they shall intimate their deliverance respecting the presentee to the patron, who shall thereupon have power to issue another presentation within the period of six calendar months after the date of such deliverance if no appeal shall be taken to a superior judicatory of the church, or in the event of an appeal being taken to a superior judicatory of the church, then within six months after the date of the judgment of the superior judicatory of the church affirming the deliverance of the inferior judicatory of the church or dismissing the appeal" (§ 2).

It is to be inferred from the terms of the act, that the same procedure may be adopted in regard to a second, or any number of successive presentations.

*Procedure in Case of Objections Repelled.*—"If the presbytery or other judicatory of the church, after considering all the objections aforesaid to the presentee, and all the reasons stated against his settlement in that particular parish, shall be satisfied, in the discharge of their functions and in the exercise of their authority and duty as ministers of the gospel and as office-bearers in the church, that no good objections against the individual, or no good reason against his settlement has been stated as aforesaid, or that the objections and reasons stated are not truly founded in any objection personal to the presentee in regard to his ministerial gifts and qualities, either in general or with reference to that particular parish, or arise from causeless prejudices, the said presbytery or

other judicatory of the church shall repel the same, and, subject to the right of appeal as hereinafter provided, shall complete the further trials and examination of the presentee, and, if found by them to be qualified for the ministry in that parish, shall admit and receive him into the benefice as by law provided" (§ 3).

There is here a qualification, which it is declared must attend the decision of the members of a presbytery when they repel objections. They must "be satisfied in the discharge of their functions, and in the exercise of their authority and duty as ministers of the gospel," &c. It does not appear, however, that there are means of inquiring into the existence of this qualification, or of giving redress where it is wanting. If it were alleged that a presbytery had exceeded the powers given them by the act, in as far as some of the members were *not* "satisfied in the discharge of their functions," &c., of the invalidity of the objections, but acted on some other motive, it may be questioned, on analogy with the principles on which the operations of inferior civil tribunals are opened up, whether an inquiry would be allowed in relation to such an allegation. If it were allowed, the question as one of fact would have to go to a jury.

*Limitation of the Power of Rejection.*—"It shall not be lawful for any presbytery or other judicatory of the church to reject any presentee upon the ground of any mere dissent or dislike expressed by any part of the congregation of the parish to which he is presented, and which dissent or dislike shall not be founded upon objections or reasons to be fully cognosced, judged of, and determined in the manner aforesaid by the said presbytery or other judicatory of the church" (§ 4).

The distinction must be kept in view between dissent or dislike merely stated as such, and the tendering of formal objections founded on the existence of dissent or dislike. It is illegal for a presbytery to give effect to statements made by parishioners, of their own dissent from the admission of the presentee, or of their dislike towards him. It may be questioned, however, whether the circumstance that a certain number of the parishioners object to the presentee, or that he is disliked in the parish, might not be admitted to be valid objections by a presbytery, as coming within the terms "such objections and reasons as are personal to the presentee in regard to his ministerial gifts and qualities, either in general, or with reference to that particular parish."

*Appeal.*—"It shall be in the power of the presentee,

patron, or objectors, to appeal from any deliverance pronounced as aforesaid, by the said presbytery acting within its competency as a judicatory of the church, which appeal shall lie exclusively to the superior judicatories of the church, according to the forms and government of the Church of Scotland as by law established" (§ 5).

It is to be observed, that the judgments from which an appeal lies to the higher church courts, are those which the presbytery has pronounced "acting within its competency as a judicatory of the church." In relation to the privileges conferred by it, the terms of the act limit the competency of the presbytery as a judicatory of the church; wherever, therefore, the ground of complaint is an infringement of the act, the remedy will be in the Court of Session.

The last section of the act provides, that in cases where a presentee has been rejected under the veto act, and another presentee has been presented and admitted under the notion that the veto act was law and the first presentee duly rejected, no action is to lie in consequence of the settlement of the second presentee, unless it have been begun before 1st May 1843.

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## CHAPTER III.

### ECCLESIASTICAL EDIFICES AND THEIR APPURTENANCES.

#### SECT. 1.—*Building and Repairing Churches.*

THE expense of repairing or rebuilding parish churches is borne by the respective landed proprietors of the parishes generally, in the proportion of their valued rents. Liferenters are not liable.[1] Where a parish is partly town, partly landward, the expense is divided proportionably to the real rents of the houses and lands;[2] and where the town part of the parish is within a royal burgh, the portion for which the burgh is liable is in the first place chargeable against the magistrates.[3] The question whether a new church is required, or the existing one should be repaired, is in the first place decided (on the report of professional persons, and on notice to the heritors) by the presbytery, whose decision is

[1] D. P. L. 8.—[2] Boswell v. Hamilton, 15th June 1837.—[3] D. P. L. 10, 11.

subject to review by the Court of Session.[1] The result of the decisions on the subject is, that where the repair of the church amounted to about half the expense of building a new one, the former alternative was adopted; but that where it exceeded three-fourths, the latter was enforced. In this case the presbytery may require an edifice which will accommodate two-thirds of the parishioners above twelve years of age, not excluding dissenters.[2] The presbytery are not entitled to insist on the enlargement of a church which is in good repair; but if it is in such a ruinous condition that there will be little difference between the expense of repairing it and that of building a new one, it would seem that they are entitled to give the heritors the alternative of repairing and enlarging, or of building a new church of the legal dimensions.[3] The heritors assess themselves for the expense.[4]

Individual heritors, the presbytery, and the minister, have recourse in the Court of Session against the proceedings of the presbytery or heritors.[5] Heritors are entitled to repair or rebuild a church, and to levy the requisite assessment, without the intervention of the presbytery.[6] To transport a church from one part of a parish to another, the consent of three-fourths of the heritors, in point of value, is required; but parties having interest may oppose the measure in the Teind Court, the authority of which must be obtained.[7] Where parishes are divided or disjoined, according to the acts for that purpose,* the erection and maintenance of the church rests with the heritors in the same manner as that of an ordinary parish church.[8] By the act of 1844, powers are given to heirs of Entail, and other persons having limited titles, to convey lands for the erection of churches and their appurtenances.[9]

*Additional Churches' Act.*—By 5th Geo. IV. c. 90, which provides the sum of £50,000 for additional places of worship in the Highlands and Islands, the commissioners appointed for the purpose may erect a church, on the application of any heritor or heritors to the extent of £100 scots valued rent, the heritors undertaking to repair the church to the extent of one per cent. on the cost, if the pew-rents (which are likewise applicable to the repair of the minister's house,

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[1] D. P. L. 14-16.—[2] Ibid. 18. Con. P. L. Sup. 30. *et seq.*—[3] D. P. L. 25. 26.—[4] Ibid. 27.—[5] Ibid. 30.—[6] Boswell *v.* Portland, 9th December 1834.—[7] D. P. L. 32.—* See above, p. 100.—[8] 1707, c. 9. 7 & 8 Vict. c. 44.—[9] 7 & 8 Vict. c. 44, § 10.

&c.)[1] are insufficient for the purpose. The heritors consult with the presbytery regarding the district to be assigned to the new charge, which, on their not agreeing, may be fixed by the sheriff, so far as to constitute the foundation of a report to the commissioners, who, on receiving it, may require further information.[2] By the act of 1844 for disjoining parishes, the district attached to any such church may be made a parish *quoad sacra*, and when this is done, the repair and preservation of the fabric of the church fall on the parties who would be liable if the church had been built for a newly erected parish.[3]

## SECT. 2.—*Church Seats.*

The area of the church is divided among the heritors in the proportion of their valued rents.[4] It is believed that where the parish is partly landward, partly burgh, the criterion of real value should be adopted, as in the expense of building,—the community holding the portion meted out to the town in the case of royal burghs.[5] The patron and clergyman are entitled to family seats, and the heritors to family seats (being part of their proportions of the area), of which greater amount of area gives priority of choice; and the community of a burgh, when they have a share of the area, are entitled to a seat for their magistrates.[6]

Where parties do not agree, a process of division may be brought before the sheriff, whose decision may be reviewed by the Court of Session.[7] An heritor's portion of the area is not his disposable property, but is attached to his lands, for the use of their owner and tenants, and it will be proportionably divided, if the lands become separated among different owners.[8] In burghs the magistrates have the power of letting the seats belonging to the community.[9] The magistrates cannot make the seats a source of revenue for the ordinary purposes of the corporation. In the case where this was laid down, it was held that where, as in the city of Edinburgh, the practice is sanctioned by custom, the magistrates may levy a rent, to the extent to which the proceeds may be necessary for supporting the fabric of the church, for the expense of repairs and alterations, and for a provision for the celebration of worship, in so far as no other funds were ap-

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[1] 5 Geo. IV. c. 90, §§ 4, 18.—[2] Ibid. § 6.—[3] 7 & 8 Vict. c. 44, §§ 14, 15.—[4] D. P. L. 36.—[5] Ibid. 37. Con. P. L. Sup. 24.—[6] D. P. L. 38-41.—[7] Ibid. 43.—[8] Ibid. 45.—[9] Ibid. 47.

propriated for these purposes. It was found that the ministers' stipends being otherwise provided for were not to be paid by a levy of seat rents.[1] In the churches established in terms of 5th Geo. IV. c. 90, the manner of letting the pews (the rent of which must not exceed 2s. 6d. per sitting) is settled by the heritors undertaking the repairs, and if they cannot agree, by the commissioners, on the report of the sheriff. The half-yearly rents are payable in advance.[2]

In the churches built and endowed under the act of 1844 for division of parishes, a portion of the sittings, to be fixed by the sheriff, but not in any case exceeding a tenth, are to be set apart as free to all comers. A portion not exceeding a fifth is to be let at rents to be restricted by the presbytery, and the remainder are to be let as the minister and those liable for the stipend and repair of the church may agree.[3]

### SECT. 3.—*Churchyard.*

The churchyard is, in the general case, shared among the heritors, &c., for the interment of their families and tenants, on the same principle as the area of the church; but no actual division of the area is made farther than to the extent of giving each heritor a family burying-place.[4] Except in the case of heritors, families do not seem to acquire a distinct property in a particular portion of the churchyard from the uninterrupted usage of burying their dead within its limits.[5] The heritors have the management of the churchyard, and the erection of tombstones, &c., is subject to their approval.[6] They have the burden of keeping the walls in repair.[7] The minister is entitled to the grass of the churchyard.[8]

Corporations or private individuals are entitled to establish separate burying-places, holding them like other feudal property, and letting or selling the right to interment in them.

### SECT. 4.—*Manses and Glebes.*

Every parish minister, excepting those of royal burghs, with no landward district attached, is entitled to a manse and glebe,[9] even in the case where he and his predecessors have been in use from time immemorial to receive a sum of

[1] Clapperton *v.* Magistrates of Edinburgh, 14th July 1840.—[2] §§ 19, 22.—[3] 7 & 8 Vict. c. 44, § 9.—[4] D. P. L. 64.—[5] Ibid.—[6] Ibid. 73.—[7] 1597, c. 232. D. P. L. 80.—[8] Ibid. 83.—[9] Ibid. 101, 102. Con. P. L. 349. Auld *v.* Magistrates of Ayr, 13th June 1827, App. 2 W. & S. 600.

money instead of them.[1] The legal extent of the glebe is four acres arable, or sixteen "soumes" pasture land;[2] * and the minister is farther entitled to grass for one horse and two cows out of such church-lands as may be in the parish, or to the sum of £20 scots annually.[3] The glebe is to be taken from the "kirk-lands" nearest to the church, if there are any; and if none, from any other commodious lands, the proprietors of those set apart having relief against the other proprietors.[4] An allowance is made by act of parliament, to those ministers whose stipend is under £200, and who have neither a manse nor a glebe, and to those whose stipend is under £180 and who are deficient in the one or the other.[5] If there is no manse in a parish where one may be legally demanded, the presbytery are entitled to have half an acre assigned for the purpose, on which the heritors may be ordained to erect a manse and offices, and lay out a garden.[6] The decision of the presbytery is subject to review by the Court of Session, as in the case of building a church.[7] (*See Sect.* 1.)

The expense of building a manse was formerly limited to £1000 scots, but the medium sum latterly admitted has been about £1000 sterling.[8] When the old manse admits of proper repair, the Court of Session will not sanction the erection of a new one.[9] The expense of building and repairing manses is divided among the heritors, as in the case of churches.[10] The state of the manse is generally taken into consideration on the entry of the incumbent; and when, on all requisites being fulfilled, the presbytery declare it "a free manse," the burden of keeping it in repair is imposed on the incumbent, in so far as respects "ordinary current repairs arising during his possession, but not for any general or extraordinary repair rendered necessary by unavoidable decay from lapse of time."[11] It is generally understood that a minister of a burgh-parish is not entitled to a manse, but that he may have right to house-rent, from immemorial custom in favour of his predecessors.[12] If a minister is excluded from his manse during the time of repairing or rebuilding, or while a decree of the presbytery in his favour, and which is finally decided by the Court of Session in his favour, has been opposed, he is entitled to manse rent.[13]

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[1] D. P. L. 105.—[2] 1592, c. 118; 1606, c. 7.—* A soume of grass is considered to be as much as will pasture ten sheep or one cow; but its extent is regulated by the custom of the district (D. P. L. 117).—[3] 1663, c. 21.—[4] 1594, c. 202. Con. P. L. 371.—[5] 5 Geo. IV. c. 72, §§ 2, 3.—[6] D. P. L. 113.—[7] Con. P. L. 254.—[8] 1663, c. 21. D. P. L. 146.—[9] Con. P. L. 295.—[10] 1663, c. 21. D. P. L. 157.—[11] D. P. L. 154.—[12] Ibid. 162.—[13] Ibid. 163.

Where an incumbent has possessed any subject as part of his benefice for thirteen years, he does not require to prove his title, which, however, may be disproved by any regular title in favour of another person.[1] The minister has the uncontrolled agricultural management of his glebe, and he or his representatives will be entitled to reap any crop sown during his incumbency.[2] In working mines, cutting peats for sale, &c., he is under the control of the heritors and presbytery, who have to keep in view the permanent value of the benefice. The incumbent cannot let his glebe on a lease to last beyond his incumbency.[3]

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## CHAPTER IV.

### Teinds or Tithes.

#### Sect. 1.—*Origin, Early History, and Division into Parsonage and Vicarage.*

Tithes or Teinds, which are now a separate estate in land, liable to the burden of providing stipends to the parish clergy, were formerly drawn in kind, from the produce of the land, of which they formed a tenth part. This was called the Spirituality of benefices, from the divine origin attributed to it; while the landed property, with which the church was liberally gifted, was termed the Temporality. According to the ecclesiastical definition, tithe was demandable on grain, hay, fruits, vegetables, and, in general, on all agricultural and horticultural produce; on the produce of fishings, and huntings; on coppicewood; on the brood of animals; on labour and on commerce.[4] With the exception, however, of the instances in which vicarage-tithe became exigible, the exaction was in practice limited to grain.[5] In the appropriation of the tithe, it was at a very early period the practice to allocate a portion of that arising from each parish on the bishops and other dignified clergy.[6] In the twelfth and thirteenth centuries, the exclusive right of the parish clergyman was attempted to be enforced by several successive canons.[7]

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[1] D. P. L. 165.—[2] Ibid. 174.—[3] Ibid.—[4] Canons of Perth, 34-42.—[5] M. St. ccxxxi.—[6] Selden on Tithes, ch. vi.—[7] Con. on T. i. 26.

*Distinction of Parsonage and Vicarage.*—The parish clergyman was designated parson, rector, presbyter, or clerk, and his tithes were called parsonage or rectorial tithes. Vicarage-tithes came into existence in the following manner:—It was usual to bestow benefices, not only on the secular or parish clergy, but likewise on the regular or monastic; and thus, by gift from the king, or other lay patron, confirmed by the ecclesiastical authority, religious houses became entitled to draw the tithes of benefices for their own use.[1] Similar appropriations were likewise made to bishops, and a few to chapters.[2] Those to whom the tithes were thus appropriated held them under the condition of providing either in their own persons, or by deputy, for the cure of souls; and it became customary to appoint stipendiary assistants, called vicars.[3] The salaries of these assistants were, in some cases, completely dependent on the liberality of the proprietors of the tithe; in others, the condition of the grant, or the ecclesiastical authorities, recognised a fixed salary.[4] The small tithes, as they were termed, were, at a later period, either revived or instituted for the support of the vicars, and the relief of the proprietors of the parsonage teind. These were termed vicarage teind, and by that designation they are still distinguished.[5]

The subjects of vicarage teind are in general calves, lambs, wool, hay, eggs, fruit, milk, &c.[6] The chief practical distinction between the two is in this, that all lands are presumed to have been liable to pay parsonage tithes, and will be so allocated on for ministers' stipend, unless an exemption can be proved, while vicarage tithe is only established by an express custom in its favour, not relinquished by disuse for forty years.[7] The latest instances in which vicarage tithe has been modified on for ministers' stipends have been towards the end of last century.[8] The practice of drawing it in kind has now almost entirely fallen into disuse, and there will be very few instances (if any) in which there is not a prescription against the levying of it. It may be said to exist then solely as a nominal component part of the stipends of those ministers whose predecessors got it commuted into an annual payment, or of the teinds valued in old valuations, made when a titular drew the vicarage teind in kind.

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[1] Con. on T. i. 33-34.—[2] Ibid. 59-61.—[3] Ibid. 47.—[4] E. ii. 10, 12.—[5] Ibid.—[6] Con. on T. i. 76. M. St. ccxxx.—[7] E. ii. 10, 13.—[8] Con. on T. ii. 116.

### SECT. 2.—*Changes following the Reformation.*

At the approach of the Reformation much of the property of the church was disposed of by the incumbents to laymen, and the remainder, after that event, devolving on the crown (with the exception of the benefices of the bishops) was similarly bestowed, and afterwards erected into temporal lordships, the proprietors of which were called Lords of Erection.[1] These proprietors were nominally burdened with the support of the clergy by salaries modified out of a third part of the benefices.[2]

*Annexation.*—On the majority of James VI., all church temporalities were annexed to the crown, except those in the hands of hospitals, universities, schools, and clergymen within burgh, patronages vested in laymen before the Reformation, and the residences of prelates and commendators who were lords of parliament. There are likewise several specific exceptions.[3] Whether the resumption extended to all the temporalities which had been formerly gifted by the crown, or merely included those in the hands of the churchmen, is doubtful; and it is maintained that grants even to laymen required and obtained special confirmation to except them from the act.[4] The tithes belonging to parsonages and vicarages were specially excepted, and this created a new doubt whether those which had belonged to bishops and religious houses were included. It is the general opinion of lawyers that all teinds were excepted, and such was the view adopted in practice.[5]

By this act the benefices of bishops were put at the disposal of the crown. The episcopal establishment, after becoming extinct for a very short period, was restored in 1606, when the act of annexation, in as far as it included them, was repealed.[6] After being again abolished and restored, the order was finally discontinued at the Revolution, when without any special enactment their revenues were understood to accresce to the crown, and their tithes became (as will be described below) liable to ministers' stipend.[7]

### SECT. 3.—*The Commissions and their Proceedings.*

Meanwhile, in 1617, a commission was appointed to pro-

[1] E. ii. 10, 18. Con. on. T. i. 98, *et seq.*—[2] 1567, c. 10.—[3] 1587, c. 29.—[4] St. ii. 8, 35, p. 320. Con. on T. i. 102.—[5] St. ii. 8, 9. E. ii. 10, 22. Con. on. T. i. 103.—[6] 1606, c. 2.—[7] Con. on T. i. 334.

vide the clergy with stipends, each from the tithes of his own parish (for their former trifling provision was not generally located on any particular parish), limited to a maximum of ten chalders of victual, or 1000 merks (£55, 11s. 1⅓d. sterling), and to a minimum of five chalders of victual, or 500 merks (£27, 15s. 6⅔d. sterling).[1] King Charles, soon after his accession in 1625, issued, without the intervention of parliament, a revocation of all appropriations of church property, of whatever description, which had been made during the two preceding reigns.[2]

The powerful barons, who had come into possession of the church property, appeared to menace resistance. The king threatened to try his right of revocation in a court of law, and raised a summons of reduction for that purpose. Some of the nobles showed a desire to compromise, which was met by the crown. A commission was appointed in 1627, which was instructed not to interfere with the heritable rights to church lands which had been confirmed to their new proprietors, farther than to the effect of securing the superiority to his majesty, and to receive surrender of the tithes of those who should put them willingly at the disposal of the king without being compelled to do so by course of law.[3]

*The Submissions.*—In consequence of this alternative, four "submissions" were made into the hands of the king by four different bodies, who accepted of his majesty's arbitration, viz. the lords of erection and landholders, the bishops and clergy, the royal burghs, and certain tacksmen and others having incidental right to teinds.[4] The consequence of the respective decreets arbitral which he pronounced was,—the establishment of valuations of tithes, and sales of them to the proprietors of the land, so that the produce might not be subject to division between the owner of the lands and the owner of the teinds,—and their appropriation as a fund liable to their utmost extent for ministers' stipend.

To facilitate the inquiry into the value of teinds, subcommissioners were appointed, whose duty it was to visit the several parishes, and to report to the high commissioners.[5] Some of their reports were sanctioned when made; others have been brought forward for approval at later periods.

*The Court of Session.*—The commission was continued from time to time, till the period of the Union, when its

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[1] 1617, c. 3.—[2] Forbes on Tithes, 258. Con. on T. i. 132.—[3] Forbes, 263. Con. on T. Ap. xl.—[4] Con. on T. i. 135.—[5] 1633, c. 19.

powers and authority were vested in the Judges of the Court of Session.[1] The tribunal so constituted is called the Court of Commission of Teinds. It has lately been empowered to divide its jurisdiction into two parts; the one simply judicial, for deciding in matters of right, to which the form of process of the Court of Session has been adapted; the other ministerial or discretionary, for the fixing of valuations, modifications, &c., with a form adapted to the purpose.[2]

*General View.*—At the period when the operation of the first commission commenced, tithes were in general in one or other of the following situations: 1*st*, Held by bishops and other dignified clergy; these became afterwards annexed to the crown. 2*d*, In the hands of the parsons or vicars who served the cure. 3*d*, In the hands of colleges, schools, hospitals, &c. 4*th*, In the hands of the crown. 5*th*, In the hands of lay titulars, the representatives of the lords of erection. A portion only of these tithes was drawn in kind. On some occasions the person entitled to them took a composition in kind, in others in money, by letting them on tack to the proprietor; and in other cases they were let on tack to third parties.

*Present Results.*—It may be stated in farther elucidation of the subject, that the state of tithes, in consequence of the proceedings of the commissions, is as follows:—The greater part have been bought up by the proprietors of the respective lands, after stipends have been modified to the ministers, and are held by these proprietors under the burden of augmenting the ministers' stipends to the extent of their value; in other words, there are in these cases no tithes, but part of the rent of the proprietors constitutes ministers' stipend, and a certain additional part is liable to augmentation of stipend. A part is still in the hands of titulars, also liable to ministers' stipend and augmentation, and no longer drawn in kind, but paid by the proprietor of the ground according to valuation; if any such tithes remain unvalued, they are compounded for. The bishops' tithes are in the hands of the crown, liable to augmentation of stipend. The tithes which remained in the hands of the clergymen of parishes still belong to them, but are commuted, and those in the hands of colleges, hospitals, &c., have generally been valued, and paid by composition, but have not been sold to the proprietors of the lands.

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[1] 1689, c. 30; 1693, c. 23; 1707, c. 9.—[2] 6 Geo. IV. c. 120, § 54. A. S. 12th November 1825.

### SECT. 4.—*Valuations.*

The two objects of the issuing of the commissions above mentioned, were, to allow heritors to have the tithes of their estates commuted into a money payment, which might be redeemed by them, and to afford sufficient stipends to the clergy. The first step was the valuation. When tithes were let to the proprietor of the land for a certain rent—in other words, when he payed a composition for them—their exact amount could not be ascertained. In such cases their value must be calculated at one-fifth of the rent.[1] Where they have been drawn in kind, the practice (as sanctioned by the decreets arbitral) has been to strike the average annual amount during seven years, deducting one-fifth for "the king's ease."[2] Where the amount of the rent without the tithe has been proved, but it has been found impossible to prove the amount of tithe, or if the titular has not appeared, one-fourth of the former was taken as the value of the latter.[3] Where the titular proved the value of the tithe, the landlord might in return prove the value of the rent received by him, and in case of a discrepancy the two were added, and a fifth deducted as tithe.[4] This plan was adopted in a late decision on the import of an old valuation by the sub-commissioners.[5]

Valuations in later times have generally been made entirely from the fifth of the rents. When the lands are let, the rent actually paid is the criterion,[6] and though it may be proved to be insufficient, the landlord is not deprived of this partial benefit from its inadequacy.[7]

*Actual Rent.*—The rent actually payable for the year when the proof is led is the rule. A lease granted for an advanced rent, but the term of which has not commenced, cannot be founded on.[8] Where a grassum is paid, it must be divided by the years of the lease, and the quotient added to the rent, unless it be shown "that the old rent was kept up, and that grassums were in use to be paid formerly for the lands."[9] All summonses of valuation must now set forth the rent paid, if the lands are under lease; if they are not under lease, the rent that would be obtained for them on leases for nineteen years, if arable, or arable and pasture, and eleven years if pasture alone.[10]

[1] 1633, c. 17. Con. on T. i. 161.—[2] Con. on T. i. 166-179.—[3] Mutter *v.* Heritors of Dumfries, 25th June 1777. M. Teinds, i. App. 2, M. St. ccxxxiv.—[4] Con. on T. App. lxiii.—[5] Locality of Crieff, 9th December 1812. Con. on T. i. 173.—[6] Ibid. 185, *et seq.* M. St. ccxxxiv.—[7] Ibid.—[8] Con. on T. i. 188.—[9] Ibid. 187. M. St. ccxxxiv. Baillie *v.* Douglas, 15th December 1730. M. 15738.—[10] A. S. 12th November 1825, § 4.

### SECT. 5.—*Deductions in Valuations.*

Farm produce being the original subject liable to tithe, in estimating the rents on estates, such portions as are not properly farm rents, will be deducted. The rents of minerals, mills, gardens, orchards, &c. are so deducted.[1] Where a cumulo rent is payable for lands and fishings, the proportion payable for the lands only is to be estimated.[2] Where part of the rent is for the use of a moss, the produce of which is to be sold, a deduction is made;[3] but it is otherwise where the tenant is merely allowed the personal use of a moss.[4]

*Improvements.*—In the case of extraordinary improvements, beyond the ordinary range of good husbandry, a deduction will be admitted;[5] but none was allowed for lime, shells, and marl, laid on the lands.[6] The practice is to limit the claim to improvements within seven years of the commencement of the process.[7] Productive land brought into existence, as by draining a loch, is not titheable.[8] The portion of the rent paid for farm-houses, barns, &c. is not deducted, as these are employed in the production of the crop;[9] nor are even supernumerary tenements of this description admitted to consideration.[10] But where a landlord had undertaken to keep the tenant's houses in repair, he was allowed a deduction.[11] In the north a deduction was not allowed for malt barns and kilns, because they were part of the ordinary accommodation given in the district.[12]

The right to take lime from a quarry belonging to the landlord, has not been viewed as a ground for proportionally diminishing the estimate;[13] but it has been otherwise where the landlord has come under an obligation to furnish a considerable quantity of lime or marl, or to sell it at a reduced price.[14] Personal services and poultry are not estimated in the rent; but it has been held that should an unusual quantity of fowls appear on a rental, so as to leave a presumption of fraud, a portion would be estimated.[15] Where the tenant became bound to pay the land-tax, although his rent was thus diminished by his engagement to pay what is generally

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[1] Con. on T. i. 196, M. St. ccxxxii.—[2] Watson *v.* Heritors of Northmavine, 7th March 1821.—[3] Heritors of Calder *v.* University of Glasgow, 11th December 1734, M. 15739.—[4] Con. on T. i. 198.—[5] Ibid.—[6] Earl of Selkirk *v.* Officers of State, 8th December 1802, F. C.—[7] Con. on T. i. 199.—[8] Ibid.—[9] Ibid. 196.—[10] Earl of Selkirk, as above.—[11] Skene *v.* King's College, 16th February 1737. El. Teinds, No. 5.—[12] Ibid.—[13] Kincaid *v.* York Building Company, 26th June 1771, M. 15756.—[14] Scott *v.* St Mary's College, 5th February 1806.—[15] Adam *v.* Heritors of Cushney, 15th July 1752, M. 15749.

paid by the landlord, it was not allowed to be added to the rent.[1]

### SECT. 6.—*Procedure in Valuations.*

A process may either be raised for an original valuation, or for approbation of a sub-valuation (viz. a valuation by the sub-commissioners before the Union), if any such is in existence. These do not prescribe by not being acted on, and may be appealed to at any time.[2] Thus we find in 1834 a sub-valuation of the year 1629, confirmed by the Court of Session as commissioners of teinds.[3] Where the actual payment has for a track of time exceeded the subvaluation, the latter will be held as relinquished.[4]

*Parties.*—The parties to a valuation are the titular, and (if the tithe has been let to a person not the proprietor of the land) his tacksman, the heritor, and the minister.[5] The person who pursues the action (generally the heritor) must cite the others. In case of their not appearing, they have the same remedy as in decrees in absence in ordinary actions.[6] Where the reports of sub-commissioners are to be approved of, though they do not bear that the minister was cited, or had appeared, this will be presumed, especially where a procurator for the presbytery has appeared, as is frequently the case.[7] No extrajudicial arrangement as to the value of the tithe can affect the right of the minister, though his predecessor should have been a party to it, as the rights of the incumbent, for the time being, can be restricted by nothing but the decree of a competent court.[8]

The valuation is in the same representative of value as the rent. Victual or grain rents being at one time common, victual valuations were of course frequent; they are now almost entirely in money.[9] Where the proprietor has a tack of his tithes, or, in other words, pays a composition to the titular, his tithes may still be valued; but during the currency of the lease he will have to pay the tack-duty.[10] Where a piece of property of which the tithe is valued, becomes separated among different proprietors, the valued tithe will be divided in proportion with the valued rent, if it has been split, if not, in proportion with the real rent.[11]

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[1] Baillie *v.* Duke of Douglas, 2d December 1780, M. 15738.—[2] Con. on T. i. 242. Thomson *v.* Galloway, 20th July 1763, M. 10687.—[3] Thomson, 18th June 1834.—[4] Somerville *v.* Lauderdale, 4th August 1773, M. 15764.—[5] Con. on. T. i. 276, 280.—[6] A. S. 12th November 1825.—[7] Erskine *v.* Balfour, 7th March 1798, M. 15772.—[8] Knox *v.* Heritors of Slamannan, 23d June 1773, M. 14809.—[9] Con. on T. i. 217.—[10] Ibid. 221.—[11] Ibid. 222.

The minister has seldom an interest to pursue a process of valuation, and the practice is not usual, except for the purpose of showing that all the free tithes are exhausted, in order that he may claim the bounty on the holders of small stipends, by 50th Geo. III. c. 84.[1] (*See Sect.* 8.)

### SECT. 7.—*Sale.*

After teinds have been valued, the heritor may, at any time, insist on purchasing them, or paying the value of the annuity in a slump sum. The following tithes, though they may be valued, cannot be sold. 1*st*, Those which belonged to bishops, and are now in the hands of the crown, so long as they remain so appropriated. 2*d*, Those applied to pious uses, whether mortified or in the hands of burghs. 3*d*, Those belonging to colleges and hospitals. 4*th*, Those which have been reserved, like a feu-duty, by an heritor in a sale of his lands.[2]

The price which the heritor may have to pay depends on the position of the person who possesses the tithes. Titulars, or those who have special titles to the tithes, must sell at nine years' purchase.[3] Where there is no titular, the patron has the right to tithes; but he must sell them to the heritor at six years' purchase.[4] When the heritor raises a process of sale, the proprietor of the tithe, if he demand nine years' purchase, must produce a special title; the clause "*Decimis quam rectoriis quam vicariis earundem*," common to the titles of patrons, is insufficient.[5] Where tithes are entailed, a sale may still be enforced, the price being vested in terms of the entail.[6] The minister has rarely an interest in a sale, and seldom becomes a party, though he is generally cited.[7] It is usual for the parties to agree extrajudicially to such a contract of sale as the court would enforce.[8]

*Annuity.*—In the decreets arbitral pronounced by Charles I., a claim was made for an annuity to his majesty from tithes, which was fixed at six per cent.[9] This right is said to have been resigned by the crown in 1674.[10] It afterwards became the practice to consider it resigned in favour of the heritor, and in the sale of tithes, six per cent. is deducted at the present day.[11]

The sum, then, which is to be multiplied by nine (or six

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[1] Con. on T. i. 277.—[2] 1693, c. 23.—[3] 1633, c. 17.—[4] 1690, c. 23.—[5] Annandale *v.* Irving, 4th December 1748, M. 15661.—[6] Con. on T. i. 317.—[7] Ibid. 319.—[8] Ibid. 320.—[9] 1633, c. 15.—[10] Con. on T. i. 271.—[11] Ibid. 316.

as the case may be), is the amount of the annual tithe, deducting, first, the stipend payable to the minister; and, second, six per cent. of the remainder.[1] The heritor obtains the tithe as the titular held it, with the burden of augmenting the minister's stipend.

## SECT. 8.—*Stipends.*

It has already been stated that the commissioners appointed in 1617, and their successors, were empowered to modify stipends to the clergy from the tithes of their parishes. The minimum of 500 merks, or five chalders of victual, was, in 1649, raised to a minimum of eight chalders, or to three chalders and money for the other five, at a conversion not exceeding £100 scots, or beneath 100 merks for each chalder;[2] and previous to that time a practice had arisen (authorized by another rescinded act) of modifying a sum to meet the expense of communion elements.[3]

*Augmentations.*—With some hesitation, the plan of augmenting stipends which had once been modified, was introduced, and was at first confined to those which were below the minimum, or in which the modification was collusive.[4] It afterwards became the practice (after considerable discussion) to grant second augmentations "according to the state of matters at the time, and the merits of each particular case, notwithstanding a former augmentation since the institution of the court."[5] In 1808 the matter was regulated by act of parliament, by which no stipend can be augmented until the lapse of twenty years from any previous augmentation.[6]

Whatever may have been the medium of payment of any stipend, when augmented it must be wholly modified in victual, unless it be necessary, from the state of the teinds, or for the interest of the benefice, or on account of the produce in which the tithe has been paid, that a part should be modified in money, or some produce other than victual.[7] In converting the money into victual, the average of the fiars for the previous seven years is to be taken as the medium.[8] The minister is not to receive his stipend so modified in kind, but to be paid the value of it according to the highest fiar prices of each year.[9] The minister is the proper pursuer of

[1] See form, Con. on T. i. 316.—[2] Rescinded act, 14th March 1649, c. 45. —[3] Con. on T. i. 361.—[4] Ibid. 402.—[5] Ibid. Ap. No. cxx.—[6] 48 Geo. III. c. 138, § 2.—[7] Ibid. § 8.—[8] Ibid. § 9.—[9] Ibid. §§ 11, 13.

an augmentation; but to prevent collusion, he must cite, besides the heritors, the moderator and clerk of the presbytery.[1]

*Small Livings.*—In 1810, an act was passed for augmenting small livings, by which £10,000 annually was set apart from the revenue for the purpose of raising all stipends to £150 respectively, where the tithes of the parish do not provide that sum.[2] The receipts and other documents used in the practice of these augmentations are exempt from stamp-duty.[3]

Where the stipend modified exhausts the tithe, it must be paid by the fiars, as above, and not in kind.[4] The heritors may, however, surrender the whole tithe to the minister, and in such a case it seems to be the opinion that the minister is not entitled to the fiars' commutation.[5] No over-payment to the minister for any length of time can preclude an heritor from surrendering his tithes, as they are valued;[6] though a right to a higher payment may be acquired by the minister by prescription on an apparent title, such as a decree of locality.[7] Augmentations are not so readily granted from the tithes of colleges, even in their turn (*see Sect.* 11.), as from those of heritors.[8]

### SECT. 9.—*Procedure in Augmentation.*

The minister cites the heritors, titular, and all having interest in the tithe, by the precentor giving public notice from his desk of the raising of the summons six weeks before it is called in court, by a notice affixed to the church-door, by a messenger-at-arms, and by certain advertisements.[9] If the king is titular, the officers of state must be cited. The citation to the moderator and clerk of the presbytery is sufficiently given by letter.[10] The pursuer must set forth in a note lodged with the clerk of court, the amount and nature of his stipend, with the amount of money for communion elements, and give a rental of the parish (distinguishing the rent of each heritor) and a statement of the size of the parish, and the number of inhabitants.[11] If the tithes have not been valued, a valuation will accompany the process, a fifth part of the proved rental being separated as tithe.[12]

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[1] 48 Geo. III. c. 138, § 17.—[2] 50 Geo. III. c. 84, §§ 1, 3.—[3] Ibid. § 22.—[4] Smith *v.* Duke of Portland, 22d June 1814.—[5] M. St. ccxxxix. Con. on T. i. 430.—[6] Baird *v.* Minister of Polmont, 3d July 1832.—[7] Locality of Madderty, 9th July 1817.—[8] Con. on T. i. 448.—[9] A. S. 5th July 1809, § 1.—[10] Ibid.—[11] A. S. 1809, § 2; 1825, § 23.—[12] Con. on T. i. 457.

*Amount.*—The extent of augmentations is a matter left to the discretion of the court, on a due consideration of all relative circumstances. "In fixing the amount of the augmentation, the court first inquires into the state of the teinds of the parish, and how much remains unexhausted over and above the old stipend. This being the only fund out of which the court can augment, the augmentation must be in some measure regulated by the extent of that fund. . . . Next to the amount of the unexhausted teind, the court regards the size and population of the parish, the labour of the charge, and the price of provisions. The rental of the lands of the parish, even where the teinds of the parish have been valued, is also regarded as a circumstance proper to be looked into, because it affords some criterion to judge of the general state of the parish, and the ability of the heritors to pay stipend."[1] It would appear that the extent of a glebe will affect an augmentation, and land enjoyed as a benefice undoubtedly does so.[2]

A second minister, appointed by a private arrangement, cannot pursue for an augmentation,[3] unless the old commission have awarded him tithes in place of his salary.[4] An assistant minister, or an assistant and successor, has no title to pursue for an augmentation.[5]

## SECT. 10.—*Payment of Stipend.*

The title of the minister of a parish consists in two steps, presentation to the benefice, and collation to the spiritual office. (*See Chap.* II.) No stipend is due until the collation have taken place, and a payment before that event will not relieve the heritors from a subsequent claim.[6] Collation will not entitle to stipend without presentation, and so where a presbytery having rejected a presentation, and themselves exercised the right *jure devoluto*, the first presentation was sustained, the person so inducted had no right to stipend.[7] The stipend continues to be due to the minister, though he should be suspended, until his connexion with the parish be terminated by his death or deposition.[8] When a minister obtains an augmentation, he is held entitled to the legal interest on the arrears of the augmented stipend, from the

[1] Con. on T. i. 415.—[2] Ibid. 419-421.—[3] Marshall *v.* Town of Kirkcaldy, 7th July 1738, M. 14795.—[4] Fairnie *v.* Heritors of Dunfermline, 14th June 1749, M. 14796.—[5] Shaw *v.* Heritors of Roberton, 29th January 1806, M. Stipend, Ap. No. 5.—[6] Con. on T. ii. 84.—[7] Cochran *v.* Stoddart, 26th June 1751, M. 9951.—[8] Campbell *v.* M'Donald, 26th Feb. 1741, M. 14795.

charge on the decree of modification.[1] Where heritors of a parish fell into arrear in paying their victual stipends, and proposed to account for it in the fiars' prices of the respective years for which it was due, the court found the minister entitled to the market-price, which was higher.[2]

*Terms.*—Whitsunday and Michaelmas are the two terms of payment of stipend. If the incumbent be admitted before Whitsunday, he is entitled to the whole year's stipend, and if his interest cease before that term, he has no claim to any part of it. If he is admitted between Whitsunday and Michaelmas, he is entitled to a half-year's stipend. If his interest cease between these terms, he or his executors have right to a half-year's stipend, and if it cease after Michaelmas, to the whole year's stipend.[3]

*Ann.*—A sum equivalent to half a year's stipend is due to the executors of a minister deceasing, in name of Annat or Ann. It is added to the sum otherwise due to him, so that if the minister outlive Whitsunday he will have half the year's stipend, and his executors will have the other half as ann; if he outlive Michaelmas he will have the whole year's stipend, and the executors will have an additional half-year's as ann.[4] The widow gets one-half of the ann, and the children or other nearest of kin the other, the whole passing to the nearest of kin when there is no widow.[5] It does not require Confirmation, cannot be gifted away by the minister, and is not attachable by his creditors.[6]

### Sect. 11.—*Locality.*

The process of locality is the form by which, on a stipend being modified, it is proportioned among the various persons liable to pay it from their holding tithe. "Every interlocutor of modification contains a remit to a Lord Ordinary to prepare a locality; and the first step taken by the Lord Ordinary is to appoint the heritors, or their agents, to meet and choose a person to be suggested to the Lord Ordinary as common agent. After a common agent has been thus named, and his nomination has been approved of by the Lord Ordinary, it is his duty to attend to the general interest of the heritors, as a body, and to the rights of the minister. Under his superintendence a scheme of locality is made up, whereby the heritors are located upon, agreeably

[1] Anderson v. Urquhart, 31st January 1805, M. 14836.—[2] Wright v. Binning, 8th December 1801, M. 14833.—[3] 1672, c. 13.—[4] 1672, c. 13. E. ii. 19, 66.—[5] E. ii. 10, 67. Corrected by Ivory, n. 316.—[6] E. ii. 10, 68.

to what is conceived to be their respective rights. When this scheme is objected to by any of the heritors, the common agent answers the objections in name of the other heritors, and in that capacity conducts the litigation, and all other questions of the same kind, until they are finally terminated. The Lord Ordinary, to whom the cause has been remitted, determines those questions in the first instance; and his interlocutor may be brought under the review of the whole court." [1]

*Interim Locality.*—As the locality is generally a tedious process, it is the practice for the minister's stipend to be apportioned by an interim locality, drawn up by the common agent, and approved of by the court, to be the rule till all questions between the heritors are settled.[2] If an heritor have been prejudicially located in the interim locality, he will be entitled to recompense by an action of recourse against the others.[3]

*Order.*—The tithes are appropriated in succession according to their ownership. Those in the hands of lay titulars (*see above, Sect.* 3.), called free tithes, are first appropriated. Next in order are those let in tack,—if the tack be not to the heritor, and if the stipend located for amount to more than the tack duty, the tacksman is compensated by a prorogation of the lease. If the heritor is tacksman of his own tithes, he can insist on the tack-duty payable to the titular being exhausted, before the tithe as held by him is liable.[4] The same privilege affects heritors possessing by relocation after expiry of their leases.[5] When the tithes which are unlet, and the tack-duty of those which are let are insufficient, then the tithes of the heritors holding tacks are liable to the extent of the difference between the tack-duty and the value of the tithe.[6] All the tithes to which the titular has a right, either through himself or his tacksmen, being exhausted, the tithes of the heritors which they have purchased as above (*see Sect.* 7) become next liable to the extent of their clear value.[7] Where lands and teinds are feued together, a proportion of the feu-duty (one-tenth) is set apart, before the feuars are located on.[8]

The ordinary parochial tithes must be exhausted before those which were in the hands of bishops, and are now in

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[1] Con. on T. i. 477.—[2] A. S. 5th July 1809, and 12th November 1825, § 14.—[3] Con. on T. i. 547.—[4] Ibid. 480, *et seq.* E. ii. 10, 51, 52.—[5] Locality of Cupar, 28th November 1834.—[6] Con. on T. i. 482.—[7] E. ii. 10, 52. Con. on T. i. 482.—[8] Dundas *v.* Baikie, 13th February 1793, M. 14820.

the hands of the crown, are liable, and therefore these are the next in order.[1] Tithes in the hands of colleges are next iable.[2] It is held that tithes appropriated to pious uses (such as paying the salaries of the deans of the chapel royal) are liable in the last place.[3]

*Exemptions.*—All lands, whether arable or pasture, are presumed to be liable to tithes, except those which are held by rights from churchmen who had held the lands exempt.[4] All religious houses at one time held the lands cultivated by themselves free of tithe; but this privilege was in the middle of the twelfth century restricted to three orders, the Cistertians, the Hospitallers, and the Templars, except for land redeemed and brought into cultivation by religious houses, which continued free, whatever order they belonged to.[5] The title produced as ground of exemption must be prior in date to the act of annexation of 1587, and if granted before 8th March 1558, must have been confirmed by the pope or the crown, if after that period by the crown.[6] The title must not only distinctly include the right to tithes, but mention that the tithe has never been separated from the land.[7] It has been found that the King's Park, as a royal domain, is not liable to tithe, but that where a royal domain is alienated to a subject the liability returns.[8]

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## CHAPTER V.

### MEMBERS OF RELIGIOUS COMMUNITIES OTHER THAN THE ESTABLISHED CHURCH.

#### SECT. 1.—*Laws affecting their Persons.*

As the members of religious communities, not of the Establishment, have no special privileges, any law that can be laid down, as affecting them, is either of a negative nature, or contains disabilities, or other injunctions distinguishing

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[1] Con. on T. i. 504-506.—[2] Heritors of Portmoak, 9th December 1795, M. 14823.—[3] Con. on T. i. 510.—[4] Glenlyon *v.* Clark, 15th Nov. 1842.—[5] Con. on T. ii. 4, 10, 30.—[6] 1584, c. 7; 1587, c. 29. Con. on T. ii. 28, 39.—[7] Con. on T. ii. 39.—[8] Gilchrist *v.* Earl of Haddington, 26th November 1829; and Linlithgow, 25th November 1829. Con. on T. ii. 63, 64.

them from the members of the Establishment. Unless, perhaps, there may be an exception, in the enactment prohibiting judges and corporate officers from appearing in their official robes in any church not of the Establishment under a penalty of £100,[1] all the positive enactments on this head are directed against Roman Catholics, and members of the Episcopal persuasion. Dissenters from the Church of Scotland are merely not included in those privileges relating to ecclesiastical matters specially conferred on members of the Establishment.* There were, until lately, penalties incurred in the solemnization of marriages by Roman Catholic priests and dissenting clergymen, but these have been repealed.

A case of considerable importance as to freedom of endowment for ecclesiastical purposes was decided in 1841. A person having left a legacy to "The General Unitarian Baptist Assembly" to endow a church and support a preacher of that persuasion, and for the annual delivery of a sermon "on the unity of the Divine nature in the person of the Father only," payment of the legacy was opposed on the ground that it was "for the propagation of tenets which are not only not recognised by the state, but are condemned by the law of the country, as directly and inveterately hostile to the creed which forms part and parcel of the law of the land." But the court sustained the validity of the legacy on the ground as set forth by Lord Jeffrey (Ordinary), that "where there is nothing in the tenets of any religious sect which is contrary to express law, to good morals, or to public decency, [there is] no ground upon which any distinction can be taken in a civil court between one tolerated sect and another."[2]

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[1] 10 Geo. IV. c. 7, § 25.—[2] General Assembly of Baptist churches v. Taylor, 17th June 1841.

* In a work which professes to give an account of the institutions and laws of the country, the peculiar regulations of bodies, whether lay or ecclesiastical, which are not constituted by the civil legislature, or allowed to grow up side by side with it, as acknowledged institutions of the country, can properly have no place. The distinction, however, between the powers of the judicatories of the Church of Scotland and those of the bodies dissenting from that church are not very marked, except in those cases where statute gives a certain efficacy to the former. In neither can any person who is not officially connected with the body be affected by its proceedings; and both are liable to be controlled by the civil courts, if their proceedings affect the property or other civil rights of individuals. As the several bodies which have seceded from the Established Church, and especially the last and largest, have adhered to the same general form of church government, the account of the judicatories of the Church of Scotland given in the preceding pages, may not be without its use in giving a general idea of the polity of the several sects of presbyterian dissenters.

*Roman Catholics* were, previously to the year 1793, subject to many penal regulations,—among which were prohibitions to purchase or take by succession landed property. These were repealed by an act of that year, to all who should take an oath prescribed by the act, declaratory of the religion of the party, and of allegiance to the sovereign.[1] By the catholic relief act of 1829, the right of electing and of being elected representatives in the House of Commons was extended to members of that persuasion.[2] (*See Part* II. *Chap.* III.) The only public office in Scotland from which Roman catholics are excluded is that of royal commissioner to the General Assembly.[3] When Roman catholics are members of corporations they may not vote in the disposal of church patronage.[4] Ecclesiastics, or other members of the Roman catholic persuasion, either wearing the habit of their order or officiating, in any place which is not their usual place of worship or a private house, forfeit £50.[5] Jesuits, and members of orders bound by monastic or religious vows, must register themselves with the clerk of the peace of their county, under a penalty of £50 for every month they remain in the kingdom unregistered. Jesuits not natural born subjects, who have come into the country since the passing of the act, or may come into it, are liable to be banished.[6] Persons admitting others to such societies, within the United Kingdom, are liable to fine and imprisonment, and those who become so admitted are liable to be banished.[7] By the act 9 & 10 Vict. c. 59, some farther disabilities affecting Roman catholics, which in so far as Scotland is concerned were merely nominal, were abolished.

*The Members of the Episcopal persuasion* were, after the Revolution, subject to many restrictions and disabilities, which were gradually reduced by acts of the reign of Anne, George I., and George II., and were conditionally abolished in 1792. By the act of that year, each pastor of an episcopal congregation must subscribe a declaration in favour of the Thirty-nine Articles, under a penalty of £20 for the first offence of officiating without doing so, and prohibition to officiate during three years, for the second.[8] Each clergyman so qualifying, must also, on every performance of divine worship, pray for the sovereign and royal family, in terms of the liturgy of the Church of England, under the like penal-

[1] 33 Geo. III. c. 44, §§ 2, 7.—[2] 10 Geo. IV. c. 7, §§ 1, 8.—[3] Ibid. § 12.—[4] Ibid. §§ 14, 15.—[5] Ibid. § 26.—[6] Ibid. §§ 28, 29, 30.—[7] Ibid. §§ 33, 34, 35.—[8] 32 Geo. III. c. 63, §§ 2, 4.

ties,[1] and those twice within one year present at episcopal worship, where this is omitted, forfeit £5.[2]

By 3 & 4 Vict. c. 33, provision was made for permitting, under certain conditions, clergymen ordained by bishops of the Scottish Episcopal Church, to officiate in the places of worship of the Church of England and Ireland. On the application of such a person, whether a bishop or a priest, the bishop of any diocese in England or Ireland may grant written permission to him to perform divine service, preach, and administer the sacrament, within the diocese, for any one day or any two days, the days and the place of worship being specified in the document (§ 1). Before such permission can be granted, the party desiring it must produce two separate documents dated within six months before the time of his application:—1*st*, Letters recommendatory—if he be a bishop, from two bishops, and if he be a priest, from the bishop of his district—under hand and seal. 2*d*, A testimonial from such bishops or bishop as the case may be, under hand and seal, to the effect that the applicant is a person of honest life and godly conversation, and that he professes the doctrines of the Church of England and Ireland (§ 2). There are penalties against the permission of an infringement of these rules by clergymen of the Church of England and Ireland, and a Scottish episcopal clergyman violating them forfeits £50 recoverable in the Court of Session (§ 5). It is provided that, except under these conditions, no person who has been ordained by a protestant bishop who is not of the Church of England and Ireland, though he should afterwards be ordained by a bishop of England and Ireland, can lawfully officiate in these countries, if the second ordination be subsequent to the date of the act, viz. 23d July 1840 (§ 6).

### SECT. 2.—*Contracts by Religious Communities.*

The connexions which members of religious persuasions, not of the Establishment, have with each other, are regulated entirely by the civil law. The position of their church officers depends on specific contract, and will in general be affected by the rules applicable to ordinary civil obligations. From the extent, however, to which opinion is involved in all questions relating to religion, there are considerations which must influence agreements into which the members

[1] 32 Geo. III. c. 63, §§ 5, 6.—[2] Ibid. § 10.

of particular sects enter, with a view to the performance of their religious duties, not applicable to ordinary contracts. The law, however, upon the various questions in which the particular tenets of religious bodies must be understood to influence their engagements, is not very precisely settled, and it will not be safe to state more than the mere result of individual decisions.

Where members of an associate congregation had a difference with the minister whose call they had signed, and ceased to attend on his ministration, it was found that those only who continued to attend were liable for his stipend, as fixed by the managers, and that the others were responsible for their share only down to the period when they quitted the congregation.[1]

The question, Who has a right to an endowment? must occasionally be inferred from circumstances. It appears to be held, at least by the Court of Session, that in the case of a division, adherence to the church judicature (if there be any) under which the church was endowed, will be the criterion of title, and not the majority in numbers of the congregation, even when they constitute a majority of subscribers.[2] Where a lease was taken in favour of a minister to be settled in a congregation, who must be a member of a certain synod, on a division in the congregation, it was found that the minister chosen by a minority adhering to the synod was the lessee, though for a period of four years there had been no minister.[3] In a question as to the persons who should be liable to a builder for erecting a chapel under contract with a committee of management, it was at first held that the question, "Who were members?" must be decided according to the rules and constitution of the particular church; but it was subsequently held, that if people were ostensibly members, the court could not give effect to peculiar rules which might be held to disqualify them.[4]

In a late case, where the proprietors and congregation were divided, and where the church judicatories deposed the minister, he maintaining that he was acting on the principles of the body to which the congregation professed to belong, and that they (the judicatories) were not, the court in the mean time divided the use of the church between the parties, till it should be decided which had a permanent right.[5] It was

[1] Hyslop *v.* Nairne, 14th June, 1825.—[2] Davidson *v.* Aikman, 27th June 1805, M. 14584; but see App. 5th February 1813. 1 Dow, 1.—[3] Craig *v.* Muckersey, 18th February 1823.—[4] Wallace *v.* Gray and Others, 17th March 1836; and 31st May 1838.—[5] Galbraith *v.* Smith, 10th March 1837.

maintained on the part of the minister that the cause of his deposition was his adherence to the original constitution of his church, which, though dissenting, supported the Establishment principle. The court did not hold this to be proved, but it acted on the general rule, that the proceedings of the church courts of the body to which the congregation belonged must be given effect to, and that it was not for the civil court to find that this church court had departed from its original principles. It was observed in the course of the case, that alleged irregularities on the part of the church courts could not be reviewed.[1]

Persons having formed themselves into a congregation in connexion with the United Secession, applied to a presbytery to moderate in a call, intimating their intention to give their future minister a stipend of £180. In their call they promised the individual selected "a suitable maintenance." The sole fund said by the congregation to be at their disposal, according to the practice of their church, was the seat rents, and these did not amount to £180 a-year. The clergyman brought an action for the difference, maintaining that the call was an obligation to pay the sum intimated to the presbytery. It was pleaded, on the other hand, that the call was purely ecclesiastical, that it involved no civil obligation, and that it was so known to the minister. The court sanctioned, as a preliminary step, an inquiry into the understanding of the particular community on the matter, and a verdict was given against the clergyman.[2]

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[1] Smith *v.* Galbraith, 21st February 1843.—[2] Arneil *v.* Robertson, 6th July 1841, and 9th January 1843.

# PART V.

## REVENUE AND TAXATION.*

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### CHAPTER I.

#### Commissioners of Supply and Land Tax.

In the periodical supply acts of the Scottish parliament, commissioners were appointed for "ordering and uplifting" the supply, according to the proportions of the respective shires arranged by the acts.[1] These commissioners had power to inquire into the value of, and to rate all descriptions of landed property, and to appoint clerks and collectors.

The tax imposed on heritable property continuing unvaried for a long period of time, while other taxes have been increasing, has become of very insignificant comparative amount. By the Union it was limited to £48,000 (deducting all expenses), when the English land-tax should amount to a sum little short of two millions.[2] In 1797 it was limited to £47,954, 1s. 2d., and made perpetual, but liable to be redeemed by the proprietor for stock in the three per cents., equal in annual value to one-tenth more than the tax.[3] This tax being apportioned to the counties by act of parliament, the division among the various heritors is the proper duty of the commissioners of supply, and they levy the tax according to the proportions by the valued rents, "as ascertained by the rules fixed by the convention of 1667."[4] Provision is made by a late act for a remedy where lands are taxed in more than one locality, owing to doubts as to the place to which they properly belong.[5]

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* N. B. The game-laws will be found in Part VI.—[1] 1689, c. 32; 1698, c. 1; 1704, c. 4, &c.—[2] 5 Anne, c. 8, art. 9.—[3] 38 Geo. III. c. 5, § 136. Ibid. c. 60, § 9.—[4] Thomson's Scottish Acts, vii. 545. Hutch. J. P. i. 346. —[5] 1 & 2 Vict. c. 58.

*Splittings.*—When a freehold estate is divided, the commissioners have to "split," or divide the valued rent for the purpose of apportioning the taxation, a process which was formerly in extensive use when superiorities were partitioned for election purposes.[1]

*How appointed.*—The commissioners for the respective counties are appointed by acts of parliament passed from time to time. The latest are 7 & 8 Geo. IV. c. 75, 2 & 3 Wm. IV. c. 127, 3 & 4 Wm. IV. c. 95, 6 & 7 Wm. IV. c. 80, and 1 & 2 Vict. c. 57. The persons so appointed are only to act if qualified. The qualification is an estate of £100 valued rent, and both superior and vassal may be qualified from the same estate. Magistrates of royal burghs, and apparent heirs, of freeholders entitled to vote on their freeholds for members of parliament, do not require a farther qualification. The penalty for acting without qualification is £20.[2] Acting justices of peace, possessing the requisite qualification, are entitled to be commissioners of supply.[3] Sheriffs and sheriffs-substitute may be commissioners without qualification.[4]

*Officers.*—The commissioners had the appointment of the collectors of the land-tax, which is now vested in the treasury (*see next Chapter*), but the commissioners are still authorized to appoint general collectors of local taxes in their respective districts.[5] They may name a convener; and where this is omitted, the sheriff, on application to the Court of Session, will be authorized to call any necessary meeting, or any private commissioner may call a meeting.[6]

The commissioners of supply have certain special powers by the militia act.[7] They act in the local management of the assessed taxes and of the income tax,[8] and they have certain functions regarding roads and bridges, to be elsewhere examined.

*Burghs.*—One sixth part of the whole land-tax is laid on the burghs. It is proportioned on them by the convention of royal burghs, and is allocated among the inhabitants according to their means and estates, by stentmasters appointed by the magistrates and councils.[8]

By the parliamentary reform act, all the powers and duties of any meetings of freeholders are vested in commissioners

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[1] Wight on Elections, p. 184, &c.—[2] Bankt. iv. 18, 1. Connel on Elections, 114. Bell's Law Dict.—[3] 7 & 8 Geo. IV. c. 75, § 2.—[4] Ibid. § 4.—[5] 3 & 4 Wm. IV. c. 13, § 4. 6 & 7 Wm. IV. c. 65, § 10.—[6] Connel on Elections, 120.—[7] 42 Geo. III. c. 91.—[8] See the two following Chapters.—[8] Bankt. iv. 18, 5. B. P. 11-26. 38 Geo. III. c. 5, § 128.

of supply,[1] particularly the duty of assessing, collecting, and managing the rogue-money,[2] which is an annual tax imposed on each county for defraying the expense of apprehending criminals, and subsisting them till trial.[3] (*See below*, p. 185.)

## CHAPTER II.

### Assessed Taxes.

*Management.*—The assessed taxes are now under the general superintendence of the united "commissioners of stamps and taxes."[4] The local superintendence of the assessment is vested in the commissioners of supply. (*See previous Chapter.*) The choice of collectors of assessed taxes, as well as of the land-tax, was formerly in these commissioners, but it has lately been transferred to the treasury.[5] The persons appointed are responsible to the treasury and the board of stamps and taxes, and no responsibility is incurred by counties or burghs for their failure or default.[6] At their annual meetings, the commissioners of supply may appoint what they may conceive a sufficient number of assessors for the several parishes and burghs, and if they do not make such appointment, or those nominated refuse to act, the duty of assessing falls on the surveyors.[7]

*Appeal.*—The commissioners of supply hear all appeals against assessments. The proper form of appeal is by lodging with the collector, and the surveyor or inspector, within fifteen days after the notice of assessment, a note of the intention to appeal, with the ground of complaint.[8] A list, fixed on the church-door, is held as sufficient notice of assessment.[9] The appeal falls, if not insisted on at the next half-yearly meeting for discussion of appeals.[10] The clerk of the commissioners must give notice to the collectors and surveyors of the times when appeals are to be heard, and they in their turn give notice to the respective assessors or surveyors, so that the parties appealing may have all necessary knowledge by personal application to them.[11]

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[1] 2 & 3 Wm. IV. c. 65, § 45.—[2] Ibid. § 44.—[3] 11 Geo. I. c. 26, § 12.—[4] 4 & 5 Wm. IV. c. 60, § 8.—[5] 5 & 6 Wm. IV. c. 64, § 10.—[6] Ibid. 6 & 7 Wm. IV. c. 65, § 12.—[7] 43 Geo. III. c. 150, § 8. 45 Geo. III. c. 95, § 1.—[8] 43 Geo. III. c. 150, § 20.—[9] 45 Geo. III. c. 95, § 2.—[10] 43 Geo. III. c. 150, § 22.—[11] Ibid. § 24.

*Enforcement.*—On non-payment of duties, warrants may be obtained from any two commissioners, or the sheriff, or the convener of the county, authorizing the goods of the defaulter to be distrained to meet the duties and treble the value. On poinding, the goods are valued by two sworn appraisers, and the owner may redeem them on payment of the appraised value within four days. Where sufficient property is not found, the party may be imprisoned till payment.[1]

*Assessment.*—The general objects of assessment are, windows, male-servants, carriages, horses, dogs, horse-dealers, hair-powder, armorial bearings, and game-licenses.[2] With reference to the window-duties, houses unoccupied at the time of making the assessment, are so marked in the return, and when persons entering on the occupancy give notice to the surveyor or inspector within twenty days, they are only liable to be assessed for the period from the end of the previous quarter; but if they do not, they are liable to a penalty of £5, and assessment for the whole year. When a house becomes unoccupied within the year, the whole year's duty is chargeable, unless notice be given, in which case, there is exemption for each quarter during which there has been no occupancy.[3] In decisions under this enactment, any furniture left in the house has generally been considered occupancy.[4] Scientific and literary societies, when they are purely of that character, without affording pecuniary profit to shareholders, and are certified to be so by the registrar for certifying and registering the rules of friendly societies, are exempt from assessed taxes.[5]

The year for the purposes of assessment is held to commence and terminate on the 24th May.[6] Within twenty-one days after the duties become current, notices are posted on the church-doors, directing individuals to furnish lists of all articles (windows and game-duty excepted), on account of which they are liable to be assessed;[7] and besides this general notice, the assessors or surveyors must deliver to each householder a special notice to furnish such list within twenty-one days from the date of the notice.[8] If the party neglect to lodge the list, the assessor or surveyor is to make

[1] 43 Geo. III. c. 150, § 30.—[2] 48 Geo. III. c. 55. 52 Geo. III. c. 93, Sch. A, C, D, E, F, G, H, I, K, L. 4 & 5 Wm. IV. c. 19. 2 & 3 Vict. c. 35. 6 & 7 Vict. c. 24. The duties on stage carriages are regulated by 2 & 3 Vict. c. 66.—[3] 43 Geo. III. c. 161, § 15. 6 Geo. IV. c. 7, § 2.—[4] Irving on the Law of Assessed Taxes, 107.—[5] 6 & 7 Vict. c. 36.—[6] 43 Geo. III. c. 161, § 24. 52 Geo. III. c. 93, § 5.—[7] 43 Geo. III. c. 161, § 25.—[8] Ibid. § 26. 52 Geo. III. c. 93, § 5.

an assessment, which will be final and without appeal, unless on the ground of the party having been absent from home when he should have returned it.[1] Persons omitting to send lists, or sending false lists, forfeit £50.[2] There is an alternative, however, generally adopted, of rectifying the assessment by a surcharge to the amount of double the duty on any omission.[3] The doubling of the duty may be avoided by an affidavit of the circumstances under which the omission took place, to the satisfaction of the surveyor or inspector.[4]

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## CHAPTER III.

### INCOME TAX.

### SECT. 1.—*General Nature.*

A CONSIDERABLE addition has been made to the fiscal laws by the Income Tax act, 5 & 6 Vict. c. 35, as amended by 5 & 6 Vict. c. 37, and 6 & 7 Vict. c. 24. The act was continued by 8 & 9 Vict. c. 4, for three years after 5th April 1845, and it seems likely to be for some time a fixed element in our financial system. Of an act containing 193 sections, the greater part of which has been already enforced, no general digest will here be expected. It may be observed, that the difficulty of bringing an abridgment of the clauses of the act within a small compass is materially increased from the circumstance that the old income tax acts which had expired, viz. 48 Geo. III. c. 141, and 50 Geo. III. c. 105, both in themselves statutes of considerable length, are resuscitated, and "shall severally and respectively be and become in full force and effect with respect to the duties hereby granted, and shall be severally and respectively duly observed, applied, practised, and put in execution, &c., so far as the same shall not be superseded by, and shall be consistent with the express provisions of this act, as fully and effectually, to all intents and purposes, as if the same powers, &c., were particularly repeated and re-enacted in the body of this act" (§ 3).

The management of the duties is with the commissioners of stamps and taxes, and the local operation of the act is vested

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[1] 43 Geo. III. c. 161, § 30.—[2] Ibid. § 37.—[3] Ibid. §§ 38, 63.—[4] Ibid. § 65.

in the land-tax commissioners, and certain commissioners for special purposes (§ 4-8).

The various sources of income which are taxed are divided into five schedules.

Schedule A refers to lands, tenements, and all descriptions of heritable property, on the annual value of which a charge of 7d. per £1 is made in respect of the property. Ordinary heritable property is to this end estimated at the annual rack rent, if it is held on rack rent, on any term which has begun seven years before the year of assessment. If it has not been so let, the tax is assessed on the annual value. There are separate rules for estimating teinds, grassums, mines, quarries, and miscellaneous profits arising from, or works connected with land. There is a special remedy for decrease in value in the case of mines. In charging tenements which, as let either with or without land, are under £10 in yearly value, the assessment is in the first instance against the landlord.

Schedule B refers to farms, which are charged 2½d. per £1 on the rent in respect of the occupancy. This is payable by the tenant, and is over and above the landlord's assessment under Schedule A. Gardens and nurseries are not included in this schedule.

Schedule C embraces holders of stock, from whom 7d. per £1 on the dividend is deducted when the dividend is paid. There is an exemption in favour of savings banks, friendly societies constituted under the acts, and establishments for charitable purposes. Claims of exemption under this schedule must be made at the head office of stamps and taxes in London.

Schedule D charges a duty of 7d. per £1 "upon the annual profits or gains arising or accruing to any person residing in Great Britain from any kind of property whatever, whether situate in Great Britain or elsewhere," and "upon the annual profits or gains arising or accruing to any person residing in Great Britain from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in Great Britain or elsewhere;" the schedule further includes all sources of income which do not come within the other schedules. This is the schedule to which professional incomes of all kinds belong, and the rules for obtaining returns and making the assessments are numerous and complex. The schedule does not embrace mining, quarrying, and other operations dependent on the possession of heritable property, which come within Schedule A. In the case of trades,

manufactures, &c., the charge is on a balance of profits on an average of three years. In the case of professions not involving trading operations, it is on the full amount of emolument within the preceding year.

Schedule E embraces the salaries of public officers, and all salaries or annuities paid out of the public revenue, on which 7d. per £1 is charged. The schedule applies to government officers, and to clergymen, officers of corporations, officers of joint stock companies, &c.

### SECT. 2.— *Special Regulations and Remedies.*

*Exemptions and Method of Relief to Persons charged.*— Any person charged under the act (whether by assessment or by deductions from any payment made to him), whose total income is under £150, may obtain relief from the general commissioners, by repayment of the duties, excepting such as he may be entitled to charge against any other person. The claim is to be made before the commissioners where the claimant resides (§ 163). A person claiming exemption must, within the time for returning the lists and declarations (or within such farther time as the commissioners may for special cause allow), deliver to the assessor a statement of his claim, with a signed declaration, setting forth all the particular sources of his income with the particular amount of each, every sum of annual interest, or other payment by which his income is diminished, and any sum he may have retained, or be entitled to retain, from such payments on account of duty payable by him. The assessor is to transmit the notice, &c., to the commissioners, and if the inspector or surveyor do not object within forty days, the commissioners may allow the claim. When the assessment is in another district, the commissioners certify the exemption to the Stamps and Taxes. If the claim is objected to, it must be heard on appeal (§ 164). When any person thus found entitled to exemption, has had the duty deducted from any annuity, dividend, salary, or other payment, or has paid the duty, the commissioners are to certify the exemption to the head-office of Stamps and Taxes, from which an order for repayment by the receiver-general, or a collector, or a distributor of stamps, is sent to the party (§ 164). Any person making a fraudulent claim, or any false statement in connexion with it, forfeits £20, and treble the duty chargeable; any one aiding or abetting forfeits £50 (§ 166). In claims of exemption the income from lands, tenements, &c., is to be

rated according to the schedules, and the income from the occupation of lands, in terms of Schedule B, is to be taken at a third of the rent. Where the claimant is both proprietor and occupant, the third, as above, is to be added to the annual value, to make the united value from proprietorship and occupancy (§ 167). Partners, whether in farms or trading concerns, may claim exemption on their respective incomes. No such separation is to be made, however, where lands are let or sublet without the lessor relinquishing possession (§ 168). Every claim is to be made to the commissioners of the district where the claimant resides, whether he be charged there or not, unless where his whole income arises from an office or pension, as to which he is chargeable by official commissioners (§ 169). Guardians, trustees, agents, &c., may act for parties who cannot conveniently attend (§ 170).

*Double Assessment.*—Any party twice assessed, through any error or mistake, may apply to the commissioners of the division where the erroneous assessment is made, who, having a certificate from the commissioners by whom the right assessment is made, or other evidence before them, may give relief (§ 171).

*Times of Payment.*—The tax is payable half-yearly; on or before 20th March, and on or before 20th September (§ 176).

*Annuities.*—In the case of annuities, whether they be payable out of profits or any other fund, the person paying is liable as if there were no annuity, on his full income, and is to deduct the proportion of duty from the annuity. When, from the circumstances of the fund arising abroad, or otherwise, there is no duty paid, and consequently no deduction, the annuity becomes chargeable under Schedule D as for "profits of an uncertain annual value" (§ 102).

*Enforcing Deductions.*—A creditor refusing to allow deduction on interest, forfeits treble the principal debt. Any one receiving rent, or a charge on land, or an annuity on property or official income, and refusing to allow the deduction of any income tax that may have been paid on it, forfeits £50; and all agreements to pay in full, and not deduct the duty, are void (§ 103). Where interest or annuity is payable out of the gains charged in Schedule D, the commissioners on application grant a certificate of the payment of the tax, to authorize the corresponding deduction from the annuity, &c. No certificate is required in the case of real property, or of any office of employment or profit (§ 104). Where the annuity

goes for charitable purposes the deduction is repayable by order of the commissioners (§ 105).

*Place of Charging.*—Every householder (not engaged in trade or profession) is charged to Schedule D, by the commissioners of the place of his abode; and every trading and professional person is to be charged where he exercises his trade or profession. Where there is more than one concern, a separate charge applies to each, unless where it is intended to pit the loss from the one against the gain from the other. Persons who are neither householders nor engaged in trade, &c., are charged where they ordinarily reside. Each person must deliver with his list a declaration stating where he is chargeable, and whether he is engaged in any trade, profession, &c., and where it is exercised. In manufactures, the assessment is at the place of manufacture, not that of sale. Where a person not engaged in trade or profession has two places of residence, he is charged at that one in which he resided at the time of beginning to execute the act, "or in which he shall first come ordinarily to reside," after having given the general notices. Incomes arising in Ireland payable to people in this country, may be assessed where the persons reside (§ 106). There are special provisions for assessing income derived from foreign or colonial property or securities, at certain of the great trading ports, of which Glasgow is the only one in Scotland (§ 108). Where a person has two residences, or carries on trade in a different place from his residence, he must, if the commissioners require it, make separate returns, being only liable to one assessment. Statements under Schedule D may be sealed up, if superscribed with the name and the place of abode or of business, of the person making the return (§ 110). By the supplementary act 6 & 7 Vict. c. 24, §§ 7, 8, in case of double charges, the Commissioners of Stamps and Taxes are to give relief, and fix the place of charge.

*Appeal.*—When the assessments under A and B are verified, the commissioners are to direct notices, in the way deemed most expedient, fourteen days beforehand, of the day of appeal. The notice may be general, or special to individuals assessed (§ 80). Persons aggrieved, on ten days' notice in writing to the inspector or surveyor, may appeal to the general commissioners of the district where they are charged. Notice of the day of hearing is to be given to the appellants. No appeals can be received after the time limited by the commissioners, except on the ground of diminution of income. The commissioners may give farther time in cases of absence,

sickness, "or other reasonable cause" (§ 118). The commissioners must cause a notice to be put up in their office, and on the church-door, limiting the time for hearing the appeals (§ 119). On receiving notice of appeal, or allowing the objection of the inspector to the amount of assessment, the commissioners may require a schedule of particulars from the party. Where the party has removed, or cannot be found, a precept calling for the return, affixed to the church-door, is binding on him (§ 120). The inspector or surveyor may state objections to the schedule, sending a sealed notice to the party before the appeal is heard (§ 121). The party may be summoned to verify his statement on oath, and may be allowed to amend it before making oath (§ 122). The commissioners, when dissatisfied with any assessment, may demand answers to queries in writing. The party, instead of writing the answers, may tender himself for examination, and have his statement taken down (§ 123). The person may be required to verify his answers or deposition on oath (§ 124). The commissioners may summon persons to appear as witnesses, provided they be not the clerk, agent, or servant of the party, persons in these capacities being only examinable in the same manner as parties. A person neglecting to attend, or refusing to give evidence, incurs a penalty not exceeding £20 (§ 125). The commissioners may assess on the schedule, or otherwise, as may seem just. Where the party neglects or refuses to return the schedule, or to make answers to the inquiries, &c. as above, the commissioners are to make a conclusive assessment on the facts before them (§ 126). When in the final assessment an increase is made in the sum returned in the schedule, or when at any time it is discovered that an increase ought to be made on an assessment, the party may be charged in a penalty not exceeding treble the amount of increased duty, unless it be made clear that the omission did not proceed from design or gross neglect (§ 127). Any person failing to deliver a schedule when required, or to appear and verify it, forfeits £20, and treble the duty (§ 128). A person who has made a mistake may send in an amendment to his schedule, and the penalty may be saved by sending in the schedule before proceedings are commenced on the default. The commissioners may stay proceedings against a party omitting to return a schedule, if it be shown that he has acted *bonâ fide*, and explanations may be received, and time given, where there is a good excuse for imperfections in a schedule (§ 129). A person charged under Schedule D may,

on the prescribed notice, carry his appeal to the special commissioners. Persons claiming exemption on incomes under £150 are, however, not entitled to appeal to the special commissioners (§ 130).

*Disputes.*—The general commissioners are authorized to settle all disputes between landlords and tenants, or any other persons, in relation to deductions from rents, feu-duties, or other annual payments, or between existing and former occupants of lands or tenements, as to their respective proportions of duty; their decrees being enforced by the powers conferred on them for levying the assessment. Their judgments are final (§ 160).

*Surcharges.*—Inspectors and surveyors are to have access to returns and assessments, and may make surcharges where they think the amount is under-estimated (§ 161). On every surcharge allowed upon appeal for failure to deliver a declaration, or for giving an unsatisfactory one, the charge is to be treble the surcharged duty; but if a declaration is made satisfactory to the commissioners, and they think there has been reasonable cause of controversy, and that the party intended no fraud, they may allow the surcharge, remitting the whole or part of the treble duty (§ 162).

*Change of Place.*—When a person comes to reside in a new place, within the year, the inspector, &c., is to give him notice to make out and deliver, within fourteen days, a signed declaration, stating the place where he was assessed for the year, with a certificate of his assessment, or in default of that, a statement for the purpose of assessment. Neglect or falsehood renders the party liable to a penalty of £20. Where he has not been assessed in his former place, the commissioners may assess him as if he had resided in their district from the beginning (§ 177).

*Frauds.*—A person removing without returning his statement, or before assessment, for the purpose of evasion, and a person removing without settling the instalments due by him, forfeits £20, besides the duties (§ 177). A person fraudulently changing his residence, or converting or assigning away his property, or rendering property temporarily unproductive, or managing by any contrivance to escape a genuine assessment, becomes liable to be assessed in treble the duty attempted to be evaded (§ 178). Persons giving false evidence are liable to the punishment of perjury (§ 180). Persons forging or altering any of the certificates or receipts, authorized by the act, are liable to transportation for fourteen years (§ 181).

No neglect to pay the tax in respect to a house or other building, is to deprive one of the elective franchise (§ 184).

The oaths of the commissioners and other officials, which enjoin secrecy, excepting as to such divulgements as are necessary for carrying out the act, are in Schedule F (§ 189).

The matters to be contained in the several returns are enumerated in schedule G (§ 190).

## CHAPTER IV.

### EXCISE.

#### SECT. 1.—*Commissioners and Officers.*

THE crown is empowered to appoint commissioners, not exceeding thirteen in number, for the collection and management of the excise-duties of the United Kingdom; they are subject to the directions of the Treasury.[1] Previously to August 1834, there were assistant-commissioners for Scotland; but these are abolished, and their duties performed by the general board.[2] The Treasury have the appointment of a comptroller and auditor for the United Kingdom.[3] The commissioners appoint the proper collectors, officers, clerks, and others, for the collection of the duties, not exceeding the number fixed by a general order from the Treasury. They promote, suspend, and dismiss officers, and regulate their salaries, allowances, and expenses.[4]

No person, holding any office in connexion with the excise, is to deal in exciseable commodities, under penalty of forfeiture of his office, and incapacity to fill any other connected with the excise.[5] Any officer connected with the excise who asks or takes a bribe directly or indirectly, or enters into an agreement to conceal or connive at any infringement of the excise laws, or to omit performing his duty, is liable to a penalty of £500, and to be rendered incapable of serving in any government office. The same pecuniary penalty is incurred by any individual who may corrupt or attempt to corrupt an officer to such breach of duty.[6] When any such

[1] 7 & 8 Geo. IV. c. 53, §§ 1, 2.—[2] 4 & 5 Wm. IV. c. 51, § 1.—[3] 4 & 5 Vict. c. 20, § 14.—[4] 7 & 8 Geo. IV. c. 53, § 4.—[5] Ibid. § 10.—[6] Ibid. § 12.

punishable transaction takes place between a private party and an officer connected with the excise, either party giving prior information which leads to the conviction of the other is indemnified.[1] Where officers would share in penalties or forfeitures (*see below*), if they are found to have acted collusively, as above, or negligently, they lose their portion.[2]

### SECT. 2.—*Regulations as to Premises and Utensils.*

*Entry.*—Every person carrying on business subject to the laws of excise, and obliged by any excise act to make entry of his premises or utensils, does so by giving an account according to the terms of the particular excise act, to the officer of the survey, to be entered in the general entry-book; the penalty for omission is £200.[3] A person employing entered premises, &c., for other purposes than those for which they are entered, forfeits £100.[4] No second entry can be made of premises in name of any one but a partner of the person in whose name the previous entry stands; but if any person vacate his premises without withdrawing his entry, the commissioners may consider the entry withdrawn, and permit a new one to be made.[5] To be legal, the entry must be made by a person who has attained the age of twenty-one, and by the real owner of the business; but whoever makes the entry, or uses the premises, is responsible.[6] In the case of a joint-stock company or a corporation, entry must be made by the directors, or if they exceed four in number, by four of them at least. The directors so signing are personally liable for duties, penalties, &c. Entries by clerks or managers are not sufficient.[7] To make the forfeitures correspond precisely with the entries directed to be made in the acts applicable to particular commodities, it is enacted, that when any stills, vats, coppers, or other utensils, are required by any act to be entered, and are not so, then the utensils, and their contents, and the effects on the premises, are forfeited.[8] Every entered building, place, or utensil, must be distinguished by a number painted on a conspicuous part of it, and the proprietor must paint all fixed pipes, and describe their direction and purpose at the requisition of the surveyor, under penalty of £100.[9] A book called a "specimen" may be deposited in any entered prem-

[1] 7 & 8 Geo. IV. § 13.—[2] Ibid. § 104.—[3] 4 & 5 Wm. IV. §§ 5, 6.—[4] Ibid. § 7.—[5] Ibid. §§ 8, 9.—[6] 7 & 8 Geo. IV. c. 53, § 20.—[7] 4 & 5 Vict. c. 20, § 6.—[8] Ibid. § 5.—[9] 7 & 8 Geo. IV. c. 53, § 21.

ises, for recording the entries of the officers who survey the premises, and any person other than an officer of excise secreting, carrying away, destroying, or making entries in, this book, is liable to a penalty of £200.[1]

*Duties.*—Persons carrying on business subject to excise regulations delaying to pay the duties when demanded forfeit double the value of the duties.[2] The collector, on affidavit, may grant warrant for levying unpaid duties, in the same manner as penalties are levied (*see below, Sect.* 4), reporting to the commissioners, who may stay the proceedings or grant relief.[3]

Officers of excise are entitled to enter on premises used for any business subject to excise regulations, and to take account of and charge any duties they may find chargeable, at any time, by night or day; but if the entrance is to be made at any time between eleven at night and five in the morning, it must be by request, and in presence of a constable, unless a different rule be established by any excise act applicable to any particular commodity.[4] For the security of the duties it is provided that "all stills, backs, vats, coppers, cisterns, tables, presses, machines, and machinery, vessels, utensils, implements, and articles for making or manufacturing or producing any such goods or commodities," are to be under a perpetual hypothec for duties, penalties, and forfeitures, in whatever hands they may come; but that where exciseable commodities have been taken account of and duty charged, if they be *bonâ fide* sold in the usual course of trade and delivered to the purchaser, before the teste on a writ of extent, or the issuing of any process for recovery of duties, they are safe in the purchaser's hands.[5]

## SECT. 3.—*Smuggling.*

Any person connected with the manufacturing of exciseable commodities in unentered premises is liable in a penalty of £30, over and above the penalties which may be leviable on the proprietor by the act applicable to the particular manufacture; and any officer may, either at the time of discovery or afterwards, bring a person discovered in the act before a justice of peace, by whom he may be summarily amerced in the penalty, or, on failure, be imprisoned, with hard labour, for three months. On a second offence, the

[1] 7 & 8 Geo. IV. c. 53, § 23.—[2] 4 & 5 Wm. IV. c. 51, § 11.—[3] 7 & 8 Geo. IV. c. 53, § 27.—[4] Ibid. § 22.—[5] 4 & 5 Vict. c. 20, § 24.

penalty and imprisonment are doubled. The commissioners alone have the power of modifying the punishment.[1] All exciseable commodities and implements concealed with intent to defraud the revenue are forfeited, along with the vessels for containing them, and vehicles and cattle for removing them; and persons concerned forfeit treble the value, or £100, as the commissioners or the informer may decide.[2]

*Searching Premises.*—A justice of peace, on an excise officer making oath before him of suspicion of exciseable articles concealed, may grant warrant to search the premises, break down obstructions, and remove exciseable commodities, by day or night, but if between eleven at night and five in the morning, only in presence of a constable.[3]

*Assistance.*—"All justices of the peace, mayors, bailiffs, constables, and all his majesty's officers, ministers, and subjects, serving under his majesty by commission, warrant, or otherwise," are required to assist revenue officers.[4] Any constable, or other ministerial officer of the peace, refusing to assist an excise officer, forfeits £20;[5] the assistance may be continued by such ministerial officer beyond his jurisdiction.[6] Similar powers to the above are conferred on officers of the customs.[7] (*See Chap.* V. *Sect.* 6.)

*Obstructions, &c.*—Persons who obstruct officers or their assistants making seizures, or who attempt a rescue, or injure the commodities seized, forfeit £200.[8] Officers and their assistants assaulted or resisted with offensive weapons, in attempting to make seizures, may oppose force to force; and if in doing so they occasion wounds or death, they may be admitted to bail.[9] (See Index, *Murder*, *Homicide.*)

Officers of customs seizing exciseable commodities, must give notice at the next excise office, or to the supervisor, or other officer of the district, who must take an account of the goods, after which they cannot be removed without a permit.[10] Police officers seizing such commodities, must deposit them in the next excise office, unless when it is necessary to detain them for a time as productions in any criminal trial; a penalty of £20 is incurred by neglect.[11]

Goods produced for the purpose of fraudulently obtaining a drawback, are forfeited, along with treble the value, or £100, as the commissioners or the informer may choose.[12]

*Disposal of Forfeited Goods.*—Forfeited goods are publicly

[1] 7 & 8 Geo. IV. c. 53, § 33.—[2] Ibid. § 32.—[3] Ibid. § 34.—[4] Ibid. § 35.—[5] 4 & 5 Wm. IV. c. 51, § 16.—[6] 7 & 8 Geo. IV. c. 53, § 37.—[7] Ibid. § 38.—[8] Ibid. § 39.—[9] Ibid. § 40.—[10] Ibid. § 107.—[11] Ibid. § 108-111.—[12] 4 & 5 Wm. IV. c. 51, § 12.

sold to the best bidder.[1] No such goods can be sold for home consumption at a less price than the duty; and if such a sum is not offered, they must be sold for exportation, destroyed, or applied to some public use.[2] Goods condemned as being adulterated, or mixed with prohibited ingredients, must be destroyed.[3] In case of seizures of effects under £15 in value, they are to be dealt with as if they had been condemned by a judgment of the Exchequer, after the lapse of a month, if within that time no application in writing be made by the owner to the commissioners, the collector or supervisor, or the seizing officer.[4]

### SECT. 4.—*Prosecutions.*

No actions of any description can proceed for any penalty, forfeiture, or condemnation, except by order of the commissioners, or at the instance of the Lord Advocate or Solicitor General, summary proceedings for conviction upon immediate arrest excepted.[5] Actions for the recovery of penalties, and the condemnation of goods seized as forfeited, proceed on information exhibited before one justice, which may be tried before two or more justices.[6] Every information for recovery of penalty or condemnation, must be presented within four months after the offence or seizure, notice being given to the accused within one week after the exhibiting of the information. The party receives ten days' warning to attend, by summons, except in the case of prosecution for double the value of duties neglected to be paid, when twelve hours' warning is sufficient.[7]

The justices of peace, to the number of two or more, meet every three months, or oftener if there be occasion, to hear excise prosecutions.[8] No officer of excise can act as a justice; nor can any person carrying on a business subject to excise regulations act in any case relating to that class of business. Convictions contrary to either of these regulations are null.[9] A witness summoned to appear, and having his expenses tendered, is liable to forfeit £50 if he do not appear, or if he refuse to give evidence.[10] Officers of excise and informers are competent witnesses, notwithstanding their right to receive a portion of the penalty or forfeiture, on conviction.[11]

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[1] 7 & 8 Geo. IV. c. 53, § 100.—[2] Ibid. § 101.—[3] 4 & 5 Wm. IV. c. 51, § 13.—[4] 4 & 5 Vict. c. 20, § 32.—[5] 7 & 8 Geo. IV. c. 53, § 61.—[6] Ibid. § 65.—[7] 4 & 5 Wm. IV. c. 51, § 19.—[8] 7 & 8 Geo. IV. c. 53, § 67.—[9] Ibid. § 68.—[10] Ibid. § 74.—[11] Ibid. § 75.

In all prosecutions, whether at the instance of the excise, or against any officer of excise, the proof that goods have paid duty, or that they are not of a kind for which duty is exigible, lies on the proprietor or person claiming them.[1]

*Mitigation.*—The justices may mitigate penalties down to one fourth part at their discretion;[2] but this does not extend to prosecutions for double the value of duties neglected to be paid.[3] It is to be observed that the separate statutes applicable to the different exciseable commodities, impose their respective penalties; and where, by any such act, a penalty is imposed, and, in default of immediate payment, imprisonment for a limited period, the justices cannot mitigate except where they are specially empowered to do so by the terms of the act.[4] The commissioners of excise may mitigate or entirely remit penalties.[5]

*Appeal.*—An appeal lies from the decisions of justices as above, to the next quarter sessions. A week's notice must be given to the opposite party and the justices appealed against; any penalty incurred, or goods forfeited, being in the mean time deposited with the collector or supervisor within three days after the judgment.[6] If twenty days do not elapse before the immediately following quarter sessions, the appeal must be deferred to the next following sessions.[7] If the justices at quarter sessions make any new judgment, they have the same power of mitigation with the judges appealed from.[8]

*Execution.*—Where any judgment is for the condemnation of property, it is made effectual by a warrant for sale; and where it is for a penalty, it authorizes it to be levied on the goods of the party by sale, not less than four or more than eight days from the date of the warrant.[9] On a return by the officer that sufficient effects have not been found, a warrant will be granted to imprison the party until he makes satisfaction.[10]

Where no claimant appears for effects seized, notice must be exhibited on the outside of the excise office on the next market-day after the expiration of six days from the day of seizure, and on any subsequent market-day, specifying the day (which must be after the termination of eight days from the day of notice) and the place where the justices shall proceed to adjudge the matter, and if no one comes forward,

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[1] 7 & 8 Geo. IV. c. 53, § 76.—[2] Ibid. § 78.—[3] 4 & 5 Wm. IV. c. 51, § 20.—[4] Ibid.—[5] 7 & 8 Geo. IV. c. 53, § 78.—[6] Ibid. §§ 82, 83.—[7] 4 & 5 Wm. IV. c. 51, § 23.—[8] 7 & 8 Geo. IV. c. 53, § 84.—[9] Ibid. § 86-89.—[10] Ibid. § 90.

the justices may decide the case in absence.[1] Where cattle or goods of a perishable nature are seized, they may be redelivered to the owner on his giving security; and if the owner do not appear and offer security, any such property may, after the lapse of fourteen days, be sold by auction, without being condemned, the owner having the choice of receiving the proceeds, or the appraised value, if the final decision is in his favour, and a farther sum of compensation for the loss sustained by the seizure, at the discretion of the commissioners.[2]

The Lord Advocate or Solicitor General may stop prosecutions, and the commissioners may forbear from prosecuting, or restore seizures, or compromise prosecutions.[3] The Treasury may restore seizures before or after condemnation, and remit penalties before or after judgment.[4] The commissioners may allow a sum not exceeding eightpence per day to excise prisoners.[5]

*Exchequer.*—All questions as to arrears of duty, penalties, forfeitures, seizures, &c. belong exclusively to the jurisdiction of the Court of Exchequer,* with the exception of the questions which, as above, are decided by justices of the peace. All prosecutions in the Court of Exchequer must be commenced within three years after the cause of action.[6] In cases which the justices are empowered to decide, no defendant can bring the proceedings before any superior court by advocation, reduction, or any other form; but the crown may bring any process into the Court of Exchequer by *certiorari.*[7]

### SECT. 5.—*Actions against Officers, &c.*

When an action is to be brought against any officer or other person acting under the excise laws, a month's notice in writing must be given, and it must be pursued within three months after the time when the cause of action arose.[8] If the pursuer is unsuccessful, treble costs are awarded against him.[9] Any officer or other person who receives notice of action, may tender amends within a month, and if they be rejected, they may be pleaded in bar of action, and on being deemed sufficient, the verdict will be found for the defender, with treble costs as above.[10]

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[1] 7 & 8 Geo. IV. c. 53, § 93.—[2] Ibid. § 94.—[3] Ibid. §§ 97, 98.—[4] Ibid. § 99.—[5] Ibid. § 113.—* See above, p. 15.—[6] 7 & 8 Geo. IV. c. 53, §§ 57, 58.—[7] Ibid. § 79.—[8] Ibid. §§ 114, 115.—[9] Ibid. § 115.—[10] Ibid. § 116.

In the case of a seizure, where decision is given for the claimant, the person who made the seizure is not liable to prosecution, if the judge report that there was a probable cause for seizure; and in the case of a verdict against an officer for any such seizure, if the judge give a similar report, the prosecutor becomes entitled to only twopence of damages, and to no costs.[1]

In the case of any overcharge or overpayment, complaint may be made within a year,—and in the case of a return of duty being authorized by any act of parliament, complaint may be made within the time limited by the act,—to any two justices, who are authorized to give redress, provided the complainant have entered the particulars of his complaint, and his name and place of business, in a book kept for the purpose in the office of the solicitor of excise.[2]

### SECT. 6.—*Permits.*

The acts applicable to the various descriptions of exciseable commodities generally prohibit their conveyance from place to place in certain given quantities, unless they be accompanied by a permit. No permit can be given by an officer of excise, unless there be presented to him a "request note," signed by the person who desires the permit, or his clerk or servant, containing the date, the names of the places from and to which the commodities are to be conveyed, and the names and addresses of the persons from whom and to whom they are to be sent.[3]

Where a person, not licensed under the excise laws, wishes to remove exciseable commodities from place to place, he may obtain a permit, on showing, to the satisfaction of the collector or supervisor, that all duties on the articles have, to the best of his knowledge, been paid, and (where the articles are to be transferred to another person) making a declaration, that the goods have not been sold to that person; a request note is required, as above.[4] Each permit limits the time for which it is available; and if not used, must, within that time, be returned.[5]

If a corresponding decrease of stock do not appear when an officer takes account after the granting of a permit which is not returned, the individual forfeits an equivalent quantity of the commodity; and whatever commodities are delayed

[1] 7 & 8 Geo. IV. c. 53, § 119.—[2] 4 & 5 Wm. IV. c. 51, § 27.—[3] 2 Wm. IV. c. 16, §§ 5, 6.—[4] Ibid. § 16.—[5] Ibid. § 8.

in their removal beyond the fixed period, may be seized.[1] Goods so seized may be restored on the delay being shown to the court to have been occasioned by unavoidable accident.[2] Exciseable commodities removed without permit may be seized, and every party concerned in the removal is liable in a penalty of £200.[3] An agreement or obligation for the price of exciseable commodities delivered without permit will not be given effect to in a court of law, and if paid, may be recovered by action at any time within a year.[4] In pursuance of this provision, the Court would not interpose to enforce delivery of a conveyance of heritable property, in fulfilment of a bargain by which the disponee was to receive it as payment of debts incurred for exciseable commodities not accompanied by permits.[5] No permit is now required for the conveyance of wine, and that commodity has been removed from the management of the excise.[6]

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## CHAPTER V.

### CUSTOMS.

### SECT. 1.—*General View of Customs' Laws.*

THE laws relating to the customs have been three times consolidated into a continuous series of statutes. The last consolidation took place in 1845, when the whole laws applicable to this part of the revenue, and to analogous matters regarding the registration of vessels and the warehousing of goods, were resolved into the following chapters of the 8 & 9 Vict., viz. c. 85, "An Act for the Management of the Customs;" c. 86, "An Act for the General Regulation of the Customs;" c. 87, "An Act for the Prevention of Smuggling;" c. 88, "An Act for the Encouragement of British Shipping and Navigation;" c. 89, "An Act for the Registering of British Vessels;" c. 90, "An Act for granting Duties of Customs;" c. 91, "An Act for the Warehousing of Goods;" c. 92, "An Act to grant certain Bounties and Allowances of Customs." These have been subsequently

[1] 4 & 5 Wm. IV. c. 51, § 8.—[2] 2 Wm. IV. c. 16, § 9.—[3] Ibid. § 11.—[4] Ibid. § 12.—[5] Russell *v.* Liston's Trustees, 12th June 1844.—[6] 5 & 6 Wm. IV. c. 39.

followed by some acts of 9 & 10 Vict., viz. c. 22, "An Act to Amend the Laws relating to the Importation of Corn," a considerable portion of the provisions of which are only temporary, and are in the mean time suspended; c. 23, "An Act to alter certain Duties of Customs;" c. 63, "An Act for granting certain Duties on Sugar and Molasses;" and c. 102, "An Act to amend the Laws relating to the Customs."

With regard to the regulations of the customs, they are so minute and complicated, that they hardly admit of abridgment, and a detailed account of them will not be expected in a work of the present description. It is considered unnecessary, therefore, to state the regulations affecting the conduct of officials, or those which are likely only to apply to persons whose avocations, as exporting or importing merchants, or as shipowners, must make the minutiæ of the customs laws a matter of so much practical importance to them, that they are not likely to trust to a commentary or abridgment any farther than as it leads them to the statutes themselves, by the terms of which they must direct their proceedings.

### SECT. 2.—*Management, Officers, &c.*

The management of the customs is in the hands of a board of commissioners, not exceeding thirteen in number, appointed under the great seal, and holding office during the pleasure of the crown.[1] They are under the control of, and must obey the instructions of, the Treasury.[2] The commissioners of the Treasury, or the commissioners of the customs, under their authority, have the appointment of all custom-house officers.[3]

Officers of the customs taking fees or gratuities for their own use are dismissed; and persons offering a fee or bribe are individually liable to a penalty of £100.[4] The official hours of attendance are regulated by treasury warrant.[5] Officers of the customs are exempt from serving in corporate offices, or as jurors, or in the militia.[6]

The Treasury are empowered to appoint legal quays, and to discontinue those already so established.[7]

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[1] 8 & 9 Vict. c. 85, § 2.—[2] Ibid. § 3.—[3] Ibid. § 6.—[4] Ibid. § 8.—[5] Ibid. § 11.—[6] Ibid. § 12.—[7] 9 & 10 Vict. c. 102, § 14.

## SECT. 3.—*Foreign Trade.*

The following matters as to the foreign trade are provided for by 8 & 9 Vict. c. 86:—

The production of the Manifest; the Report of the build and port of the ship, of the places of shipment, and of the nature of the cargo; the inspection of the vessel on arrival by the officers of the customs; Entry inwards by Bill of entry, Bill of sight, or Bill of store; regulations for the abatement of duties, when goods are damaged during the voyage; the times and places for landing goods; clearance and entry outwards; delivery and filing of Cockets; delivery of Victualling bill; exportation of Debenture goods; prohibitions and restrictions on exports and imports, and the like.

Vessels sailing with passengers, and having no other cargo on board but their necessary personal luggage, are considered as sailing in ballast; when there are both passengers and goods on board, the master passes an entry, and receives a cocket in his name, stating the particulars of the packages, and the names of the passengers.[1]

## SECT. 4.—*Coasting Trade.*

The expression, "coastwise," is applied, by the laws of the customs, to all trade between one part of the united kingdom (including the Isle of Man) and another.[2] No vessels are permitted to load for the coasting trade, until they are relieved of any cargo brought from beyond seas.[3] Goods must not be laden or unladen, in the course of the coasting trade, without notice to the custom-house authorities, under pain of forfeiture of the goods.[4] The notice must contain the name and tonnage of the ship, the name of the master, the name of the port to which she is bound, or from which she has arrived, and the wharf at which her lading is to be taken in or discharged. If the notice be for lading, it must specify the last voyage made by the vessel. Notice of unlading must be delivered within twenty-four hours after arrival, under penalty of £20.[5]

The master of each coasting vessel must keep a Cargo-book, with the name of the vessel, of the master, and of the port to which she belongs. Each voyage must be entered

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[1] 8 & 9 Vict. c. 86, § 91.—[2] Ibid. § 113.—[3] Ibid. § 115.—[4] Ibid. § 116.—[5] Ibid. § 117.

in this book, with a statement of all goods laden and unladen.[1]

*Transires.*—General Transires may be granted by the collectors and comptrollers of the customs, for loading and clearance, when the ship trades regularly from one place to another on the Forth, or between certain named places on other parts of the coast if nothing is carried but manure, lime, chalk, stone, gravel, sand, or earth.[2] The commissioners may grant transires for any places, and any descriptions of goods, to continue during their pleasure,—these must be written in the cargo-book.[3]

In the coasting trade, there are the same restrictions as to the time of shipping and unshipping, as in the foreign trade, viz. From the 1st September to the last day of March, it is limited to the period between sunrise and sunset; and during the remainder of the year, to that between seven o'clock of the morning and four o'clock of the afternoon. There must be no shipping or unshipping on Sundays or holidays, and the places appointed and approved of by the proper officers of the customs must be used.[4]

### SECT. 5.—*Warehousing System.*

Warehouses are either of Special security, or of Ordinary security. The former are for the purpose of custody for exportation of such goods as are not permitted to be imported for home use; the latter for the custody of imported goods until the duty is paid. The commissioners of the Treasury have the power of appointing warehousing ports, and the commissioners of customs, subject to their direction, may appoint warehouses of special security or of ordinary security in such ports, and specify the description of goods that may be warehoused in them, and the manner of stowing them.[5] Besides those so approved of, warehouses connected with wharfs (being legal quays), and along with such wharfs enclosed by walls, in terms of any act of parliament, are warehouses of special security.[6]

*Bond.*—In the warehouses of ordinary security, a bond is taken that the duties shall be paid on the goods warehoused, or that they shall be exported. This is accomplished by either taking a general bond from the warehousekeeper, with two securities, for the duties of all goods which may come

[1] 8 & 9 Vict. c. 86, § 120.—[2] Ibid. § 123.—[3] Ibid. § 123.—[4] Ibid. § 125.—[5] 8 & 9 Vict. c. 91, § 2.—[6] Ibid. § 3.

into his custody, or by taking separate bonds, each with one security, from the several importers.[1] When goods are sold under the latter circumstances, a new bond may be taken from the purchaser, and the previous one cancelled.[2]

All warehoused goods require to be cleared off within three years, unless farther time be given by the Treasury; if they remain beyond the period so allowed they may be sold, the proceeds being applied to the payment of warehouse rent and other charges. They must be cleared out by the person who may so become purchaser within three months.[3] Provision is made, under effective restrictions, for enabling proprietors to unpack, repack, sort, clean, and provide for the safety of their warehoused goods,[4] to indemnify them against the fraud or carelessness of the officers of the customs, to make allowances for waste, and to give relief by remission of duties, when goods are destroyed by unavoidable accident.[5]

### SECT. 6.—*Smuggling.*

*Vessels, &c.*—When it is discovered that spirits in casks of less content than twenty gallons, " or any tea exceeding 6 lbs. weight on the whole, or any tobacco or snuff not being in a cask or package containing 300 lbs. weight of tobacco or snuff at least," or tackle for facilitating smuggling, has been,—in a boat, or vessel not square rigged, belonging in whole or in part to British subjects, or having half the persons on board British subjects, within 100 leagues of the British coast,—or in any foreign vessel not square rigged, or foreign boat having one or more British subjects on board, within eight leagues of the coast,—or in *any* foreign vessel or boat within one league of the coast,—an attempt to smuggle is presumed, and the articles along with the vessel are forfeited.[6] Vessels coming into harbours with the above commodities in quantities below the fixed amounts, are forfeited; but may be restored if the commissioners of customs are satisfied that the owner or master was not privy to the circumstance.[7] There are exceptions in favour of the customary quantities in which certain descriptions of tobacco and spirits are imported, and a general exemption of the importation of tea in vessels of 60 tons.[8]

Vessels in whole or in part belonging to British subjects,

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[1] 8 & 9 Vict. c. 91, § 8.—[2] Ibid. § 33.—[3] Ibid. § 16.—[4] Ibid. § 35-41.—[5] Ibid. § 45-47.—[6] 8 & 9 Vict. c. 87, § 2.—[7] Ibid. § 3.—[8] Ibid. § 4. 4 & 5 Wm. IV. c. 89, § 7-9.

having secret places for concealing contraband goods, are forfeited; and when goods prohibited, or liable to any duty or restriction, are found concealed on board any vessel, they are forfeited, along with all goods packed up with them.[1] Any person on board a vessel liable to forfeiture for any of the above causes, forfeits £100, unless he prove that he was merely a passenger, and had no interest in the vessel or cargo.[2] When a vessel having a cargo on board is found light or in ballast, and the master fails to give a satisfactory account of the disposal of the cargo, she is forfeited.[3]

Persons making signals to smuggling vessels at sea, are liable to a penalty of £100, or in default, to imprisonment with hard labour not exceeding a year, and may be seized by any witness and brought before the next justice of peace for commitment in order to trial.[4] Every boat attached to a vessel must bear the vessel's name and port, and the master's name, and other boats must have the name of the owner and of the place, in both cases, painted in white or yellow on a black ground, in letters two inches long, on the stern, under penalty of forfeiture.[5] Fishing and pilot boats must be tarred black, and must not be made to resemble boats in the preventive service under the like penalty.[6]

Vessels containing a certain amount of arms, or having on board more than the number of mariners proportioned by the act to their tonnage, require to be licensed by the commissioners of the customs.[7] Licenses are not required for boats solely engaged in fishing on the coasts of Scotland, nor for life-boats, tow-boats, and boats used solely in rivers or inland navigation.[8]

*Individuals.*—Persons in any way accessory to the importation of goods without payment of duties, or of prohibited goods, or clandestinely removing goods from the bonded warehouses, forfeit treble the value or £100 at the election of the commissioners, along with the goods themselves, and all cattle, carriages, &c. used in their removal.[9] Persons offering goods for sale, under pretence of their being prohibited or uncustomed, forfeit £100, or treble the value.[10] Any person accessory to smuggling tea or foreign manufactured silk of the value of £20, is liable to a penalty of treble the value. Such a person may be detained by any officer, and on being brought before a justice of peace, he may be released

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[1] 8 & 9 Vict. c. 87, § 15.—[2] Ibid. § 53.—[3] Ibid. § 8.—[4] Ibid. § 60.—[5] Ibid. §§ 12, 13.—[6] Ibid. § 14.—[7] Ibid. § 16-22.—[8] Ibid. § 23.—[9] Ibid. §§ 28, 46.—[10] Ibid. § 49.

on giving security to the amount of the penalty to appear for trial.[1] Persons detected in smuggling spirits not exceeding in amount a gallon, or tobacco not exceeding 6 lbs., may be summarily convicted by a single magistrate and subjected to a penalty not exceeding £5, and in default to imprisonment not exceeding a month.[2]

*Search.*—Officers of the customs, and officers in the army and navy employed in the preventive service, may go on board vessels, and, on presenting their commission (if it be required), search the vessel, and individuals on board;[3] but an individual, before being searched, may require the officer to bring him before a justice, or a superior officer of the customs, at whose discretion the search is to proceed or be dropped.[4] Any officer offending, in not conveying a person before a justice or superior officer when required, or making a search "not having reasonable grounds" of suspicion, forfeits £10.[5] Any person on board a vessel where he has foreign goods concealed, denying their possession to an officer, forfeits for that offence treble the value.[6] An officer of the customs having a writ of assistance from the Exchequer, may, attended by a constable or other public officer, search buildings for smuggled goods, and may, in case of resistance, break open doors and repositories.[7]

*Seizures.*—Officers of the customs are vested with the powers conferred by the excise acts on excise officers, for making arrests and seizures (*see Chap.* IV. *Sect.* 3.), and excise officers possess the same powers which are expressly conferred on custom-house officers. The right of officers of the customs to seize exciseable commodities, appears however only to extend to British spirits.[8] The regulations as to conveying seized goods to warehouses, and as to seizures by police-officers, are similar to those of the excise acts.[9]

*Assemblages and Violence.*—Persons assembled to the number of three or more, for the purpose of smuggling spirits, or tobacco, or tea, or silk, worth more than £20; or who have employed others so to assemble, and persons interrupting officers in the performance of their duty, or attempting to rescue goods seized, or to prevent seizures, by destroying the goods or otherwise, are liable to be imprisoned with hard labour; for the first offence, for not less than six or more than nine months;

[1] 8 & 9 Vict. c. 87, § 52.—[2] Ibid. § 57.—[3] Ibid. § 36.—[4] Ibid. § 37.—[5] Ibid. § 38.—[6] Ibid. § 39.—[7] Ibid. § 40.—[8] 7 & 8 Geo. IV. c. 53, § 38.—[9] 8 & 9 Vict. c. 87, §§ 42, 43.

for the second, for not less than nine or more than twelve months; and for subsequent offences, for twelve months.[1]

*Prosecutions.*—Penalties may be pursued for before the Court of Exchequer (*see Part* I. *Chap.* IV. *and this Part, Chap.* IV. *Sect.* 4.) by the Lord Advocate, or before two justices by information.[2] In the former case action must be brought within three years; in the latter within six months.[3] A single justice of peace may order a person brought before him to be detained, or, on information, may summon a party for trial before two justices.[4] In default of payment of penalties, parties are committed to prison till payment, the imprisonment, where the penalty does not exceed £100, terminating at the end of six calendar months.[5] The justices may mitigate penalties, but only in the case of a first offence, and so that the award shall not be less than a fourth of the statutory penalty.[6] Actions against officers must be brought within six months after the cause of action.[7] The rules as to such actions, and as to the staying of prosecutions for penalties, and mitigating penalties, &c., are similar to those of the excise acts (*see Chap.* IV. *Sects.* 4 & 5). Offences involving violence will be discussed in the Chapter on Crimes.

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## CHAPTER VI.

### Stamps.

The restrictive operation of the stamp-laws belongs to the law of Private Rights and Obligation. The principal miscellaneous regulations affecting the public are as follow:—

### Sect. 1.—*Management and Distribution.*

Since the year 1834, the administration of the stamp-duties has been under the charge of the Commissioners for Stamps and Taxes, appointed under the great seal.[8] The commissioners appoint distributors of stamps, and they may grant licenses free of expense to any persons who, in their

[1] 8 & 9 Vict. c. 87, § 56.—[2] Ibid. § 82-84.—[3] Ibid. § 134.—[4] Ibid. §§ 83, 84.—[5] Ibid. §§ 84, 87.—[6] Ibid. § 86.—[7] Ibid. § 121.—[8] 4 & 5 Wm. IV. c. 60, § 8.

discretion, they may deem fit to deal in stamps, each dealer finding security in £100, that he will vend no stamps but such as he receives from the head office, or the local distributor.[1] Any person selling stamps without license, or hawking stamps (that is, selling them apart from a fixed place of business), whether he have a license or not, forfeits £20.[2] Penalties do not extend to persons employed in engrossing deeds charging for the stamps.[3] The paper for receipt-stamps being granted gratis by the commissioners, venders making any charge for it (except where such stamps are bound up in a book, or there is but one stamp on a sheet), are liable to a penalty of £10.[4]

Postage stamps are under the management of the commissioners, but are to be kept in a separate account to be transferred to the post-office revenue.[5] The stamp-duty on newspapers is considered along with the statutory regulations relating to the press.*

### SECT. 2.—*Spoiled Stamps.*

The commissioners are empowered to give equivalents for spoiled stamps, under such regulations as they may issue from time to time.[6] The circumstances in which stamps are held as spoiled are these: any unexecuted instrument rendered unfit for its purpose, for the stamp of which the person who has charge of the drawing has not been paid;[7] any executed instrument found to be void in law from the beginning, or which, from mistake, is unfit for its intended purpose, or which is incomplete from the want of some material signature; and any instrument the purpose of which is frustrated by the refusal of any person to act under it, or by the non-acceptance of the office conferred by it, or which becomes void for want of registration, or becomes useless by reason of the object being effected by means of some other stamped instrument.[8]

The application must be made within six months of the date, except the deed becomes void from non-registration, in which case it must be made within six months of the time when it so became void.[9] It would appear that in the cases of the deed being unexecuted, and being invalid through mistake, if the party lives beyond ten miles from Edinburgh,

[1] 3 & 4 Wm. IV. c. 97, § 1.—[2] Ibid. § 3.—[3] Ibid. § 4.—[4] 9 Geo. IV. c. 27, §§ 4, 5.—[5] 3 & 4 Vict. c. 96, § 20.—* See Part VI. Chap. II. Sect. 2. —[6] 5 Geo. III. c. 46, § 39. 44 Geo. III. c. 98, § 17.—[7] 5 Geo. III. c. 46, § 39.—[8] 53 Geo. III. c. 108, § 11.—[9] Ibid.

the period is extended to a year.[1] The above provisions do not refer to stamps for policies of insurance, the minute separate regulations as to which will be found in the act, 54th Geo. III. c. 133. Bill-stamps are allowed as spoiled when signed only by the drawer, and neither put in circulation nor tendered for acceptance.[2] The commissioners may require affidavits on Oath (or, by 5th & 6th Wm. IV. c. 62, § 6, if so directed by the treasury, on Declaration) of all necessary facts and circumstances.[3] Spoiled stamps must be delivered up to the commissioners to be cancelled.[4] In the general case, the value is given in other stamps; but the commissioners were in 1833 empowered to give money in their discretion, and to return the money for any unused stamp within three calendar months from the time when it is purchased.[5]

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## CHAPTER VII.

### Poor Law.

#### Sect. 1.—*Board of Supervision.*

By the new Poor Law a board of supervision is appointed, of which one member, who receives a salary, must give regular attendance for the purpose of conducting the business of the board. They hold two stated general meetings annually—one on the first Wednesday of February, and the other on the first Wednesday of August. The board may hold other meetings from time to time, on due notice, and may depute their power to committees: and may, under the sanction of the Secretary of State, make rules for the transaction of their own business.[6]

It is the duty of the board "to inquire into the management of the poor in every parish or burgh in Scotland." To this end they may require parties to answer questions, or make returns on matters connected with the relief of the poor. By a summons signed by one member or the secretary,

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[1] 53 Geo. III. c. 108, § 16. 5 Geo. III. c. 46, § 39. 50 Geo. III. c. 35, § 14.—[2] 53 Geo. III. c. 108, § 14.—[3] Ibid. § 17.—[4] Ibid. § 11.—[5] 3 & 4 Wm. IV. c. 97, § 19.—[6] 8 & 9 Vict. c. 83, § 3-7.

they may require the attendance of parties, and may examine them on oath or solemn declaration; and they may require the production, under like sanction, of books and documents. They may authorize one of their number to conduct any special inquiry, deputing to him the above powers, and to report to the board, limiting the period for which he is authorized so to act. They may, with assent of the Secretary of State or the Lord Advocate, appoint a commissioner not from their own number, to conduct an inquiry. Their choice is limited to the faculty of advocates, duly qualified medical practitioners, and architects or surveyors. The authority must not last beyond forty days.[1] The pains of perjury apply to persons who give false evidence on any of these inquiries, and obedience to the statutory orders of the board or those authorized by them, in the giving evidence, the production of documents, &c., is sanctioned by the person convicted of disobedience being liable for the first offence to pay a penalty not more than £5, and for any subsequent offence a penalty not less than £5 and not more than £20.[2] The board must keep minutes of their proceedings. They must make an annual report to the Home Office to be laid before parliament, containing, "in particular, a full statement as to the condition and management of the poor throughout Scotland, and the funds raised for their relief."[3] Any member of the board, or the secretary, or a clerk or other officer of the board authorized under the hand of two members, may attend a meeting of a parochial board, and take part in the discussion, but without a vote.[4]

*Combinations.*—It is by appointment of the board, on consideration of the utility of the project, that parochial boards may meet to consider a project for a combination. A resolution and declaration of the board is necessary to the establishment of a combination. The board have power, on the application of the board of any parish adjoining any combination, to declare that it shall form part of the combination.[5]

In assessed burghs or combinations, they from time to time fix the number of persons to be members of the parochial board, keeping in view the "population and other circumstances," and not exceeding the statutory limits of thirty.[6] They have also to fix a day for the election and nomination of the members,[7] and to make regulations for collecting and returning the votes.[8] The board have autho-

[1] 8 & 9 Vict. c. 83, § 9-11.—[2] Ibid. § 13.—[3] Ibid. § 8.—[4] Ibid. § 15.—[5] Ibid. § 16.—[6] Ibid. § 17.—[7] Ibid. § 18.—[8] Ibid. § 19.

rity to divide burghal parishes or combinations into wards, determining the proportion of the board that is to represent each, "having due regard to the population and the value of property therein."[1] In the rural parishes where there is assessment, they fix from time to time the number of the elected members of the parochial board and name the day of election.[2] No parochial board can act on a plan of assessment, until it has been reported to the board of supervision and has received their approval.[3]

The board may suspend or dismiss inspectors of the poor attached to local boards, by minute or order, on the ground of neglect or refusal to perform duties, or of incapacity;[4] and they may suspend or remove medical officers of poor houses, for incompetency or neglect.[5] They have authority where parochial boards fail duly to remove insane persons to lunatic asylums, to take measures for the removal.[6] They receive reports of resolutions by parochial boards relative to the erection or alteration of poor-houses, and their sanction is necessary before any such resolution can be put in force:[7] and in the case of a poor-house being supported, according to agreement, by two or more parishes jointly, the consent of the board of supervision is necessary to the withdrawing of any parish.[8] The rules for the management of poor-houses, and the rates at which extra-parochial poor are boarded in them, require the sanction of the board.[9]

*Relief.*—The board has power, on the application of any pauper dissatisfied with the amount of relief awarded to him, to investigate the grounds of complaint, and if they appear well founded, so to declare by a minute which enables the party to pursue on the poor's roll.[10] Without the approval of the board, no court can entertain an action relative to the amount of relief.[11]

In the case of parochial boards neglecting or refusing to perform their functions, or of any other impediment arising, the board of supervision may apply to the Court of Session to enforce the law.[12]

### SECT. 2.—*Parochial Boards.*

The local administration of the Poor Law is committed to parochial boards. So long as there is no assessment, the

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[1] 8 & 9 Vict. c. 83, § 20.—[2] Ibid. § 23.—[3] Ibid. § 34.—[4] Ibid. § 56.—[5] Ibid. § 66.—[6] Ibid. § 59.—[7] Ibid. § 60.—[8] Ibid. § 61.—[9] Ibid. §§ 64, 65.—[10] Ibid. § 74.—[11] Ibid. § 75.—[12] Ibid. § 87.

local board in each parish is to consist of the old administrators of the Poor Law,[1] that is to say, the kirk-sessions in country parishes, and the magistrates or managers selected by them in burgh parishes, according as the practice may have been. Where there is a combination of parishes without an assessment, the administration is to be either by the old bodies combined, or by committees of their number.[2]

*Burghal.*—When an assessment is adopted in any burghal parish or combination of parishes, the persons assessed are to elect such number of managers, not more than thirty, as the board of supervision may fix. This board is to adjust the qualification for belonging to the parochial board, according to local circumstances, being excluded from raising it to a higher annual pecuniary value than £50. There are to be other members independent of qualification—four to be named by the magistrates of the burgh, and a number, not exceeding four of their own number, deputed by the kirk-session, or if there be more than one parish, by the several kirk-sessions assembled together.[3] When an assessment is resolved on, the board of supervision fixes the days of election, and makes regulations for the collecting and returning of the votes.[4] With regard to the qualifications for votes on heritable property, each owner under £20 of annual value has one; the possessor of such property between £20 and £40 has two; the possessor of property between £40 and £60, three; where the property exceeds the last amount and is less than £100, there are four votes; when the amount exceeds this sum and is under £500, there are five votes; and when it is above £500, there are six. Each person rated on occupancy, or on means and subsistence, is to have the same number of votes as would be held according to the above gradation by a person rated on heritable property to the same extent. A person assessed both on means and subsistence and on ownership, may vote in both capacities, but is not to have more than six votes in all. No person exempted from assessment on the ground of poverty, or who is in arrears, has a vote.[5] When a burghal parish or combination is divided by the board of supervision into wards, no person is to vote in any ward unless he reside or have the property qualifications on which he votes within it; and the division is not to give an elector more votes than he would have had if the parish were undivided.[6] The collector's books are the

[1] 8 & 9 Vict. c. 83, §§ 17, 22.—[2] Ibid. § 17.—[3] Ibid.—[4] Ibid. §§ 18, 19.—[5] Ibid. § 19.—[6] Ibid. § 20.

test of the annual value of heritable property for the above purposes.[1]

*Rural.*—In parishes not burghal, the board is to consist, 1*st*, of the owners of heritable property of the yearly value of £20 and upwards; 2*d*, of the magistrates of any royal burgh, if there be any within the parish; 3*d*, of the kirk-session; 4*th*, of certain elected members. No person is to have an official seat unless he be assessed for the poor. No more than six are to sit as members of a kirk-session, and any session containing a greater number, is to depute six to the board. Heritors may act through their authorized mandataries.[2]

The persons who have not seats by property or office as above, and who are liable to assessment, are to choose the elected members from their own body annually.[3] The votes are thus distributed: owners of heritable property under £20 have each one vote; tenants and occupants, and persons assessed on means and subsistence, if assessed at less than the lowest amount which gives a seat by property qualification, are also to have one vote; then the number of votes rises by the same gradation as that which has been stated with regard to burghal voters, the being assessed to the same extent with an heritable proprietor giving the voter as many votes as that proprietor would have according to the burghal ratio. The collector's books are conclusive evidences of the number of votes an elector is entitled to. A person, assessed on more than one criterion, may vote on both, with this restriction, that no person can have more than six votes, and that no person who has a seat by property or office can vote. Persons exempted on the ground of poverty and persons in arrears have no vote. At elections votes are taken by an inspector, or a person appointed by the parochial board.[4]

There are some rules applicable both to burghal and rural qualifications to vote or act. Members of corporations or joint stock companies, and joint occupants, are not entitled to vote as such at elections on ownership or occupancy; but an officer or one member appointed by the company or joint owners, whose name is entered as so authorized in the parochial books, is to vote.[5] Husbands of owners may vote or act in right of their wives.[6]

*Disputes as to Elections* are decided summarily and finally

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[1] 8 & 9 Vict. c. 83, § 21.—[2] Ibid. § 22.—[3] Ibid. § 23.—[4] Ibid. § 24.—[5] Ibid. § 25.—[6] Ibid. § 26.

by the Sheriff without record or written pleadings. No person can question the validity of an election unless he serve a notice on the returning officer at the time of making the return or within forty-eight hours afterwards.[1] When an election is disputed, the person returned is entitled validly to sit and act until the validity of the election is determined.[2] If the officer wilfully make a false return he is liable to a penalty of £20.[3]

*Meetings.*—Every board must hold at least two meetings every year on the first Tuesdays of February and August respectively, or as soon thereafter as may be, or at such other stated times as the board of supervision may approve of. The business at these meetings is the adjustment of the roll of paupers and their allowances. The board may fix other days for other general meetings. Special meetings may be held upon summons being issued by the inspector or the chairman. Committees may be appointed with the full powers of the board.[4] A chairman is elected annually, and in case of his absence at any meeting, a temporary chairman is to be elected. The chairman has both an original and a casting vote.[5] When any parochial board refuses or neglects to perform the injunctions of the act, the board of supervision may apply to the Court of Session, or in vacation to the Lord Ordinary on the bills, to compel performance.[6]

The various functions of the parochial board will be found set forth under the heads of assessment, relief, &c.

*Combinations.*—Two or more parishes may be combined "for all purposes connected with the management of the poor, and the administration of the laws relating to their relief, and for the purpose of raising the necessary funds for the relief and support of the poor, and also for the purposes of settlement." A combination is treated as one parish in all these matters.[7] The method in which the union of parishes into a combination is sanctioned, is considered above in connection with the board of supervision.

## SECT. 3.—*Assessment.*

Any parochial board assembled on notice by letter or advertisement, may resolve by a majority to collect the funds for the relief of the poor by Assessment. The resolution is reported to the board of supervision, and the parochial board

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[1] 8 & 9 Vict. c. 83, § 27.—[2] Ibid. § 28.—[3] Ibid. § 29. [4] Ibid. § 30.—[5] Ibid. § 31.—[6] Ibid. § 87.—[7] Ibid. § 16.

cannot depart from it without the consent and authority of that board.[1] They may resolve on the manner of the assessment either at that meeting or at an adjournment, or at a meeting called for the purpose. In thus establishing an assessment for the first time, any one of the following three modes may be adopted:—1*st*, Taking the annual value of lands and tenements as the general principle, a sum may be imposed, one half being levied in respect of ownership, the other in respect of tenancy or occupancy. 2*d*, One half of the assessment may be laid on owners of lands and tenements according to the annual value of such property, and the other on the inhabitants according to their "means and subsistence," not including real property in the United Kingdom. No person is to be assessed on means and subsistence whose whole income is less than £30 a-year. 3*d*, The assessment may be made by an equal per-centage on the annual value of real property, and on the estimated means and subsistence of individuals from other sources.[2] When one half is imposed on owners and the other on occupants, the board may direct property to be distinguished into classes according to its purposes, and to adapt the rate to each class respectively; but the classification appears to apply only to the part levied on occupancy, that levied on ownership being according to a fixed ratio.[3] The parochial board must have the approval of the board of supervision to its proposed method of assessment before it is held as fixed.[4]

The act gives power, in places where there was any local act or any established usage of assessment, to the parochial board with the approval of the board of Supervision, to continue such old established assessment.[5]

*The old system of assessment* is thus still in some measure part of the law, and demands notice. In country parishes one-half of the assessment falls on the heritors, whether resident or not, in the proportion of their valued rents, or, if it is considered more equitable, of their real rents; the other falls on the householders.[6] The feu-duties of superiors have been held not liable to be assessed as heritage.[7] Ministers' manses and glebes now made specially liable by the statute used to be exempt, and it was a general understanding that all places of worship, charitable institutions, and public works which are not a source of profit to private individuals, should

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[1] 8 & 9 Vict. c. 83, § 33.—[2] Ibid. § 34.—[3] Ibid. § 36.—[4] Ibid. §§ 34, 35.—[5] Ibid., § 35.—[6] Proc. 1692.—[7] D. P. L. 411.

be exempt.[1] The proprietors of mills and of coal and salt works are liable.[2]

In apportioning half the assessment on the householders, the rule generally adopted has been that each individual be rated according, not merely to his rent, but to his means and substance (heritable property excepted); but it has been usual to make the amount of rent the criterion of the means and substance, especially in burghal parishes.[3] In burghs, it would seem that attending a place of business in the burgh has been held sufficient occupancy, though the residence has been in another parish, at least it has been so found in the case of a merchant burgess;[4] but persons assessed on such a principle have been charged according only to the amount of their property within burgh.[5]

The method of assessment in the burghs was very diverse —in some, each tenement was assessed according to its value, one half of the tax being paid by the proprietor, the other by the tenant, in others the whole was levied on occupants, and in some the whole on proprietors.[6]

By the consolidation act in estimating annual value it is taken at the average rent which the subjects will produce when let from year to year, with deduction of the probable average of repairs, insurance, and other expenses, and of public burdens. No mine or quarry is assessable unless it has been worked for some part of the year preceding the day of assessment.[7]

*Roll.*—A roll is made up at the first assessment, and yearly or half-yearly as may be arranged, as the rule for subsequent assessments, containing a list of the persons assessed, and of the sum to be levied on each, distinguishing from each other assessments in respect of ownership, or occupancy, or means and subsistence. The roll so made up is the rule for the ensuing yearly or half-yearly period. The amount assessed on each person is to be immediately intimated after the book is made up. Errors may be corrected at subsequent meetings of the board. Parties are not precluded by the roll being made up, from their legal remedy for any overcharge.[8] If the amount imposed for any year or half-year be insufficient, the board may meet and impose an additional assessment.[9] When the assessment is divided between tenants and owners, the whole may be levied

[1] D. P. L. 412.—[2] Inveresk Parish *v.* Magistrates of Musselburgh, 28th May 1794, M. 10585.—[3] D. P. L. 417-421.—[4] Buchanan *v.* Parker, 21st February 1827.—[5] D. P. L. 423.—[6] D. P. L. 428 *et seq.* Report of Commissioners, 1835, 48.—[7] 8 & 9 Vict. c. 83, § 37.—[8] Ibid. § 38-40.—[9] Ibid. § 41.

on the tenant, who has recourse for the half against his landlord.[1] The holders of building leases are to be held owners for the purposes of the act.[2] Owners and occupants are not to be liable to assessment for the same premises in more than one parish.[3] When canals and railways pass through more than one parish or combination, the charge is to be according to the number of miles in length within each.[4] People who are in the occupancy of heritable property, or carry on business in parishes where they do not reside, and where the assessment is on means and subsistence, are liable to be assessed on means and subsistence there, and they are not liable to be assessed on the same means and subsistence elsewhere. People assessed on means and subsistence not connected with occupancy or business are in the same manner not liable to be assessed on the same means and subsistence in any other place. A person who may be liable in more than one parish may make his choice in which he shall be assessed on means and subsistence not connected with occupancy or business.[5] No person is assessable on means and subsistence if the whole amount does not exceed £30 a-year.[6] The parochial board may grant exemptions on the ground of inability.[7] Clergymen are liable to be assessed on their stipends, and the old privileges of exemption enjoyed by the members of the college of justice and others in Edinburgh are abolished by the consolidation act.[8]

The act provides that for recovering the assessment, all provisions "for collecting, levying, and recovering the land and assessed taxes, or either of them, and other public taxes, shall be held to be applicable to assessments imposed for the relief of the poor," and that sheriffs and magistrates may grant warrant in the same form and under the same penalties. It is at the same time rendered competent to pursue in the sheriff's small debt court. Assessments are preferable over private debts in case of insolvency or bankruptcy.[9]

In all assessed parishes the church collections are put at the disposal of the kirk-session.[10]

### SECT. 4.—*Miscellaneous Sources of Income.*

All funds and property for the use of the poor that were vested in the old parochial authorities, or any other body for

[1] 8 & 9 Vict. c. 83, § 43.—[2] Ibid. § 44.—[3] Ibid. § 46.—[4] Ibid. § 45.—[5] Ibid § 47.—[6] Ibid. § 48.—[7] Ibid. § 42.—[8] Ibid. §§ 49, 50.—[9] Ibid. § 88.—[10] Ibid. § 54.

the use of the poor, are by the act vested in the parochial boards.[1] All funds endowed for the poor, unless there be any special method of investment appointed by the endowment, are to be lodged in one of the chartered banks, or placed at interest on government or heritable security, or invested in the stock of one of the chartered banks. The Board of Supervision may require returns as to such funds.[2]

In places where there is no assessment, one half of the sums collected at the parish churches must be paid over to the general fund for the relief of the poor;[3] the other half, left to the disposal of the kirk-session, has been generally employed in giving temporary relief in cases of sudden distress, paying the session-clerk's salary, and other miscellaneous services.[4] When parishes are brought under an assessment, the church collections are to be entirely at the disposal of the kirk-session, who are, however, not authorized to apply the money to any purpose to which it was not in whole or in part legally applicable before the passing of the consolidation act. The heritors are to retain their old right to examine the accounts relative to the expenditure of such sums, and session-clerks must report concerning them, when required, to the Board of Supervision.[5]

The dues for the use of hearses and mortcloths, when kirk-sessions have acquired by usage the exclusive privilege of letting them out to hire, form part of the fund for the poor.[6] Where any sum exceeding 100 merks Scots (£5, 11s. 1⅓d.) is won by gambling or betting, within the period of twenty-four hours, or at horse-racing, the surplus may be claimed for the poor of the parish, and magistrates refusing to put this law in force on information, are liable to a penalty of double the sum won.[7] The penalties imposed by many acts of parliament making rules and restrictions supposed to be conducive to the public safety, are payable into the fund for the poor; as, for instance, the penalties for contravening the act which appoints the sale of bread to be by weight.[8] Penalties recovered for the breach of the Poor Law Consolidation act go to the poor.[9]

### SECT. 5.—*Inspectors.*

The inspectors of the poor are appointed by the parochial

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[1] 8 & 9 Vict. c. 83, § 52.—[2] Ibid. § 53.—[3] Proclamation, 1693.—[4] D. P. L. 400.—[5] 8 & 9 Vict. c. 83, § 54.—[6] D. P. L. 401.—[7] 1621, c. 14.—[8] 6 & 7 Wm. IV. c. 37, § 14.—[9] 8 & 9 Vict. c. 83, § 82.

board, according to the necessities of the parish, who fix their remuneration, and must report the names of inspectors and their salaries to the board of supervision.[1] The inspector has the custody of, and is responsible for, all books, writings, and documents relating to the management and relief of the poor. It is his duty to inquire into and ascertain the circumstances of each pauper, to keep a register of paupers and of the sums paid to them, and also of all persons who have applied for and been refused relief, with the grounds of the refusal. He must visit twice a-year at least, and oftener if required by the parochial board or board of supervision, all the paupers on his roll who reside within five miles of his district. He must report to the central or local boards upon all matters connected with the management of the poor, according to his instructions, and he "must perform such other duties as the said boards may direct."[2]

The board of supervision may suspend or remove inspectors for incompetency, negligence, or misconduct.[3] Inspectors may pursue or defend actions on the part of the parochial board, the members not requiring to appear.[4] When there is an application for parochial relief, it is the duty of the inspector to make inquiry forthwith into the circumstances, and, if the applicant have not a settlement, to afford temporay relief.[5]

### Sect. 6.—*Relief.*

It has been usual to divide paupers in Scotland into the Permanent and the Occasional poor.

*Permanent Poor.*—The former are those who, from advanced age or otherwise, are physically disabled from obtaining a livelihood by labour (though they should not be entirely disqualified for every description of work), destitute children under fourteen years of age, insane persons, and idiots.[6] Destitute widows with several young children generally receive relief for their families.[7]

*Occasional Poor.*—It had been the practice for kirk-sessions to give occasional relief to persons temporarily destitute, but who at other times were able to support themselves. But it has always been questioned how far there was a legal claim for such relief.[8] There seems now to be no doubt that there is a legal claim for occasional relief, for every parochial

[1] 8 & 9 Vict. c. 83, § 32.—[2] Ibid. § 55.—[3] Ibid. § 56.—[4] Ibid. §§ 57, 58.—[5] Ibid. § 70.—[6] Dunlop's Parochial Law, p. 357.—[7] Ibid.—[8] Monypenny, p. 31. Dunlop, 360.

board must appoint an inspector, and by the 70th section to be shortly noticed, the inspector is bound to give temporary relief before the person is enrolled as a regular pauper. As to the funds collected by the assessment, it is specially provided that they "shall extend and be applicable to the relief of occasional as well as permanent poor."[1]

*Able-bodied.*—It has long been a question whether able-bodied paupers are entitled to relief in Scotland, and it has been purposely left doubtful in the act by the clause that "nothing herein contained shall be held to confer a right to demand relief on able-bodied persons out of employment."[2] In one case where the heritors and kirk-session of a parish had imposed a rate for the purpose of giving assistance to able-bodied men reduced to want by the failure of the crops, the court, by a majority, decided against individuals who opposed the assessment,[3] but no case appears to have occurred to open the question whether the able-bodied poor can insist on such an assessment being made.

*Settlement.*—To be entitled to permanent relief, the party must have a settlement in the parish or combination. Under the old system a settlement was acquired by three years' residence, but by the late act the person who may acquire a settlement is one who "shall have resided for five years continuously in such parish or combination, and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief."[4] These expressions are not very distinct, but it would appear to be intended, not that a person, to fail in acquiring a settlement by residence must have actually been a public beggar or an applicant for relief, but that a person living by the profession of public begging is not to be considered as industriously maintaining himself. If this be the interpretation, a person who has lived on the eleemosynary assistance of people not his own family, though without public begging, cannot acquire a settlement. It is enacted that a settlement once obtained by residence does not continue, if, during any succeeding period of five years, the person has not resided for one year continuously in the parish or combination.[5]

In the decisions under the old law, it has been found that a woman on her marriage loses her own settlement and obtains that which her husband has or may acquire, and that she

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[1] 8 & 9 Vict. c. 83, § 68.—[2] Ibid.—[3] Pollock *v.* Darling, 17th January 1804, M. 10591.—[4] 8 & 9 Vict. c. 83, § 76.—[5] Ibid.

cannot, during his lifetime, obtain a settlement by residence, though living apart from him.[1] Children under fourteen years of age, and those above that age, who from infirmity are unable to work for their livelihood, and must depend on their parents, and persons whose situation entitled them to parochial relief, though they might not have applied for it, were not entitled to obtain settlements by residence.[2] A settlement once obtained is, unless under the above exception in the late act, not lost until another is substituted for it, and so a person who has resided for the statutory period in a Scottish parish, will not lose his settlement by residing in England, unless he have obtained a legal settlement there, in terms of 4th and 5th Wm. IV. c. 76.[3] The right to acquire a settlement by residence is not confined to natives of Scotland.[4] The settlement of children who cannot, as above explained, obtain one by residence, is in the case of legitimate children that of the father; of illegitimate, that of the mother.[5] Where the mother of an illegitimate child had never obtained a settlement, the settlement that had been obtained by her father was found to be legally that of her child.[6] Where no other settlement has been acquired, the claim of the pauper falls on the parish where he was born.[7]

Where an application for relief is made to an inspector, or to an officer who has the inspector's duties to perform, he must return an answer within twenty-four hours. The applicant is bound to give the officer all information for the proper ascertainment of his settlement, and to answer all inquiries regarding his case. He is "bound to answer upon oath if required, all such questions as may be put to him before any justice of the peace or magistrate," being liable to a prosecution for perjury in the case of falsehood.[8]

When an application is made, if the party be in a state which gives him a title to relief, the question of settlement is not considered. The inspector must, in the first place, give immediate relief until the meeting of the parochial board; and, if the pauper belong to another settlement, the relief must be continued by the board until the proper settlement be ascertained. In the case of the inspector giving immediate relief, he is entitled to delay his answer to the general application.[9] The board affording immediate relief

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[1] D. P. L. 375.—[2] Ibid.—[3] See Brown *v.* Kirk-session of Mordington, 4th March 1806, M. Poor Ap. No. 4.—[4] Higgins *v.* Barony Parish, 9th July 1824.—[5] D. P. L. 383.—[6] Kirk-session, &c. of Lasswade *v.* Newlands, 6th March 1844.—[7] 1672, c. 18.—[8] 8 & 9 Vict. c. 83, § 70.—[9] Ibid.

have recourse against the pauper's proper settlement, or against relations bound to aliment him. Notice must be sent to the parish from which recourse is to be claimed, and there is no recourse for relief unless it be granted *after* the notice.[1] When the parish of settlement (if in Scotland) does not remove the pauper within a reasonable time after notice, the relieving parish may remove him, unless his state of health render him unfit to be removed, and the removal, or necessary continuance of relief, is a charge on the parish of settlement,—the relieving parish not being entitled to receive more than the rate expended on its own poor.[2]

*Judicial Recourse.*—A person refused relief may apply to the sheriff, who, if he thinks the party entitled to relief, may make an order on the inspector to give interim relief until he give in a statement why relief was refused. The sheriff appoints the statement to be answered, and may nominate an agent for the pauper. The interim allowance may be continued until the question is decided on its merits, "provided always, that nothing herein contained shall be construed to enable the said sheriff to determine on the adequacy of the relief which may be afforded, or to interfere in respect to the amount of relief to be given in any individual case."[3]

When the amount of relief is considered inadequate, the pauper may lodge a complaint with the board of supervision, who are to investigate the matter without delay, and may by a minute declare their opinion that the applicant has just cause of action. A certified copy of the minute entitles the party to the benefit of the poor's roll in the Court of Session. The board of supervision may award to the party interim aliment during the litigation.[4]

It is declared incompetent for any court of law to entertain an action relative to the amount of relief, unless the board of supervision has previously declared that there is a just cause of action.[5]

*Medicine.*—It is declared to be among the objects to which the funds raised for the relief of the poor are to be applied—"To provide for medicines, medical attendance, nutritious diet, cordials, and clothing," for the poor, when such things are required.[6]

*Education.*—Another object to which the funds are applicable is declared in general terms to be "for the educa-

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[1] 8 & 9 Vict. c. 83, § 71.—[2] Ibid. § 72.—[3] Ibid. § 73.—[4] Ibid. § 74.—[5] Ibid. § 75.—[6] Ibid. § 69.

tion of poor children, who are themselves or whose parents are objects of parochial relief."[1]

### SECT. 7.—*Poor-Houses.*

The provisions in the act relating to Poor-houses are declared to be "for more effectually administering to the wants of the aged and other friendless and impotent poor, and also for providing for those poor persons who from weakness or facility of mind, or by reason of dissipated or improvident habits, are unable or unfit to take charge of their own affairs." The parishes or combinations in which poor-houses may be erected are those which by the immediately preceding census contain more than 5000 inhabitants. A poor-house may be established or enlarged by a vote of the parochial board, approved of by the board of supervision.[2] The plan of every poor-house, or enlargement, or alteration, must have the approval of the board of supervision.[3]

Parishes may unite with the concurrence of the board of supervision for the purpose of building a common poor-house, the expense being met according to the proportions fixed by agreement. After agreeing to an arrangement, no parish can withdraw without the consent of the board of supervision.[4] For building or enlarging poor-houses money may be borrowed on the security of subsequent assessments, to an extent not exceeding three times the amount raised by assessment during the previous year. Loans must be repaid by annual instalments of not less than a tenth part, exclusive of interest, and no farther loan can be entered on until the whole of any existing loan with interest has been paid up.[5]

The local boards frame rules and regulations for poor-houses, subject to the approval of the board of supervision. They are to relate to the management, discipline, and treatment, and may contain provisions for inmates being visited by clergymen of their own religious persuasion.[6] Boarders from other parishes may be received in poor-houses, at a rate subject to the approval of the board of supervision.[7]

The local boards where there are poor-houses are bound to make provision for medical attendance to the inmates, and for the employment of a stipendiary medical officer, and also to make provision for dispensing medicines to the sick

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[1] 8 & 9 Vict. c. 83, § 69.—[2] Ibid. § 60.—[3] Ibid. § 63.—[4] Ibid. § 61.—[5] Ibid. § 62.—[6] Ibid. § 64.—[7] Ibid. § 65.

poor generally. Medical officers may be suspended or removed for neglect or incompetency by the board of supervision.[1]

Parochial boards may make arrangements for subscribing to public hospitals or dispensaries, from which their districts derive benefit.[2]

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## CHAPTER VIII.

### MISCELLANEOUS LOCAL TAXES.

#### SECT. 1.—*Police and Criminal Prosecutions.*

A TAX of long standing called the Rogue money, has been voted and assessed—formerly by the freeholders, of late by the commissioners of supply, "for defraying the charges of apprehending of criminals, and of subsisting them in prisons until prosecution, and of prosecuting such prisoners for their several offences by due course of laws."[3]

Previously to the Rural Police Act noticed below, the rogue money was generally assessed on the valued rent. The expenses of prosecutions before justices of peace, and other miscellaneous charges connected with criminal proceedings, fall on this fund. It is stated in the Eighth Report of the Commission on the Courts of Law in Scotland (1821)—

"With respect to the rogue money, which is raised by voluntary assessment in each county, the practice of the several counties is by no means uniform. In some there is little or no fund of this description levied; and in other cases where the county is so assessed the fund is not applied to defray the expenses of the precognitions taken and trials held before the justices, or the portion allotted for these purposes proves inadequate. To remedy this defect, endeavours have, in various instances, been made by the clerks and procurators fiscal to obtain payment by application to the Barons of Exchequer. But on examination of the Lord Treasurer's Remembrancer in Exchequer, through whose office such applications are presented, we find that he has no authority to receive the claims, or issue any sum on this account; and

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[1] 8 & 9 Vict. c. 83, § 66.—[2] Ibid. § 67.—[3] 2 Geo. II. c. 28. 2 & 3 Wm. IV. c. 65, § 44.

that the rules by which he is alone empowered to make any payments for purposes of this nature are exclusively applicable to the clerks and fiscals of the sheriff courts."

By the rural police act, the commissioners of supply may either levy the additional funds for carrying on that establishment in the method of the old rogue money, or levy both taxes in the manner appointed by statute for levying the prison assessment in landward parts of counties. The rural police assessment is not to extend to royal burghs, or to towns having their own police establishments. Disputes regarding the tax are summarily decided by the sheriff.[1]

In some counties there are local acts, in virtue of which assessments are raised for the maintenance of court rooms and other matters connected with the administration of justice. Some of the large towns have separate local police acts, in which sums are assessed for every description of police purpose, while in other towns there are assessments under the powers of the general police act, to be noticed farther on.

### SECT. 2.—*Prisons' Tax.*

By the prison discipline act, provision is made for the building of a central prison or penitentiary at Perth, for the current expenses of this penitentiary, for the building of local prisons in the counties and burghs, and for the current expenses of local prisons. Of the sum to be levied for the construction of a general prison, the greater part has already been collected and expended. It was appointed to be levied in instalments not exceeding £2000 or by the later act £1200 yearly, and the General Board of Prisons were appointed to divide its incidence over the several counties, according to a combined estimate, which may be altered from time to time, of the respective amounts of population and of crime in each. This adjustment was made the measure of the liabilities of the several counties for the expense of building and repairing the local prisons, no county being liable for more than it would have to contribute if £10,000 were levied over the whole country, in the same manner as the instalments levied for the building of the general prison, power being given to the commissioners of supply and the magistrates of burghs to consent to an increased proportion in any county.[2] The counties have to meet each its proportion of the general expense of the central prison, according to the

[1] 2 & 3 Vict. c. 65.—[2] 2 & 3 Vict. c. 42, §§ 35, 36. 7 & 8 Vict. c. 34, §§ 21, 31.

number of prisoners it has contributed, and their respective periods of confinement.[1] The current expenditure within each county on local prisons is assessed from year to year by the county board, the proportion between town and country districts being apportioned according to their respective populations by the central board.[2]

In assessing the sums thus apportioned on individuals, the rule as to county districts (with the exception of some specialties as to Orkney and Zetland, Cromarty and Ross) is alternative, 1*st*, On lands in the valuation books according to the valued rent, and on houses and lands not in the valuation books according to the real annual value, in such ratio that, for every £5 Scots assessed on £100 Scots of valued rent, there shall be assessed 1d. per £1 sterling on subjects valued at real annual value; when houses are attached to lands charged according to valued rent, to an extent beyond what the houses would be rated at on the principle of annual value, the houses are not to be separately rated. 2*d*, The other alternative is, that the whole real property of the district, including fishings, mines, works, and manufactories of all descriptions, may be rated according to their real annual value, or according to the manner in which they are rated for any general assessment for any other public purpose.[3] The amount may be levied either on the landlord or the tenant; but when the tenant pays, he is entitled to be reimbursed by the landlord.[4] The assessment in burghs is levied under the authority of the magistrates. If there be municipal or police taxes levied in the town, they may select any such tax, and impose the prison assessment according to the same admeasurement, employing the same machinery for its collection. Where there is no such tax, or the junction is considered inexpedient, the magistrates are to collect the assessment according to the annual value of the property, "in such manner as they shall think just." The tax within burgh is payable by occupants; but tenants are entitled to be repaid a half by their landlords.[5]

### SECT. 3.—*Transit.*

On the turnpike-roads, tolls are collected in virtue of the several local acts, and of the general turnpike-road act, which has to be noticed farther on.* To the same department of the work is referred the subject of the commutation roads,

[1] 2 & 3 Vict. c. 42, § 37.—[2] Ibid. § 39.—[3] Ibid. §§ 41, 42.—[4] Ibid. § 45.—[5] Ibid. §§ 47, 50.—* See Part VII. Chap. II.

which are supported not by tolls paid on those who are using them, but by general rates levied within certain districts.*

Harbour dues are levied sometimes by local acts, and sometimes by prescriptive custom. They are occasionally mixed up with lighthouse dues, and in many places there are lighthouses immediately under separate local management. The general lighthouse dues for the whole country are charged under the authority of the Commissioners of Northern Lights.†

The powers of magistrates of royal burghs to charge transit dues on imports has already been referred to.‡ Where a burgh was by charter and immemorial usage entitled to levy a duty on certain goods, whether imported into or passing through the bounds of the burgh, it was found, after a railway had been constructed, and was in use, that the company were liable to the burgh for the duties on their traffic.[1] §

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* See Part VII. Chap. III.—† See Part VII. Chap. VII.—‡ See above, p. 52.—[1] Magistrates of Linlithgow *v.* Edinburgh and Glasgow Railway, 17th July 1845.—§ The subject of Local Taxes was examined by the author at more length in the portion relating to Scotland of "The Local Taxes of the United Kingdom, containing a Digest of the law, with a Summary of Statistical Information concerning the several Local Taxes of England, Scotland, and Ireland, published under the direction of the Poor Law Commissioners."

# PART VI.

## REGULATIONS AND RESTRICTIONS OF TRADES AND OCCUPATIONS.

THERE are, besides those long established courses of education, and rules of examination, which are held necessary to qualify people to perform certain professional functions, or hold responsible offices, many statutory restrictions, affecting particular callings and pursuits, some of which are directed to the protection of the people engaged in the humbler departments of the work, while others are, whether successfully or not, directed towards the protection of the public from injury. There are, besides those which will be found in the immediately following pages, many restrictions on trade for the protection of the revenue, which have already been in some measure examined.* Other regulations of a similar nature will have to be specially kept in view in connexion with the laws affecting Transit, to which the next Part is devoted.

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## CHAPTER I.

### REGULATIONS DIRECTED TO THE PROTECTION OF THE EMPLOYED.

#### SECT. 1.—*Factory Regulations.*

IN 1833 an act was passed "to regulate the labour of children and young persons in the mills and factories of the United Kingdom.[1] In 1844 and 1845 two acts were passed for carrying out the principles of this act, and for restricting in manufactories the quantity of labour extracted from children, that they may be protected from being the victims of the cupidity of their parents or guardians. The acts at the same time in some measure restrict the labour of females, while they establish a system of education, appoint precautions against deleterious or dangerous operations, and organize a

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* See above, Part V.—[1] 3 & 4 Wm. IV. c. 103.

general system of factory inspection. The acts are termed respectively, "An Act to amend the Laws relating to Labour in Factories,"[1] and "An Act to regulate the Labour of Children, young Persons, and Women in Printworks."[2] Ropeworks are specially exempted from the regulations of the factory acts.[3]

*Inspectors.*—The factory inspectors, who were instituted by the act of 1833, have authority to enter manufactories and print-works, and may bring with them the certifying surgeon and any peace-officer. They may examine any individuals in the works and the attached schools, and may inspect registers, certificates, notices, and other like documents. All persons who obstruct or refuse to give information to an inspector, are liable to a penalty not less than £3 or more than £10.[4]

Official surgeons are appointed under the act of 1844, whose function it is to give certificates of age for the purpose of carrying out the regulations of the acts as to children. No person older than sixteen years requires to have such a certificate. There is no exclusion of certificates by other medical men, but there is a limitation to the effect that any such certificate must be by a graduate in medicine or a licentiate in surgery, and countersigned by some justice of peace who is not connected with the manufactory in which it is used.[5] There are rules for fixing the fees of certifying surgeons, regulated by the number of persons they visit and the distance they travel.[6]

In the application of the acts to the ages of the people employed in factories, they are divided into three periods. Those under thirteen are called "children." The term "young persons" is employed in the factory act to those between thirteen and eighteen, and in the calico-printing act, to those between thirteen and sixteen.[7] It is not lawful to employ children under eight years of age.[8] The general restriction of children's labour in factories is to seven hours a-day, but there are exceptional provisions applicable to work which is not continuous, or is merely caused by occasional emergencies.[9] The time of working is appointed to be measured by a clock open to public view, which has received the approbation of the inspector.[10] There are restrictions appli-

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[1] 7 & 8 Vict. c. 15.—[2] 8 & 9 Vict. c. 29.—[3] 9 & 10 Vict. c. 40.—[4] 7 & 8 Vict. c. 15, §§ 3, 61. 8 & 9 Vict. c. 29, §§ 4, 41.—[5] 7 & 8 Vict. c. 15, §§ 8, 9, 10.—[6] Ibid. § 13.—[7] 7 & 8 Vict. § 73. 8 & 9 Vict. c. 29, § 2.—[8] 7 & 8 Vict. c. 15, § 29. 8 & 9 Vict. § 19.—[9] 7 & 8 Vict. c. 15, §§ 30, 31.—[10] Ibid. § 26.

cable to "young persons," which likewise apply to females though more advanced in years.[1] No child or female can lawfully be employed in a printwork during the night.[2]

There are special regulations against children and young persons being employed in dangerous work connected with the machinery, and for fencing in those parts of the machinery which are liable to do injury.[3] When serious accidents occur, notice must be sent to the certifying surgeon, who is to visit the factory and report to the inspector.[4]

There are some sanitary rules for the preservation of the health of persons employed in factories—they chiefly apply to the painting and washing of roofs and ceilings, and to the prohibition of the employment of children and young persons in the departments of the work most likely to prove injurious to health.[5]

There are regulations as to attendance on schools, which are obligatory both on the proprietors of factories and the parents or guardians of children.[6]

*Penalties.*—The occupier of the manufactory or print-work is liable in the first instance to the penalties imposed for breaches of the acts, having recourse against any foreman or other person who has been the offender.[7] A summons for an offence may be issued by one justice, on complaint in writing by an inspector, a sub-inspector, the procurator-fiscal, or "any person having a title and interest to prosecute with the concurrence of the procurator-fiscal"[8] complaints are to be heard by two or more justices "acting for the county or other jurisdiction wherein the offence was committed, or for any adjoining county or jurisdiction, with the like authority as though the cause of complaint had arisen within such adjoining county or jurisdiction, provided that the place of hearing the complaint in such other county or jurisdiction be not more than five miles from the place where the offence was committed."[9] Burgh magistrates have the same powers under the act as justices. But no person can act as a magistrate under the acts in a complaint committed in any establishment, of which he himself, or his father, son, or brother is the occupier.[10] The proceedings may be summary and no more than the substance of the evidence requires

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[1] 7 & 8 Vict. c. 29, §§ 32, 35, 36, 37.—[2] 8 & 9 Vict. c. 29, § 22.—[3] 7 & 8 Vict. c. 15, §§ 20, 21.—[4] Ibid. §§ 22, 23.—[5] Ibid. §§ 18, 19.—[6] Ibid. §§ 31, 38, 39. 8 & 9 Vict. §§ 23, 24, 25.—[7] 7 & 8 Vict. § 41. 8 & 9 Vict. c. 29, § 30.—[8] 7 & 8 Vict. § 46. 8 & 9 Vict. § 33.—[9] 7 & 8 Vict. § 45. 8 & 9 Vict. § 32.—[10] 7 & 8 Vict. § 71. 8 & 9 Vict. § 53.

to be taken down in writing. The fees charged are limited to those chargeable under the sheriffs' small debt act.[1]

In default of payment of the penalty and costs within the time fixed by the judgment, they may be levied by distress and sale, under warrant from a magistrate entitled to act under the statutes.[2] There are special clauses for enforcing the production of documents and the attendance of witnesses.[3]

Prosecutions are not to be advocated into the higher courts, and convictions are not to be quashed for immaterial defects of form. The convictions for the minor fixed penalties under the acts are not subject to appeal. In those cases where an appeal may be had, it must be to the next quarter sessions that may happen twelve days after the decision. The inspector of the district must receive notice in writing of any intended appeal within three days after the decision and seven clear days before the quarter sessions. The party must also, seven days before, give security with two sureties before a justice, to appear, abide judgment, and pay costs.[4]

### SECT. 2.—*Regulation of Mines and Collieries.*

An important branch has been added to this department of the law by the act for regulating the operations in collieries and other mines, and for prohibiting the employment of females and children in such establishments,—5 & 6 Vict. c. 99.

The act does not prohibit the employment of any persons in connexion with collieries or other mines, if their work be carried on above ground (§ 7).

The abolition of the employment of females was gradually effected; and the time has now passed (1st March 1843) from which it is declared to be illegal, and to subject employers to the penalties of the act, all contracts for their employment being void (§ 1).

The employment of males under ten years is prohibited under the penalties of the act (§ 2). There is a prohibition against binding as apprentices to work in mines or collieries youths under ten years of age, and against binding apprentices for a longer term than eight years. There is an exception to this rule in favour of apprenticeship to "a mason, joiner, engine-wright, or other mechanic, whose services may

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[1] 7 & 8 Vict. § 46. 8 & 9 Vict. § 33.—[2] 7 & 8 Vict. § 45. 8 & 9 Vict. § 32.—[3] 7 & 8 Vict. § 47-49. 8 & 9 Vict. § 34-36.—[4] 7 & 8 Vict. §§ 69, 70. 8 & 9 Vict. §§ 51, 52.

be required occasionally below as well as above ground." This exception distinctly applies to the prohibition of an apprenticeship exceeding eight years. It is difficult to gather from the phraseology of the act whether it also applies to the binding of youths who are less than ten years of age as apprentices. The prohibition immediately above narrated, however, would clearly apply to the employment of apprentices under ten years of age in mines, although apprenticed to a mason, joiner, &c. Apprenticeships in contravention of the act are void; and young persons who were apprentices at the time of the passing of the act are entitled to be discharged on reaching the age of eighteen years (§ 4).

The penalty for infringing any of the above provisions is a sum not exceeding £10 and not less than £5 for each person employed in contravention (§ 5). If it appear, however, to the judge before whom a prosecution is brought, that the employer acted in ignorance of the age of the young person employed, and that he was deceived by the parents or guardians, they may remit the penalty and summon the culpable parties, imposing on them a penalty not exceeding 40s. (§ 6).

Where the entrance to a mine or the communication between one part and another is by a shaft, pit, or inclined plane, it is illegal to employ any person but a male upwards of fifteen years old in taking charge of any part of the machinery or tackle by which persons ascend or descend, or in taking charge of a horse or other animal employed to move it. The penalty in this case is a sum not less than £20 and not more than £50 (§§ 8, 9).

The act prohibits the wages of persons employed in collieries and other mines being paid in public-houses or any premises attached to them. The penalty for contravention is a sum not less than £5 or more than £10; and it is provided that wages proved to be so paid do not extinguish the employer's debt, the right of the workman to prosecute for them subsisting as if he had not been paid (§ 10-12).

Prosecutions may proceed before two justices of peace or the sheriff, and the penalties are leviable by distress and sale, implemented where sufficient property cannot be found to meet the penalty, by imprisonment, with or without hard labour at the discretion of the court, but not to exceed two calendar months. One half of the penalty goes to the informer, and the other to the kirk-session or other managers for the poor of the parish (§§ 18, 19).

In the case of a conviction by two justices, there is an

appeal to the next quarter sessions of the peace held fifteen days after the day of conviction. A notice of the appeal and of its cause and matter must be served on the complainant in writing within seven days after the conviction; and the appellant must either remain in custody till the sessions, or find bail with two sureties to abide the judgment with costs (§ 21).

There is a provision for exonerating the proprietors or lessees of mines in cases where the act is contravened without their knowledge by the overseers or others in their employment, and for levying the penalties against the persons actually guilty (§ 13).

### Sect. 3.—*Regulations as to Chimney-Sweepers and Chimneys.*

The regulations for the employment of chimney-sweeps and the building of chimneys are embodied in the 3 & 4 Vict. c. 85. The employment of any person under twenty-one years of age to enter a chimney for the purpose of cleaning it or extinguishing a fire, is rendered penal, subjecting the party to a fine not less than £5 or more than £10 (§ 2). The apprenticeship of any youth under the age of sixteen to a chimney-sweeper is illegal and void (§ 3). There are specific regulations as to the breadth and character of the partition walls between chimneys, and the capacity and form of the chimneys, with penalties for infringement. By § 7, all prosecutions under the act may be held before the sheriff or two justices of peace. Penalties may be levied by distress and sale, one half going to the informer and the other to the managers for the poor. By § 11, the decisions of sheriffs are final, but those of justices of peace may be carried by appeal to the quarter sessions.

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## CHAPTER II.

### Regulations directed to the Protection of the Public.

### Sect. 1.—*Printers.*

Every printer printing any document for sale or circulation, requires to print on the face of it if it be of one page, and

either on the first or last page if it be of more than one, his name, and his place of abode or business. A person omitting this rule is liable to a penalty not exceeding £5 for each copy circulated.[1] Offenders may be committed before a justice, but no proceedings are to be had under the statute except at the instance of the crown.[2]

### SECT. 2.—*Newspapers and Advertisements.*

*Declaration.*—Before commencing the publication of any newspaper, a declaration must be delivered by the parties to the commissioners of stamps and taxes, or to their proper officer at the head office in Edinburgh, or to the local distributor or other person appointed for the district. The declaration must set forth "the correct title of the newspaper to which the same shall relate, and the true description of the house or building wherein such newspaper is intended to be printed, and also the house or building wherein such newspaper is intended to be published, by or for or on behalf of the proprietor thereof, and shall also set forth the true name, addition, and place of abode of every person who is intended to be the printer or to conduct the actual printing of such newspaper, and of every person who is intended to be the publisher thereof, and of every person who shall be a proprietor of such newspaper who shall be resident out of the United Kingdom, and also of every person resident in the United Kingdom who shall be a proprietor of the same, if the number of such last mentioned persons (exclusive of the printer and publisher) shall not exceed two, and in case such number shall exceed two, then of such two persons, being such proprietors resident in the United Kingdom, the amount of whose respective proportional shares in the property or in the profit or loss of such newspaper shall not be less than the proportional share of any other proprietor thereof resident in the United Kingdom, exclusive of the printer and publisher, and also where the number of such proprietors resident in the United Kingdom shall exceed two, the amount of the proportional shares or interests of such several proprietors whose names shall be specified in such declaration." The declaration must be signed by all those parties to it who are in the United Kingdom. A new declaration must be made on any of the following occurrences: Where the share of any proprietor mentioned in the declaration undergoes any change

[1] 2 & 3 Vict. c. 12, § 2.—[2] Ibid. § 4. 39 Geo. III. c. 79, § 30.

so that it becomes less than the share of any other proprietor, exclusive of the printer and publisher; whenever the printer, or the publisher, or a named proprietor, or the person named as conducting the printing is changed or changes his residence; when the title of the paper, or the place of printing, or the place of publishing, is changed; when any officer of the stamp-office requires a declaration to be made, and causes a notice in writing to be delivered to any of the persons, or left at any of the places mentioned in the previous declaration. The declaration must be made before a commissioner of stamps or an authorized officer. A person guilty of any suppression or misstatement becomes guilty of an offence punishable by fine or imprisonment.[1] The printing or publishing a newspaper without compliance with the requisites of the act, renders the party liable to a penalty of £50 for every time that the newspaper is printed or sold anterior to compliance.[2] The declarations are preserved and filed, and extracts from them are evidence to render the parties who appear on them liable in the respective capacities in which they so appear, unless it be proved that any party has subsequently become a lunatic, or that a new declaration, or an alteration has been duly returned. When a newspaper is produced, corresponding in description and the names of parties with the contents of such an extract, it is unnecessary to prove that it was purchased from the person against whom proceedings are taken. Certified extracts are obtainable on payment of a shilling for each.[3] The titles of newspapers, with the names of printers and publishers, are inserted in a book patent to the public, at the head office of stamps in Edinburgh.[4]

*Names.*—At the end of every newspaper and supplement, must be printed the christian and surname, with the designation and place of abode of the printer and publisher, and a description of the places of printing and publication, with the day of publication. Error or omission renders the party liable to a penalty of £20.[5]

*Delivery of Copies.*—Copies of newspapers and of all new editions and supplements must be delivered at the stamp office. When the paper is published within twenty miles of Edinburgh, one copy must be delivered on the day of publication or the next lawful day not a holiday. In other places two copies are to be delivered at the district stamp-office or

[1] 6 & 7 Wm. IV. c. 76, §§, 6, 12.—[2] Ibid. § 7.—[3] Ibid. § 8.—[4] Ibid. § 10.—[5] Ibid. § 14.

any more convenient office which the commissioners may sanction, within three days after publication. The parties are entitled to receive the ordinary published price of the paper for the copies delivered. Each copy must have on it a written statement by the printer or publisher, or by some person authorized by him for the purpose, of whose appointment notice in writing, signed by the printer or publisher in the presence of an officer of the stamp-office (by whom it is certified), has been given to the commissioners or the officer to whom the copies are to be delivered. The written statement must be in the ordinary hand of the printer or his substitute and signed by his proper signature, and must set forth the name and place of abode of the printer.[1] The penalty for non-fulfilment is £20. The stamp-office is to hold the copies in readiness to be used as evidence by parties desiring to found upon them at any time within two years after publication. The copies are to be evidence against the respective parties, of their liability for the contents of the papers, and for all papers issued with the same title, unless a party can prove that he was not connected with or privy to the publication.[2]

*The Stamp Duties* on newspapers are regulated by the same statute, which requires that each newspaper shall be printed with a separate die, made at the expense of the proprietors of the paper and announcing its title. A paper with a different character of stamp from that indicated by the act, is held as unstamped.[3] There are provisions for licensing and taking bond from sellers of stamps.[4]

Persons selling newspapers not duly stamped, are in the position of debtors to the crown and bound to account; and they are at the same time liable to a penalty of £20 for each paper sold.[5]

Any person connected with an attempt to get an unstamped paper conveyed post free as if it were stamped, is liable to a penalty of £50.[6]

An arrangement is made in the act, by which, in cases where it may be doubtful whether a periodical is a newspaper requiring to be stamped, the responsibility of adopting a conclusion is to a certain extent laid on the stamp-office authorities. In the first place, the printer lodges at the stamp-office his name and a description of his premises and his place of abode. He then gives in a signed list of all periodicals printed by him, renewing it quarterly.[7] In these

[1] 6 & 7 Wm. IV. c. 76, § 13.—[2] Ibid.—[3] Ibid. § 3.—[4] Ibid. § 15.—[5] Ibid. §§ 16, 17.—[6] Ibid. § 18.—[7] Ibid. § 24.

circumstances, the party does not become liable to penalties or forfeitures unless he receive a notice from the stamp-office that a paper printed by him is liable to stamp duty.[1]

*Advertisements.*—Before a newspaper can be published, security must be found for payment of the advertisement duties, by the publisher, and one or more proprietors, as the proper officer may arrange, with two sureties.[2] The advertisement duty on newspapers is payable for monthly periods, within twenty-eight days after the expiry of each calendar month. After the expiry of the period, if the duty be not settled within ten days after notice sent, the proper officer is to sell no more stamps for the paper until arrears are settled.[3] Of every periodical or other work in which advertisements are printed, a copy must be sent to the stamp-office,—if published within twenty miles round Edinburgh, within six days; if in other places, within ten days after publication. The advertisement duty is payable at the same time, and the advertisements are registered.[4]

*Seizures.*—In case of suspicion of a newspaper being published or sold unstamped, or otherwise contrary to the act, one justice, on the oath of the applicant, to the effect that there is reasonable and probable cause to believe this to have taken place within one month, and on the application of an officer of stamps, may grant warrant to search suspected premises in the daytime. Not only the papers and the types and machinery used in their production, but any other machinery in the same premises belonging to the same person may be seized, and are liable to be forfeited in the Court of Exchequer.[5] The holders of warrants may break open doors, where access is refused, during the day; persons resisting or impeding execution become liable to a penalty of £20.[6]

*Penalties* are to be sued for by the law officers of the crown or of the stamp-office. The proceedings are in the Court of Exchequer, unless the penalty be under £20, when it may be sued for by information or complaint before one or more justices.[7] The commissioners may mitigate or compound for penalties before or after conviction. Justices may also mitigate penalties, not reducing them to less than a fourth of the statutory sum, and providing for the payment of costs. Penalties go to the crown, but the commissioners may at their discretion reward informers out of the sums recovered.[8] A justice may summon the party and witnesses to appear before himself or any other justice. Conviction may proceed

[1] 6 & 7 Wm. IV. c. 76, § 25.—[2] Ibid. § 11.—[3] Ibid. § 20.—[4] Ibid. § 21.—[5] Ibid. § 22.—[6] Ibid. § 23.—[7] Ibid. § 27.—[8] Ibid. §§ 27, 28.

on confession, or the evidence on oath of one credible witness, and may take place in the absence of the defender. Penalties and costs may be realized by distress and sale, five days being allowed for the redemption of seized goods. If the distress prove insufficient, the party may be committed for a period not more than three months or less than one.[1]

An appeal lies to the quarter sessions next occurring after ten days from the date of conviction, notice being given to the prosecutor seven free days before the session, and security being found within three days after conviction with two sufficient sureties, to follow out the appeal and obey the final decision. The sessions may re-open the case and hear witnesses. On confirmation of the decision, costs may be awarded. Proceedings are not to be quashed for unessential informalities, and other modes of appeal are prohibited.[2]

## SECT. 3.—*Banking.*

As the business of a banker, especially when he issues notes, is supposed in some measure to affect the currency of the country, it has been subjected to certain restrictions. By the "Act to regulate the Issue of Bank Notes in Scotland,"[3] a period was selected in reference to which a measure was taken of the average circulation of each bank of issue, which limits the extent to which any such bank can continue its issues, unless the additional issues be represented by bullion in the bank's coffers.[4] It is at the same time enacted that no addition is to be made to the number of banks entitled to issue notes.[5] Banks of issue are required by the act to make a weekly return of their paper circulation and their bullion, to the commissioners of stamps and taxes, at the end of each period of four weeks, a statement of the average circulation being annexed to the return.[6] In taking an account of the bullion which is admitted by the act to be a measure of the bank's privilege of circulation, no silver coin, beyond a fourth part of the gold coin in the possession of the bank is counted.[7] From all banks except the Bank of Scotland, the Royal Bank, and the British Linen Company, there must be an annual return made to the commissioners of stamps and taxes, of the name, residence, and occupation, of the banker, or if there be a company, of each partner, with, in the latter case, the designation of the firm, and the name of every place where they carry on business.[8]

[1] 6 & 7 Wm. IV. c. 76, § 28.—[2] Ibid.—[3] 8 & 9 Vict. c. 38.—[4] Ibid. §§ 1, 6, 10.—[5] Ibid.—[6] Ibid. § 7.—[7] Ibid. § 11.—[8] Ibid. § 13.

There are certain regulations in this act against the making and negotiation of bills and notes for small sums, except under such restrictions as may prevent them from being used as cash; these regulations belong properly to the laws affecting negotiable instruments.[1] The minor penalties for enforcing observance of this department of the act are recoverable before justices of the peace, in the same manner as the penalties in the stamp acts. It would appear that prosecutions cannot be raised unless at the instance of the crown.[2]

There are certain regulations applicable to joint-stock banks, defining the privileges and responsibilities of the individual members, and providing for internal arrangements, the consideration of which belongs properly to the law of Partnership.[3]

### SECT. 4.—*Regulation of Theatres.*

The licensing of public theatres, and the judicial control over the conduct of persons connected with them, are both regulated by 6 & 7 Vict. c. 68. The justices of peace for the city or county are appointed, on requisition accompanied by certain prescribed notices, to hold a special sessions for licensing a theatre. By § 9, the justices are to make rules for the preservation of order in the theatres within their jurisdiction, subject to revisal and amendment by the home secretary. Where a breach of these rules or a riot occurs in a theatre, the justices may direct it to be closed for a discretionary period. By § 11, acting in an unlicensed theatre renders the performer liable to a penalty of £10 per day.

The same statute regulates the revisal and license of pieces intended for theatrical representation by the Lord Chamberlain. Before any new piece can be acted for hire, a copy of it must have been seven days in that officer's hands; and the seven days are counted from the payment of his fee, according to a scale which he is authorized to issue, under a prohibition against a fee exceeding two guineas for any one piece. This rule refers to "every new stage-play," "every new act, scene, or other part added to any old stage-play," "every new prologue or epilogue," and "every new part added to an old prologue or epilogue." The copy must be accompanied by a statement of the theatre where and the

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[1] See the Law of Private Rights, &c. Part XI. Chap. I. Sect. 3.—[2] 8 & 9 Vict. c. 38, § 21.—[3] See the Law of Private Rights, &c. Part VI. Chap. III. Sect. 3.

time when the piece is intended to be first acted, signed by the manager. A person acting a play before the expiry of the seven days, or one which has been disallowed, becomes liable to a penalty not exceeding £50 (§ 12-15).

### SECT. 5.—*Manufacture of Gold and Silver Plate.*

The standard of gold and silver plate in Scotland, and the method of assaying it, are fixed by a statute of 1836.[1] Gold and silver smiths are required by the act to send their names and designations, with the initial marks which they intend to stamp on their work, to the wardens of the goldsmiths' corporation of Edinburgh, or of Glasgow.[2] Each practiser of the trade is thus registered with one of the corporations, and when he constructs any article requiring the assay mark, he sends it first stamped with his own initial mark, to be stamped at the assay office of the corporation with which he has registered himself.[3] When articles palpably do not deserve the assay mark, but have not been sent with a fraudulent intention, they are returned without being stamped. Where it is suspected that there is any concealed base metal or fraudulent mixture in an article, the assay master may in the presence of two wardens of the company cut it up. If a fraud is detected, the article is defaced and forfeited; if no fraud be found it must be repaired at the expense of the assay office. Disputes as to the judgment of an assay master and wardens may be decided by any two justices or magistrates of the city in which the assay office is.[4] The officers of the assay office are liable to a penalty of £100, if they reveal any patterns, designs, or inventions of articles sent to be assayed.[5] Certain small articles are exempt from the assay; but it is provided that persons selling articles which should be but are not stamped, are liable to a penalty not exceeding £100, and to the forfeiture of the article.[6] Penalties are recoverable before the sheriff or two justices, who may proceed summarily. The penalty and expenses are levied on conviction by poinding and sale, and if a sufficient sum be not realized by the poinding, the party may be imprisoned for a term not exceeding six months. There is an appeal from the decisions of justices, on finding caution for the penalty and costs, to the next quarter sessions, which may sit after

[1] 6 & 7 Wm. IV. c. 69.—[2] Ibid. § 2.—[3] Ibid. § 3.—[4] Ibid. §§ 5, 6.—[5] Ibid. § 12.—[6] Ibid. § 18.

ten days from the conviction. The judgments of sheriffs and quarter sessions are final.[1]

### SECT. 6.—*Licensed Public Houses.*

Certificates for obtaining licenses to keep inns for the sale of exciseable liquors are granted in counties by the justices of peace (who are entitled to divide counties into districts), at their half-yearly meetings on the first Tuesday of May and the last Tuesday of October; and by the magistrates of royal burghs on the last Tuesday of April and the last Tuesday of October.[2] The certificate lasts for a year; no renewal is to be refused without hearing the applicant defend himself in open court, where there must be at least two justices or magistrates present.[3] Though the certificate applies only to one building, the holder may sell spirits, &c., in vessels moored in rivers, or at fairs in his own or the adjoining parish.[4] Application for a certificate, with the name and address of the party, must be made ten days before the meeting to the clerk, who is entitled to a fee of 2s.[5] Licenses to keepers of canteens authorized by the Board of Ordnance, may, in terms of the annual mutiny act, be granted by two justices at any time.[6]

No justice or magistrate who is a maltster, brewer, or dealer in excise commodities, can act as a licensing justice, nor can one join in granting a certificate for premises of which he is the landlord, under penalty of £50.[7] Appeals from decisions lie to the quarter sessions; they must be lodged within ten days, and caution found.[8] No person can obtain an excise license without producing the justices' certificate.[9] On the death of a person holding a certificate, any two justices or magistrates may transfer it to his representatives in the premises, until the next meeting for granting certificates.[10]

*Certificates.*—The form of a certificate requires the publican not to sell adulterated viands or liquor, not to use weights or measures of an illegal standard, not to permit disorderly conduct, gambling or tippling during the hours of divine service; not to keep the house open at unseasonable hours, or harbour prostitutes, thieves, &c.[11] The penalty for the first infringement of these rules is the sum of £5, with expense of

[1] 6 & 7 Wm. IV. c. 69. § 22.—[2] 9 Geo. IV. c. 58, § 1-5.—[3] Ibid. § 7.—[4] Ibid. § 8.—[5] Ibid. § 10.—[6] 1 & 2 Vict. c. 17, § 73.—[7] 9 Geo. IV. c. 58, § 13.—[8] Ibid. § 14.—[9] Ibid. § 18.—[10] Ibid. § 19.—[11] Ibid. Sch. B.

conviction; and in case of non-payment within fourteen days, imprisonment for a month, the court having, at the same time, power to declare the certificate null. The penalties are increased with the second and third offence; they may be mitigated by the court, provided they be not made less than a fourth.[1] The complaint may be made before the sheriff, two justices, or the burgh court; the decisions of sheriffs are final, and those of justices may be appealed to the quarter sessions.[2]

Persons keeping public houses without certificates are liable to penalties somewhat higher than the above, viz. for the first offence a fine of £7, with expenses, and, in case of non-payment within four days, imprisonment for six weeks.[3] (As to the weights and measures to be used by publicans, see *Part* VIII. *Chap.* VII.)

### SECT. 7.—*Regulations as to Pawnbrokers.*

Every person acting as a pawnbroker must take out a license in terms of the stamp acts, under a penalty of £50 for each time a pledge is taken without license.[4] Persons who take no higher consideration than 5 per cent. per annum for money lent on pledge are not to be deemed pawnbrokers.[5] Pawnbrokers must, under a penalty (not exceeding £10) enter every advance (if exceeding 5s.) with a description of the pledge, the date, and the name and address of the person pawning the goods, and of the owner, in a book kept for the purpose, and must copy the entry on the ticket; all advances above 10s. must be entered in a separate book and numbered, the number being marked on the ticket. Tickets for sums under 5s. must be delivered gratis, those for sums between 5s. and 10s. for one halfpenny; between 10s. and 20s. for one penny; between 20s. and £5 for twopence, and those for sums of £5 and upwards for fourpence.[6] The pawnbroker must file a duplicate on a pledge being redeemed, stating his profit by the loan.[7] Pawnbrokers receiving in pledge unfinished manufactures or apparel, from the persons to whom they are committed to be finished, forfeit double the sum lent, and must restore the goods.[8] On the declaration of the proprietor of any goods showing just cause to presume them unlawfully pawned, warrant may be granted

[1] 9 Geo. IV. c. 58, § 21.—[2] Ibid. § 23-26.—[3] Ibid. § 30.—[4] 25 Geo. III. c. 48, §§ 1, 3. 55 Geo. III. c. 184, Sched. License.—[5] 25 Geo. III. c. 48, § 5. 39 & 40 Geo. III. c. 99, § 30.—[6] 39 & 40 Geo. III. c. 99, §§ 6, 26.—[7] Ibid. § 7.—[8] Ibid. § 11.

by a justice of the peace to search for them, by breaking open doors, &c., and to restore them to the owner.[1]

If the pawnbroker refuses to restore a pledge for any loan of a sum not exceeding £10, on application by the borrower, or some one having right from him, within the proper period, with tender of the principal sum and profit according to the table of rates, a justice of peace may, on a representation, accompanied by a solemn declaration and production of the ticket, bring parties before him, examine into the circumstances and order restitution, on pain of imprisonment till the party is satisfied.[2] Pawnbrokers are to look on the holder of the ticket as the proprietor of the goods, unless they have notice or knowledge to the contrary.[3] Where the ticket is destroyed or mislaid, the pawnbroker may be compelled to give the owner a copy of it with a blank affidavit (for which he may receive in loans under 5s. one halfpenny, in those between 5s. and 10s. one penny, and where the sum is above 10s., the same sum he is entitled to receive for the ticket), which being filled up by a justice of peace on evidence of ownership and the party's solemn declaration, restores to him the right to redeem the goods.[4]

Pawnbrokers must have signs, stating name and trade, on their places of business, under a penalty of £10 per week.[5] Where it is proved to a justice of peace that a pawnbroker has embezzled or injured a pledge, or sold it before the proper time (*see below*, p. 206), he may award damages, which, if less than the principal and profit, may be deducted therefrom, and if more, must be made up to the party under a penalty of £10.[6] A pawnbroker not producing his books and papers unmutilated when required by a magistrate, in consequence of any criminal or other question, is liable to a penalty not less than £5, or more than £10.[7] Pawnbrokers must not take pledges from persons intoxicated, or from children under twelve years of age. They must not purchase or take in pledge the ticket of another pawnbroker, or buy in the course of their trade any goods before eight of the morning, or after seven of the evening, or employ any person under sixteen years old to receive pledges, or take pledges, at the following prohibited times, viz., before eight A. M. and

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[1] 39 & 40 Geo. III. c. 99, §§ 12, 13. 5 & 6 Wm. IV. c. 62, § 12. N.B.—This latter act substitutes a declaration in every instance in which an oath is appointed to be taken by the pawnbrokers' acts.—[2] 39 & 40 Geo. III. c. 99, § 14.—[3] Ibid. § 15.—[4] Ibid. § 16.—[5] Ibid. § 23.—[6] Ibid. § 24.—[7] Ibid. § 25.

after seven P. M. between 29th September and 25th March, and before seven A. M. and after eight P. M. during the remainder of the year. There is an exemption applicable to the evenings of Saturday, or of the day preceding Christmas, Good Friday, or a government-fast, when business may be done by them till eleven o'clock. The penalty for contravening this rule is the forfeiture of a sum not less than £1, or more than £5, recoverable before a justice.[1] All miscellaneous offences against the rules laid down in 39th and 40th Geo. III. c. 99, render a pawnbroker liable to a penalty not less than 40s. or more than £10.[2] Information against pawnbrokers for offences must be given within twelve months.[3] It has been found that in such cases as that of a person pawning goods over which he has no authority, the authority given by the act to the justices, though it may be resorted to, does not preclude the jurisdiction of the sheriff.[4]

*Rate of Profit.*—The following is the rate of profit or interest which pawnbrokers are entitled to charge per calendar month (a charge for one month being due at any time before its expiry, but charges for additional months not commencing until after the expiry of seven days, and being to the extent of only one-half the profit, until after the expiry of the first fourteen days[5]). For 2s. 6d., one halfpenny. For 5s., one penny. For 7s. 6d., three halfpence. For 10s., twopence. For 12s. 6d., twopence halfpenny. For 15s., threepence. For 17s. 6d., threepence halfpenny. For a sum of £1, fourpence; and so on progressively and in proportion for any sum not exceeding 40s. For every sum exceeding 40s. and not exceeding 42s., eightpence; and for every sum exceeding 42s. and not exceeding £10, threepence, to every £1, and so on in proportion for any fractional sum.[6] Where any intermediate sum lent on a pledge exceeds 2s. 6d. and does not exceed 40s., a sum of fourpence may be charged in proportion to each £1. Pawnbrokers must expose to sight in their offices, tables of these rates, and of the rates charged for tickets as above.[7]

A person unauthorizedly pawning the goods of another is liable, on proof before a justice of the peace, to a penalty not less than 20s. or more than £5, or in default to be imprisoned for not more than three months.[8] If persons offering goods in pawn refuse to give a proper account of themselves, and

[1] 39 & 40 Geo. III. c. 99, § 21. 9 & 10 Vict. c. 98.—[2] 39 & 40 Geo. III. c. 99, § 26.—[3] Ibid. § 27.—[4] Tweddel *v.* Duncan, 9th June 1841.—[5] 39 & 40 Geo. III. c. 99, §§ 2, 5.—[6] Ibid. § 2.—[7] Ibid. § 3.—[8] Ibid. § 8.

how they have acquired the property, or give a false one, or if there is reason for presuming fraud, either in a person offering to pawn or to redeem goods, the pawnbroker may deliver the person into the hands of an officer, in order to his being brought before a justice of the peace for examination.[1] Goods pawned are forfeited on the expiry of a year, exclusive of the day of pawning. But it has been held in England that the property is not transferred, but that the pawnbroker merely has a right to sell it; and consequently that on a claim after this period, with tender of principal and interest, the property must be restored if unsold.[2]

*Sale.*—All pledges for a sum above 10s. and not more than £10, must be sold by auction, preparatory to which they must be exposed to public view, and published in a catalogue, in which the pawnbroker's name and address, the number of each pledge, and the month in which it was pawned are entered. The sale must be twice advertised, with the name and address of the pawnbroker, and the month when the goods were received. A penalty not exceeding £10, or less than 40s. is payable to the owners for any breach of this regulation.[3] Pictures, prints, books, bronzes, statues, busts, carvings in ivory and marble, cameos, intaglios, musical, mathematical, and philosophical instruments, and china, must be sold in sales by themselves, at some one of four periods in the year, viz. on the first Mondays of January, April, July, and October, and following days, with the above preliminaries, under the penalty of not less than 40s. or more than £5, payable to the owner.[4] If the owner give notice before one witness to a pawnbroker not to sell a pledge at the expiry of a year, it must be kept liable to the redemption of the owner for three months additional.[5] Pawnbrokers must keep accounts of such sales, with the date of the pledge, and the name and address of the owner; the price for which the pledge was sold, date of sale, and name of the auctioneer; and any overplus must be paid to the party on his demanding it within three years, deducting costs. The account of the sale must be open to any person interested on payment of a penny. On contravention of these rules, the pawnbroker forfeits to the borrower £10, and triple the sum advanced.[6] Pawnbrokers must not purchase pledges except at the auctions.[7]

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[1] 39 & 40 Geo. III. c. 99, § 10.—[2] Ibid. § 17. Walter *v.* Smith, 1822, 5 Barn. and Ald. 439.—[3] 39 & 40 Geo. III. c. 99, § 17.—[4] Ibid. § 18.—[5] Ibid. § 19.—[6] Ibid. § 20.—[7] Ibid. § 21.

### SECT. 8.—*Dealers in Gunpowder.*

No private individual can have more than 50 lbs. of gunpowder, and no dealer more than 200 lbs. in one building not a magazine, under forfeiture of the excess of powder, and the barrels containing it, and of 2s. for every 1 lb. of excess.[1] Very strict rules are enacted for the conveyance from place to place of any amount of gunpowder exceeding 100 lbs. in weight.[2]

### SECT. 9.—*Sale of Bread.*

Bakers must sell bread by weight (except French or fancy bread or rolls), under a penalty not exceeding 40s. and must use avoirdupois weight under a penalty not less than £2 or more than £5.[3] Bakers must keep scales in their places of sale under penalties.[4] The regulations apply to bread made of flour or meal, of wheat, barley, rye, oats, buck-wheat, Indian corn, pease, beans, rice, or potatoes, and with any common salt, pure water, eggs, milk, barm, leaven, potato or other yeast, and with no other ingredient.[5] These penalties and others for adulteration and other offences, are recoverable before a justice or other magistrate.[6]

### SECT. 10.—*Licensed Hawkers.*

All chapmen and pedlars, before they can sell their wares, must be licensed, under a penalty of £25,—the rule is held to apply not only to traders perambulating the country, but to any person who sets up a temporary place of sale in a locality where he has not his usual residence.[7] Hawkers must have every package or vehicle numbered, and the words "licensed hawker" distinctly marked on it, under penalty of £10.[8] The same penalty is applicable where the mark is adopted by an unlicensed person, and where a hawker refuses on demand to show his license, to any magistrate or peace-officer, or to any person to whom he offers goods for sale.[9] The act does not apply to goods sold in public market, or to any person selling printed papers within twenty miles of his residence, or to the sale of fish, fruit, or victuals, or to the sale of any fabrics by the maker or his servants, in any market-town.[10]

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[1] 12 Geo. III. c. 61, § 11.—[2] Ibid. § 18-22.—[3] 6 & 7 Wm. IV. c. 37, §§ 4, 5.—[4] Ibid. §§ 6, 7.—[5] Ibid. § 2.—[6] Ibid. §§ 8, 9, 17.—[7] 55 Geo. III. c. 71, §§ 1, 6.—[8] Ibid. § 7.—[9] Ibid. §§ 8, 10.—[10] Ibid. §§ 15, 16.

## CHAPTER III.

### GAME.

THERE are two separate qualifications essential to a person entitled to kill game, the landed qualification and the payment of duty.

#### SECT. 1.—*Landed Qualification.*

The landed qualification consists of the possession of "a plough," or "ploughgate of land."[1] The extent of "a ploughgate" not being accurately ascertained, the simple possession of land is the practical qualification. It has been decided that, in virtue of long usage, a person so qualified may grant a deputation to an unqualified person to shoot over his lands.[2] The penalty of acting without the qualification is £100 Scots (£8, 6s. 8d).[3] Property only can give the qualification; it does not accrue to a lease, however long, or though perpetually renewable. A tenant cannot therefore kill game on his farm without a deputation from the proprietor.[4]

The landlord, and persons deputed by him, may, at the same time, hunt and kill game at pleasure among the tenant's fields and enclosures, he having a claim for all damage occasioned.[5]

It is believed, however, that a tenant might interdict his landlord from hunting on land recently sown, as the damage would not be capable of exact appreciation.[6]

A person not qualified as above, having in possession any hares, partridges, pheasants, muirfowl, ptarmigans, heathfowl, snipes, or quails, without leave from a qualified person, forfeits for the first offence 20s., and for all others £2, and in case of not paying within ten days, suffers imprisonment for six weeks in lieu of the former penalty, and for three months in lieu of the latter.[7]

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[1] 1621, c. 31.—[2] Trotter *v.* Macewan, 8th July 1809.—[3] 1621, c. 31.—[4] Tait's J. P. 173. Earl of Hopetoun *v.* Wight, 17th January 1810.—[5] Ronaldson *v.* Ballantine, 21st December 1804, M. 15270.—[6] Grigor on the Game Laws, 44.—[7] 13 Geo. III. c. 54, § 3.

### SECT. 2.—*Duty Qualification.*

A game certificate is necessary for the killing of "any game whatever, or any woodcock, snipe, quail, or landrail, or conies." The duty paid is £3, 13s. 6d.; but a certificate may be obtained for a gamekeeper, for whom duty is payable as a man-servant, for £1, 5s.[1] A person having the landed qualification in his own right, may employ an unqualified assistant, who must, however, bring no additional dogs or guns.[2]

A person acting without a certificate is liable in a penalty of £20, with costs, and the amount of the duty.[3] Prosecutions must be brought within six months, and may be tried summarily before two commissioners of supply, or one commissioner who is a justice of the peace, though the parties be absent. The penalty may be mitigated to one-half; on default, it is levied by poinding, which, if ineffectual, is followed by six months' imprisonment. An appeal to the Court of Justiciary seems to have been intended, but the provisions of the act have been found insufficient to that end.[4] Woodcocks and snipes may be taken by nets and springes, and conies or rabbits may be taken by proprietors of warrens, on any enclosed ground, or by the tenants of lands, or persons authorized by them, without certificate.[5] A person found killing game by any assessor, commissioner, proprietor, or tenant of lands, gamekeeper, &c., may be required to show his certificate, and if he refuse, or give a false one, or (on failure of having it with him) give a false address, he is liable to the penalty.[6]

### SECT. 3.—*Day-Poaching.*

An individual trespasser, in pursuit of game, forfeits a sum not exceeding £2, with costs. Where an individual disguises himself, or where persons to the number of five trespass, each person forfeits a sum not exceeding £5, with costs.[7] Such trespasser may be required by any proprietor, tenant, gamekeeper, servant, &c., to leave the ground, and give his name and address; and if he refuse, or give an elusory address, he may be immediately seized and conveyed

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[1] 48 Geo. III. c. 55, § 4, and Sch. L. 52 Geo. III. c. 93, Sch. L.—[2] 54 Geo. III. c. 141.—[3] 52 Geo. III. c. 93, Sch. L. Rule 12.—[4] Ibid. Rule 13. Shanks *v.* Neilson, 20th December 1837, 1 Sw. 617.—[5] 52 Geo. III. c. 93, Sch. L. Exceptions.—[6] Ibid. Rule 11.—[7] 2 & 3 Wm. IV. c. 68, § 1.

to a justice of the peace, by whom he may be summarily adjudged to pay a penalty not exceeding £5. He must not be detained more than twelve hours untried, without prejudice to his being brought to trial, if dismissed at the end of that period.[1] The penalties are not incurred by persons hunting or coursing, and in fresh pursuit of deer, hares, or foxes, started in other ground.[2]

Game in their possession may be seized from illegal trespassers.[3] A trespasser assaulting a person acting under the powers of the statute is liable to a penalty not exceeding £5 (in addition to any other penalty incurred), and in default, to imprisonment not exceeding three months.[4] Penalties go to the fund for the relief of the poor;[5] in default of payment of the ordinary penalties, the justices may imprison with or without hard labour, for a period not exceeding two months.[6] Witnesses not attending when summoned, or refusing to give evidence, are liable in a penalty not exceeding £5.[7] An appeal lies from the decision of justices to the quarter sessions, on notice within three days after conviction, and seven days before the court meets.[8]

The daytime for the purpose of the act is to be deemed to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour after sunset.[9]

### SECT. 4.—*Night-Poaching.*

In the regulations as to night-poaching, the night is held to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise,[10] and the word "game" is deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.[11]

A person entering upon land, open or enclosed, with instruments for destroying game, is liable to be imprisoned for a period not exceeding three months, with hard labour, and at the expiry to find caution, himself in £10, and two sureties in £5 each, or one in £10, for avoiding such offence for a year, or to be further imprisoned for six months. For the second offence the penalty, amount of security, the

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[1] 2 & 3 Wm. IV. c. 68, § 2.—[2] Ibid. § 4.—[3] Ibid. § 5.—[4] Ibid. § 6.—[5] Ibid. § 7.—[6] Ibid. § 8.—[7] Ibid. § 10.—[8] Ibid. § 14.—[9] Ibid. § 3.—[10] 9 Geo. IV. c. 69, § 12.—[11] Ibid. § 13.

period to which it extends, and the imprisonment on failure, are doubled. The third offence may be punished with transportation for seven years, or imprisonment, with hard labour, for a period not exceeding two years.[1] Persons to the number of three entering on land for the purpose of killing game, with fire-arms, bludgeons, or other offensive weapons, are liable to be transported for a term not more than fourteen or less than seven years, or to imprisonment with hard labour for a term not exceeding three years.[2]

Owners and occupants of land, and lessees of game, and their servants, may pursue and apprehend night trespassers, and convey them before any two justices; and if any such trespasser offer violence with an offensive weapon, he becomes liable to transportation for seven years, or to imprisonment and hard labour for a period not exceeding two years.[3]

Where transportation is not the punishment, the case may be tried by any two justices, with appeal to the general or quarter sessions, as in day-trespassing.[4] Sheriffs have a cumulate jurisdiction with the justices. Transportable offences are tried by the Court of Justiciary.[5]

By an act of 1844, the whole restrictions, penalties, and punishments applicable to night trespassers as above, "shall be applicable to, and imposed upon any person by night unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any such land open or inclosed."[6]

### SECT. 5.—*Forbidden Time.*

The forbidden time for muirfowl and ptarmigan is between the 10th December and 12th August. For heathfowl between 10th December and 20th August; for partridges between 1st February and 1st September; and for pheasants between 1st February and 1st October. Any person killing, taking, possessing, selling, or buying game in forbidden time, forfeits £5 for each bird; and in case of failure to pay within ten days, is liable to two months' imprisonment for each £5.[7] The penalties do not apply to the case of pheasants or partridges kept in mews or breeding-places.[8]

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[1] 9 Geo. IV. c. 69, § 1.—[2] Ibid. § 9.—[3] Ibid. § 2.—[4] Ibid. §§ 5, 6.—[5] Ibid. §§ 10, 11.—[6] 7 & 8 Vict. c. 29.—[7] 13 Geo. III. c. 54, § 1. 39 Geo. III. c. 34.—[8] 13 Geo. III. c. 54, § 2.

By two old statutes, persons killing hares or deer during snow-time forfeit £100 scots (£8, 6s. 8d.) for each offence, half going to the crown, and half to the informer; these acts are however held to be in desuetude.[1]

### SECT. 6.—*Animals not included in the Acts.*

*Deer.*—Deer in forests were formerly looked on as private property, and the act of taking or destroying them was punished as theft.[2] At the present day, they may be appropriated by enclosure in a park, and the taking or destroying them in such a situation would doubtless be viewed as theft.[3] Deer at large are held as *inter regalia*, and not to be hunted except by one who has a royal charter of forest.[4] It is not presumed, however, that one could now be prohibited from hunting deer on his own ground.

*Pigeons.*—The supporting large dovecots being found destructive to the neighbouring grain, no one is entitled to the privilege unless he have property to the extent of ten chalders of victual-rent within two miles of the dovecot.[5] There is a presumption, however, that old dovecots were built before the year 1617, when the act containing this regulation was passed, unless the contrary be proved.[6] A proprietor may build a dovecot for every ten chalders.[7] Tenants are not entitled to kill the pigeons belonging to landlords so qualified when consuming their grain, but they may drive them away.[8] How far persons will be responsible for destroying pigeons kept in small numbers, when at large, is doubtful. It is believed, that when they are destroyed, the owner, on identifying his birds, would be entitled to their value.[9]

Marine birds, and other wild animals not included in the lists to which the penalties are applicable, may be killed with impunity, wherever this can be done without trespass.[10]

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[1] 1621, c. 32. 1685, c. 20. Grigor on the Game Laws, 87.—[2] 1587, c. 59.—[3] E. ii. 1, 10. Ness on the Game Laws, 90.—[4] Hutch. J. P. ii. 547.—[5] 1617, c. 19.—[6] E. ii. 6, 7.—[7] Brodie *v.* Gordon, 3d July 1752, M. 3602.—[8] Grigor on the Game Laws, 15.—[9] Ibid. 16.—[10] Ibid. 17.

# CHAPTER IV.

## FISHINGS.

### SECT. 1.—*Where and how appropriated.*

IN the sea and in navigable rivers, the fishing is open to the public, except where there is any special appropriation, or restriction by act of parliament. In streams not navigable, running through private property, the smaller fish are understood to be the property of the adjacent landlords. The right to fish for salmon, however, is held to be in the crown, and it can only be enjoyed by a subject when it is granted by charter, or is presumed to have been so by appearing in the titles of his property during the period of prescription.[1] The right of salmon-fishing on a stream, and the property of the land adjacent to it, may be held by different individuals through separate rights from the crown.[2] The person who possesses the fishing must have the means of using his right, and so is entitled to access through the adjoining lands; but he is not entitled to make towing-paths, or construct sights.[3] A proprietor is entitled to fish for trout in the stream which his land borders, though the salmon-fishing be the property of another person; but he must so exercise the right as not to injure the salmon-fishing.[4] It is held that a right to a public pathway along the banks of a stream through private property does not include a right to angle for trout in the stream.[5]

*Sea.*—It has long been questioned how far muscle-scalps, lobster-fishings, &c., can be appropriated, and so made the subject of grants; but in practice they have been appropriated and let on lease. The authorities are in favour of muscle-scalps being, like oyster-beds, subjects of property, leaving the question as to lobsters more doubtful.

In 1764, a grant of a muscle-scalp from the crown was held a preferable right to one of later date, the reporter (Lord Kaimes) observing that "it belongs to the public, and consequently the use of it is open to every one of the lieges. But as such general use tends to root out every muscle-

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[1] E. ii. 6, 15.—[2] Ibid.—[3] Ibid. H. on L. and T. i. 274, 275.—[4] Mackenzie *v.* Rose, 26th May 1830.—[5] Fergusson *v.* Shirreff, 18th July 1844.

scalp, expediency, supported by practice, has introduced a prerogative in the crown of gifting muscle-scalps to individuals, which has the effect to preserve them by the exclusive use given to the grantees."[1] In a later case, the following opinion was given by the Lord Ordinary Corehouse:—"It has not been decided in any reported case whether an exclusive right to fish lobsters on the coast of an arm of the sea, or in a navigable river, can be competently granted by the sovereign, or acquired by a subject; neither is there any authority in the text-writers directly in point. It is settled law, that a right to fish oysters and muscles in the sea, from the scalp or bed to which they are attached, may be appropriated. Further, there are many grants in Scotch charters of a right of fishing of white or floating fish in the sea, the legality of which, though not expressly recognised, seems to have been taken for granted repeatedly in the decisions of the court."[2]

In 1840, an act of Parliament recognised oyster fishings as property, by rendering any party guilty of theft, who should "wilfully and knowingly take and carry away any oysters or oyster brood, from any oyster-bed, laying, or fishery, being the property of any other person or persons, body corporate or politic, and sufficiently marked out or known as such."[3]

With regard to white fishings, though the law-books, in general, treat the question of their appropriation as doubtful, it appears to be provided by a statute not much known, but which seems to be unrepealed, that all persons whatever are empowered to catch herrings, cod, ling, "or any other sort of white fish," "in all and every part of the seas, channels, bays, friths, lochs, rivers, or other waters where such fish are to be found, on the coast of Scotland," and that every party interrupting a fisher catching white fish is liable to a penalty of £100.[4]

By an act for carrying into effect a treaty between Britain and France, regarding the mutual rights of the fishers of both countries on the seas bordering on each country, it is provided that the fishing is to belong exclusively to British subjects, in the sea within three miles from low-water mark. Not only are British subjects liable to be tried before the sheriff or a justice of peace of the adjoining county, for any offence committed within that limit; but French subjects transgressing the treaty by fishing within the limits are also

[1] Grant *v.* Ross, 6th July 1764, M. 12801. See Agnew *v.* Magistrates of Stranraer, 27th November 1822.—[2] Duke of Portland *v.* Gray, 15th November 1832.—[3] 3 & 4 Vict. c. 74.—[4] 29 Geo. II. c. 23, § 1.

liable to be brought before the sheriff or a justice, and to be subjected to a penalty not exceeding £10.[1]

### SECT. 2.—*Restrictions as to Sea Fishings.*

The Scottish fishings are under the regulation of the Board of Fisheries established at Edinburgh, which having had to enforce the rules regarding the taking and curing of fish on which a bounty was formerly granted, retain since the bounty was abolished a considerable portion of their powers,[2] which are believed to be exercised in such a manner as to give the fish cured under their sanction a character in the foreign markets. The acts relating to the powers of the board, and the laws relating to the sea-fishings in general, are likely to be soon consolidated and amended. The commissioners require to make an annual report, a copy of which is laid before each House of Parliament.[3] They can make rules from time to time for putting in effect the restrictions of the acts.[4]

*Herrings.*—The herring-fishery on the coast is subject to many regulations too minute to be here repeated. The principal statutes now in force are 48 Geo. III. c. 110, 55 Geo. III. c. 94, 1 Geo. IV. c. 103, 1 & 2 Geo. IV. c. 79, 5 Geo. IV. c. 64, 7 Geo. IV. c. 34, and 1 & 2 Wm. IV. c. 54. By these it is, among other things, provided that the meshes of herring nets must not be less than one inch "from knot to knot," under penalty of £40, and forfeiture of every improperly constructed net.[5] No white herrings must be cured and put up in any barrel wholly or partly made of fir, or which is not half an inch thick throughout of made-work, or which does not contain thirty-two gallons English wine-measure, under pain of forfeiture.[6] When there are disputes between the curers of herrings and the fishery officers as to the quality of the herrings, or the acts being conformed with in relation to them, application may be made to a justice of peace to appoint two arbiters to settle the matter.[7]

*Lobsters.*—Lobsters must not be caught between 1st June and 1st September, under penalty of £5 sterling for each offence.[8]

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[1] 6 & 7 Vict. c. 79, §§ 11, 12.—[2] 48 Geo. III. c. 110, § 5, and 1 & 2 Wm. IV. c. 54.—[3] 48 Geo. III. c. 110, § 7. 55 Geo. III. c. 94, § 4.—[4] 48 Geo. III. c. 110, § 48.—[5] 48 Geo. III. c. 110, § 12. 55 Geo. III. c. 94, § 15.—[6] 55 Geo. III. c. 94, § 12.—[7] 48 Geo. III. c. 110, § 38. 55 Geo. III. c. 94, § 36.—[8] 9 Geo. II. c. 33, § 4.

### SECT. 3.—*General Regulations as to Salmon Fishing in Rivers.*

Independently of special laws extending to particular parts of the country, it is a general rule that net and coble or the rod are the only legitimate modes of catching salmon, unless where a property has been time out of mind established in cruives or yairs. The former of these consist of boxes with valves towards the mouth of the river, which the salmon in ascending force up; the latter, of enclosures with narrow openings, which the salmon, having once entered, cannot easily leave.[1]

Those who are entitled to use cruives must make their hecks three inches distant from each other, and must observe "the Saturday's slop," *i. e.* pull up the hecks to the height of an ell (3 feet 1 inch) at six o'clock on Saturday night, leaving the cruives open till sunrise on Monday morning.[2] Except on the Solway, cruives and yairs are illegal in those parts of rivers where the tide ebbs and flows.[3] The same rule has been held to apply to all kinds of fixed machinery; such as stent-nets, hang-nets, stake-nets, &c., and to the erection of a bulwark or loose dike, with a creel or pocket-net, to intercept the fish.[4] It has been found that no length of possession can confer a right to fish with yairs in a place where it is illegal.[5]

### SECT. 4.—*Salmon Fishings north of the Tweed and Solway.*

The close time is between the 14th September and the 1st February, and persons catching fish between those dates are liable to a penalty of not less than £1 or more than £10 for each offence, and to forfeiture of the fish caught, with the boats, tackle, &c.[6] Persons catching or dealing in foul fish forfeit a sum not less than £1 or more than £2 for each fish.[7] Owners or occupants of cruives infringing the rule as to Saturday's slop (*see Sect.* 3.), forfeit a sum not less than £5 or more than £20 for each offence.[8] All proprietors and occupants of fishings must remove their boats and tackle during close time, or secure them from liability to be used, under a penalty not less than 40s. and not more than £10 for the first offence, and for every other after notice.[9]

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[1] E. ii. 6, 15. Tait's J. P. 162.—[2] 1477, c. 3. (Thomson's Acts, ii. 119.) E. ii. 6, 15.—[3] 1424, c. 11. 1563, c. 68.—[4] Iv. Er. 355, note 86.—[5] Mackenzie *v.* Renton, 12th June 1840.—[6] 9 Geo. IV. c. 39, §§ 1, 2.—[7] Ibid. § 5.—[8] Ibid. § 7.—[9] Ibid. § 8.

The catching of salmon by the employment of fire is prohibited, under a penalty of not more than £10, or less than £2 for each offence.[1] Persons selling, having in their possession, or wilfully taking or obstructing, spawn or fry, forfeit a sum not less than £1, or more than £10.[2] Persons trespassing on land or fishings for the purpose of catching salmon, forfeit a sum not more than £5, or less than 10s.[3] All penalties go to any informer who will prosecute, and prosecutions may be raised before the sheriff or justices, who may decide summarily, and without written pleading, subject to appeal to the Circuit Court, or Court of Justiciary.[4] There are provisions for assessing proprietors for the necessary expenses connected with the regulations.[5]

An interpretation act was passed in 1844, to remove doubts that this act extends to the sea. It applies a penalty not less than 10s. and not more than £5, to the taking of salmon in any estuary, sea-loch, creek, bay, or shore of the sea, or in any part of the sea within a mile of low-water mark, without the owner's permission.[6]

### SECT. 5.—*Tweed Fishings.*

In the Tweed and its dependencies, the catching of salmon with the net is prohibited between the 15th October and 15th February, or with the rod between 7th November and 15th February. During the period from the 15th February to the 1st June, they must not be taken between six o'clock on Saturday night and two o'clock on Monday morning; and from 1st June to 15th October they are not to be caught between six o'clock on Saturday night and six o'clock on Monday morning.[7] For every breach of these rules, a penalty not less than £2 and not more than £20 is incurred (with forfeiture of fish taken and engines used); and in the case of infringement of the weekly close time, the justices cannot mitigate the penalty to less than £10, unless the offence have been committed within half an hour after the forbidden time has commenced or before it is over.[8] Whoever buys or sells or has in possession a fish of the salmon kind, caught in the close time, forfeits a sum not less than £1 or more than £2 for each fish, with the fish and the boat, cart, &c., in which it may be found.[9] When salmon are found in the possession of persons during the close time, the

[1] 9 Geo. IV. c. 39, § 6.—[2] Ibid. § 4.—[3] Ibid. § 3.—[4] Ibid. § 9.—[5] Ibid. § 10.—[6] 7 & 8 Vict. c. 95.—[7] Local Acts, 11 Geo. IV. c. 54, §§ 1, 2. 6 Wm. IV. c. 65, § 6.—[8] 11 Geo. IV. c. 54, § 3.—[9] Ibid. § 4.

proof that they are not caught in the Tweed lies with themselves.[1] Persons trespassing on the river or adjacent lands for the purpose of catching salmon, forfeit for each offence not less than 10s. or more than £5, and the possession of nets or other instruments is held evidence of the intention.[2] Persons beating the water, or otherwise interrupting the progress of the fish, forfeit not less than £10 and not more than £20 for the first, and not less than £20 or more than £40 for every subsequent offence.[3] Persons injuring the fish by quick-lime or other deleterious substances forfeit a sum not less than £2 or more than £5 for the first, and not less than £5 or more than £10 for subsequent offences;[4] and persons throwing rubbish into the stream forfeit £1 for each offence.[5] Persons catching or injuring the spawn of salmon forfeit not less than £1 or more than £10, and 2s. for each fish caught or destroyed, with the instruments used, &c.[6]

Disorderly persons, who are not possessors of fishings, fishing with net and coble, &c., within the mouth of the Tweed, forfeit a sum not less than £2 or more than £20 for each offence, with the nets, cobles, &c.[7] No person must fish with salmon-tackle without leave from a proprietor, under a penalty not less than 10s. and not more than £2;[8] and any person fishing for trout, and happening to catch salmon, must deliver them to the proprietor, under a penalty of not less than 10s. or more than £2 for each fish.[9] There are provisions for the removal of boats and nets during close time, for appointing overseers and bailiffs, and for imposing assessments on proprietors, &c.

### SECT. 6.—*Solway Fishings.*

Salmon must not be caught in the Bladenoch, Luce, Pollanton, and Cree, between 25th September and 31st December; in the Dee and the Fleet between 25th September and 1st February; or in the Solway Frith, the Nith, the Urr, and any other stream connected with the Solway not specified, from 25th September to 10th March. This close time extends to the Annan, to which, however, more special regulations and distinct penalties have been applied by a later local act. The same periods apply to the dependencies of the respective streams.[10] Salmon must not be taken with the lyster, spear, &c., in any of the waters of the Solway, to

[1] 11 Geo. IV. c. 54, § 2.—[2] Ibid. §§ 7, 8.—[3] Ibid. § 10.—[4] Ibid. § 22.—[5] Ibid. § 23.—[6] Ibid. § 6.—[7] Ibid. § 18.—[8] Ibid. § 28.—[9] Ibid. § 29.—[10] Local Act, 44 Geo. III. c. 45, § 1.

which the old act applies, between the 25th September and the 10th March.[1] The penalty of transgressing any of these regulations is, for the first offence £5, for the second £15, for the third and every other £20, together with forfeiture of the fish caught and the tackle used, which must be destroyed.[2]

Persons who catch, destroy, or have in their possession breeding fish, or fish out of season, incur like penalties, and the sum of £1 for each fish;[3] but owners or tenants of fishings do not incur the penalties if they restore the fish to the water unhurt.[4] Persons who have made cuts for irrigating land must cross them with bars or wirework sufficient to prevent the fry from passing, under the same pecuniary penalties as the above; and similar penalties are incurred by proprietors of fishings, or of mills, manufactories, &c., who injure the fry.[5] Persons fishing without leave of proprietors forfeit the same penalties, and their tackle, which must be destroyed.[6] Owners and occupants of fishings, and persons authorized by them, may angle with the rod from the 1st June to the 25th September.[7] Persons having in their possession or selling salmon in the shires of Dumfries, Kirkcudbright, and Wigton during close time (unless they can prove the fish to have been caught in a place where it is not close time), or foul fish, incur similar penalties.[8] Justices may mitigate any penalty by subtracting £5 from it when it exceeds that sum, and may impose costs of suit.[9] An appeal from the judgment of the local magistrates lies to the Circuit Court of Justiciary.[10]

The Annan, with its tributary streams and the seacoast adjacent to its mouth, was subjected to new regulations in 1841.[11] Besides the annual close time from 25th September to 10th March, there is a prohibition against taking fish between six o'clock on Saturday night and two o'clock on Monday morning from 10th March to 1st June, and between six o'clock on Saturday night and six o'clock on Monday morning, from 1st June to 25th September. There is a farther prohibition against fishing in the mouth of the river during the two complete consecutive periods of the flowing and ebbing of the tide, in which high water occurs between twelve o'clock on Saturday night and twelve o'clock on Monday morning, between 10th March and 25th September.[12]

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[1] Local Act, 44 Geo. III. c. 45, § 1.—[2] Ibid.—[3] Ibid. § 4.—[4] Ibid. § 5.—[5] Ibid. § 6.—[6] Ibid. § 9.—[7] Ibid. § 10.—[8] Ibid. § 11.—[9] Ibid. § 17.—[10] Ibid. § 24.—[11] Local Act, 4 & 5 Vict. c. 18.—[12] Ibid. § 22.

The neighbouring proprietors are appointed commissioners for applying the act.[1] Penalties are recoverable before the sheriff or any one justice, and they may respectively grant search-warrants on information.[2] It is specially provided, that being a commissioner under the statute, or being interested in the fishery, is not to disqualify any one from acting as a justice in its enforcement.[3]

### SECT. 7.—*Net Fishing for Trout.*

Fishing with net for trout in fresh water is specially prohibited to any one who is not proprietor of the adjoining land, "or not having a right there to fish for trout or fresh-water fish, or not having a written permission from some such proprietor or person entitled to fish as aforesaid." Persons offending are liable to a penalty not exceeding £5, for each offence, with all fish taken and nets and other things used.[4] The pecuniary penalty is incurred for trespassing with intent to fish, and the possession of a net is sufficient evidence of intent.[5] An offender may be seized and brought before the sheriff or a justice for committal, until he find caution to appear. It is no disqualification to a justice so acting, that he is the proprietor of, or otherwise interested in the fishings.[6] The complaint is heard and decided on by the sheriff, who acts summarily, justices only having jurisdiction as committing magistrates. An appeal lies from the sheriff to the Circuit Court or the High Court of Justiciary.[7]

[1] Local Act, 4 & 5 Vict. c. 18, § 2-13.—[2] Ibid. §§ 38, 49.—[3] Ibid. § 45.—[4] 8 & 9 Vict. c. 26, § 1.—[5] Ibid. §§ 2, 3.—[6] Ibid. §§ 4, 5.—[7] Ibid. §§ 6, 7.

# PART VII.

## REGULATIONS AS TO TRANSIT.

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### CHAPTER I.

#### Post-Office.

With the general practical operation of Mr Hill's Penny Postage Act (3 & 4 Vict. c. 96), the public in general must be familiar, and the most important part of it, the scale of duties as applied to the weight of the letters, and the difference between the respective postages of letters prepaid or stamped, and those charged by the post-office on delivery, are matters for which a law book is not likely to be consulted. Those who wish to refer to the statutory authorities on these matters, will find them provided for in §§ 2, 12, 13, 14, 15, and 17. The most complicated portion of the old post-office law consisted in the exceptional provisions connected with the various franking privileges, and in the stringent rules it was necessary to adopt to prevent the post-office from being defrauded, through these privileges, or through the employment of private methods of conveying letters. For the same reason, the regulations for the free transmission of newspapers had to be carefully watched in their operation. The uniformity of the present system has removed these causes of complex arrangement, which were aggravated by the difference, now no longer subsisting, between the city district postal arrangements, called penny posts, and the general arrangements for the passage of letters from town to town.

It is a general rule under the act, that there is one rate of postage for letters prepaid or duly stamped, on being posted, and another rate exactly twice as high applicable to letters paid on delivery. It is one of the most useful but perhaps least known peculiarities of the system, that when a letter,

after having passed through the post-office to a certain address, is redirected without being opened owing to the person to whom it is addressed being in a different place, and posted without being prepaid or stamped, the charge for its thus passing a second time through the post-office, payable on delivery, is the lower rate (§ 14). The government offices keep an account with the post-office department, both for letters transmitted and letters received. The double postage on letters received being thus charged against one department of the revenue and credited to another, the government is not put to expense by the postage being doubled, and it is understood that the public offices to which the franking privilege formerly belonged, are in use to receive, though they be not prepaid, such letters as formerly came within their franking privilege. When parliamentary papers are transmitted through the post-office in the same manner as newspapers, in covers open at the ends, they are subject to a scale of postage duties at the rate of 1d. per oz., and the postage is the same whether it be prepaid or charged on delivery (§ 11).

A schedule is attached to the act, containing a table of the British postages charged on letters passing between the United Kingdom and foreign countries. The corresponding scale of weight is the same as that which applies to letters passing from place to place in the United Kingdom; viz., where the letter does not exceed half an ounce in weight, one postage is charged; where it is between half an ounce and an ounce, two postages, &c. It has to be kept in mind, however, that in so far as they may be liable to a foreign postage in addition to the British postage, such letters may have to be tried by a different scale from the British, and one which may commence at a lower weight.

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## CHAPTER II.

### Turnpike Road Act.

[All the previous public general statutes affecting Turnpike Roads in Scotland are repealed, and the present act (1 & 2 Wm. IV. c. 43) extends to all local acts in force or to be passed (§§ 1, 2), but not to the roads and bridges under the management of the commissioners for Highland roads and

bridges, acting under 59th Geo. III. cap. 135, 4th Geo. IV. cap. 56, and 5th Geo. IV. cap. 38;* nor to the road from Glasgow to Carlisle, under 56th Geo. III. cap. 83, and other local acts (119).]

### SECT. 1.—*Trustees and Officers.*

The trustees of the respective trusts are those qualified by the local acts, and each must swear or affirm to the amount of his qualification if required by any other trustee (§ 3). Those omitting to do so when required, or acting without qualification, or acting while holding some lucrative situation connected with the trust, are liable, on prosecution before the Sheriff or Court of Session, to a penalty of £20, and their acts as trustees are null (§ 4). No trustee is disqualified from acting as sheriff or justice in execution of the act, and no lender of money to the trust is disqualified from acting as trustee, sheriff, or justice (§§ 5, 6).

Trustees at their general meetings (which may be called by any two trustees on advertisement, and to which trustees must proceed at their own expense) may divide trusts into districts, appointing committees of management, of which three are a quorum (§ 9), appoint clerks, collectors, superintendents, surveyors, &c. (§ 10), accept and enforce subscriptions, borrow money, assigning tolls in payment (§§ 19, 23), erect or remove toll-bars, reduce tolls or raise them as far as permitted by the local act (§ 33), let tolls by public roup (§ 34), provide tables of tolls and tickets, &c. (§ 35). Trustees are not personally liable for the engagements undertaken by them in terms of the act (§ 24), and may sue and be sued through their clerk or treasurer (§ 16). They must by themselves or a committee audit the accounts and make up abstracts, to be signed by not less than three of their number (§ 18). Unless where all sums collected are lodged in name of the trustees with the Bank of Scotland, or the Royal or British Linen Company's Bank of Scotland, the treasurer must find security (§ 11). Where the monies are so lodged, an individual is not liable to a penalty (which he would otherwise incur) for acting both as clerk and treasurer (§ 12).

The clerk must keep an authenticated minute-book, signed

* Since the passing of the General Turnpike Act, these have been amended by 3 & 4 Wm. IV. c. 33.

extracts of which are probative, (§ 14); and account-books must be kept accessible to trustees and creditors gratis, and to other persons on payment of 1s. (§ 15). Officers under the trustees are prohibited from holding contracts, under penalty of £100 (§ 13). All officers must account with the trustees, and give up monies and vouchers in their hands whenever required, and in the case of their neglecting or refusing for the space of fourteen days to do so, the sheriff or justices at quarter sessions may summarily direct the money to be levied, and vouchers recovered, by poinding, sale, and imprisonment (§ 17).

### SECT. 2.—*Borrowing Money.*

Where money is subscribed for particular parts of roads on security of the tolls, it may be pursued for if not paid up within forty days' notice (§§ 19, 20). Money may be secured by assignations according to a particular form. They are transferable by indorsation, which, when intimated to the clerk, has the effect of an intimated assignation (§§ 21, 22). Money may also be borrowed on transferable annuities for life not exceeding 10 per cent. on lives not under 50 years of age (§ 23).

### SECT. 3.—*Making, Altering, and Repairing Roads.*

The plans appointed by the standing orders of the lords and commons to be lodged with the clerk of the peace when local road acts are applied for,* must remain in the clerk's hands, and be accessible to proprietors and occupants along the lines (§ 28).

*Appropriation of Lands.*—The trustees and their servants may enter the land through which they are authorized to carry a road, and any adjoining land, and may stake out the road, cut drains, make temporary ways, &c. (provided they do not interfere with gardens, nurseries, avenues, pleasure grounds, &c.) paying for the damage occasioned; and persons injuring their operations are liable for each offence to a penalty not exceeding £5 (§ 60); no damages are paid to proprietors (except to the extent of injury occasioned by removing fences) for ground necessary for making the road of

* See standing orders of House of Lords on private bills, 190, and standing orders of Commons, Turnpike Roads. See also 7 Wm. IV. & 1 Vict. c. 83.

the smallest legal breadth, which is twenty feet exclusive of ditch and bank; and on satisfying the adjoining proprietors, a road may be extended to forty feet of breadth (§ 61).

Trustees are not empowered to make a deviation to a greater distance than 100 yards, or of greater length than 500 yards at one place, or in making a new road to diverge more than 100 yards from the plan, or to use any garden or pleasure ground for such deviations without the written consent of the owner, unless greater powers are given by local acts (§ 62).

*Materials.*—Trustees may deposit rubbish on waste lands, and take materials, where they are not wanted by the owner, from all lands except pleasure grounds, paying for stones used in building, and for damage done to enclosed lands, and fencing pits dug in waste lands. Disputes are decided by the sheriff or justices; and before materials are taken from enclosed lands, the proprietor must have been warned fourteen days previously to attend before the sheriff or justices for his interest (§ 80). Persons carrying off materials are subject to a penalty not exceeding £5 (§ 81).

*Footpaths.*—Trustees must make footpaths on all roads within two miles of any town which contains 2000 inhabitants within the compass of a circle with a radius of half a mile from the centre of the market place; and in default, any five householders, finding caution to pay costs of process, or any magistrate, may complain to the sheriff (§ 82).

A temporary road may be made through adjoining grounds (not pleasure grounds) while a road is under repair, questions as to damage being settled by the sheriff (§ 83). Drains may be carried through neighbouring lands, and kept at the expense of the trust (§ 84); but the proprietors must keep clear the ditches along the sides and their outlets (unless they be on waste land), or reimburse the trustees for doing so (§ 85). Trustees may alter the junction of any road or avenue with the turnpike, so as to make it commodious, or compel the proprietors or administrators to maintain sufficient bridges over the drains at the junction; the trustees may also cause mounds or projections, occasioned by the junction, to be removed (§ 86). The trustees must keep up mile-stones, direction-posts at the crossings, and parapets in dangerous places (§§ 93, 94). They must cut down weeds to prevent them from going to seed, and if they fail to do so after eight days' notice, the neighbouring proprietors may do so at the expense of the trust (§ 103).

### SECT. 4.—*Tolls and Toll-bars.*

If tolls are to be reduced, raised, or abolished, notice must be given on all the toll-bars of the road, and by advertisement; and where the money borrowed on the credit of the tolls is not discharged, no tolls can be reduced or abolished without the consent of creditors to the extent of three-fourths of the money borrowed, and of any trustees who have become personally liable (§ 33). No tolls must be let longer than three years. They must be exposed to public roup, at which the trustees may employ a person openly to bid for them, and if they are not so let, they may be let by private bargain (§ 34). A schedule must be provided for every bar, containing a scale of toll-duties, the name of the bar, and that of every bar cleared by payment at it. Where other bars are cleared, tickets, containing the day of the month and the names of the bars cleared, must be given to those paying (§ 35). A local act provided that no tolls should be charged for passing through a bar within five miles of another at which toll had been paid, in the case of any new bar being erected within that distance of another, leaving such toll still chargeable at the existing toll bars within five miles of each other. The site of one of these was changed in such a manner that cross roads, which were not so formerly, stood between it and the next bar. The exception as to existing bars was found no longer to apply to it.[1]

*Exemptions* are as follow:—The royal family and attendants (§ 36); conveyances employed in making or repairing turnpike or commutation roads or bridges, or toll-houses on such roads; conveyances employed in carrying instruments of husbandry, produce, or manure, from one part of a farm to another, beasts going to or returning from plough or harrow, pasturage, watering-place, and smithy; persons going to or returning from their place of worship; clergymen visiting the sick of their parish; persons attending the funeral of an individual to be buried in the parish in which he died; post-office conveyances; horses and vehicles engaged in military service, or the conveyance of public stores, or used by any officer of the road in performance of his duty, and cattle and carriages not travelling above 100 yards on the road (§ 37). The above are exempt by the general turnpike act. In the mutiny act it is usual to insert an exemption in favour of

[1] Cambuslang Road Trust *v.* Graham, 11th March 1846.

all military officers and soldiers in uniform, whether dress or undress, but not when passing in hired or private vehicles.[1] Persons fraudulently claiming exemption are liable to a penalty not exceeding £5 (§ 37).

*Rules as to Charging.*—Nothing under 1 cwt. must be considered a loading in charging toll (§ 38). Post-chaises returning without passengers are exempt from toll till 9 o'clock of the day after they have paid toll (§ 39). Where horses, having been charged at a bar, return with a carriage before 9 o'clock next day, the toll of the horses is deducted (§ 40). Stage-coaches, with passengers, pay every time they pass (§ 41), and hired vehicles, &c. every time they pass with a new hiring (§ 42). Four-wheeled carriages attached to other vehicles are liable to be charged as if with two horses, and two-wheeled carriages as if with one. Where a horse is attached to a vehicle, but does not drag it, it is charged as a single horse (§ 43). Where toll is refused, the keeper may at any time within twelve hours seize and detain the defaulter's effects, and on his failing to pay the toll and expenses within four days, the keeper may on forty-eight hours' warning bring the matter before the sheriff or a justice to be summarily decided (§ 44).

Persons evading toll, by leaving the road, or removing horses from vehicles while passing, passing by force, or forging tickets, forfeit a sum not exceeding £5 (§ 45). Where weighing machines are erected, those evading toll by unloading and afterwards loading, are liable in a penalty not exceeding 40s. (§§ 46, 47). Toll-keepers wilfully failing to charge additional toll for weight, are liable to a penalty not exceeding £5 (§ 48). A trustee or surveyor, suspecting such failure, may compel any driver who has not gone above 100 yards from the toll, to return, on tendering a shilling (to be returned if the vehicle is above weight), and the driver refusing forfeits a sum not exceeding 40s. (§ 49). A driver obstructing, or refusing assistance in the weighing, is liable to a sum not exceeding £5 (§ 50). Trustees may exempt from toll, to the extent of a third, vehicles having two flat-rimmed cylindrical wheels five inches wide, or with four such wheels seven inches and a half wide (§ 52). Trustees may, previous to letting tolls, compound with individuals for one year, for a sum to be paid in advance, but toll-keepers must not compound under a penalty not exceeding £20 (§ 53). Trustees may compound with the postmaster-general for tolls of mail-coaches, &c. for any period (§ 54).

[1] Ann. Mut. Act, *e. g.* 1 & 2 Vict. c. 17, § 61.

*Toll-keepers.*—Each toll-keeper must have his name painted in letters at least two inches in length on his toll-house, and must keep up the schedule provided by the trustees, otherwise no toll is exigible, and any toll-keeper making such omission, or taking more or less than the legal toll, illegally detaining individuals or vehicles, refusing to give his name, or giving a false name, refusing to give a ticket, or using abusive language, forfeits a sum not exceeding £5 (§ 55). On the death of a toll-gatherer, any two trustees may appoint a person to collect till next meeting of trustees. Where a collector discharged refuses to give up possession, or the family of one who has died refuse to give up possession, within three days after a new appointment, constables may remove them in the day-time by warrant from the sheriff or a justice of peace (§ 56). When a tacksman is a month in arrear, the sheriff, or any two justices, may summarily decide the case, and eject him, the trustees being entitled to re-let the tolls, and to obtain damages (§ 57). Where a toll-gatherer absconds, the tacksman is liable for penalties incurred by him (§ 58). Toll-gatherers must not be licensed to sell liquors and victuals, without a recommendation by the trustees (§ 59).

### Sect. 5.—*Rules as to Neighbouring Occupants.*

A proprietor may occupy a fourth of the breadth of the road with materials for building or repairing an edifice immediately adjoining, on three days' notice to the clerk or surveyor, and fencing and lighting as the trustees may require (§ 87). Adjoining occupiers must prune their hedges, and cut them to the height of six feet, and prune the branches of trees and bushes, so that the road be not prejudiced by the shade, and the sun and wind not excluded, unless they be in pleasure-grounds, or an ornament or shelter to a house, in which case they are only to be lopped in so far as they annoy travellers. If parties do not comply within ten days after notice from the overseer, complaint may be made to the sheriff or justices, who will summon them to appear in ten days, and, on inquiry, direct compliance; on failure of which, within ten days thereafter, the occupier is liable to forfeit 2s. for every twenty-four feet of hedge, and 2d. for each tree, along with the expense occasioned by the pruning being performed by the overseer (§ 88). The time when the pruning of hedges can be enforced is between the 30th September and the 31st March, and ornamental trees are not to be lopped (unless they impede travellers) if the party become bound

to pay the additional expense occasioned by their remaining as they are (§ 89).

Persons encroaching on the road with edifices, hedges, drains, &c. are liable to a penalty not exceeding £5, and to have the encroachment removed at their expense (§ 90), and persons erecting buildings above seven feet high, without consent of the trustees, or making new enclosures or plantations, within twenty-five feet of the centre of the road, or enclosing places from which the trustees have been accustomed to take materials, without their consent, are liable to a penalty of £5, and the expense of removal, which may be enforced by the sheriff or justices on application (§ 91). Proprietors making pits or cuts within twelve feet of a road, and leaving them unprotected, on notice from two trustees or the procurator-fiscal, are liable to a penalty for each day they are left unprotected after three days from the notice (§ 102). Where persons allowed to open any part of a road to lay pipes, tunnels, &c., do not immediately repair the damage occasioned, it may be done at their expense, and the persons obtaining permission to make such operations are liable for all damage occasioned to the public (§ 100). Persons ploughing unenclosed land adjoining to the road, must make side-ridges of the breadth of twelve feet, under a penalty not exceeding £5 (§ 104).

Gates must not be hung so as when open to project into the road; transgressors, after six days from receiving notice, being liable to a penalty not exceeding £5, with the expense of alteration (§ 105). No windmill, watermill, steam-engine, or limekiln must be erected within 100 yards of a turnpike road, unless it be screened so as not to do damage, by frightening horses, or otherwise, and no skinner's washing pond must be placed within 100 yards of a road, under a penalty not exceeding £5 for each day (§ 107).

There are detailed provisions for enabling trustees to purchase, and compel the sale of, lands from heirs of entail, bodies corporate, clergymen, and others who would not be entitled to dispose of the property by common law. The value is decided by a jury of fifteen, who are liable to a penalty of £5 for non-attendance (§ 63 to 69).

### SECT. 6.—*Nuisances, Impediments, &c.*

Persons slaughtering or cutting up animals on a road, or an exposed situation near it,—persons occupying iron or brass works, glass works, soda, soap, and other chemical

works, not screening their windows so as to prevent their lights from shining on the road at night,—and persons allowing filth to run from their premises on the road,—become liable to a penalty not exceeding 50s., over and above damages.

The following are nuisances rendering the party liable to a penalty of 50s. and damages:—Driving or riding on the causeway; damaging the causeway or fences; damaging any erection under the superintendence of the trustees; injuring or removing tools or materials used by authority of the trustees; dragging any timber or other article along the road without a wheeled carriage, or allowing it to trail upon the road when on a wheeled carriage; turning any plough or harrow on a road; allowing any article, except hay and straw, to project more than thirty inches beyond the sides of a horse, or one foot beyond the wheels of a carriage, or in any way so as to form an obstruction; carrying any timber, or other article, above twenty-five feet long on a carriage not having more than two wheels; pitching tents on a road; burning bonfires and fireworks within a hundred yards of a road; shooting, flying kites, baiting bulls, and playing at games on the road, or any exposed situation, where passengers may be annoyed; leaving carriages without attendance, except in cases of accident, and during their loading or unloading, and not keeping as near as possible to the side in loading, unloading, or taking refreshment; leaving materials or rubbish on a road; hanging clothes on the fence of a road; permitting pigs driven on the road to damage it; leaving the stone used for blocking a vehicle on a declivity, lying on the road; injuring or extinguishing lamps (§ 96). Obstructions may be removed and sold, unless redeemed by payment of the penalty (§ 87).

When buildings, and other things under the superintendence of the trustees, are injured, and the perpetrator is not discovered, the sheriff or justices may, by summary process, assess the amount on the persons liable to the conversion money for statute-labour (*see Chap.* III. *Sect.* 2) within the parish (§ 95). Drivers riding on carts, waggons, &c. without reins, allowing them to proceed unattended, allowing a dog attending the vehicle to go at large, not keeping to the left on meeting or passing, or wilfully preventing any other person from passing, are liable to a penalty not exceeding £5 (§ 97). Where one person acts as driver to more than two carts or to two carts the hinder of which is dragged by more than one horse, or by a horse not attached to the back

of the cart in front by a rein which will not permit it to be more than six feet distant,—a sum not exceeding 40s. is forfeited (§ 98). A similar penalty is exigible for allowing a child under the age of fourteen to drive (§ 99). Persons depasturing beasts on a road, or the road-side, except it pass through waste or unenclosed land, forfeit 5s. for each beast, which may be seized and sold by the authority of the sheriff, if not redeemed by payment of penalty and expenses within three days after notice on the two nearest toll-bars (§ 103).

Persons employed on roads, leaving materials longer than is necessary, laying any thing on the road which may endanger passengers, or making pits or cuts without fencing them, are liable to a penalty not exceeding £5, with damages and expenses, for which any traveller on the road may prosecute. Trestles or bars may be laid down by contractors, with the sanction of the trustees, to protect their operations from being interfered with (§ 101). The name and address of the owner, and the number of the vehicle, must be painted on the right side of every cart and carriage let for hire, in roman letters not less than an inch long, light on a dark, or dark on a light ground; in default, the owner and driver being liable to a penalty not exceeding 40s. each, and double toll-duty. Drivers refusing to allow the name to be read forfeit a sum not exceeding 40s. (§ 108).

### SECT. 7.—*Prosecutions.*

Prosecutions may be raised by the trustees, or any one of them, or the procurator-fiscal, before the sheriff or justices of the peace (§ 109). Convictions are made effectual by poinding and sale, during which the offender may be imprisoned, unless he find caution. If sufficient effects cannot be found in cases of penalties above 40s., the offender may be imprisoned for a period not exceeding four months; in others, for a period not exceeding two months. Sums received are reserved for the use of the trust (§ 110). A witness not appearing when summoned, forfeits a sum not exceeding £5 (§ 112).

Unknown persons committing offences may be seized and brought immediately before the sheriff, or a neighbouring justice, without warrant (§ 113). Appeals lie within three months, and on fifteen days' notice and caution, to the quarter sessions, and judgments not so appealed, and those of quarter sessions, are final (§ 114). In cases of disrepair or neglect of a road, any person who has paid toll, on finding

caution for expenses, may present a petition to the Court of Session, to be dealt with summarily. If the complaint is found to be without probable cause, the petitioner, besides expenses, forfeits £20 to the trust (§ 117). All prosecutions must be raised within six calendar months after the cause of action (§ 118). It was found that this restriction did not apply to an action by a tacksman of tolls, against the trustees, for repetition of rent paid and damages, on the allegation that they had not implemented obligations stipulated for in the articles of roup.[1]

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## CHAPTER III.

### Highways not Turnpike.

#### Sect. 1.—*Management.*

The following old regulations as to highways, which are not turnpikes, are in the general case superseded by local acts, but as they are not repealed by any public general statute, it is thought proper to embody them, as they may still be in force in some places. These roads, with the bridges and ferries on them, are appointed to be under the superintendence of the justices of peace and the commissioners of supply, who hold two meetings annually; the one at the time of assessing the land-tax, and the other at the Michaelmas head court.[2] They may choose clerks, surveyors, and other officers.[3] Roads must be at least twenty feet broad of clear passable road, exclusive of bank and ditch, but are not to exceed thirty feet.[4] Any two or more justices and commissioners may examine roads, and direct them to be made of the legal width; they may also report proposed improvements, with the reasons for making them, to the next general meeting, to which occupiers of land, aggrieved by their proceedings, may likewise appeal.[5] Where improvements beyond widening to the legal breadth are approved of by the general meeting, the damages occasioned to neighbouring occupants are awarded by a jury empannelled by the sheriff.[6]

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[1] Sommerville *v.* Gordon, 23d December 1842.—[2] 1617, c. 8, § 8. 1661, c. 38. 1686, c. 8. 11 Geo. III. c. 53, § 4.—[3] 5 Geo. I. c. 30, § 2.—[4] 11 Geo. III. c. 53, §§ 3, 5.—[5] Ibid. §§ 5, 6.—[6] Ibid. § 7.

By an old law, heritors may, at sight of the justices of peace and commissioners of supply, "cast about the highways to their convenience, provided they do not remove them above two hundred ells upon their whole ground."[1] Such alteration must be made entirely at the proprietor's expense.[2] The justices of peace alone are entitled to shut up by-roads which are rendered useless by the construction of turnpikes, or interfere with the collection of tolls on them.[3] (*See the preceding Chapter.*)

Unless in any place where these old rules may be still in force, the management of the highways throughout Scotland is under the regulation of a numerous array of local statutes, the varied and conflicting operation of which has been in some measure neutralized by a general act passed in 1845. The act makes regulations for the proceedings of the justices or other trustees acting in the execution of any general or local act.[4] They are bound in attending meetings to pay their own expenses, and unless there be a regulation of an opposite kind in the local act, a preses is to be chosen at each meeting, who is to have a casting vote.[5] Any two trustees may call a meeting or require the clerk to do so. No resolution can be revoked or altered, unless notice have been given at a previous meeting, and entered in the minutes, and transmitted to every trustee not then present who was present when the resolution was passed. An intimation must also be advertised twice in some newspaper circulating in the district ten days before the meeting.[6]

*Officers.*—The trustees are to appoint all the necessary salaried officers, who must not have any interest in a contract relating to the trust, under penalty of £20.[7] Trustees may pursue and defend actions by their clerk or treasurer.[8]

The trustees are to keep minutes and books, in which the incidental are to be separated from the ordinary expenses, and the sums due by and to the trust are to be stated. The accounts must be made up annually, including all transactions preceding a month before their date, and audited and signed by two trustees, or their preses if more than two be present.[9] An abstract must be published in the newspapers within a month after the auditing and signing, and any person who has paid commutation money may have access to the accounts on payment of a shilling. An official failing

[1] 1661, c. 41. 1685, c. 39.—[2] Tait's J. P. 198.—[3] 1 & 2 Wm. IV. c. 43, § 70.—[4] 8 & 9 Vict. c. 41, § 2.—[5] Ibid. § 3.—[6] Ibid.—[7] Ibid. § 4.—[8] Ibid. § 5.—[9] Ibid. § 6.

in these injunctions, or refusing access to the accounts, forfeits a sum not exceeding £5 to any one who will prosecute.[1]

The act embraces regulations for facilitating the altering, making, and repairing of the high roads, by enabling the trustees to appropriate lands, to take materials, &c. which are substantially the same as those applicable to turnpike roads.*

SECT. 2.—*Statute Labour and Commutation Money.*

By the old law, which is probably not now in practice in any part of the country, the appointed source from which the highways are constructed and kept in repair, is the statute labour. The persons who have to afford the labour are the industrial tenants of the district,[2] including not only those employed in agriculture, but those within burgh, "*e. g.* shopkeepers, weavers, masons, wrights, coopers, smiths, and even sailors who are fishers, or ply in passage boats, but not those who go upon foreign voyages or coastways, and even apprentices to artificers in towns."[3] The periods for which labour is exigible are three days before the expiry of the month of June, not being in seed-time, and three days after harvest.[4] The justices and commissioners, or their overseers, appoint the periods, and give notice from the parish churches on the Sundays immediately preceding. Those who absent themselves without providing substitutes are liable to a penalty of 1s. 6d. for each day.[5] The labourers must bring with them the necessary tools.[6] Where the ways are at a distance from those liable to repair them, the labour may be commuted into payment of 18s. scots yearly.[7]

By the numerous local commutation road acts, statutory arrangements for computing the labour into a money charge have been extended through the country. Many complaints were made of the unequal or harsh pressure of the tax, and some general regulations for amending it form part of the act of 1845.

By that act, on the narrative that it is inexpedient to continue personal service, or to levy the conversion of it as a poll tax, trustees are empowered at any general meeting, "if they shall think fit," to pass a resolution for such abolition.[8]

By a positively restrictive clause of the act, no conversion

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[1] 8 & 9 Vict. c. 41, § 7.—* See above, p. 224.—[2] 5 Geo. I. c. 30, § 3.—[3] Tait's J. P. 200. See Barclay's Law of the Road, 90, *et seq.*—[4] 5 Geo. I. c. 30, § 3.—[5] Ibid. § 4.—[6] 1669, c. 16. 1670, c. 9.—[7] Ibid.—[8] 8 & 9 Vict. c. 41, § 14.

or labour is to be required of any one who is not proprietor or occupant of some heritable subject worth £2 a-year.[1] If their local act direct the tax to be levied on occupants, power is given to the trustees to assess the proprietors, where the tenants are exempt by reason of the holding being worth less than £2 a-year.[2] It is made competent for the trustees convened at a meeting duly notified, to grant exemptions to persons whose holdings are not above £5.[3] To make up for deficiencies caused by these exemptions, the trustees may make an additional assessment, half to be levied on owners and half on occupants, who are entitled to deduct the payment from their rent.[4] The annual value of holdings may be ascertained either under the arrangements of the local act, or by the method enacted in the prison discipline act;* or, if they think fit, the trustees may take the amount ascertained under that act as the rule.[5] In addition to the methods of recovery that may be provided by the local act, sums under £8, 6s. 8d. may be sued for in the sheriff's small debt court.[6]

### SECT. 3.—*Regulations for the Use of the Roads.*

The proprietor of every vehicle must have his name and residence painted on it in different colours from the body of the vehicle, with the number, where the same person owns more than one, under a penalty not less than 5s. or more than 20s.[7] Where there is a change of owners, a corresponding alteration must be made within fourteen days, under a similar penalty.[8] A false name renders the party liable to a penalty of 40s.[9] A chaise-driver sitting in his chaise without having another person to drive it, and the driver of any cart or waggon getting on the vehicle without having another person to drive it (unless where there is one horse, or two horses abreast, guided by reins), within six miles of Edinburgh, four miles of Glasgow, or two miles of any other town; and a driver causing any mischief or obstruction, or when mounted on his cart (in places where that is not prohibited) refusing to descend on the demand of any person apprehending danger, forfeits a sum not exceeding 20s. if he is owner, and not exceeding 10s. if he is not so.[10]

In the following cases a sum is forfeited not less than 5s. or more than 20s.:—Where persons drive carts or horses

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[1] 8 & 9 Vict. c. 41, § 10.—[2] Ibid. § 12.—[3] Ibid. § 11.—[4] Ibid. § 13.—* See above, p. 186.—[5] 8 & 9 Vict. c. 41, § 15.—[6] Ibid. § 9.—[7] 12 Geo. III. c. 45, § 1.—[8] Ibid. § 3.—[9] Ibid. § 4.—[10] Ibid. § 5.

abreast, or do not (when driving two or more) connect them with each other in line by ropes attached to their bridles: Where persons leave unyoked carts on the road (except during a reasonable time for loading or unloading), or deposit rubbish, dead horses, or other nuisances; and where the drivers of vehicles passing each other do not each keep to his own left hand.[1]

Offences are to be tried before the sheriff, justices, or magistrates, who, if the vehicle belong to the offender, on the penalties not being paid, or security found for them within twenty-four hours after conviction, may order it to be sold, and if it does not belong to the offender, may immediately commit him to prison for a period not exceeding two months. Persons seeing offences committed may seize the offenders and their vehicles, and if they resist or maltreat the person seizing, they are liable to a penalty of 20s.[2]

Besides these regulations of the older acts, the regulations above stated under the titles "rules as to neighbouring occupants," and "nuisances, impediments," &c., as well as the method of prosecution for penalties incurred, have been adapted from the turnpike road act to the commutation roads.[3] *

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## CHAPTER IV.

### Roads through Private Property.

#### Sect. 1.—*Constitution of Servitude Roads.*

There are roads, besides turnpike roads and those under the management of the justices and commissioners, viz. those which pass through private property, and which have neither been appropriated by, nor are under the management of, public bodies, excepting in as far as they may interfere with turnpikes and the collection of tolls. The right to use these roads, though as we shall presently see it is in many cases a public right, is denominated a Servitude, on the presumption that it is enjoyed only by a limited number of persons as an accessory of property.

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[1] 12 Geo. III. c. 45, §§ 6, 7, 8.—[2] Ibid. §§ 9, 10, 11.—[3] 8 & 9 Vict. c. 41.—* See above, p. 228, *et seq.*

Purely Private servitude roads (which generally give merely a right to the tenants of one estate to pass through another) are of different degrees, viz. foot-roads, horse-roads, and cart and coach roads; besides which there are ways or loanings by which cattle can be driven from one field to another.[1]

A servitude of road may be contained in the title to the land, but it is generally constituted by forty years' prescription; and when people have been in the uninterrupted use of a road for such a period, or from time immemorial, the proprietor cannot shut it up, or create an obstruction.[2]

In sending issues to juries concerning the continuance of the use of roads, the form is the alternative "whether for forty years, or for time immemorial," the path has been used, &c. In one of the Melrose cases, it was found that the inquiry must not be restricted by the word 'immediately': which was ordered to be struck out of an issue: "whether for forty years, or for time immemorial *immediately* preceding the 12th day of August," &c.[3]

It will not affect the right acquired from use that it is excluded by the titles of the property; thus, when an estate was described as bounded by the river Clyde, the proprietor, on erecting walls down to the river's brink, was compelled to leave room for a footpath, which had been used beyond the years of prescription.[4] In the same case it was laid down that "supposing a right of way to have been established, an attempt on the part of the occupiers of the land over which the way ran from time to time to interrupt that right, but not effectually succeeding in interrupting that right, never can be considered sufficient to get rid of a right of way once established."[5] It was proved that during the forty years persons had been stopped and turned back, and that fences had been erected which the passengers had broken down, but these were viewed as attempts to interfere with the public use of the path, not as interruptions of the right to use it. It was pleaded, but ineffectually, that the road was only used for recreation, and that so far from being an accommodation to the public for useful purposes, it was more circuitous than the high road. It was found, however, that the proprietor was entitled to limit the width of the footpath,

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[1] E. ii. 9, 12.—[2] Oswald *v.* Lawrie, 5th November 1828, 5 Mur. 6.—[3] Mercer *v.* Reid, 1st February 1840.—[4] Rodgers *v.* Harvie, House of Lords, 8th July 1828, 3 W. & S. 251. Court of Session, 17th January 1829, 27th February 1830.—[5] Opinion of Chancellor Eldon in above Case. 3 W. & S. 259.

which had been left to the discretion of passengers, by erecting a bounding wall, and that he was not obliged to drain the path when portions of it became damp, so as to give passengers the same advantage which they previously enjoyed by deviation.

The proprietor of the lands through which a servitude road passes is not entitled to use his property in such a manner as to interrupt, or materially alter the character of the road.[1] He is, however, the proprietor of the soil of the road, and it was found that in that capacity a person was entitled to prohibit the opening of the road for laying gas-pipes.[2]

### SECT. 2.—*Rights of the Public in Roads through Private Property.*

The cases regarding the use of paths through private property by the community at large have generally so far borne an analogy with servitude rights attached to individual tenements, that it has lain with the inhabitants of particular villages, or other limited localities, to vindicate the right. In one of the cases as to the Melrose footpath, where the summons had set forth that the road was used by the portioners and inhabitants of a village of which the pursuer was portioner, the inquiry was not allowed to embrace the inhabitants of other places, or the public at large, and in the following issue as prepared the words in italics were struck out:—

"Whether for forty years, or for time immemorial preceding the 12th day of August 1836, the pursuer and his predecessors, and the other inhabitants and portioners of Bridgend, *and other places in the neighbourhood*, have possessed as a *public* footpath, a path or foot-road along the south bank of the river Tweed, from the said village of Bridgend to the town of Melrose."[3]

It thus appears that in the general case, when the road is not decidedly a public road, but has been commonly used for the accommodation of the people of a particular locality, the vindication of the right is limited to these people. There is no reason to presume, however, that though the right to vindicate a path may be thus restricted, there is any limitation in the class of persons who may use it, or that any individual would be liable to an action of trespass for walking on it.

[1] Berry *v.* Wilson, 1st December 1841.—[2] Galbreath *v.* Armour, App. 4 Bell, 374.—[3] Mercer *v.* Rutherford, 18th February 1840.

It has been established that where an individual pursues for a right of road, or for any corresponding right, such as that of drawing water, carting gravel, &c. he is entitled to libel on the practice of the neighbourhood, to have that point made a feature in the issue, and to lead evidence of his neighbours' proceedings as supporting his own right. Thus, where the issue proposed was whether "the proprietors of a house in AB, or their tenants, have been in the use," &c., it was altered to whether "the inhabitants of AB, or their tenants, and the other inhabitants of the said street or neighbourhood, have been,"[1] &c.

It would appear that the method of the public use of a road may be limited by usage; but the ruling consideration will be, whether any use to which it is wished to extend it would cause an encroachment on the land of the heritor. Thus, where a road had been used by the public for the purpose of conveying burdens by means of horses, according to the usage of the district, beyond the period of prescription, and on the introduction of carts, these were employed on the road, but had not been in use for forty years, it was decided that the public were entitled so to use it, Lord Glenlee remarking, "I cannot help thinking that there is a difference between the case of a public road and that of one claimed as a right of servitude by the proprietors of a dominant tenement. The soil occupied by a public road belongs to the public, not to the proprietors of the ground over which it passes, and they may make use of it as may be necessary for the purposes of the public."[2]

A very common description of public road is that which is commonly called a Kirk-road. Primarily, these pathways were a privilege to pass through the grounds to the parish church, but the opinion and practice of the country regarding them is that they are public roads, open to passengers during week days as well as Sundays, and not importing by their designation that persons not attending the parish church can be prohibited from using them. Although there is no decision on the express point, analogy from other cases appears to give the countenance of the law to this doctrine. Thus, where a road led towards a public harbour, by the managers of which it was made, it was found that they could not, under the plea that the road was damaged by the use,

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[1] Thorburn *v.* Charters, 4th December 1841, but see Hamilton *v.* Aikman, App. 5th July 1832. 6 W. & S. 64.—[2] Forbes *v.* Forbes, 20th February 1829.

shut out a neighbouring proprietor from access to the road with his carts and other vehicles.[1] "The defenders," said the Lord Ordinary (Cuninghame), "acquired the ground from which they propose to exclude the pursuer, for the purpose of forming a public harbour, and a road or street connected therewith from and to the town of Perth, and this being the defined and statutory nature of their right, the Lord Ordinary is of opinion, that the adjoining proprietors and the public at large are entitled to use this road at all times when they do not obstruct or interfere with the primary use for which the street was formed. The defenders could not convert the ground to any other use than that of a place of public resort and thoroughfare, and it is thought that a contrary doctrine would lead to consequences very unexpected and inconvenient for the public in other instances."

*Law of England.*—In England the law as to the constitution and use of highways, appears to be of a much more definite character than in Scotland. There seem to be two criterions necessary to a public highway through private grounds; dedication or presumed dedication of the site by the proprietor, and acceptance by the public. The latter applies a burden as well as a benefit, for when it is once clear that the road is public the parish is bound to keep it in repair, and questions as to the existence of public roads seem to occur as frequently in connexion with efforts by the parish to throw off the responsibility, as with the claims of the public to use a disputed road.[2] However small the path may be, if the public have the use of it, it is termed a highway, and is in every respect treated as public property.[3] The right to vindicate the use of such a path does not appear to be limited to any particular class of persons as occupants of what would be with us called the dominant tenement. An attempt by a neighbouring proprietor to shut a path is the same public offence as maliciously obstructing a wide highway, and the person is proceeded against by Indictment. It is considered a debateable question whether any restricted right can be communicated to the public, *e. g.* whether a proprietor can allow a road to be opened through his grounds, laying down and preserving a restriction against coals being conveyed along it. It is held that there is no representative of the public who can agree to such a restriction, and that

[1] Moncreiffe *v.* Provost of Perth, 13th December 1842.—[2] See Egremont's Law of Highways, chap. i.—[3] Wellbeloved on Highways, p. 5.

the path must be in one of two positions, still absolutely private property, or unconditionally given up to the public.[1]

Although the right of the public to a way is said to depend on the owner of the soil dedicating it to their use, the dedication is generally a fiction presumed from no interruption being offered to passengers. "A dedication is supposed to take place through a mutual agreement between the owner of the land and the public; therefore the consent of both these parties must be expressly or impliedly given. In general the express acquiescence is confined to the public, who are to benefit by the way, and through whose actual use of it the right is established; while the assent of the owner is to be derived from indirect evidence. He is bound by a *nonfeazance;* and his voluntary relinquishment to the public of a right of passage is, not unfrequently, merely supposititious."[2]

It is by a sort of analogy with the principle of prescription that with us the period during which the use of a road must be proved, is fixed at forty years. A much shorter period would be a sufficient criterion of that "dedication" or permission by the proprietor, to which the English law looks. In England there is no particular rule of time. "The circumstance of most common occurrence, which is considered sufficient to support the claim of the public, is the length of time during which they have had the uninterrupted use and enjoyment of their privilege. But of course the weight of this, as of any other evidence, must depend, in each instance, on the particular features of the case. Nor has any certain period been prescribed as necessary to support a dedication. In one case *six years* was held to be sufficient; while, in another instance, four years was considered to be too short a term."[3] The practical effect of this principle in England, is liable to be counteracted by another, that the license for the use of the path must be given by the proprietor of the soil, and is inefficacious when it is only the permission of a tenant. Thus in one case, a public street in Westminster, which was mentioned as such in an act of Parliament, and was paved and lighted, was closed by the proprietor who had lived in the neighbourhood, and must have known that it was a public street, because though the public use of it was proved for nearly a century, it could not be proved beyond the period of a ninety-nine years' lease, and was thus only the permission of a tenant.[4]

[1] See Wellbeloved, p. 56. Stafford *v.* Coyney, 7 B. & C. 257.—[2] Wellbeloved, p. 42.—[3] Ibid. 44.—[4] Wood *v.* Veal, 5 B. & A. 454.

We have no grounds for deciding what would be the effect in Scotland of a *brevi manu* removal by the public of any barrier made by the adjacent proprietor across a path which they are entitled to use. On a public highway, traversed by persons and vehicles, there is no doubt that individual passengers may remove any obstruction as a public nuisance. In England the method by which a right of way is often tried is, by an action of trespass against some one for the removal of a fence or barrier. The defence is, that the removal took place on a public highway, and if the defence be successful, the removal is virtually pronounced to have been lawful.[1] The rule is thus expressed, "Moreover, any one may justify pulling down or otherwise destroying a common nuisance, as a new gate or house erected in a highway, or may fill up a ditch dug across it; and it has been holden that there is no need in pleading such justification, to show that as little damage was done as might be."[2]

As already stated there is no absolute authority to hold that in the case of a public pathway through private ground miscellaneous passengers would have any such privilege in Scotland; but it has been distinctly established that the persons entitled to the use of a purely servitude road have that privilege, and where the servants of the occupant of the dominant tenement removed a fence set up by the holder of the servient tenement, interdict and action of damages were found incompetent.[3] In the case therefore of a kirk or market road,—which, though constituted in a servitude held by the inhabitants of some village or other community is yet virtually a public road,—although it may be doubtful whether the public at large are entitled to remove obstructions, there can be no doubt that members of the community in whose particular favour the right of pathway has been constituted have that power.

*Interdict.*—Where people are using a road to which they are not entitled, or the proprietor of the neighbouring ground is making illegal obstructions on a public road, the form of redress usually resorted to has been Suspension and Interdict. In one case where an individual, on the part of the public, claimed a right of road, he applied for interdict against the adjoining proprietor building up the stiles of the road, and thus so far altering its state and appearance, as to prejudice the claimant in his proof of the nature of the road. As the usual

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[1] See Egremont 164, *et seq.*—[2] Egremont 171. See Rol. Abr. *voce* Nusans.—[3] Calder *v.* Munro, 27th January 1831.

caution was not offered, interdict was not granted, but the court appointed a survey to be made.[1] The proprietor applied for interdict to prevent, during the discussion of the question of right, the public from passing along the pathway in dispute, which bordered the seashore. He produced no title however: his plea that the proprietor of the neighbouring grounds should in such circumstances have the presumption in his favour was repelled; and interdict was refused.[2]

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## CHAPTER V.

### PUBLIC VEHICLES.

#### SECT. 1.—*Stage-coaches.*

ALL carriages drawn by animal power, at a rate exceeding three miles an hour, to or from a particular place, with a regular fare, are considered stage-carriages, and must be licensed.[3] The license must specify the owners, the route taken with its extent, the days of travelling, and the number of passengers outside and inside for which the vehicle is licensed.[4] Licenses are to hold from their date or from a fixed period of commencement mentioned in them, and supplementary licenses may be granted either where the holder of a license wishes to change the route of the coach, or to widows, children, &c., of deceased holders of licenses.[5] The proprietor receives numbered plates to be fixed on a conspicuous part of each side of the carriage, paying duty for each separate pair.[6] Owners or employers of stage-coaches without license, or without having the plates affixed, are liable to a penalty of £20.[7] If any stage-coach, whether it be licensed or not, charging distinct fares for the individual passengers, have not the stamp-office plates affixed, the driver, guard, or person having charge of it, forfeits £10, or if he be also the owner, £20; and any officer of the stamp-office, without a warrant or the assistance of any constable, may apprehend the driver of a coach without plates at the end of its journey,

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[1] Anderson *v.* Morton, 9th July 1846.—[2] Morton *v.* Anderson, 18th July 1846.—[3] 2 & 3 Wm. IV. c. 120, §§ 5, 6.—[4] Ibid. § 11.—[5] 5 & 6 Vict. c. 79, §§ 8, 9.—[6] 2 & 3 Wm. IV. c. 120, §§ 8, 23, 26.—[7] Ibid. § 27.

and bring him before a justice of peace.[1] Mail-coaches are not exempt from the rules as to plates.[2]

There must be painted in letters of one inch at least in length, on a conspicuous part of each side of a stage-coach, the name of one proprietor, with the names of the places between which the coach plies, and on the back the greatest number of inside and outside passengers for which license is obtained, under a penalty of £5.[3] These rules are not applicable to mail-coaches carrying no more than four outside passengers.[4]

*Number of Passengers.*—A four-wheeled stage-coach, the roof of which is not more than eight feet nine inches from the ground, and the bearing of the ground between the track of the wheels of which is not less than four feet six inches, if licensed to carry nine passengers may carry five of them outside, and if licensed to carry twelve may carry eight outside, and if licensed to carry fifteen may carry eleven outside, and if licensed to carry eighteen may carry twelve outside; and for every additional three passengers for which a coach is licensed it may carry two outside. The punishment for overloading is a penalty of £5 against the conductor or the guard.[5] The guard and driver, and children in the lap, and one child under seven years of age, are not counted, but two children under seven are counted one.[6] No person must be allowed to sit on the luggage on the roof, nor must more than one person sit beside the driver, under a penalty of £5 against the driver.[7] It is farther provided, that for each passenger there must be a breadth of sixteen inches measured off in front of the seat, children under five years of age in the lap not being counted as passengers.[8] The number of passengers for which a coach is licensed, distinguishing outside from inside, must be painted of a conspicuous colour, in words at length, and in letters not less than an inch long, on the back of the coach and on the side of each compartment. The penalty for omission or error in the statement is £10.[9] Individuals prosecuting as to omission of these requisites, or as to an excess in the number of passengers, may commence their proceedings against the driver, the conductor, or the guard, provided they do so within ten days after the existence of the ground of action.[10]

*Luggage.*—The luggage on the roof of a four-horse coach

[1] 5 & 6 Vict. c. 79, § 11.—[2] Ibid. § 12.—[3] 2 & 3 Wm. IV. c. 120, § 36.—[4] Ibid. § 46.—[5] 3 & 4 Wm. IV. c. 48, § 2. 5 & 6 Vict. c. 79, § 17.—[6] 3 & 4 Wm. IV. c. 48, § 3.—[7] Ibid. § 4.—[8] 5 & 6 Vict. c. 79, § 13.—[9] Ibid. § 14.
[10] Ibid. § 18.

must not exceed ten feet nine inches in height from the ground, and that on the top of a two or three horse coach must not exceed ten feet three inches, under penalty of £5.[1]

*Drivers, &c.*—Drivers must, at the requisition of any justice of peace, surveyor, toll-keeper, or stamp-officer, or of any passenger, permit the carriage to be measured and the passengers to be counted; and for these purposes a passenger may require the carriage to be stopped at a toll-bar, and the keeper to give a signed memorandum of the results; the penalties being £5 against the driver for failing to stop, and against the toll-keeper for failing to give certified measurements.[2] A driver quitting his box without a proper substitute, or permitting a passenger to drive, or by intoxication, negligence, furious driving, &c., endangering the safety of passengers or their property, and a driver or guard failing to take proper care of luggage, or making an overcharge, or using insulting language to passengers; and a guard unnecessarily discharging fire-arms, becomes liable to a penalty of £5.[3]

## SECT. 2.—*Post Horses and Carriages.*

The annual license duty for letting post horses amounts to 7s. 6d., a proportionate duty being levied on each occasion when a horse is let, whether it be a saddle-horse, or be employed in dragging a vehicle other than a stage-coach.[4] All licenses, at whatever time granted, expire on the 31st day of January annually. Persons letting horses without license forfeit £10 for each horse.[5] A postmaster must take out a license for each place at which he lets horses, under penalty of £20,[6] and must at each such place have a sign containing his full name, and the words "licensed to let horses for hire," under penalty of £5.[7]

Carriages kept to be let with horses by the mile must be numbered with figures one inch and a half long, and have the name of the owner and of the place for which he holds the license painted in distinct letters at least an inch in height, under penalty of £10.[8] The duty being proportional to the distance travelled over, or to the time occupied, toll-keepers are appointed to check these particulars; and for this end postmasters are supplied with blank tickets to hold the name of the hirer, and the place he is going to, or the time he is to hire the horse, as the case may be, unless it is

[1] 2 & 3 Wm. IV. c. 120, § 43.—[2] Ibid. § 45.—[3] Ibid. §§ 47, 48.—[4] Ibid. § 53 and Sch. A.—[5] 2 & 3 Wm. IV. c. 120, § 55.—[6] Ibid. § 58.—[7] Ibid. § 59.—[8] Ibid. § 60.

hired by the mile; and toll-keepers are provided with check tickets containing similar particulars to be given in exchange for these.[1] The postmaster must deliver the ticket to the hirer or his postilion.[2] The hirer is not bound to pay for any greater distance than that mentioned in the ticket; and if the postmaster enter a wrong distance he is liable to forfeit £10, and may be refused any future license.[3]

The hirer must deliver the ticket at the first toll; and, if the horse is hired otherwise than by the mile, he receives the exchange ticket, which he has to show to the other toll-keepers as he passes their bars.[4] Where the hirer cannot produce the proper ticket (original or exchange), he is liable to pay 1s. 9d. for each horse to the toll-keeper. Toll-keepers must fill and subscribe the tickets, and those contravening these and other regulations are liable to forfeit £10.[5] A hirer refusing to deliver the proper ticket, or falsely stating that his horse is not hired, forfeits £10.[6] Toll-keepers called on by the collectors to deliver up, at some place not more distant than the nearest market town, the tickets left with them, on failure forfeit 20s. for each.[7] The commissioners of stamps may erect bars for collecting tickets where there are no toll-bars.[8] When a horse is hired for twenty-eight days or more, and is returned before expiry of the period, the postmaster must, under a penalty of £20, demand the check ticket and deliver it to the collector.[9] Proprietors of hackney coaches kept in any town to be driven not exceeding five miles from the General Post-office thereof may compound for the duties according to certain rates.[10]

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## CHAPTER VI.

### RAILWAYS.*

### SECT. 1.—*General Regulations.*

*Railway Board.*—BY several public general statutes and local acts, the powers of central control over railways were vested

[1] 2 & 3 Wm. IV. c. 120, § 61.—[2] Ibid. § 62.—[3] Ibid. § 63.—[4] Ibid. § 64.—[5] Ibid. § 65.—[6] Ibid. § 66.—[7] Ibid. § 67.—[8] Ibid. § 69.—[9] Ibid. § 70.—[10] Ibid. § 84.

* N. B.—More information regarding local acts for railways and other public works will be found above, Part III. Chap. V. The Railways' Clauses Consolidation Act, containing model clauses for railway bills, is given in the Appendix.

in the Board of Trade, but in 1846 a separate Board of Railway Commissioners was instituted, on whom these and other functions were appointed to devolve.[1] Besides the powers to be hereafter mentioned, they are specially authorized to examine and report to the crown, or either house of Parliament, upon any subject relating to any railway or proposed railway; and on every application for a new act, it is their duty, if required by the crown or either house, to inquire and report, on local inspection or otherwise—

"*Firstly*, Whether there are any lines or schemes competing with the proposed railway.

"*Secondly*, Whether by such bill it is proposed to take powers for uniting with such railway or proposed railway, any other railway or canal, or to purchase or lease any railway, canal, dock, road, or other public work, undertaking, or easement.

"*Thirdly*, Whether by such bill it is proposed to constitute any branch railway, or any other work in connexion with the proposed railway.

"*Fourthly*, Whether any plans, maps, and sections of any such proposed railway which, pursuant to any orders of either house of Parliament, shall have been deposited in their office, are correct, and if not, in what particulars, and how far they are incorrect; and whether or not, in the opinion of the commissioners, such errors as they shall find are material to the object for which such plans and sections are required.[2]"

The board have power to settle disputes between the proprietors of connected lines, in relation to the conducting of their mutual business at the point of junction, and the rules of the board are enforced by the sheriff.[3] They have power to regulate and restrict for the safety of the public the right of opening side communications with passenger railways,[4] and to authorize the alteration of dangerous level crossings.[5]

*Inspectors.*—The board are authorized to appoint inspectors of railways, who are entitled at all times to have access to the lines and their appurtenances. No person can be appointed an inspector who has within a year been a director of, or has held an office under any railway company.[6] Any person wilfully obstructing an inspector, is liable, on prosecution before a justice of peace, to pay a penalty not exceeding £10, or in default to be imprisoned for a period not exceeding three calendar months.[7]

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[1] 9 & 10 Vict. c. 105.—[2] Ibid. § 10.—[3] 5 & 6 Vict. c. 55 § 11.—[4] Ibid. § 12.—[5] Ibid. § 13.—[6] 3 & 4 Vict. c. 97, § 5.—[7] Ibid. § 6.

When railway companies, in virtue of their powers, pass by-laws which may apply to individuals who are not their own office-bearers or servants, they must send a certified copy to the board; and none of the rules can come in force until two months after the copy has been before the board, unless the board signify their approbation before that time has elapsed.[1] The board may disallow any by-laws, whether before or after they have come into operation.[2] The provisions in railway acts previous to 1840 for sanctioning by-laws by the approval of justices of the peace or others, are repealed.[3]

*Penalties.*—Where penalties are incurred under any of the acts relating to railways, the board may certify the case to the Lord Advocate, who may prosecute for the public behoof.[4] When the cause of complaint is want of compliance with a statutory regulation, the Public Prosecutor has such right of action as any private party who may have been aggrieved would have had; when the cause arises from the company acting contrary to statute, he may proceed by Interdict.[5] Prosecutions at the instance of the board must be raised within one year after the commission of the offence.[6]

*Opening Lines.*—No railway or part of a line may be opened to the public until a calendar month after notice of the intention to open it has been communicated to the board, and ten days' notice of the time when the line will be completed for the conveyance of passengers, and open for inspection.[7] The company opening a line or branch in contravention of this rule, incurs a penalty of £20 per day till the provision has been complied with.[8] The board may, when it seems necessary for the public safety, postpone the opening of a railway for a limited term.[9]

*Returns.*—There is a provision under which the board are authorized to require returns from all railway companies, according to a form prescribed by the board. The returns are to apply to the following matters:—The aggregate traffic in passengers according to the several classes; the aggregate traffic in cattle and goods; tables of charges for passengers and goods; and accidents, as more particularly noticed below. The penalty for not making such return within thirty days after it is required, is £20 for each day it is neglected.[10] An officer making a false return is punishable as for an offence.[11]

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[1] 3 & 4 Vict. c. 97, §§ 7, 8.—[2] Ibid. § 9.—[3] Ibid. § 10.—[4] Ibid. § 11.—[5] 7 & 8 Vict. c. 85, § 17.—[6] 3 & 4 Vict. c. 97, § 12.—[7] 5 & 6 Vict. c. 55, § 4.—[8] Ibid. § 5.—[9] Ibid. § 6.—[10] 3 & 4 Vict. c. 97, § 3.—[11] Ibid. § 4.

*Obstructions, &c.*—There are some provisions in implement of those in the several local railway acts, for preserving order, suppressing attempts at obstruction, and punishing culpable carelessness. Under these it is rendered lawful for any officer or agent of the company, or a special constable, and for private parties giving assistance to such persons, to seize any person in the company's employment, and bring him before a justice of peace, in the case of his being found drunk on the railway, or infringing any of the statutory regulations or by-laws, or being guilty of any act or careless omission which might be the occasion of an interruption, or might do injury to person or property. A single justice of peace may adjudicate in such cases on complaint on oath, without information in writing; and it is at his option either to award imprisonment, with or without hard labour, for a period not exceeding two months, or to impose a penalty not exceeding £10, with the like imprisonment in default of payment.[1] The justice, if he think the case sufficiently serious, may refer it to the quarter sessions, committing the accused or liberating him on bail.[2] The obstructing of officers of companies in the fulfilment of their duty, and the trespassing on railways coupled with a refusal to remove at the direction of an authorized officer, are each offences which may be treated in the same manner, with the exception that the penalty, instead of not exceeding £10, must not exceed £5. There is a special clause making the obstruction of any engine or carriage, or the endangering the safety of passengers, equivalent to the English offence of misdemeanour, and punishable with imprisonment for any term not exceeding two years.[3] In Scotland such cases would fall within the jurisdiction either of the Court of Justiciary or of the Sheriff.

*Accidents.*—When an accident occurs on any railway, "attended with serious personal injury to the public using the same," notice must be given to the board within forty-eight hours, the penalty for omission or delay being £5 per day, recoverable in the Court of Session or the Sheriff Court.[4] The board may require returns of all serious accidents on railways, whether attended with personal injury or not, under penalty of the like forfeiture.[5] There is a provision for enabling railway companies to enter on adjoining lands for the repair or prevention of accidents.[6]

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[1] 3 & 4 Vict. c. 97, § 13.—[2] Ibid. § 14.—[3] Ibid. § 16.—[4] 5 & 6 Vict. c. 55, § 7.—[5] Ibid. § 8.—[6] Ibid. § 14.

There are some specific regulations for the manner in which gates are to be used for the protection of the public when railways and public roads cross each other, and for the companies erecting and maintaining all necessary fences.[1]

General regulations for the gauge of railways are enacted by 9 & 10 Vict. c. 57, and the penalties leviable for breach of the regulations are made recoverable by the Railways' Clauses Consolidation Act.*

There are special provisions for limiting the terms on which railway companies must provide for the conveyance of the mails, relating both to remuneration and rate of speed.[2] There are other provisions relating to the terms on which railway companies are bound to convey troops with their baggage, and policemen, for the public service.[3]

Government has the power of establishing electric telegraphs along railways, of which the companies may have the use on such terms as may be agreed on.[4] Where there is any telegraph on a railway, unless it has been established exclusively for the service of government on the railway, all persons are to have an equal privilege of employing it.[5]

The revenue duties payable on railways are regulated by 5 & 6 Vict. c. 79.

### SECT. 2.—*Statutory Conditions.*

Certain statutory conditions are annexed to the construction of all railways authorized by acts of the session of 1844, or of any subsequent session of parliament. If after twenty-one years, from the 1st of January next after the passing of the act for any railway, the dividends on an average of the last preceding three years equal 10 per cent., the Treasury may revise the charges, and so adjust them as to provide a profit of 10 per cent., and no more, to which amount the company must be guaranteed.[6] The Treasury are, after such a lapse of time, to have the option of purchasing the railway for the behoof of the public at twenty-five years' purchase, but if the dividends are under 10 per cent., and the company demand a higher valuation, they are entitled to have an arbitration on their claim.[7] By a precautionary provision, the Treasury, before giving any guarantie, or

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[1] 5 & 6 Vict. c. 55, §§ 9, 10.—* See Appendix.—[2] 1 & 2 Vict. c. 98. 7 & 8 Vict. c. 85, § 11.—[3] 5 & 6 Vict. c. 55, § 20. 7 & 8 Vict. c. 85, § 12. —[4] 7 & 8 Vict. c. 85, § 13.—[5] Ibid. § 14.—[6] Ibid. § 1.—[7] Ibid. § 2.

making any purchase for the public behoof, must have the authority of an act of parliament to that end.[1]

Each company must provide, for the accommodation of the poorer class of travellers, one third class train at least on each week-day, and on Sunday if there are Sunday trains on the railway, to start at a time to be approved of by the railway board, to travel at a rate not less than twelve miles an hour, including stoppages, and to be provided with seats, and protected from the weather. The fare is not to exceed one penny per mile, and each passenger is to be allowed half a hundredweight of luggage, and passengers are to be entitled to have with them children under three years old without charge, and children from three to twelve at half fare.[2] These conditions apply not only to all railway companies newly established as above acquiring "directly or indirectly" any new powers by an act of 1844, or of any subsequent year. The board have a discretionary power to agree with companies to substitute for these other conditions not less advantageous to the public.[3] The penalty for non-fulfilment of the conditions is £20 per day.[4]

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## CHAPTER VII.

### NAVIGATION.

### SECT. 1.—*The Mercantile Navy.*

AN extensive series of minute regulations affecting the mercantile navy is embodied in an act of 1844, "to amend and consolidate the laws relating to merchant seamen; and for keeping a register of seamen."[5] Many of the enactments of this statute belong properly to the law of employer and employed.* They affect the mutual rights and obligations of shipowners and the mariners employed by them, providing a fixed law to supply those deficiencies in the private contracts between seafaring men and shipowners, which are caused in some respects by the rapidity with which such engagements are made, and in a great measure are to be attributed to the wandering habits of the people employed. These statutory provisions are also directed to the providing, so far as it can be done by a general code, which can only be

[1] 7 & 8 Vict. c. 85, § 4.—[2] Ibid. §§ 6, 10.—[3] Ibid. § 8.—[4] Ibid. § 7.—[5] 7 & 8 Vict. c. 112.—* See the Law of Private Rights and Obligations, Part X. Chap. II.

judicially put in force within the limits of the British empire, means for putting in force obligations, which, though contracted within the limits of the empire, have frequently to be fulfilled in other parts of the globe.

Justices of the peace have many functions to perform under this act. They have to adjudicate in the case of seamen refusing to join the ship for which they have engaged, or absenting themselves without leave,[1] and in complaints for the various descriptions of breach of agreement or duty on either side, which are particularly set forth in the act.[2] The penalties are recoverable "by information and summary proceeding before any justice or justices of the peace, in and for any part of Her Majesty's dominions . . . . . where or near to the place where the offence shall be committed, or the offender shall be."[3] Summary action is given before a justice for arrears of wages not exceeding £20.[4]

The act embodies certain sanatory regulations, requiring ships carrying a specified number of persons, and proceeding on a certain length of voyage, to have surgeons on board, and enjoining the distribution to the crew of certain commodities supposed to counteract the deleterious effects of feeding on salted provisions.[5] One of the most important portions of the act is a series of arrangements for keeping a register of seamen, and for each seaman having in his possession a ticket which he obtains on giving the information necessary for entering him on the register.[6] It appears that two justices have by the act authority summarily to decide in prosecutions for assault and battery on board vessels in the same manner as in England justices have jurisdiction in such questions arising in that part of the empire. Cognizance may be so taken "in the case of any assault or battery committed on board any ship belonging to any subject of Her Majesty in any part of the world" by any two justices "residing at or near any port or place at which the said ship may arrive or touch." The complaint must be brought within three months after the assault, or after the vessel has arrived at her port of destination, or after the parties have come within the jurisdiction of the justices.[7]

By "an act for the protection of seamen entering on board merchant ships,"[8] the Board of Trade are to license persons "to hire, engage, supply, or provide" seamen to be entered on board merchant ships.[9] Persons who engage

[1] 7 & 8 Vict. c. 112, § 6.—[2] Ibid. § 7-12.—[3] Ibid. § 62.—[4] Ibid. § 15.—[5] Ibid. § 18.—[6] Ibid. § 19-30.—[7] Ibid. § 44.—[8] 8 & 9 Vict. c. 116.—[9] Ibid. § 1.

seamen without license, unless they be the owners of a vessel, the master, or some person authorized in special connexion with the vessel, forfeit a sum not exceeding £20 for each seaman hired.[1] There is a penalty not exceeding £5 leviable on any person who demands money from a seaman for engaging him.[2] There are penalties for unlicensed persons soliciting seamen to lodge with them, and for lodging-keepers overcharging seamen, or detaining their effects.[3] Penalties are recoverable before two justices of the place where the offence is committed, or the offender may be.[4]

### SECT. 2.—*Precautionary Regulations for Steam and other Vessels.*

In 1846 an act was passed appointing precautionary rules for the public safety, chiefly applicable to steamers, but in some respects affecting all sea-going vessels.[5] It appoints all iron steamers above a certain tonnage to be built in compartments.[6]

Vessels of 100 tons or upwards are prohibited from proceeding to sea unless they have boats duly supplied with requisites, in number according to the table set forth in the act. Every vessel carrying more than ten passengers must also have a life-boat and two life-buoys.[7] Every sea-going steamer begun to be built after the passing of the act, must, in addition to the boats in the table, and instead of a life-boat, have paddle-box boats, or such other boats as may be directed by the admiralty.[8] No steamer of 100 tons is to proceed to sea without a hose for extinguishing fire attachable to the engines.[9] When any of these regulations are neglected, the owner, if he be in fault, forfeits a sum not exceeding £100, and the master, or other person in charge, if in fault, forfeits a sum not exceeding £50.[10] Officers of the customs are prohibited from clearing out vessels in which any of these requisites are deficient.[11]

There are regulations for the manner in which steamers are to pass each other, and power is given to the admiralty to make and publish rules for the exhibition of lights in steam-vessels, under penalties for neglect or omission.[12]

*Declaration.*—There are provisions for compelling the owners of steam-vessels to send half-yearly declarations of particulars regarding their state to the Board of Trade, and

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[1] 8 & 9 Vict. c. 116, §§ 3, 5.—[2] Ibid. § 8.—[3] Ibid. §§ 10, 11.—[4] Ibid. § 12.—[5] 9 & 10 Vict. c. 100.—[6] Ibid. § 2.—[7] Ibid. § 3.—[8] Ibid. § 4.—[9] Ibid. § 5.—[10] Ibid. § 7.—[11] Ibid. § 8.—[12] Ibid. § 9-13.

for corresponding certificates of registry being granted, which are necessary to be produced before the vessel can be cleared at the Custom House.[1]

*Accidents.*—Whenever a steamer occasions or suffers a serious accident, the master must immediately transmit through the post-office to the Board of Trade, a signed report of the circumstance, and its probable cause, stating the vessel's name, and port, and the place where she is; when by non-appearance it is supposed that a vessel is lost, a similar notice must be sent. A sum not exceeding £50 is forfeited for neglect.[2] The Board of Trade may appoint persons to inquire into such casualties and to report, and all facilities must be given for conducting the inquiry that are practicable without delaying the vessel.[3] Inspectors may summon and examine witnesses, administer oaths, and call for documents. Persons are not to be required to travel more than ten miles to give evidence before inspectors without having expenses tendered to them.[4] Persons obstructing the inquiry are liable to be seized, and taken before a justice, who may summarily levy a penalty not exceeding £5, or may subject the party to imprisonment not exceeding two months, in case of default.[5]

*Penalties.*—No prosecutions are to be held under the act, unless at the instance of the Lord Advocate or of the Board of Trade.[6] The miscellaneous penalties are summarily recoverable before any two justices, one justice being entitled to issue a summons. A complaint may be heard in absence of the accused, on proof of due service of the summons.[7] Offences committed at sea are held for the purposes of jurisdiction to have been committed in the place to which the party accused is brought, or where he is found.[8] The penalties are levied by distress and sale, and by imprisonment in default.[9] There is an appeal from the judgment of the justices to the quarter sessions.[10]

### SECT. 3.—*Emigrants' Protection.*

In 1842, an act was passed for the protection of emigrants from injury by the fraud or recklessness of persons conducting the business of conveying them to their places of destination.[11] A portion only of the act can be considered as locally applicable to Scotland. Its provisions do not in

[1] 9 & 10 Vict. c. 100, § 14-17.—[2] Ibid. § 19.—[3] Ibid. § 20.—[4] Ibid. § 21.—[5] Ibid. § 22.—[6] Ibid. § 30.—[7] Ibid. § 23.—[8] Ibid. § 24.—[9] Ibid. §§ 25, 26.—[10] Ibid. § 34.—[11] 5 & 6 Vict. c. 107, as amended by 8 & 9 Vict. c. 14.

general apply to cabin passengers.[1] A number of minute regulations are set forth in the act, limiting the number of passengers to the tonnage and space, regulating the proportional supply of provisions, providing for medical attendance, &c., the general scope of which may be understood from the following clause, enacting penalties for default of the several specific enactments:—

"Be it enacted, that if in any ship carrying passengers on any such voyage as aforesaid, such lower deck or platform, of such thickness as herein-before directed, shall not be laid and continued throughout the whole duration of any such voyage in such manner as is hereinbefore required; or if the height between such lower deck or platform and the upper deck shall be less than six feet; or if there shall be more than two tiers of berths; or if such berths shall not be securely constructed, or shall not be of the dimensions herein-before required; or if there shall not be throughout the whole duration of any such voyage such an interval as is herein-before prescribed between the deck and the floor of the berths; or if any such ship shall clear out and put to sea not having on board tanks or sweet casks of such size and number as aforesaid, and such water and provisions as aforesaid, for the use and consumption of the said passengers, of the kind and to the amount and in the proportion herein-before required; or if such water and provisions shall not be issued in manner herein-before required; or if such ship shall not be provided with good boats according to the rates aforesaid; or if copies of this act shall not have been kept on board and produced on demand as herein-before required; or if there shall not be on board any such vessel such medical practitioner as aforesaid, or such medicines and other things necessary to the medical treatment of the passengers as is herein-before required; or if any such ship shall be cleared out before such list of passengers as herein-before mentioned shall have been delivered in manner and form aforesaid to such officer as aforesaid; or if the additions to such list and such additional separate list or lists as aforesaid be not made in the cases aforesaid, and delivered in the cases in which they are herein-before required to be delivered; or if any such list, or the additions to the same, shall be wilfully false; or if any such list, including the additions, if any, to the same, shall not be exhibited to or deposited with the proper officer at any port or place at which it is herein-before required to be exhibited or deposited; or if

[1] 5 & 6 Vict. c. 107, § 51.

any passenger shall, without his previous consent, be put on shore at any place other than the place at which the master had contracted to land such passenger; or if any passenger shall not be allowed to continue on board such ship in manner herein-before provided; or if every such facility for inspection shall not be afforded as is herein-before required, the master of any such ship shall for and in respect of each and every such offence be liable, on such summary conviction as herein-after mentioned, to the payment of a fine not exceeding £50 sterling British money."[1]

While passengers are not deprived of their right of action for breach of contract, the special penalties of the act are made recoverable at the instance of the permanent emigrant agent, or an officer authorized by the customs.[2] When intending emigrants, after having paid any passage money, are, by the fraud or carelessness of the parties contracting with them, deprived of their passage, or delayed, they are entitled to recover their passage money, or to subsistence during delay.[3] The penalties, return passage money, and subsistence money, may be recovered before two justices, acting either for the place where the complaint has arisen, or where the party complained against may happen to be. The summons may be granted by any one justice on complaint, the proceedings may be in absence if the party have been duly summoned, and the amount is recoverable by distress and sale.[4]

### SECT. 4.—*Lighthouses.*

The management of the lighthouses on the coast of Scotland is regulated by the act 6 & 7 Wm. IV. c. 79. For the purpose of systematic arrangement, and preventing such coincidences as may make one light be mistaken for another, the local lights and other sea marks established by corporations or other bodies, are placed under the control of the Commissioners of Northern Lights, and no alteration can at any time be made on them without the consent of that body.[5] At the same time the commissioners cannot make any alterations on the existing lights, or erect any new lights without the approval of the Trinity House in London.[6] Power is given to the commissioners and their officers to seize the contents and apparel of vessels when tolls established under authority of the act are not paid.[7] The commissioners have remedial

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[1] 5 & 6 Vict. c. 107, § 27.—[2] Ibid. §§ 28, 29.—[3] Ibid. § 22.—[4] Ibid. § 29.—[5] 6 & 7 Wm. IV. c. 79, § 38.—[6] Ibid. § 42.—[7] Ibid. § 54.

powers, when forges, kilns, or other fires or lights, are so used in places near the sea that they are liable to be mistaken for sea-lights. When the owner of such a work, in receiving notice, does not take steps for preventing the light being visible at sea, he becomes liable to a penalty of £10, recoverable, at the instance of the commissioners, by summary proceedings before one justice.[1] If the proprietor do not make an alteration within seven days after the conviction, it may be made by direction of the commissioners. Penalties are recoverable by distress and sale, and the sums recovered go to the poor of the parish.[2]

## SECT. 5.—*Inland Navigation.*

The greater portion of the inland navigation systems are regulated by local statutes. For the purpose of allowing free competition with railways and other methods of conveyance, an act was passed in 1845, for enabling the proprietors or managers of canals and other inland systems of navigation to be themselves the carriers of goods on their own lines, serving the public at uniform and regular charges, and subject to the rules of responsibility applicable to other public carriers.[3]

The local acts under which canal and other navigation companies have been created, having generally established a uniform rate of charges per *ton* or per *mile*, it was deemed expedient that powers should be given by statute to the bodies having the management of these lines of navigation, whether joint stock companies or managers, to vary their charges as expediency required.[4] There is a provision that the rate shall always be a fixed one in its relation to persons, *i. e.* that for the same amount of service or accommodation the charge shall always be the same whoever may take advantage of it.[5] Where there is a company of shareholders, the change requires the sanction of a majority of two-thirds, according to the established method of counting and voting, at a meeting called for the purpose. To be legally adopted by a body of commissioners or trustees, the change requires the sanction of a majority, at a special meeting. In all cases certain notices must be given before the change commences.[6] Conterminous proprietors and owners of lines of navigation are not to be deprived of any privilege they may have under

[1] 6 & 7 Wm. IV. c. 79, § 61.—[2] Ibid.—[3] 8 & 9 Vict. c. 42.—[4] Ibid. c. 28.—[5] Ibid. § 2.—[6] Ibid. § 3.

special statute by such an alteration, and where several lines of navigation are connected, so that the charges on one have reference to those on another, there must be the consent of the managers of all parts of the line, on adopting a change.[1]

[1] 8 & 9 Vict. c. 28, § 4.

# PART VIII.

## PUBLIC POLICE.

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### CHAPTER I.

#### Constables and other Officers of the Law.

Each court of justice has its officers for putting its orders in execution. Messengers-at-arms appointed by the lord lyon execute the summonses and letters of diligence of the superior courts. The proceedings of the sheriff courts are enforced by sheriffs' officers. These several officials can only perform the instructions contained in their warrants; but there are others termed Constables, or police-officers, who are authorized to use certain discretionary powers for the purpose of preserving the peace of the community.

Constables are the officers of the justices of the peace in counties, and of the magistrates in burghs. The justices are directed to appoint them at their quarter sessions, two at least for every parish, with a sufficient number for those burghs which have no municipal police. The magistrates of burghs are directed to elect a new set every six months,—there are penalties attached to the refusal of the office, these rules having been made at a time when it was unpopular.[1] The above regulations are now of little practical importance, as it is found more convenient to employ permanent and professional persons, whose powers and duties are in towns regulated by the respective police acts, or by the general police act. (*See next chapter.*) By the Rural Police Act, already mentioned in reference to local taxation,* counties may be assessed for the support of a local constabulary force.[2]

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[1] 1661, c. 38. E. i. 4, 16. Hutch. J. P. i. 304.—* Part V. Chap. VIII. Sect. 1.—[2] 2 & 3 Vict. c. 65.

*Public Works.*—Constables are often attached to public works, in virtue of the local acts by which they are regulated. By a late act, the sheriff may appoint constables to act on railways and other public works in the course of construction, and within one mile beyond their limits, on the application of the company carrying on the work, or of any two justices acting in the district. The sheriff fixes the amount of their remuneration, payable by the conductors of the work.[1]

The duties of constables are twofold; they apprehend criminals on warrants, and keep the peace on their own responsibility,—the former duty belongs to another branch of the subject,* the latter only will be here considered.

A constable who witnesses the perpetration of a breach of the peace, or has immediate information of it from an eye-witness, may seize the delinquent, and is entitled to the assistance of the bystanders.[2] If the person escape to his own house, it would appear that the constable is not entitled to break open the doors of the house, if refused admittance; but he may keep watch in the neighbourhood, and apprehend the delinquent when he leaves it.[3] A constable is entitled to break into a house in order to put a stop to any tumult or disorder,[4] and he may apprehend a person using violent threats which tend to immediate mischief.[5]

A constable ought to arrest persons causing danger by discharging firearms in public places, furiously driving carts or oxen in crowded streets, &c.[6] In the case of a mob or riot, he should repair to the spot with his baton, and endeavour to keep the peace by seizing and dispersing the rioters.[7] It is a constable's duty to apprehend all lunatics wandering about unprotected, and to bring them before the sheriff to be disposed of.[8] Constables are entitled to apprehend all vagabonds, impostors, and sturdy beggars, viz. gipsies, jugglers, thimble-riggers, and other vagrant gamblers, fortune-tellers, persons who circulate spurious tales of distress, &.[9] They may apprehend pedlars who do not show their licenses, and these may be detained by ordinary individuals, until notice is given to a constable. The constable refusing to act on such notice forfeits £10.[10] By several statutes, of which the substance will be found in this volume, and by many local police and other acts, peculiar

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[1] 8 & 9 Vict. c. 3.—* See below, Part IX. – [2] Tait's Powers and Duties of a Constable, 19.—[3] Ibid. H. C. ii. 76. Hutch. J. P. i. 305.—[4] Ibid.—[5] Tait's Powers, &c., 19.—[6] Ibid. 24.—[7] Ibid. 25.—[8] Ibid. 24. 4 & 5 Vict. c. 60, § 3.—[9] Tait's Powers, 21.—[10] 55 Geo. III. c. 71, §§ 13, 14.

statutory powers are given to constables for the apprehension of transgressors.

By two late statutes, the out-pensioners of Chelsea hospital and the marine out-pensioners of Greenwich hospital may be enrolled "as a local force for the preservation of the peace," and they may be considered as in some respects supplying the place of an armed police.[1]

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## CHAPTER II.

### THE GENERAL BURGH POLICE ACT, 3 & 4 WILLIAM IV. c. 46.

#### SECT. 1.—*The Preliminary Meeting.*

IN any royal burgh, burgh of regality, or burgh of barony, a meeting of the ten-pound householders to consider whether any of the provisions of the act shall be adopted must be called by the acting chief magistrate, if a requisition be presented to him by ten-pound householders to the number—of seven or more, where the population does not exceed three thousand, or of twenty-one or more, where it does exceed three thousand (§§ 1, 3). On receiving the application, the magistrate has to appoint lists of the population to be provided within fourteen days, and within the same time to obtain from the assessors of the house-tax, or from other quarters if expedient, a list of the ten-pound householders, distinguishing the amount at which each is assessed (§§ 4, 63). Disputes about this list are settled by the sheriff (§ 5).

The meeting must be held at a period beyond twenty-one and within thirty days from the date of the requisition. Notice must be affixed to the doors of the town-house and parish churches fourteen days before it is held, and the meeting must be intimated by the drummer or other public crier twice a-week for two weeks, or be proclaimed at the market place, and advertised in a newspaper published in or circulated in the burgh, three days before it is held (§ 8). The persons entitled to vote at the meeting, and at all others under the act, are the occupants of premises within the burgh "of the value of not less than ten pounds;"* and

[1] 6 & 7 Vict. c. 95. 9 & 10 Vict. c. 9.—* The act does not say of the *yearly* value of not less than ten pounds.

companies may grant authority to one partner or more, according to the number of ten-pound qualifications afforded by their premises. Where none of the provisions of the act are adopted by the meeting the expense must be paid by the requisitionists (§§ 6, 9).

*Poll.*—The determination come to by the meeting is declared by the president, whose decision is final, unless five of the voters, within twenty-four hours, demand a poll by written application: in which case the chief magistrate names a time within two free days (exclusive of Saturdays and Sundays) for taking the poll (§ 11). No poll is to commence on Saturday, or be open for more than two days, or during a longer space than between the hours of 9 A. M. and 4 P. M. of the first day, and 8 A. M. and 4 P. M. of the second (§ 13.) The necessary clerks are appointed, and poll books provided at the direction of the chief magistrate (§ 14). The poll may be closed, when an hour has elapsed during which no voter has come forward (§ 15). When the poll is closed, the clerks transmit the respective results to the chief magistrate, who must declare them publicly on the next day (§ 16).

*Adoption of Act.*—None of the provisions of the act can be adopted without a majority of three-fourths, and, when a resolution to adopt part of the act is carried, the particular clauses must be stated in the minutes (§§ 17, 18). The meeting first called may at once determine whether any of the provisions are to be adopted, or may remit to a committee to report (§ 10). No provisions which are not adopted can be again taken into consideration until the lapse of two years, when they may be re-considered in the same manner (§ 19).

*Boundaries.*—When a meeting has decided on adopting any of the provisions, it may have in the next place to settle the boundaries of the burgh as applicable to the act. In burghs sending members to parliament, these are as described by the reform act. In other burghs they may extend to a distance not exceeding one thousand yards from the boundaries fixed by charter, grant, prescription, act of parliament, &c. (§ 2). The boundaries are to be arranged at the general meeting (§ 20). Contiguous burghs may unite for the purposes of the act, the chief magistrates acting as presidents by annual rotation, and such elections as both cannot equally join in, being also arranged by rotation. Disputes as to boundaries, and as to rotations, are to be finally settled by the sheriff (§§ 5, 24).

### SECT. 2.—*Commissioners and their Powers.*

The meeting specifies the number of commissioners of police to be chosen (§ 24). They must not be fewer than five, or more than twenty-one, including the chief magistrate who is to act as president; while, as nearly as possible, a fifth part more are to be chosen by the magistrates and town council from among themselves (§ 21). Where there is a division into wards, there must be one commissioner for each ward (§ 22). Any resident voter is eligible (§ 27). The commissioners are to be elected at a second meeting of the voters called by the chief magistrate, who must declare to the meeting the persons elected, unless a poll be demanded (§§ 26, 27). No one is entitled to vote for a commissioner who is relieved from the previous year's assessment on account of poverty, or is a month in arrear (§ 33). Incidental vacancies may be filled by the commissioners (§ 34.)

Instead of electing commissioners, the meeting held for that purpose may, by a majority of three-fourths, appoint the magistrates to act as commissioners (§ 35). No commissioner can hold a lucrative office or contract under the act (§ 36). As nearly as may be, a third of the elected commissioners and a third of those chosen by the magistrates and council must retire at the end of the year, being those whose names stand highest in alphabetical arrangement, their places being filled by a new election. The future elections must be so arranged that each set of commissioners shall retire at the end of three years (§ 30).

*Meetings.*—The commissioners hold their first meeting at twelve o'clock noon of the first Monday after their election (§ 29). General meetings must be held on the second Monday of May, August, November, and February, in each year (§ 38). On requisition in writing by two commissioners, the clerk may call a special meeting within four days, but such special meeting cannot alter the rules established at general meetings (§§ 39, 40). Meetings may be adjourned, and committees may be appointed either to report or act (§ 43). The commissioners must defray their own expenses (§ 42).

*Authority.*—The commissioners are to be vested with the power of appointing collectors, clerks, surveyors, policemen, &c., and of fixing their salaries, and otherwise directing them. They may purchase the property necessary for the purposes of the act, and they have power to regulate the lighting, paving, cleansing, supplying water, &c., according

to its terms. They are likewise entitled to enact and enforce penalties not exceeding twenty shillings (§ 44). They may contract for the execution of works (§ 45), and the proceeds of assessments and other property are vested in their hands for the purposes of the act (§ 46). They may sue and be sued in name of their clerk, or of any one of their number (§ 58).

Accounts of property vested in, received, and disbursed by the commissioners, and minutes of their proceedings must be entered in books patent to the public. Parties having objections to these may complain to the magistrates (§ 72). An account of charge and discharge must be made out between the last Monday in January and the second Monday in February yearly, and an abstract published in the newspapers circulating in the burgh (§ 73).

*Property.*—There are provisions for enabling the commissioners to purchase and hold property for the purposes of the act, and to enable them to make bargains with heirs of entail, minors, corporations, and others, whose right to dispose of property under their management is limited (§§ 50 to 54, 57). The commissioners are empowered to obtain accommodation for a police-office, and watch-houses (§ 106), and along with the magistrates and council they may erect a weigh-house (§ 107). They may borrow money,—in the lighting and watering department, to the extent of six,—in the other departments, to the extent of three years' assessment (§ 125), and at their annual meetings they may assess for a sinking fund of five per cent. per annum, provided they do not exceed the maximum fixed at the previous triennial meeting (§ 126).

### SECT. 3.—*Assessment.*

The general meeting called as above, if it has resolved to adopt any part of the act, must fix the maximum of assessment (which must not exceed one shilling and sixpence per pound of rent) for the next three years, and apportion it to the purposes of the act (§ 20). At the end of every three years the qualified persons are to be in a similar manner convened, to fix the maximum for the three years ensuing (§ 31). At these meetings the rate of assessment must not be reduced while any money borrowed on its security remains unpaid, and the rate appointed must never be under two-thirds of what was fixed at the previous meeting (§ 32).

*Allocation.*—The commissioners, at their general meeting

in November, have to allocate the assessment on all houses of £2 rent and upwards (§ 64). Unoccupied houses, the town-house, places of worship, and buildings for purposes of charity and education are exempt. Persons without the burgh, but within the boundary embraced by the act, are to be assessed in proportion to the rent of their buildings only, without including grounds, and only in as far as they derive benefit from the operation of the act (§ 65). Any free income arising from the "common good" is to contribute as the commissioners and town-council may deem reasonable, the sheriff deciding in case these parties disagree, and an appeal lying from the sheriff to the Court of Exchequer (§§ 66, 67). The assessment is paid by the occupant of the premises, whether proprietor or tenant: a tenant for a shorter period than a year, may deduct it from the rent. When premises are unoccupied for a full half year from term to term, deduction is allowed (§ 68). The lists made up constitute the rule for allocating the assessment, but the valuations may be altered by the commissioners, if appealed against (§ 69).

*Collection.*—The collector may obtain from any of the magistrates a summary decree for levying the rates. When ten days after demand elapse without payment being made, a magistrate, on the collector's certificate, may grant warrant to an officer to enter the defaulter's premises and seize his goods, which, in case of payment not being made in three days, may be sold by public roup. The assessment and expenses being thus paid, the surplus is handed over to the defaulter. A record of the proceedings must be made by the collector, and kept open for inspection for three months, within which period parties may appeal to the magistrates (§ 70). The commissioners may remit a part or the whole of the rate in cases of poverty (§ 71).

### SECT. 4.—*Lighting, Cleansing, &c.*

The commissioners may contract, as they shall deem most expedient, for the lighting of the streets with oil or gas (§ 108). On application to the magistrates and road-trustees, they will be permitted to open the streets for the laying down of pipes, &c., an operation which must be conducted with as little inconvenience to the public as possible (§ 110). The commissioners may supply the town with water, by sinking wells, or contracting with proprietors of water (§ 115).

The gas-pipes and water-pipes are to be kept at the greatest possible distance from each other,—on all occasions at least four feet, where that is practicable, and where they cross or approach, the greatest care is to be taken, under penalties, to make the gas-pipes air-tight (§ 116). Where water becomes contaminated with gas, the commissioners become liable to a penalty, and to additional penalties for every day after notice, during which the contamination is unremoved (§ 117). Owners of water-works may apply to the sheriff for warrant to examine the gas-pipes (§ 118), and for farther protection, any inhabitant may proceed against the commissioners, in respect of the gas-works being a nuisance (§ 119). The commissioners may treat for the management of any water or gas works already established (§ 120). Injuring any of the works, or abstracting water, renders parties liable to penalties (§§ 121, 122). The commissioners may contract to supply individuals with water or gas, and may levy arrears of the rate by poinding and sale (§ 123). Persons supplied with water must provide self-acting cocks, and prevent the water from being wasted or destroyed (§ 124). The commissioners may appoint scavengers, or contract for the removal of the filth, &c. (§ 111).

### SECT. 5.—*Miscellaneous Regulations.*

The rules and by-laws of the commissioners are to be hung up in conspicuous places (§ 85). Brokers must register their names in the burgh court books, and every broker and pawnbroker must keep a register of his transactions, and produce any articles in his possession, on demand by the procurator-fiscal, or other proper officer, under penalties (§ 82).

The magistrates may license such number of hackney coaches as they think fit. Any person taking out a license, and neither returning it nor setting up a vehicle, is made liable to a penalty. The magistrates may make regulations extending to seven miles round the burgh for coachmen, and to two miles for chairmen and porters (§ 113). The commissioners may appoint the names of streets to be painted on them, and houses to be numbered (§ 88).

*Tenements.*—The dean of guild, the magistrates, or the sheriff, may order encroachments to be removed, under penalties (§ 90). Where the encroachment is the only convenient access to a tenement, it can only be removed by consent of the proprietor, but he may be compelled to alter

it, so as to abate the obstruction as much as may be done consistently with preserving the access, compensation being made to him for any injury caused by the alteration (§§ 91, 92). Proprietors of ruinous houses must, on requisition, repair or pull them down, and in default, they may be repaired or pulled down on the report of workmen, the proprietor defraying the expense, and being liable to a penalty (§ 93). He is relieved, however, of such expenses connected with the process as may not have been caused by his own opposition (§ 94). Proprietors of flats or floors are empowered to make water-pipes along the back walls, and to construct drains (§ 95).

The commissioners may make sewers, &c., avoiding interference with private rights to running water (§ 96). They may provide fire-engines, and appoint men to work them (§ 97). They may likewise erect steelyards for weighing goods brought within the burgh (§ 99).

Deposits for building, and openings in streets, must be made with consent of the magistrates, and fenced in and lighted, under penalties; and the same precautions are to be observed where risk may be incurred from repairs to houses (§§ 100, 101). Sunken steps beyond the line of building must be properly protected (§ 102). The magistrates may order chimney cans, shutters, &c., which appear dangerous, to be removed, and where the paving, spouts, sewers, &c., are in disrepair, the persons liable to repair them are, on failing to do so on application, to be liable to double the expense of doing so (§§ 103, 104). Proprietors, when required by the commissioners, must make proper footpaths opposite to their premises, under a similar penalty for omission (§ 105). As soon as the magistrates and council shall have provided shambles and slaughter-houses, persons are prohibited, under penalties, from using other places for the purpose, except private persons in their own premises, and for their own use, and corporations acting under authority from the magistrates (§ 112). Any person refusing to carry off the water on his roof by pipes, &c., within fourteen days after being required to do so, is liable to the expense of its being done by order of the magistrates, and likewise of the application (§ 114).

### SECT. 6.—*Offences.*

*Jurisdiction.*—Offences under this act may be tried by the sheriff in the usual manner, or by the magistrates, at the

instance of the procurator-fiscal, all fines being applied to the purposes of the act (§ 134). The magistrates of any burgh, where the provisions of the act as to watching are introduced, are to have, for the purposes of the act, the same jurisdiction within the boundaries appointed by it, as within the ancient limits of the burgh (§ 135). The acting chief magistrate has the same jurisdiction as a sheriff in regard to the trial of offences under the act (§ 36). Persons taken into custody must be brought before a magistrate as soon as possible, and on no occasion later than the first lawful day after apprehension (§ 139).

*Vagrants.*—Officers may apprehend vagrants and beggars, and bring them before a magistrate, who may send them to their parish if it is within his jurisdiction. If otherwise, he may order them to leave the burgh; and on their being apprehended begging forty-eight hours afterwards, they may be committed to prison for a space not exceeding thirty days (§ 180).

*Officers.*—An officer appointed by the commissioners may liberate for any offence under the act, on bail not exceeding £10, but he is not responsible for refusing bail (§ 84). The policemen appointed under the act are to exercise the office of constable, and be sworn in as such (§ 74). Any one of them demanding emolument beyond his salary, or concerned in any bargain made by the commissioners, renders himself incapable of serving, and liable to a fine of £20 for each offence (§ 77). The magistrates may suspend watchmen on complaint, leaving the charge to be finally dealt with at the next meeting of the commissioners (§ 78). Persons enticing policemen off their duty become liable to a penalty of £1, and those assaulting or obstructing them to a penalty of £5, besides any damages that may be awarded in a civil action (§§ 75, 76).

Persons defacing the rules and by-laws hung up by the commissioners may be fined to the extent of £5 (§ 86). Occupants where chimneys take fire become liable to a penalty of 10s., and to a farther sum not exceeding 10s. to the person who may extinguish the fire (§ 98). Persons breaking or putting out lamps become liable to penalties not exceeding £5 for each offence, with damages, &c. (§ 109). Cattle must not be driven through the burgh for slaughter on Sunday, under a penalty (§ 83). No person may keep at any time more than 10 lbs. weight of gunpowder, or sell any by candle-light, or keep any otherwise than secured in a place apart, under penalties (§ 87).

Persons rolling casks, driving, riding, &c., on the pavements, training horses on the streets, leaving horses or vehicles on the streets unattended to, carrying timber exceeding twenty feet in length without a four-wheeled conveyance, driving furiously, throwing rubbish, &c., on the streets, may be put into the custody of a police officer by any bystander, and be brought before a magistrate, who, on complaint by the procurator-fiscal, may impose small penalties (§ 89). Keepers of disorderly houses, &c., may be bound to give security for their good behaviour (§ 81).

### SECT. 7.—*Clerk, Treasurer, and Collector.*

The commissioners, at their first meeting, appoint a clerk, whose extracts from the records are probative, and who must keep the books open for inspection without fee (§ 47). They likewise appoint a treasurer and collector, who must give security for money passing through their hands (§ 59). The clerk, and his partner or assistant, must not act as agent in the trial of any offences within the bounds (§ 48). The same person must not be clerk and treasurer, nor can the one be partner or assistant to the other (§ 49). The collector's allowance must not exceed 5 per cent. on the sums collected (§ 69). He must lodge all monies in one of the chartered banks if possible, otherwise in a bank appointed by the commissioners (§ 61). Sums lost by the insolvency of the collector or treasurer, and not recovered from the cautioner, may be assessed (§ 62).

### SECT. 8.—*Local Police Acts.*

Local police acts of burghs cease on the adoption of any part of this act, in as far as they are superseded by the part adopted, with exception of any provisions that may have been made as to water (§ 131). But where two or more burghs, described in the reform act as one parliamentary burgh, have each a police act, no inhabitants of either are entitled to make application for the adoption of the provisions of this act, without the unanimous consent of the qualified persons in both burghs (§ 132). Contracts under local acts are not affected by the adoption of this act (§ 133). The provisions of this act apply to all subsequent police acts, except where expressly altered or excluded (§ 137).

# CHAPTER III.

## Protection of the Public Health.

### Sect. 1.—*Nuisance.*

By the law of England, nuisances are divided into "*public* or *common* nuisances," which are defined, "such inconvenient and troublesome offences, as annoy the whole community in general, and not merely some particular person;"[1] and "*private* nuisances," which are defined "any thing done to the hurt or annoyance of the lands, tenements, and hereditaments of another."[2] These two different kinds of nuisance come under distinct branches of the law. The former belonging to the department of crimes, and including many offences against the public peace, are prosecuted by indictment against communities or individuals; while the latter are the subjects of private action.[3] In Scotland many of the acts which would come under the head of public nuisances in England, such as the keeping disorderly houses, erecting malicious impediments on highways, and the like, are prosecuted by the public prosecutor as police offences. These are not treated by our lawyers under the head of nuisance, which in its more legitimate acceptation applies only to acts which are in themselves lawful, but may be put a stop to by those who are subject to injury or inconvenience from them. Among these there are many which are appointed by police acts and other statutes to be prosecuted by public officers; but on the whole there is no such distinction into public and private nuisances as that which is held in England, recognised in Scotland. It is nevertheless convenient even in Scotland to make a distinction between those kinds of nuisances, which, affecting single individuals or small numbers of people, are mere incidents of the contiguous exercise of property, and those which, by the large number of persons whom they affect, become matters of public interest, and virtually questions of public law. On this principle, the former class of nuisances has been separately considered in the volume on the Law of Private Rights.*

The Local Police acts of large towns generally determine

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[1] Bl. iv. 167.—[2] Ibid. iii. 216.—[3] Ibid. ii. 216. —* See Part XIV. Chap. II. Sect 4.

certain acts to be nuisances, and appoint certain penalties to be levied on those who perpetrate them. Independently, however, of these statutory rules, it is a general principle, that whatever operation is noxious or unwholesome, or, if not so, at least renders life uncomfortable, must be removed.[1] Thus, it was found that a butcher was not entitled to slaughter cattle in his back area, in the immediate vicinity of houses within burgh; but that he was entitled to expose meat for sale in the front area, provided he erected a shed over it, and paved the area.[2] A building for the purpose of boiling whale blubber was not allowed to be erected at the end of a town.[3] A work for boiling blood, as an ingredient in the manufacture of Prussian blue, was not allowed to be conducted in the neighbourhood of a populous village.[4]

Where a manufactory has been in existence, it would only be in a peculiarly strong case that any addition to the operations would be removable as a nuisance. Thus, it was held that roasting the black ashes of soap in a soap-manufactory was not so great an additional nuisance as to warrant interference.[5] A person who moves to the vicinity of a nuisance is not entitled to complain.[6] Length of time will sanction what would otherwise be an undoubted nuisance. Thus, the proprietors of the land, through which the stream which carries the filth from the public sewers of Edinburgh towards the sea passes, having been in the habit, for more than half a century, of damming up the water and filth for irrigating and manuring their land, were found entitled to do so, though the effluvium was extremely offensive;[7] and it has even been maintained,—though not decided, that though at the early period to which the usage dates, the operation was on a much smaller scale, and much less offensive than it has in later times become, the length of usage gives a prescriptive right to pursue the system to the utmost extent to which the increasing population of the city, and the consequent increase of the sewerage, supply the means of carrying it.

The common-law remedy for a nuisance in existence, is an ordinary personal action, concluding either for cessation of the nuisance, or for cessation and damages. The question

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[1] Opinion of Chief Commissioner in Hart *v.* Taylor, 19th July 1827, 4 Mur. 313.—[2] Palmer *v.* Macmillan, May 1794, M. 13188.—[3] Dowie *v.* Oliphant, 11th December 1813.—[4] Jameson *v.* Hillcoats, 24th June 1800, M. Property. Ap. No. 4.—[5] Balleny *v.* Comb, 3d February 1813.—[6] Colvill *v.* Middleton, 27th May 1817.—[7] Duncan *v.* Earl of Moray, 9th June 1809. F. C. See also Magistrates *v.* Skinners of Inverness, 20th January 1804, M. 13191.

may, in the first instance, come before the sheriff, or, if the nuisance be within a burgh, before the magistrates. By a late act, the sheriff's authority has been "extended to all actions or proceedings relative to questions of nuisance, or damage arising from the alleged undue exercise of the right of property, and also to questions touching either the constitution or the exercise of real or predial servitudes; and all persons against whom such actions shall be brought, shall be amenable to the jurisdiction of the sheriff of the territory within which such property or servitude shall be situated."[1] Actions that have had their commencement in the sheriff's, or other local court, may be carried into the Court of Session by advocation.

When a case is in the Court of Session, whether it has originated there, or has been brought from an inferior court, it must go to a jury, the Jury Court Act specially including all actions brought for nuisance.[2]

If any work is in progress which will inevitably create a nuisance, or if the continued existence for a period, however brief, of any nuisance actually in existence, is shown to involve the risk of irreparable or very extensive damage, the party affected may obtain an Interdict to suspend operations until the main question of their legality be tried. The applicant has in the general case to find security, that if the decision be against him, he shall indemnify the other party for the damage occasioned by suspending his operations.*

*Statutory Regulations.*—In 1846 an act was passed "for the more speedy removal of certain nuisances, and to enable the privy council to make regulations for the prevention of contagious and epidemic diseases until the 31st day of August 1847, and to the end of the then next session of parliament."[3] By this act, Magistrates and Councillors of burghs, or others having like jurisdiction; Trustees or Commissioners under Draining, Paving, Cleansing, or Police Acts; or, in the absence of such bodies, the Parochial board for the administration of the Poor Law†—on receiving a certificate in writing by two duly qualified medical practitioners, of the filthy and unwholesome condition of any edifice, or of the accumulation of any noxious matter, or of any offensive drain, cess-pool, &c., may lay a complaint in writing before the sheriff or two justices, who are to order the owner or occupier to answer the complaint at a time and place named. The

[1] 1 & 2 Vict. c. 117, § 19.—[2] 6 Geo. IV. c. 120, § 28.—* See Report on the State of the Law for the Protection of the Public Health, &c., 1840.—[3] 9 & 10 Vict. c. 96.—† See above, p. 172.

order is properly served either personally, or by affixing a copy to the premises. The complaint may be heard in absence, and on proof or admission, without any written pleading or record, an order may be issued to remove the nuisance, in the manner and within the period described, which must be not more than two lawful days after the order has been given. The order or a copy is to be served on the owner, or occupier, or if this be impracticable, to be affixed on the premises. If it be not complied with, the persons who made the complaint being authorized by the sheriff or justices may proceed with the removal, persons interrupting them being liable to a penalty not less than £2 or more than £10.[1]

The persons who have instituted the proceedings may recover expenses against the owner or occupier of the tenement in relation to which they have been held, by an application to the sheriff or two justices. The court issues an order for the party appearing, and may adjudicate either on his appearing, or, if notice have been served on him, defaulting. The amount is recovered by poinding and sale. The court may excuse parties on the ground of poverty, "or other special circumstances."[2]

All penalties recovered under the act go to the relief of the poor.[3] On the other hand expenses connected with the execution of the act are payable from the fund for the relief of the poor, and any two justices may issue an order for payment.[4]

### SECT. 2.—*Precautions against Epidemics.*

By the same act, if any contagious or epidemic disease makes its appearance, and the emergency does not admit of a deliberate application to parliament, the privy council may make rules and regulations "for the prevention, as far as may be possible, of any such contagious or epidemic diseases, or for the relief of any persons suffering under or likely to be affected by any such diseases, and for the safe and speedy interment of any person who may die of any such diseases."[5] All regulations issued under the act must be laid before both Houses of Parliament.[6] Persons violating such regulations are liable to a penalty not less than £1, or more than £5, summarily recoverable at the instance of the procurator fiscal, or of any private party, before the sheriff or two justices.[7]

[1] 9 & 10 Vict. c. 96, § 3.—[2] Ibid. § 4.—[3] Ibid. § 11—[4] Ibid. § 13.—[5] Ibid. § 5.—[6] Ibid. § 12.—[7] Ibid. §§ 7, 10.

The destination of penalties, and the method in which the expenses are to be met, already stated, apply to this as well as the other department of the act.

*Quarantine.*—The quarantine laws, intended for the protection of seaports from the introduction of epidemic diseases by ships, are too extensive for insertion. Power is given by them to the privy council to make regulations in cases of emergency. (See the Quarantine Act, 6 Geo. IV. c. 78.)

By an old act, justices of the peace are appointed to "set down order in the country for governance in time of plague, and punish severely the disobeyers of the order appointed by them, according to the quality of the delinquent."[1] And on the occasion of the prevalence of Asiatic cholera, magistrates adopted and enforced sanitary regulations calculated to prevent the spread of the disease on the understanding that it was an epidemic. Certain temporary statutes were on that occasion passed, providing a code of sanitary regulations, but they have since expired.

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## CHAPTER IV.

### Offensive and Disorderly Conduct.

### Sect. 1.—*General Restrictions on Proceedings as simply Obnoxious.*

It is pretty clear that the law will recognise its authority to suppress things which are morally nuisances, as well as those which affect the physical senses. In the former case, however, it has to deal with the perilous matter of conflicting opinions, and coercive measures run the risk of being employed for the furtherance of prejudices and the suppression of opinion. Where things are done very offensive to the religion or the settled morals of the country, the matter comes within the scope of the criminal law. Leaving these cases where punishment is awarded, the law is nearly silent, and we have hardly any authority for saying that there are unpunishable moral or religious nuisances which can be prohibited. It would seem then that the extent of mischief which demands punishment marks the point where freedom of action may be interfered with. The danger and injustice

[1] 1661, c. 38.

of interference on light grounds was amply discussed in the case where it was proposed to erect in a public cemetery in Edinburgh, an obelisk to be called "The Martyrs' Monument" to the memory of Muir, Palmer, Skirving, Gerald, and Margarot, who had been convicted of sedition by the Court of Justiciary, and sentenced to transportation. The avowed object of raising the monument was to mark the sense of those concerned in its erection of the injustice of the punishment awarded. Interdict was applied for by persons whose relatives were buried in the cemetery, who said that the erection of such a monument to persons whose conduct they condemned, and who had been punished by the established tribunals, was offensive to them. The court, however, would not grant interdict.[1]

*Sunday.*—There are several old acts which prohibit "salmon-fishing, going of salt pans, milns, or kilns, hiring of reapers," and other descriptions of labour, gambling, drinking to excess, &c., on Sundays, appointing fines for transgressions, and corporal punishment in case of inability to pay.[2]

Profane swearing is punishable by statutes which appoint penalties to be divided between the parish, informers, and constables. "It is believed that there has not for a long time been a prosecution for this offence.[3]

## SECT. 2.—*Riots and Disorders.*

*Riots.*—Riotous assemblies, in so far as they have an unlawful object in view, or are the means of producing actual injury, belong to another branch of the subject.* When no such offence, however, has been committed, disorderly assemblages are cognizable by magistrates, whenever they proceed to the extent of disturbing or alarming the neighbourhood, and they are punishable with fine and imprisonment.[4]

*Disturbance of Public Worship* was at one time an offence frequently accompanied with violence, and so holds nominally a conspicuous position in our law-books.[5] It may be held, however, that any petty disturbance occasioned in a place of worship, from mischievous trickery or excited zeal, would be punished by the magistrate as an ordinary breach of the peace.[6] By an act of 1846, the provisions for the protection

[1] Paterson v. Beattie, 4th March 1845.—[2] 1594, c. 201. 1661, c. 18. 55 Geo. III. c. 94, § 11. See Tait's J. P., 407.—[3] Tait's J. P., 406.—* See Part IX., Chap. IV. Sect. 22.—[4] Tait's J. P., 49.—[5] Hume on Crimes, i. 570. —[6] Tait's J. P., 407.

of persons assembled for religious worship, are extended to "all meetings, assemblies, or congregations whatsoever, of persons lawfully assembled for religious worship."[1]

*Damage by Riots.*—"Where any damage or injury shall be done to any church, chapel, or building for religious worship; or to any house, shop, or other building whatsoever, or any fixtures attached thereto, or any furniture, goods, or commodities therein, by the act or acts of any unlawful, riotous, or tumultuary assembly of persons, or by the act or acts of any person or persons engaged in or making part of such unlawful riotous or tumultuous assembly," the person injured is entitled to receive the full damage, by summary action against the town-clerk, if the riot have taken place within burgh, and against the clerk of supply, if it have taken place in the country.[2] Where the sum does not exceed £5, it may be recovered in the Justice of Peace Small Debt Court,[3] and if it do not exceed £8, 6s. 8d., in the Sheriff's Small Debt Court.[4] Higher sums are recovered by ordinary action before the sheriff.[5]

A person who has obtained a judgment, lodges an extract with the town-clerk or clerk of supply, who intimates it to the acting chief magistrate, or to the convener of the commissioners of supply, as the case may be. The chief magistrate or convener calls a meeting of the magistrates or commissioners, who assess their respective communities, the former upon the occupants of houses, the latter upon the occupants of land according to the valued rent, and upon the occupants of houses according to the real rent—a penny on the rent of houses being levied for every shilling on the valued rent of lands.[6] Any assessment not paid within six days after demand, may be recovered by poinding and sale.[7]

*Security to Keep the Peace.*—A magistrate may bring before him persons who have used threats, on complaint, on credible information, or even on his own observation of the circumstance, and may bind them over to keep the peace.[8] The period ought to be limited, and the Court of Justiciary strongly disapproved of compelling one to find caution "to abstain from any such breach of the peace in time to come."[9] There is a separate species of security to refrain from molestation, called, "Letter of Lawburrows," which may be ob-

[1] 9 & 10 Vict. c. 59.—[2] 3 Geo. IV. c. 33 § 10.—[3] Ibid.—[4] 7 Wm. IV. and 1 Vict. c. 41, § 22.—[5] 3 Geo. IV. c. 33 § 10.—[6] Ibid. § 11.—[7] Ibid. § 12.—[8] Tait's J. P., 512.—[9] Ibid.

tained by a party fearing any injury, which may not amount to a breach of the peace.[1]

### SECT. 3.—*Vagrancy.*

The law of vagrancy in Scotland is not very distinct, and the principal statutory enactment regarding it relates to the state of society towards the conclusion of the sixteenth century, to which the present age only affords a faint parallel.[2] After enumerating among those who are to be held as vagabonds,—gipsies, soothsayers, "minstrels, sangsters, and tale-tellers," persons pretending to have been shipwrecked or to have suffered some other calamity, and able-bodied men of the labouring classes who will not work—the act includes "all vagabond scholars, of the Universities of St Andrews, Glasgow, and Aberdeen, not licensed by the rector and dean of faculty of the university to ask alms." The punishment awarded by the act is now obsolete,—it was scourging, and burning through the ear with a hot iron. The judges to whom it gave the enforcement of the act were, in burghs, the magistrates; and in landward parishes "him that shall be constituted justice by the king's commission." The procedure was to be by verdict of assize or jury—a method of inquiry not now followed before justices of the peace in Scotland. It is believed that in practice justices can derive but slight guidance from the terms of the act, and that they generally follow a series of precedents in which short imprisonments have been awarded against persons who, able to work and palpably refusing to be employed, lead a disorderly and apparently predatory life. When such persons commit the more serious offence of imposture, the sheriff generally subjects them to a higher punishment.[3]

By the poor law act, a certain class of vagrants are nominally brought within the act 1579; but both the jurisdiction and the punishment of the old statute are specially superseded. Husbands who desert their wives, and parents deserting their children, or failing to support them, being able to do so, and allowing them to be chargeable on the parish, are liable to fine or imprisonment with or without hard labour. The rule applies not only to the parents of legitimate, but to those of illegitimate children "after the paternity has been admitted or otherwise established."[4] Another class of persons liable to prosecution under this act

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[1] Tait's J. P., 275.—[2] 1579, c. 74.—[3] Tait's J. P. 542.—[4] 8 & 9 Vict. c. 83, § 80.

as vagrants, are paupers removed from Scotland to their settlements in England, Ireland, or the Isle of Man,—according to the powers vested in the sheriff or two justices when such paupers become chargeable,—who return, and without having obtained a settlement, become again chargeable on the board which has caused them to be removed. The punishment is imprisonment, with or without hard labour, not to exceed two months in duration.[1] In both cases the enforcement of the statute is specially assigned to the sheriff,[2] and it does not appear that justices of the peace have jurisdiction in the matter.

Several acts have been passed for the removal of Scottish paupers from England, the last of which is the 8th and 9th Vict. c. 117. By this act, parochial boards believing that any removal of paupers to Scotland is not justified by law, obtain redress by application to the English poor law commissioners.

### SECT. 4.—*Cruelty to Animals.*

It has been provided by statute that persons wantonly torturing or beating cattle or domestic animals, or causing mischief by negligence or ill usage in driving cattle, may, on conviction before one justice, be fined a sum not less than 5s. or more than 40s., over and above any damage occasioned, or in default may be imprisoned for not more than fourteen days.[3] Persons keeping rooms where animals are baited or made fight, are liable to a penalty not less than 10s., or more than £5.[4] Persons who keep slaughtering places, must kill animals brought to such places within three days, and in the mean time provide them with food, under a penalty not less than 5s. or more than 40s.[5] It has been doubted if the act applies to Scotland. Doubts in the case of Ireland were cleared up by 7th Wm. IV. & 1 Vict. c. 66. By a subsequent act some regulations contained in that of the 5 & 6 of William IV., relating to the licensing of places for slaughtering horses, were amended,[6] but the same doubt of applicability to Scotland applies to the amendment. These statutory regulations are understood to be enforced by some magistrates, but it has never been doubted in Scotland, and indeed is matter of practice every day, that sheriffs and justices may at common law, and independently of statute, punish with fine or imprisonment those who are guilty of cruelty to animals, by over-loading, by excessive chastisement, or for

[1] 8 & 9 Vict. c. 83, § 79.—[2] Ibid. §§ 79, 80.—[3] 5 & 6 Wm. IV. c. 56, § 2.—[4] Ibid. § 2.—[5] 5 & 6 Wm. IV. c. 59, § 8.—[6] 7 & 8 Vict. c. 87.

the gratification of wanton mischief. The setting of dogs, cocks, or other animals to fight, is a species of disorderly conduct frequently punished by fine or imprisonment.

### SECT. 5.—*Gambling.*

Persons gaining at cards or dice within twenty-four hours, or by a wager on horse-racing, any sum above £5, 11s. 1½d., forfeit the surplus to the poor.[1] It has been enacted that a person who gains by fraud at play, or gains at one sitting above £10, forfeits five times the value of his winnings to any person who will sue for it; and is liable to the punishment of perjury.[2] Any two justices may cause a person suspected of supporting himself by gambling to be brought before them; and if he do not make it appear that the principal part of his income is derived from other sources, they are to bind him over to good behaviour for a year, or commit him if he find no surety. If he afterwards play or bet for any thing exceeding the value of £1, he commits a breach of surety.[3]

There have been some alterations of the gambling acts, by late statutes, of which it would be very difficult to say how far, if at all, they are operative in Scotland. In 1844, two acts were passed for suspending proceedings by common informers, the machinery of which is entirely English, among other things requiring all criminal proceedings to have "the consent of Her Majesty's Attorney General for the time being, under his hand in writing," while the acts are declared to extend to "the United Kingdom of Great Britain and Ireland."[4] These acts have expired; but a measure was passed in 1845, for permanently effecting an adjustment of the laws against which they were employed as a temporary remedy, called "an act to amend the law concerning games and wagers."[5] By this act, the statute of the ninth of Queen Anne, above referred to, is avowedly repealed, but it would be very difficult to determine whether the repeal extends to Scotland. The permanent act is not like the temporary statutes professedly extended to "The United Kingdom of Great Britain and Ireland," but, on the other hand, there are no avowed local limits to its application; and while some enactments are necessarily confined to England, because they apply to the English courts of law, or alter old English statutes, there are other provisions which, from the

[1] 1621, c. 14.—[2] 9 Anne, c. 14, § 5.—[3] Ibid. §§ 6, 7.—[4] 7 & 8 Vict. c. 3, & 58.—[5] 8 & 9 Vict. c. 109.

generality of their character, might with some show of reason be held to extend to Scotland.

### SECT. 6.—*Lotteries.*

When acts were passed from year to year for the purpose of raising a revenue by state lotteries, they generally embodied provisions for restraining private gambling in the lottery, and against parties instituting private lotteries. There are many acts of great length and complexity of the eighteenth century for the suppression of private lotteries, but the extent to which they are applicable to Scotland is doubtful. Some of them were amended and consolidated by an act of 1787,[1] which, as it removed certain powers which were previously in the justices of peace to the English common law courts, was found to be inapplicable to Scotland.[2] It appears, however, to have been held in the same case, that the courts of law have power without statute to suppress lotteries and punish those concerned in them.[3] A statute of Queen Anne, which enacts against persons engaged in lotteries a penalty of £500, one third going to the crown, one third to the poor, and one third to the informer, appears to be held applicable to Scotland.[4]

By an act of 1836 the advertising in Britain of any lottery not authorized by some act of parliament, whether it be to take place in this country or abroad, renders a party liable to a penalty of £50, recoverable in the Court of Session.[5] By a later act, the penalty can only be pursued for at the instance of the crown.[6]

By an act of 1846 "for legalizing Art-Unions," institutions for the sole purpose of distributing prizes in the shape of works of art, are exempt from the laws against lotteries, provided they be constituted by royal charter, and their rules have the approval of the privy council. When an institution is considered to be perverted from its legitimate purposes, the charter may be withdrawn.[7]

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[1] 27 Geo. III. c. 1.—[2] Fraser v. Sprott, M. 9524. Hutch. J. P. ii. 373. —[3] Ibid.—[4] 10 Anne, c. 26, § 109. Hutch. J. P. ii. 371.—[5] 6 & 7 Wm. IV. c. 66.—[6] 8 & 9 Vict. c. 74.—[7] 9 & 10 Vict. c. 48.

# CHAPTER V.

## TRESPASS AND INJURY TO LAND.

### SECT. 1.—*Damage.*

TRESPASS is generally prosecuted in terms of the small debt acts, when the damage claimed comes within their operation. Independently of a claim for civil damages, there are statutory penalties against persons who damage the grounds of others. Any person destroying a fence, or leaping over it, or driving cattle over it, is liable to a penalty of £10 scots, half to the owner, and half to the fund for roads and bridges.[1] *

*Cattle, &c.*—Persons who have cattle, sheep, &c., must appoint herds to take charge of them, and keep them from injuring neighbouring property; and where animals are found straying on property, the owner may impound or detain them, until he be paid half a merk for each animal, and compensation for any injury done to his corn, grass, or plantations.[2] Whoever so impounds cattle, must put them in a place suited for their proper custody, or be liable to damages.[3] He must feed them, under penalty of 5s. per day for neglect, being entitled to recover the expense before a justice of peace, or to obtain it by sale of the animals after seven clear days, on three days' notice.[4] After an animal has been twenty-four hours in a pound without food, any one may enter the pound and supply food.[5] To entitle to the penalties for trespass, it is not necessary to detain the animals, the trespass admitting of ordinary proof.[6]

*Trees, &c.*—Where a tree is maliciously destroyed, the owner, or any inhabitant of the parish, may complain to any two justices, who, on conviction, may commit the offender to the house of correction to be kept at hard labour for three months, or to prison for four months if there is no house of correction.[7] The act orders frequent whipping; but this punishment has fallen into desuetude in Scotland. Persons destroying or carrying off plants of forest trees, or shrubs of the value of 5s. from gardens or nurseries during the night-

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[1] 1685, c. 39.—* See above, p. 234.—[2] 1686, c. 11. E. iii. 6, 28.—[3] E. iii. 6, 28.—[4] 5 & 6 Wm. IV. c. 59, §§ 4, 6.—[5] Ibid. § 5.—[6] Shaw *v.* Ewart, 2d March 1809.—[7] 1 Geo. I. sess. 2, c. 48, § 2.

time, are liable to be transported.[1] Where any person incurs loss by the destruction of fruit or timber trees, he must be remunerated by the parish or town, unless the offender be convicted within six months; and he may recover the sum by a summary action of damages, as in the case of riot.[2]* Independently of the above higher penalties, persons destroying trees forfeit £10 scots for each tree under ten years of age, and £20 scots for each tree above that age, and tenants are liable to this extent for damage done by their families and servants.[3]

*Muirburn.*—Persons setting fire to heath or muir from 11th April to 1st November forfeit 40s. for the first offence, £5 for the second, and £10 for every other offence; and, in case of non-payment within ten days, may be imprisoned six weeks for the first, two months for the second, and three months for every other offence.[4] The occupant of the ground is liable in case of muirburn, unless he can prove that the fire was communicated from neighbouring land, or that it was raised by some person not in his service or family.[5] A proprietor of high and wet muirlands, the heath of which cannot be easily burned before the 11th April, may, if the lands are in his own occupancy, burn the heath between the 11th and 25th of April;[6] and if the land is let, he or his factor may authorize the tenant to do so, by a writing recorded in the sheriff-clerk books of the county.[7]

### SECT. 2.—*Trespass.*

The act of 1685, already cited, imposes a penalty on persons leaping over fences, and by the game acts, persons trespassing in pursuit of game are liable to penalties.† There are no statutory rules for the protection from intrusion of waste uncultivated lands, and it is questionable whether the law of trespass extends to such tracts, so as to restrain the public at large from travelling on lands which are not cultivated or inclosed, or otherwise characterized by the marks of individual ownership; although, of course, persons who commit any specific damage on such lands will be liable to compensate the owner. There is little doubt that the proprietor of such lands may obtain, on cause shown, interdict against any named individual who asserts any

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[1] 6 Geo. III. c. 36.—[2] 1 Geo. I. c. 48, § 1.—* See above, p. 276.—[3] 1698, c. 16.—[4] 13 Geo. III. c. 54, § 4.—[5] Ibid. § 5.—[6] Ibid. § 6.—[7] Ibid. § 7.—† See above, Part VI. Chap. III.

particular right or privilege in relation to the lands, from entering upon them, for there can be no more effectual intimation to the individual in question of intention to exercise the right of ownership, than the warning involved in such a process;[1] but this leaves it still questionable whether the public at large, who have received no special intimation, and may not know who is the proprietor, or that there is any proprietor, are to be held trespassers when they stray over waste lands bearing no sign of private ownership.

If such a question were the subject of litigation, it would probably have some influence on the decision, that the older acts relative to hunting and fowling in Scotland, seem to treat these pursuits as open to all the public in lands uninclosed, unless in so far as they were restrained by statute. By the act 1475, c. 61, it is enacted "that na man hunt, shute, nor slay dear nor raes in utheris closes or parks," making apparently a statutory protection to such animals when within inclosures, which was not extended to those in waste lands. By the act 1555, c. 51, it is in the same spirit enacted, that sportsmen shall not "range uther mennis wooddes, parkes, haninges within dikes or broomes, without license of the awner of the grounde." It was not indeed until the year 1790, that it was distinctly decided that a person who possessed the necessary landed qualification was prohibited from ranging the uninclosed grounds of other persons in pursuit of game. In the case where this matter was finally decided, it was maintained by one of the parties that "from a series of our statutes, the right of persons qualified to kill game, instead of being limited to their own private property, appears evidently to extend over the whole kingdom, with the exception of inclosures, and a few other particular places;" but it was on that occasion decided for the first time that no one can pursue game on lands even though uninclosed belonging to another, without his permission.[2]

Fishermen are protected by special statute in the use of a certain range of waste land along the margin of the coast, in these terms:—

"All and every person or persons employed in the said fishery on the coasts of that part of Great Britain called Scotland, or on the said coasts of Orkney, Shetland, or any of the said islands, shall have and exercise the free use of all ports, harbours, shores, and forelands in that part of Great Britain called Scotland, or in Orkney, Shetland, or

[1] Baird v. Thomson, 19th January 1825.—[2] Breadalbane v. Livingston, 16th June 1790. M. 4999.

any of the said islands, below the highest high-water mark, *and for the space of one hundred yards on any waste and uncultivated land beyond such mark*, within the land for landing their nets, casks, and other materials, utensils, and stores, and for erecting tents, huts, and stages, and for the landing, pickling, curing, drying, and reloading their fish, without paying any foreland or other dues, or any other sum or sums of money, or other consideration whatsoever, for such liberty, except as hereafter excepted, any law, statute, or custom whatsoever to the contrary notwithstanding; and if any person or persons shall presume to demand or receive any dues, sums of money, or other consideration whatsoever for the use of any such ports, harbours, shores, or forelands within the limits aforesaid, so made use of for the purposes aforesaid, or shall presume to obstruct the fishermen or other persons employed in the taking, buying, and curing of fish in the use of the same, every person so offending shall, for every such offence, forfeit the sum of one hundred pounds sterling."[1]

## CHAPTER VI.

### Custody of the Insane.

*Commitment.*—No person can be committed to a lunatic asylum, whether public or private, without a warrant from the sheriff or sheriff-substitute;[2] and any one receiving an insane person, or accessory to his being delivered into custody, without warrant, whether the place of confinement be a licensed asylum or not, becomes liable to a penalty of £200, with costs of suit.[3] The sheriff, besides satisfying himself by other evidence, where it appears necessary, must act on the written report of a physician, or of a licentiate of the College of Surgeons in Edinburgh or London, or of the Faculty of Physicians of Glasgow, or of one who has acquired a right to practise from having served in the army or navy. When persons of the above description are not accessible, the certificate may be granted by any practitioner whom the sheriff chooses to employ.[4] A penalty of £50,

[1] 29 Geo. II. c. 28, § 2.—[2] 55 Geo. III. c. 69, § 8. 9 Geo. IV. c. 34, § 5.—[3] *Ibid.* 4 & 5 Vict. c. 60, § 1.—[4] 55 Geo. III. c. 69, § 9.

with expenses, is incurred by a medical man granting a certificate without careful examination of the patient.[1]

*Inspection.*—Sheriffs and their substitutes may at all times inspect asylums, and it is incumbent on them to make two visits yearly, the sheriff making one, and either he or his substitute the other; they are to be accompanied by the medical inspectors, or such other persons as they may direct.[2] Inspectors are annually elected by the College of Physicians in Edinburgh, and the Faculty of Physicians in Glasgow, each body choosing four from among the ordinary resident members.[3] These act for Edinburgh and Mid-Lothian, and for Glasgow and Lanarkshire, respectively. For other districts, the sheriff may employ the persons who, as above, are qualified to grant certificates.[4] Where there are a hundred patients in an asylum, there must be a resident physician or surgeon, and every asylum with less than this number, if not kept by a medical man, must be visited by such a person weekly.[5] A book must be kept in every asylum, in which is inserted the name and date of admission of each patient, and each death (with the patient's state of mind at the time of death) and discharge.[6] Where any coercion beyond solitary confinement is used, an entry must be made of the commencement, continuance from day to day, cause, and nature of it.[7] Where there is a weekly visiter, he must enter each visit, with an account of the state of the asylum and the patients.[8]

The register must be laid before the inspectors, who must note in it the day of inspection and any observations they may have to make.[9] Ministers, with the consent of the sheriff, may visit asylums within their parishes, between eight in the morning and eight in the evening; but the keeper may refuse access to a particular patient should he think it would prove prejudicial, the cause being entered in the register.[10]

*Private Asylums.*—Justices of peace may annually appoint any three of their number to inspect private asylums.[11] A private asylum can only be kept by license from the sheriff, annually renewed, under a penalty of £200, with expenses.[12] For a license to keep four or any smaller number of insane persons, there must be paid a duty of £2, 2s.; for a greater

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[1] 55 Geo. III. c. 69, § 8.—[2] Ibid. § 11.—[3] Ibid. § 4.—[4] Ibid. §§ 5, 6.—[5] 9 Geo. IV. c. 34, § 6.—[6] Ibid. § 2.—[7] Ibid. § 3.—[8] Ibid. § 6.—[9] Ibid. § 4.—[10] Ibid. § 7.—[11] Ibid. § 10.—[12] 55 Geo. III. c. 69, §§ 1, 2.

number, a duty of 10s. 6d. for each.[1] A "madhouse register" must be kept in every licensed asylum, to be kept according to a schedule at the end, which must be sealed up and transmitted to the sheriff-clerk on or before 5th January yearly. The books being opened and examined by the sheriff, are to be resealed by him, and deposited in the sheriff-clerk's office, and are not to be inspected without special warrant from the sheriff on cause shown.[2]

The death of a lunatic in a licensed asylum must, within twenty-four hours, be intimated to the sheriff, accompanied by a certificate from the medical attendant, stating the nature of the disease, the length of time during which it has continued, the time when his professional assistance was called for, and the number of professional visits. The certificate must contain a note of any undue delay in calling in assistance, if any such has been observed. The penalty for failure of intimation is £20, with an alternative of imprisonment not exceeding three months in default.[3]

*Private Custody.*—All the above rules are referable to asylums where two or more patients are kept; but no one can take charge of a single insane person, unless he be a relative, without such a medical certificate as is required for committal to an asylnm. After receiving his patient, the keeper in this instance must, within five days, transmit to the sheriff a copy of the certificate, stating the parish where, and the owner of the house in which, the patient is to reside, and must annually transmit, within seven days after 1st January, a certificate of the state of the patient, signed by two medical men, and he must notify to the sheriff the death or removal of the patient. From these documents the sheriff prepares a separate register, accessible to the Home Secretary, the President of the Court of Session, and the Justice Clerk. Any one confining a patient without such formality forfeits £50.[4]

The pecuniary penalties of the statutes may be commuted into imprisonment, not exceeding in any one case three months.[5]

*Dangerous Lunatics.*—The sheriff, on application of the procurator-fiscal accompanied by a certificate from a medical man as qualified by the acts, may commit a dangerous lunatic to safe custody. The commitment is only temporary, until an inquiry take place, preceded by notice to the next

[1] 9 Geo. IV. c. 34, § 1.—[2] 4 & 5 Vict. c. 60, §§ 10, 12.—[3] Ibid. § 9.—[4] 9 Geo. IV. c. 34, § 8.—[5] Ibid. § 2.

of kin, &c., when it may be made permanent until the person be cured, or security be found for his safe custody. The procurator-fiscal is to contract with the keepers of asylums for the custody of such persons.[1] The taxed expense of the application to the sheriff is payable out of the rogue-money. The expense of maintenance and custody is payable out of the estate of the lunatic, if he have any sufficient for the purpose; and if this is not the case, it must be defrayed by the parish. The sheriff's decision against a parish for a lunatic's support, provisional or permanent, is final, and not subject to review, leaving to the parish all legal recourse against other parties liable.[2]

A lunatic may be removed from an asylum certified by two medical men to be unfit for his custody, on an application by the procurator-fiscal to the sheriff, the expense of maintenance in the place to which he is removed being defrayed by the party liable to pay had he been continued in the place whence he is removed.[3]

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## CHAPTER VII.

### Miscellaneous Statutory Regulations.

#### Sect. 1.—*Weights and Measures.*

Weights and measures used in every description of commerce must be of the legal standard appointed by 5th & 6th Wm. IV. c. 63, and stamped by the district inspectors appointed by the justices of peace or burgh magistrates,[4] and those using them unstamped or unjust forfeit a sum not exceeding £5, with the weights or measures used.[5] Contracts in contravention of the act are not valid.[6] It was held in one case that where the party alleged that the Scots *or* imperial acre was the criterion of the price of potatoes said to have been sold, the bargain would have been good had that been proved; but as no reference to the imperial acre was proved, no effect could be given to it.[7] No weight above 56 lbs., or wooden or wicker measure used in the

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[1] 4 & 5 Vict. c. 60, § 3.—[2] Ibid. § 5.—[3] Ibid. § 6.—[4] 5 & 6 Wm. IV. c. 63, §§ 17, 18.—[4] Ibid. § 21.—[5] Ibid.—[6] Ibid.—[7] Alexander v. M'Gregor, 24th June 1845.

sale of lime, or glass or earthenware drinking-vessel, requires to be stamped; but any person buying by any such measure represented as of any amount of imperial measure, may require the same to be tested by a stamped measure, and if the seller refuse to do so, or the measure is found deficient, he becomes liable to the above penalty.[1] Weights made of pewter or lead cannot be stamped or used unless cased with brass, copper, or iron.[2] Old local and customary measures, including the Winchester bushel and Scotch ell, and heaped measures, are prohibited, under a penalty not exceeding 40s.,[3] and persons are required to make their sales by some one of the imperial measures, "or some aliquot part, such as a half, the quarter, the eighth, the sixteenth, or the thirty-second parts thereof." Under this clause it was held that a sale by a *multiple* of an aliquot part of an imperial measure is lawful, *e. g.* thirteen thirty-second parts of an imperial gallon; but that a sale in a vessel represented as containing a Scots pint, *or* a certain amount of imperial measure, and not stamped, was illegal.[4] Vessels which are not represented as being any customary or other measure or any imperial measure or fixed part thereof may be used, though not according to the standard.[5] No coal, slack, culm, or cannel, must be sold by measure, but all by weight, under a penalty not exceeding 40s.[6]

### SECT. 2.—*Shipwrecks.*

All local magistrates, constables, and custom-house officers, when called on by the commander of a vessel stranded, must give aid, and are entitled to call for the assistance of the commanders of other vessels, who, if they refuse, are liable in £100 to the commander of the ship in distress.[7] The officers of customs may detain the vessel, &c., till the salvers are remunerated. If the master or owners cannot come to terms with the custom-house officers as to the amount of remuneration, it may be referred to the arbitration of three neighbouring justices.[8] The law of salvage in England is adjusted by the act 9 & 10 Vict. c. 99, which does not extend to Scotland.

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[1] 5 & 6 Wm. IV. c. 63, § 21.—[2] Ibid. § 13.—[3] Ibid. § 6.—[4] Allan *v.* Baird, 13th June 1845. 2 Brown 294.—[5] 5 & 6 Wm. IV. c. 63, § 6.—[6] Ibid. § 9. Allan *v.* Baird.—[7] 12 Anne, St. 2, c. 18, § 1.—[8] Ibid. § 2.

# PART IX.

## CRIMINAL LAW.

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## CHAPTER I.

### Prosecutors.

#### Sect. 1.—*Public Prosecutors.*

The administration of criminal justice in Scotland differs from that of England, in committing the conduct of prosecutions, in the general case, to public prosecutors. This system with us, as in most other nations of Europe, seems to have had its origin from those fiscal officers whom the right of the crown to the feudal forfeitures of persons found guilty of crimes, prompted to take a peculiar interest in prosecutions; and the alteration of circumstances gradually changed the agent for the crown into the prosecutor for the public interest.

*Lord Advocate.*—The principal public prosecutor for Scotland is the Lord Advocate. He holds his office during the choice of the crown, and is generally chosen from among the partizans of the administration for the time being. Since the abolition of the office of secretary of state for Scotland, in 1746, he has performed many of the functions which would have otherwise fallen to that officer, and his ministerial duties are various, important, and not easily defined. His deputes or assistants are the Solicitor-General, an officer whose existence cannot be traced farther back than to the period of the Union, and certain minor assistants termed Depute-Advocates. These assistants individually exercise the full powers of public prosecutors, and the Lord Advocate is responsible for their conduct, to the extent to which he can be made responsible for his own.

*Procurators-fiscal.*—The Lord Advocate and his assistants are entitled to prosecute in any criminal court in

Scotland, but, with the exception of some proceedings in the sheriff-courts, which are superintended by a depute-advocate, they are not in the habit of appearing in the inferior judicatories, such as Sheriff, Burgh, and Justice of Peace Courts, to which special prosecutors are attached, termed Procurators-fiscal, generally chosen by the judges. These officers have to perform the several duties of making the first inquiries as to crimes presumed to have been committed within their districts, of applying to magistrates for warrants to apprehend the persons accused, of conducting the necessary examinations, and of communicating with the Lord Advocate and his deputes to ascertain whether it is their intention to prosecute the cases in the Court of Justiciary, or to leave them to the procurators-fiscal and the district courts, as cases of lesser moment.

*Responsibility.*—The trust placed in the hands of the procurators-fiscal is of less degree than that confided to the crown prosecutors. The libel, or accusation of the latter is, with the exceptions mentioned below (*see Chap.* III. *Sect.* 1), entirely in the name of the Lord Advocate, and is termed his "indictment." The accusation of the procurator-fiscal is in the form of an application to the judge of his court, and requires a warrant from the court to cite the prisoner, in terms of the application. This document is termed "criminal letters." The Lord Advocate incurs no responsibility at common law in the performance of his duties, and the power of parliament to inquire into the conduct of all public officers is, besides public opinion, the only check on his proceedings. He is not, therefore, liable to damages, on the ground of a malicious and irregular prosecution. An old act provides, that in the former case his informer shall be liable,[1] but it is doubted by many lawyers whether the Lord Advocate can be compelled to name his informer.[2] Procurators-fiscal are, on the other hand, liable to damages for irregular, oppressive, or malicious prosecutions.[3] The evil motives or misconduct of such an official will, of course, be well established before damages can be obtained, that he may not be shackled in using proper discretion in his office.

It has been found that where a statute appoints sums levied as penalties to go to "the informer," the term applies, not to the person who gives information to the prosecutor, and evidence in the trial, but to the person who pursues to

[1] 1579 c. 78.—[2] See Hume on Crimes, ii. 135. Earl *v.* Vass, 17th July 1822, App.—[3] Ibid.

conviction; and in the particular instance the procurator-fiscal was found entitled to retain the sums.[1]

The Lord Advocate is irresponsibly master of the prosecution which he has raised, and is able to modify it, so as materially to affect the prisoner's interest, and the general administration of justice. He may pass from any part of the charge, at any time before the verdict of the jury is returned. For instance, if his indictment charges two thefts, he may withdraw one of them; if a theft aggravated by housebreaking, the housebreaking. He can depart from the whole charge, even after a verdict of guilty has been returned, if he has not moved for sentence.[2] He can restrict the libel to an arbitrary punishment, that is, if the punishment of the offence charged be by law death, he can decline prosecuting to sentence of death, leaving it to the court to apply what smaller punishment it may deem fit. Whether procurators-fiscal ever possessed this right, it is unnecessary to inquire, as they never pursue in capital cases. It is enjoyed by the Lord Advocate, even where the crime has been rendered capital by statute, if his power is not specially excluded.[3] There is no recognised legal method of compelling the Lord Advocate to prosecute if he should decline.[4]

## SECT. 2.—*Private Prosecutors.*

Although prosecutions by public officers may be said to constitute the system in Scotland, yet they have not entirely superseded private prosecutions. In the earlier ages of our law, the whole matter was generally left to the private party, and on the criminal records, the public prosecutor only gradually makes his appearance previously to the reign of James VI. Since that period, his imperceptible encroachments have rendered private prosecutions formally dependent on him. A private prosecutor must have the concourse of the Lord Advocate,—not his active assistance, but his sanction,—before he can proceed. This, it is said, the Lord Advocate is not entitled to refuse.[5]

*Interest.*—The private party may prosecute not only for punishment, but for damages or assythement, and the title to receive such damages, owing to the prosecutor having himself received injury in the capacity of heir to an injured

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[1] Kerr *v.* Scott, 14th June 1842.—[2] Alison's Prac. 90.—[3] 10 Geo. IV. c. 38, § 5.—[4] Maclaurin's Cases, 258.—[5] H. C. ii. 126.

party, &c., seems to have formerly regulated the right to pursue; so that a private prosecutor still requires a peculiar interest. A person directly injured either in person or property, is undoubtedly entitled to prosecute. Mercantile corporations and magistrates of burghs may pursue for criminal injuries inflicted on them in their corporate capacity. Under the sequestration act, the trustee authorized at a meeting of the creditors by the majority in value may prosecute any person "guilty of wilful falsehood in any oath or affirmation" under the act.[1] A fraudulent bankrupt may be prosecuted by the trustee, or any ranking creditor.[2]

The legitimate relations, or next of kin, may prosecute for personal injuries done to their relation. What degree of relationship is requisite seems undefined, and the most distant known to have prosecuted are perhaps cousins-german. The crimes which may be so prosecuted seem to be indistinctly defined: "They must be personal wrongs," says Mr Alison, "and of a high and aggravated kind, such as excite strong feelings of anguish and resentment in the minds of the kindred and of the sufferer."[3] The right is undoubted in cases of murder, rape, and aggravated assault. It was admitted where a person had been seized and imprisoned in a ruinous castle.[4] In so far as an heir or executor has a patrimonial interest, as in the restitution of stolen goods, or improbation of forged writings, he may pursue in cases of injury to property.[5]

A private prosecutor, on raising his criminal letters, must give caution to report them duly executed, and to insist in the prosecution. He can be called on to take an "oath of calumny," or to swear that he believes in the truth of the charge, before it goes to a jury. He may be made liable in damages for a malicious prosecution. He possesses the power of restricting the libel in the same manner as the public prosecutor.[6]

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[1] 2 & 3 Vict. c. 41, §. 137.—[2] 7 & 8 Geo. IV. c. 20.—[3] A. Prac. 105. See also H. C. ii. 123.—[4] H. C. ii. 123.—[5] Ibid.—[6] Ibid. 125, *et seq.* A. Prac. 106, *et seq.*

## CHAPTER II.

### APPREHENSION AND COMMITMENT.

#### SECT. 1.—*Warrant and Execution.*

*Warrant.*—ANY magistrate may grant a warrant to apprehend a person accused of a crime, which will be effectual if the person is found within his jurisdiction. According to the most unexceptionable practice, the warrant should be a written document, signed by the magistrate, and should proceed on a written petition; but it would appear that it is left to the magistrate's discretion to insist on the latter precaution if he see cause.[1] A magistrate who has witnessed the commission of a crime, may verbally order the offender to be arrested. It is likewise said that he may so order arrest "if an immediate complaint be made to him of a murder, robbery, or the like violent and atrocious crime, by those who have certain knowledge of the fact, and the person of the offender; this, too, in so urgent a case, is a sufficient justification of a verbal order to the informer and others to pursue and take the individual thus positively charged, who might escape through the delay of waiting for a written warrant."[2] It is probable that in such a case the magistrate and person obeying him would act on personal responsibility, and be only justified by the result showing the correctness of the grounds on which they proceeded. A law-officer, or even a private individual, on seeing a crime committed, may apprehend the offender, and the former may, it is said, in the urgent cases above contemplated, apprehend on information. Persons so apprehended cannot be committed to prison until a warrant is obtained.[3]

*Execution of Warrant.*—The bearer of a warrant to arrest must acquaint the party with the substance of the warrant; and if called on to do so, display it, taking all precaution to prevent it from being seized or destroyed. Before breaking open doors, he must have notified his errand to the persons within, and been refused admittance. If forcibly obstructed, the obstruction constitutes a crime by itself, termed deforcement, independently of any farther offence which may be

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[1] H. C. ii. 77. A. Prac. 121.—[2] H. C. ii. 75.—[3] Ibid. 76. A. Prac. 117-119.

committed in furtherance of the obstruction, as assault or murder.[1]

The holder of the warrant cannot apprehend the accused beyond the jurisdiction of the judge granting it; but a judge of another jurisdiction (as a justice of peace of a different county from that in which the warrant was granted) may endorse it, and so make it effectual within his own jurisdiction.[2] A sheriff's warrant may now be executed beyond his county, by an officer of his court or a messenger-at-arms, without endorsement.[3] Provision is made by statute for the apprehension of persons escaping from one part of the United Kingdom to another.[4]

Three acts were passed in the year 1843, for facilitating the apprehension of offenders who attempt to escape from the countries where they have committed their crimes, and to seek refuge in places where the laws they have broken are incapable of reaching them. By 6 & 7 Vict. c. 34, arrangements are made for the execution in this country of warrants issued in any of the colonies for offences committed in them. Such a warrant being endorsed by a secretary of state, is authority for apprehending the accused and conveying him before a magistrate. The 6 & 7 Vict. c. 75, authorizes the apprehension of French criminals. It was passed in fulfilment of a treaty by which the French government agreed to give a corresponding recourse against British criminals taking refuge in France. The authority for acting in this country is a warrant issued by a secretary of state, intimating that it has been granted on an application by the representative of the French government, and requiring magistrates and officers of the law to aid in its enforcement. On this, and his being satisfied that a judicial warrant has been issued against the party in France, a magistrate capable of granting such warrant in this country may authorize the apprehension of the accused, examine into the charge, and commit for removal, if the evidence amounts to what would have justified him in committing for trial by the law of Scotland. The 6 & 7 Vict. c. 76, is an act in the same terms, for accomplishing like reciprocal arrangements with the United States of America.

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[1] H. C. ii. 80. A. Prac. 124.—[2] H. C. ii. 78. A. Prac. 125.—[3] 1 & 2 Vict. c. 119, § 25.—[4] 13 Geo. III. c. 31. 45 Geo. III. c. 92. 54 Geo. III. c. 186.

## SECT. 2.—*Examination.*

On apprehending the accused, the officer is not to commit him to prison, but must bring him, in the most expeditious manner consistent with safe custody, before a magistrate.[1] The prisoner is then subjected to examination; and as the substance of what he says is made part of the evidence in criminal proceedings, he should, if possible, be brought before a sheriff or other professional judge, in preference to a justice of peace or a municipal magistrate.

*Declaration.*—The questions put to the prisoner, with their answers, are drawn up in a judicial document, called a "declaration." Before the examination is commenced, the prisoner must be warned that whatever he says may afterwards be produced as evidence against him. To be effectual as evidence, the declaration must have been voluntarily emitted, and while the prisoner is in his sober senses. It must have a certificate to that effect. It must be uttered before two witnesses, who sign it as witnesses, and may be examined as to its contents. The prisoner must be called on to sign it; and if he refuse, the magistrate must sign it, stating the cause, whether unwillingness or inability, of its not being signed by the prisoner. If the prisoner have been put on oath, his declaration cannot be produced as evidence.[2]

After the examination of the prisoner, the magistrate may either release him, or commit him to custody, until farther investigation as to the crime of which he is accused. The prisoner cannot, in such circumstances, demand a release on bail, although it may be granted to him at the discretion of the magistrate. There is no form by which a prisoner, in such a situation, can pursue his release; but it is held as law, that the examination must be "concluded within a reasonable time," and that "a commitment for further examination must not be made use of as a commitment for custody, in order to trial."[3] When the "reasonable time" is exceeded, the prisoner has no remedy but an action of damages.

*Witnesses.*—In entering on an investigation of the case, the magistrate will, of course, examine witnesses. He can bring them before him by warrant of citation. He may put them on oath, keeping in mind that it is the general opinion of lawyers, that a person questioned on his oath regarding a

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[1] A. Prac. 129.—[2] Ibid. 130, *et seq.*—[3] Opinion of Chancellor Eldon in Arbuckle *v.* Taylor, App. 1, May 1815, 3 Dow, 160.

crime cannot be brought to trial for any connexion with that crime.[1] In England an examination before a magistrate is, to a certain extent, open to the public, and the friends and legal advisers of the accused attend. In Scotland it is conducted in secret, individuals not being confronted with each other, and legal advisers not being allowed to attend. The avowed object of the examination (termed a precognition) is to put evidence into the hand of the prosecutor. It was long understood that witnesses thus examined in each other's presence cannot be re-examined at the trial.

*Productions.*—It is the duty of the magistrate, if any articles (such as weapons, or goods said to be stolen) are to be produced in evidence, to label them as having reference to the declaration of the prisoner, or to the statement of a witness, as the case may be. In the latter case, the label should be signed by the witness, that he may the more readily identify the article when he is examined at the trial. The articles so labelled ought to be put into the custody of some one who will be able at the trial to speak to their having been safely kept. For this purpose they are generally lodged in the sheriff or town clerk's office.

*Search-Warrant.*—A magistrate who may grant warrant to arrest may grant warrant to search for stolen goods, or other articles required as evidence. In England a search-warrant can only be given on the oath of the person applying.[2] In Scotland, it is said that the magistrate can decline granting warrant without such oath; but the kind of application on which he is entitled to grant warrant is not very well defined, and he must act on his responsibility. It is only recommended that he should not grant it without a written application.[3] The search-warrant ought to state the purpose for which it is granted. In England, a warrant to search for goods, suspected to be stolen, without specifying the house, is illegal;[4] but such specification is said to be unnecessary in Scotland.[5] The officer holding a search-warrant may break open doors. In practice a warrant to apprehend, and one to search for articles, are generally petitioned for together, by the procurator-fiscal, and the magistrate "grants warrant as craved."[6]

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[1] A. Prac. 132.—[2] 7 & 8 Geo. IV. c. 29, § 63.—[3] A. Prac. 146.—[4] Deacon's Criminal Law, 1165.—[5] A. Prac. 147.—[6] Ibid.

### SECT. 3.—*Commitment for Trial.*

Having finished the precognition, the magistrate is to consider whether he shall liberate the prisoner, or commit him for trial. If he commit him, the act 1701, c. 6, termed "The *Habeas Corpus* act of Scotland," applies. By its provisions the warrant committing the accused for trial must be in writing, and it must specify "the particular cause for which he is imprisoned." The holder of the warrant, or the keeper of the prison, must give him a full copy of it; and on whatever ground he may have been first apprehended, the magistrate cannot commit him for trial except on a signed information. In practice the warrant is generally appended to the information, stating that "the prisoner above designed is committed for the crime above set forth."[1] If any of these requisites are omitted, the prisoner will obtain his liberation by an application to the High Court of Justiciary, in the form of a Suspension.

In the case of insurrection or of foreign invasion, it is provided by the act, that the privy council, or any five privy councillors, may order the apprehension of any person suspected to be connected with the insurrection or invasion, without the requisites above set forth; but this does not deprive such prisoner of his right to be brought to trial.

### SECT. 4.—*Bail.*

On the application of the prisoner, the magistrate or judge must liberate him on bail, if the crime of which he is accused do not infer a capital punishment. The person entitled to grant bail must be either the magistrate who commits, or some judge competent to try for the offence. It is necessary, therefore, that he have jurisdiction in the place where the prisoner is confined. The application for bail must be in writing, and the magistrate is allowed twenty-four hours from its presentment to him to decide whether the offence is bailable, and to fix the amount.[2]

In considering whether it is a capital crime or not, the magistrate must decide according to strict law; and if it is one of those which are called capital, although owing to the restriction of the libel by the public prosecutor it is seldom so punished, he must refuse bail.[3] No person, charged with "a high crime or offence" against the laws of the post-office,

[1] A. Prac. 154.—[2] Act 1701, c. 6.—[3] H. C. ii. 88.

is entitled to bail, except with the consent of the public prosecutor, or at the discretion of the Court of Justiciary, or the Sheriff.[1] Officers of excise are entitled to bail if they occasion wounds or death, in opposing force to force in pursuance of their duty.[2] The statement in the information is the magistrate's guide to the nature of the offence. It is said that a magistrate who commits for trial may, from a consideration of the circumstances in the precognition led before him, decide the crime to be bailable, although the information or warrant should set forth a capital crime;[3] but it is doubted whether a magistrate, other than the person before whom the precognition has been taken, can look farther than to what is stated in the information.[4]

The High Court of Justiciary exercises the power of admitting to bail, where the case, although stated as capital in the information or warrant, does not appear, on an examination of the precognition, really to be so; and in that class of cases in which, although they are capital according to law, the court considers that bail may with propriety be awarded.[5] The Lord Advocate may consent to the awarding of bail in a capital case, but in doing so he is entitled to stipulate for any amount of bail he may demand.[6]

*Amount.*—The bail which may be fixed by a magistrate must not exceed (though it may be less than) the following respective sums:—If the prisoner is a nobleman, £1200; if he is a landed proprietor, £600; if "any other gentleman, burgess, or householder," £300; and if an "inferior person," £60.[7]

The cautioner in the bail-bond becomes responsible for the appearance of the accused to answer to any libel for the crime with which he is charged, within six months from the date of the bond.[8] At the expiration of that period the accused may be again apprehended. Of the sufficiency of the cautioner, the clerk of the court of the magistrate applied to, takes consideration in the first instance, and from his judgment the prisoner can appeal to that of the magistrate. Although the time within which the magistrate must state whether or not bail is to be accepted is limited to twenty-four hours, no specific time is fixed for finally settling the sufficiency of the cautioner, &c.[9] When a prisoner is apprehended on an endorsed warrant from England or Ireland, he

[1] 7 Wm. IV. & 1 Vict. c. 36, § 38.—[2] 7 & 8 Geo. IV. c. 53, § 40.—[3] Burnet, 336.—[4] A. Prac. 163.—[5] H. C. ii. 91.—[6] A. Prac. 168.—[7] 39 Geo. III. c. 49.—[8] 1701, c. 6.—[9] A. Prac. 179.

may be admitted to bail by the endorsing magistrate, or any magistrate "before whom such offender shall be brought," unless the warrant be marked by the judge granting it with the words "not bailable."[1]

## SECT. 5.—*Running Letters.*

The act 1701 makes provision to enable persons imprisoned on criminal charges to compel their prosecutors to bring them to trial within a given time, in the following manner:—A person in custody for trial for any crime, may make an application to any judge competent (as before explained) to try the crime, requiring him within twenty-four hours to issue a precept, directing intimation to be made to the lord-advocate or procurator-fiscal, and to any private party appearing by the warrant to be concerned, to fix within sixty days after the intimation a period for the trial. The application must be in writing, and must be accompanied with a double of the warrant of imprisonment under the keeper's hand. In the case of treason, the prisoner is precluded from making application for forty days after his imprisonment, "which are hereby allowed for preparing of the process," and in such case the precepts are issued by the privy council, or the lords of justiciary.[2]

Where the warrant has been obtained from the Court of Justiciary by the Lord Advocate, the application must be made to the same court, and the precept intimated to the Lord Advocate or one of his deputies.[3]

It has been decided that the prosecutor cannot defeat the application by allowing the prisoner to be released after he has made it.[4] It has not been decided whether the application can be effectually made by a person liberated on bail, but it is to be hoped that there can be little doubt of a decision favourable to the accused on such a case occurring.

The effect of the application and intimation is, that if sixty days be allowed to elapse without the prosecutor naming a day for the trial, by causing a libel to be served on the accused, he is entitled to be immediately liberated on a written application to the judge.[5]

The prosecutor having served his libel within the sixty days, must bring the case to a conclusion within forty days after the day of serving it if the case is to be brought before

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[1] 45 Geo. III. c. 92, § 2.—[2] 1701, c. 6.—[3] H. C. ii. 105.—[4] M'Donald, 8th November 1832, A. Prac. 185.—[5] 1701, c. 6.

the Lords of Justiciary, and within thirty if before any other judge. Thus, in the one case the prosecutor has 100 days, in the other 90, within which he is to serve his libel on the prisoner and have the case decided. The effect of its not being decided within the appointed time is, that on application to a judge competent to try the crime, a precept must be issued within twenty-four hours, charging the keepers of the prison, &c. to liberate the accused. If the case has been remitted to a jury, and circumstances have prevented sentence being passed on the prisoner before the expiry of the forty days, he cannot be brought to trial again for the same crime.[1]

If, however, the libel have been served, and the period of trial postponed by desertion of the diet, or if no libel have been served within the sixty days as above mentioned, the accused is in a different situation. He is released, and no indictment can be served against him for the crime for which he was apprehended, but he may be re-apprehended on *criminal letters*, which are not, like an indictment, the mere statement of the prosecutor, but sanctioned by a judge (*see next chapter*), and in the case in question the letters must be raised before the Lords of Justiciary. The trial upon these letters must be brought to a conclusion within forty days from the time when the prisoner is incarcerated upon them, otherwise he is dismissed, and cannot be re-apprehended for the same crime.[2]

On the whole, then, the time within which a prisoner can insist on being brought to trial before the Court of Justiciary, or released without further question, is 140 days. But it is questioned whether, if the prisoner is not incarcerated, but merely served with the criminal letters, and left at large, it is incumbent on the prosecutor to bring the trial to a conclusion within the forty days.[3] It does not appear that the prosecutor is limited in the time within which he must serve his criminal letters; so, if he have failed to serve them before the prisoner's liberation (it being the usual practice to have them ready before he is out of custody), his security from arrest will consist in flight.

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[1] H. C. ii. 113.—[2] 1701, c. 6. H. C. ii. 113. A. Prac. 200.—[3] A. Prac. 203.

# CHAPTER III.

## LIBEL OR ACCUSATION.

### SECT. 1.—*Form and Nature.*

THE "libel" is the instrument of accusation laid before the court by which the offence is to be tried. Libels are of two kinds, Indictments, and Criminal Letters. In all ordinary cases of prosecution by the Lord Advocate the indictment is used. Criminal letters are used where private parties prosecute, where the Lord Advocate prosecutes one who has been liberated under the act 1701 (*see preceding chapter*), and in inferior courts. In an indictment the prosecutor personally accuses, and the statements are carried on in the second person, as "you did wickedly and feloniously steal," &c. It is signed by the Lord Advocate or one of his deputes. Criminal letters in the High Court of Justiciary proceed in the name of the queen; in others in the name of the judge. They intimate that the prosecutor has made a complaint against the party accused, stating the accusation in the third person, as, "*A. B.* did wickedly and feloniously steal," &c., and praying that he should be cited to answer to the charge. Criminal letters are signed by the clerk of court. In the supreme court they are granted on a bill, or application admitted by a deliverance of one of the judges granting the prayer, and are passed by the signet of the court.

A list of witnesses is annexed to every libel, which, whether it be an indictment or criminal letters, is signed by the prosecutor in the superior court; in the inferior by the prosecutor or the clerk. Where they cannot be enumerated in the body of the document, an inventory of articles stolen may also be annexed. The inventory is signed by the person who signs the body of the libel.[1]

Every libel assumes the form of what is termed in logic a "syllogism." It is first stated that some particular kind of act is criminal, as, that "theft is a crime of an heinous nature and severely punishable." This proposition is termed "the major." It is next stated that the person accused is guilty of the crime so named, "actor or art and part." This, with a narrative of the manner in which, and the time when,

[1] A. Prac. 211, *et seq.* Act of Adjournal, 17th March 1827, S. J. 120.

the offence was committed, is called the minor proposition of the libel.

The document, after narrating the circumstances of the crime, specifies and describes the writings and other articles, if there be any, which are kept, as above stated (*see Chap.* II. *Sect.* 2.), to be used in evidence. The conclusion or subsumption is, that all or part of the facts stated being proved or admitted by confession, the pannel "ought to be punished with the pains of law, to deter others from committing the like crime in all time coming."

### SECT. 2.—*Description of Pannel.*

In giving the name and designation of the pannel, absolute correctness is not necessary; it is enough that he is individualized, and cannot show any ground on which it can be supposed by himself or others, that the libel refers to a different person. Where names have much the same sound, and are often confounded with each other in conversation, using one for another will not vitiate the libel,—as in the instance of using Robinson for Robertson or Robison, Thomson for Tomson, Johnston for Johnson, &c.;[1] but where there was so decided a difference as the word "Kane" instead of "Cain," an objection was sustained.[2] If the profession of the pannel, or of his father, is described, it must be done correctly; so of his place of residence for the time, which in the majority of cases is a prison.

Although the name by which the prisoner may have chosen to be known at the time of his apprehension is a sufficient designation, rendering inquiry as to any previous name unnecessary, it is generally considered useful, especially if previous convictions are to be proved, to libel any other names by which the prisoner may be known, putting between each the word "alias" or otherwise. When this is done each name must be correctly given as it was assumed. If a prisoner is described as he may have described himself in his declaration or bail-bond, it is held as sufficient.[3]

### SECT. 3.—*Specification of Crime.*

In the statement of the species of crime said to be committed, if it is a common known crime, as theft, murder, &c., one word is sufficient for its description. But it is said to be

[1] H. C. ii. 158.—[2] S. J. 106.—[3] A. Prac. 225.

" competent where a new offence, or one not properly included under any known appellation, occurs, to describe it generally in the major; and, if it amounts to an act plainly criminal, such a mode of libelling will be sustained by the court."[1]

*Statute.*—Where a crime is defined, or its punishment fixed by statute, there is some obscurity as to the proper method of libelling it. Where the act of parliament is old, and the crime has become well known as a term in the common law, it is not usual to specify the statute. Yet it is said that the prosecutor is entitled to refer to it, and call for the punishment enacted.[2] Where the prosecutor, however, demands a punishment in terms of a British statute, it is understood that he must quote the clause.[3]

Where there are doubts of what order the crime when proved may turn out to be, the libel may contain an alternative thus, " Whereas, theft, as also robbery, as also reset of theft, are crimes," &c.

*Aggravations.*—It occasionally happens that the crime is aggravated, either by the manner in which it is committed, or by the character of the pannel. In such a case the nature of the aggravation will follow the statement of the offence. Thus the crime of theft may be aggravated to the following extent,—" Theft, especially when committed by means of housebreaking, and of opening lockfast places, and by one who is habit and repute a thief, and who has been previously convicted of theft, is a crime," &c.[4]

Several persons may be brought to trial on one libel, and several criminal acts may be stated in one libel against one or more persons. How far this license is to be limited, so that the accused may not be prejudiced, lies with the discretion of the court.

*Time.*—The prosecutor must state when the crime was committed, and if he adopt a precise point of time, he will not be allowed to bring proof of a crime committed at a different period. It is usual to libel the exact day, when it is known, but to reserve a latitude of proving the crime to have taken place at any period of the month specified, or of the month preceding, or the month following it; but it will be for the jury to consider whether the crime that may be proved is the identical one of which notice has been given by the libel. Where there is a plea of *alibi*, or that the accused was not in the place where the crime was committed at the time when it was committed, " it is incumbent on the prosecutor to fix down the crime on the very

[1] A. Prac. 230.—[2] H. C. ii. 167. A. Prac. 228.—[3] Ibid.—[4] H. C. ii. 170. A. Prac. 236.

day libelled, and even at the hour specified by his witnesses."[1] In some cases, such as forgery, coining, &c., considerable latitude must necessarily be permitted in specifying the time.[2]

*Place.*—More precision is demanded in describing the place; county and parish are of course given, but more minute specification is generally required, such as the street, the house, the farm, &c. Minuteness of information is more necessary than verbal accuracy, and when a well-known street has been named, a mistake as to the parish in which it is placed has been held immaterial. Any ambiguity—such as the name of one of two places having the same designation without some mark to show which is meant—is fatal to the libel.[3]

### SECT. 4.—*Execution of Libel.*

The execution of the libel, or the warning which the accused receives of the nature of the charge, and of the manner in which it is to be tried, takes place fifteen days before the trial, when the case is to come before a jury[4] (as to minor cases see *Part* I. *Chap.* V. *Sect.* 3). A copy of the libel, with a list of the witnesses and jurymen, is then served on the accused. Any deviation from the original, on which the accused can plead that it might put him into a mistake as to the charge, will vitiate the citation in whole or in part.[5]

The officer must append to the copy a short notice, according to a prescribed form, of the day and place of trial, subscribed by himself and one witness.[6] The copy and notice (both together receiving the designation "citation") must be served on the accused personally, if he can be found. If he cannot, it must be served at his dwelling-house (if he has one), by being left with the inmates, after which a proclamation is made at the head burgh of the shire, and a copy affixed to the market cross. The accused cannot plead that no copy was left at his dwelling-house, if it was left at the place he described as such in his bail-bond. If access cannot be obtained to the dwelling-house, the citation must be affixed to the door; proclamation being made and a duplicate affixed to the cross as above. Where neither the accused nor his dwelling-house can be found, and (it is presumed) in the case of fear of resistance, the court will grant

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[1] A. Prac. 253.—[2] H. C. ii. 222.—[3] Ibid. 210. A. Prac. 259.—[4] A. Prac. 334.—[5] H. C. ii. 245. A. Prac. 344. Thomson, 19th July 1837, 1 Sw. 532.—[6] 9 Geo. IV. c. 29, § 6.

a warrant to cite him edictally at the head burgh, by proclamation and affixing to the cross as above. If the accused is out of the country, he must be cited by proclamation at the market cross of Edinburgh and pier and shore of Leith, and the citation must take place sixty days before the trial.[1]

Having executed the citation, the officer must return an execution or certificate of his having done so, embodied in a narrative of the transaction. In this execution he must specify the crime charged in the copy of the libel; he does not require to describe it, or specify aggravations. He must mention the number of pages in the copy of the libel, and must specify the day of citation, and that fixed for the trial. A discrepancy between the terms of the execution and those of the note of citation left with the accused will be fatal. The mode of execution which the officer found it necessary to adopt must be specified. The execution must be signed by the messenger, and by the witness to the citation.[2]

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## CHAPTER IV.

### CRIMES.

### SECT. 1.—*Murder.*

THE commission of any act by which a human being is deprived of life, is termed homicide. It is of four kinds,—Murder, Culpable Homicide, Justifiable Homicide, and Casual Homicide: the two former only are criminal.

Where any thing which occasions death is done in consequence of a design to kill, it is murder, unless it have been necessary to kill in self-defence, or the act be justified by some special law. But murder may be committed where death ensues in consequence of the infliction of any severe injury, which shows a carelessness of life, though there be no intention to kill; as, where a man had declared that he would beat a woman, "so as just to leave life in her," and she died in consequence of the blows she received.[3]

*Provocation.*—Provocation will not diminish the extent of the crime where there has been a clear intention to kill, or to

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[1] H. C. ii. 252-258. A. Prac. 328, 336.—[2] A. Prac. 339.—[3] H. C. i. 257, and see Burnett, 4.

inflict an injury without regard to the consequences; but if a man has been so blinded with passion or fear, that he has accidentally inflicted an injury beyond his intention, the jury will, in the general case, return a verdict of culpable homicide. The views of the perpetrator must necessarily be judged of from the manner in which he sets about the act. Taking up a deadly weapon for the purpose of inflicting the wound gives the clearest presumption of intent to murder; on the other hand, laying down a deadly weapon, and using a less formidable one, or the unarmed hand, leaves room for a more favourable presumption.[1] Where death is inflicted in a quarrel by the first aggressor, there will seldom be any doubt that he is guilty of murder.[2]

If a person is intentionally slain in the commission of a crime, it is murder, unless the deceased has been using violence, or it is natural to presume that he is prepared to do so; hence the killing a highway robber, or one who is forcibly breaking into the house at night, would not be murder, unless it were clearly proved that he might have been effectually resisted without those measures which have occasioned death; but shooting a boy stealing apples, or a resurrection man, or killing a poacher by spring guns set in the ground, will constitute murder.[3]

*Officers of the Law.*—Officers of the law are peculiarly protected in the execution of their duty, and when they are slain in a scuffle, caused by resistance, the perpetrators are invariably guilty of murder. An informality in the warrant or other procedure will not alleviate the crime, unless the officer has been warned of it, and knowingly persists in acting without legal authority. In England the law appears to be considerably more favourable to the accused than it is in Scotland on this point.[4] Officers of justice on their own part must not have recourse to such violence as may endanger life, unless there be resistance on the other side, which cannot otherwise be overcome; and an unnecessary thrust with a sword, or discharge of a gun, producing death, will be murder.[5] An officer executing a warrant, which he knows to be informal, or exceeding his powers, is responsible, like an unauthorized individual, for whatever he does.[6] A wider range of privilege is allowed to officers enforcing criminal than to those intrusted with civil warrants; and it used to be an opinion

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[1] H. C. i. 256.—[2] Ibid. 248.—[3] Burnett, 56. H. C. i. 220, case of Craw, Syme, 202, 210.—[4] Compare H. C. i. 250, and Deacon's C. L. 920.—[5] H. C. i. 202.—[6] Ibid. 200.

that the holder of a warrant for a capital crime may kill if the accused flee, and there be evidently no means of taking him alive.[1]

*Soldiers.*—Soldiers on duty, and acting under proper orders, have a similar protection to officers of the law. They are entitled to kill, if they cannot otherwise protect their post of duty from being invaded, or their arms from being taken,[2] provided they are not themselves the first aggressors. Soldiers interfering for the enforcement of the law, without the direction of a civil magistrate, are responsible for their acts as ordinary individuals.

Doing an act whereby death may be caused will be murder, though there should be no intention of killing the person who suffers. Thus, if A, firing at B, kill C, it will be murder, if it would have been so had he shot B;[3] and a person who fires a gun into a crowded street, and slays a passenger, commits murder.[4] If death is occasioned in the course of committing any act of violence, or any capital crime, and is occasioned not by any collateral accident, but is the direct result of the act of committing the crime, it will be murder.[5] Thus, if one set fire to a house, and the inmate is burnt, murder is undoubtedly committed; but if in such a case an individual were destroyed in his attempts to extinguish the flames, it is not to be presumed that this would involve the crime of murder.

*Duelling.*—Killing in a duel is by law murder in all the parties concerned; but juries have been in the habit of acquitting, or giving a verdict of culpable homicide, where the survivor has acted under provocation, and has not taken any unfair advantage.[6]

## SECT. 2.—*Culpable Homicide.*

Wherever the indictment libels "murder," the jury are entitled to return a verdict of "culpable homicide." One very extensive branch of this crime may therefore be defined as, the doing of any unjustifiable act, which occasions death, yet does not involve the higher crime of murder. Where death occurs in a quarrel, or is inflicted by a person deprived of self-command by ungovernable passion, if the survivor is not the aggressor, or if he has not shown an intention to kill, the jury generally find him guilty of culpable homicide.[7]

[1] Burnett, 62.—[2] H. C. i. 208.—[3] Case of Ewart, 11th February 1828, Syme, 315.—[4] H. C. i. 23.—[5] Ibid. 25.—[6] Ibid. 230.—[7] H. C. i. 246. A. Pri. 93.

Wherever, in consequence of the perpetration of an injury, which would not be considered likely to occasion death, death chances to follow, the crime is generally viewed as culpable homicide;[1] and the same would probably be the view taken, where death would not have been occasioned by the injury, were it not for some weakness or disorder afflicting the deceased, especially if the survivor was ignorant of the circumstance.[2]

The administering any deleterious substance, with the intention of producing some bad effect on the state of the body, will be held as culpable homicide, should death be the result, as in a case where one administered nine glasses of whisky to a boy ten years of age, who died within a few hours afterwards.[3] In those cases where death is occasioned by the defence of the person or property, or in the performance of duty by officers of the law or soldiers, and in which blame may be attached to parties, from their being too precipitate or otherwise, a verdict of culpable homicide is generally found.[4] In the excise consolidation act, the extent to which a revenue officer may use violence without being culpable is thus defined:—He is authorized "to oppose force to force, and by the same means and methods by which he is so assaulted or resisted, or by any other means or methods, to oppose such force and violence, and to execute his office or duty."[5]

*Carelessness of Life.*—The other great branch of culpable homicide consists of cases which have no analogy with murder, having their origin in the careless performance of lawful acts. Whatever duty or amusement any one is engaged in, he must be careful so to conduct it, as to avoid injury to individuals; and the greater the risk of injury, the more complete must be the precaution taken to avoid it. Building, quarrying, driving vehicles, navigating steam-vessels, &c., are all among the common and lawful occupations of society; yet those who take the direction of them are responsible if they be the cause of death through an absence of careful management.[6] In a case which occurred in 1842, where a person had been killed by mismanagement on a railway, the guilt of the party tried rested not only on the acts he did, but on the dangers of which he was aware, and against which he had failed to take sufficient precaution.[7]

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[1] H. C. i. 236.—[2] A. Pri. 98. 1 Sw. 153.—[3] H. C. i. 237.—[4] Ibid. 217, *et seq.*—[5] 7 & 8 Geo. IV. c. 53, § 40.—[6] H. C. i. 192, *et seq.*—[7] Boyd, Bell's Sup. 71.

When death is occasioned in the following and similar circumstances, culpable homicide will be committed:—Where a workman on the roof of a house throws rubbish into a street without giving warning.[1] Where a carter, driving through a town or its environs, does not keep at his horse's head.[2] Where the driver of any vehicle races on a public road, or otherwise drives furiously, or neglects to keep the proper side of the road, and a proper look-out in frequented places, or does not keep a proper command over his cattle.[3] Similar rules attend furious or careless riding.[4] Where the master of a vessel, particularly a steam-vessel, neglects to keep a proper look-out, or to hang out a light during the night and in hazy weather, or to observe the established rules in passing vessels.[5]

The utmost degree of caution is required in those who follow dangerous sports,—there are few circumstances in which death by the discharge of a fowling-piece in shooting game, firing at a mark, &c., will not be culpable homicide.[6]

*Punishment.*—The punishment of culpable homicide varies with the culpability from a small fine which may be imposed in a case occasioned by mitigated carelessness, to transportation for life, where the offence makes a near approach to the crime of murder.

*Justifiable and Casual.*—Justifiable homicide embraces all those cases where death is intentionally inflicted, without either murder or culpable homicide being committed, as, by condemning and executing a criminal in the course of law, or by slaying a murderous assailant in self-defence. A woman, or her relations, may kill to protect her from rape.[7] Casual homicide is said to take place where one has been the accidental cause of the death of another, in the course of a lawful occupation, which he is pursuing with due attention to the safety of others.[8] The circumstances under which homicide is justifiable or casual, will be recognised by the absence of the peculiarities which constitute murder or culpable homicide.

## SECT. 3.—*Attempt to Murder.*

Where an injury is inflicted with an intention of committing murder, the crime is greater in degree than where

[1] H. C. i. 192.—[2] Ibid. Bell's Sup. 74.—[3] H. C. i. 192. 1 Geo. IV. c. 4.—[4] A. Pri. 122.—[5] H. C. i. 193. 9 & 10 Vict. c. 100, § 13.—[6] H. C. i. 192. Bell's Sup. 74. See cases cited, A. Pri. 114, *et seq.*—[7] H. C. i. 218. —[8] Ibid. 191.

nothing is intended but the simple injury actually inflicted. A general rule for ascertaining the intention will be derived from the question, whether, if death had followed, it would have been considered murder; and thus an injury inflicted in such circumstances as show a recklessness whether death follow or not (*see above, sect.* 1), will be considered an attempt to murder, as in a case where one wounded another by discharging a pistol loaded with swan-shot, which it was contended showed an attempt rather to maim than destroy, as for the latter purpose ball would have been used.[1] In that class of cases, however, in which murder is committed if death be occasioned by the practice of some illegal act of which it was not contemplated as the result, attempt at murder will not be committed if a less injury be occasioned. The principle on which the law professes to proceed is, that if one do an illegal act of violence, he is responsible for whatever may be the extent of the evil occasioned, just as if he had intended from the first to commit it. If the result be death, therefore, he is treated as if he intended to kill. If it be any less injury, he is punished as if that injury were what he intended to inflict.

An attempt clearly demonstrated by some direct act, involves guilt though no injury is occasioned, as where one fires at another but misses him, or mixes poison with his food which is not taken.[2] By statute, any one of the following acts, viz. attempting to shoot—even if it goes no farther than presenting fire-arms at an individual—stabbing, administering poison, attempting to suffocate, strangle, or drown, and throwing acid so as actually to injure, if done with intent to slay, or maim, or produce some grievous bodily harm —renders the party liable to the punishment of death,[3] unless it appear on the trial that, had death ensued, the crime would not have been murder.[4] The public prosecutor has the power of restricting.[5]

### SECT. 4.—*Assault.*

The crime of assault is varied in its nature and extent, and from the circumstances under which it is usually committed, the proof often resolves itself more into a comparative estimate of the guilt of several persons, than into a pure charge of crime against one. If the person under trial has

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[1] Case of Kean, April 1825, A. Pri. 164.—[2] H. C. i. 27.—[3] 10 Geo. IV. c. 38, §§ 2, 3.—[4] Ibid. § 4.—[5] Ibid. § 5.

been the sole aggressor, or the first and last who has resorted to blows, the decision will be easy. In other circumstances, he who first strikes commits a crime, though verbal provocation may alleviate it.[1] A person struck cannot be punished for immediately retaliating, if he keep near the measure of his assailant's attack, but if he go far beyond it in violence, or retaliate a blow of the hand with a weapon, he will be guilty of a new assault.[2]

*Aggravations.*—Any circumstances supposed to increase the atrocity of an assault are generally libelled as aggravations, such as " to the effusion of blood,"—" to the permanent mutilation or injury of the person,"—" to the danger of life,"—" with a bludgeon or other lethal weapon," &c., and when the aggravation is proved, the punishment is usually transportation.[3] The intent to ravish is a high aggravation of an assault, and is invariably punished with transportation where violence has been committed.[4] The intent to rob is another serious aggravation.[5] Assault is aggravated by being committed on a magistrate or officer of the law, to interrupt him in performing his duty, or to revenge its performance; by being perpetrated by one relation on another; by being committed in the house of the person assaulted; and by previous conviction.[6] It seems necessary to the aggravation of assaulting an officer of the law in fulfilment of his duty, that his character and employment are known to the assaulter.[7]

*Combination.*—By statute, the forcing of workmen by injury to person or property, threat, or molestation, to strike work, or to abstain from hiring themselves to particular persons, or to be members of associations, or to pay penalties for not being members, or to comply with any arbitrary rules as to the time, amount, or nature of work, or as to the amount of wages, and the interfering in the same manner with manufacturers or master tradesmen in the regulation of their hours of working, number of apprentices, &c., renders the perpetrator liable to imprisonment, with or without hard labour, for three calendar months, on the award of two justices of the peace.[8] In the case of a serious assault, the design of forcing a rise of wages, a strike, &c., will be an aggravation; and in such a case, the punishment will not be limited to that set forth in the statute, the intention of

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[1] H. C. i. 334.—[2] Case of Brown, April 1829, A. Pri. 178.—[3] See cases cited, A. Pri. 181, *et seq.*—[4] Ibid. 185.—[5] H. C. i. 329.—[6] Ibid. *et seq.*—[7] Bell's Sup. 102.—[8] 6 Geo. IV. c. 129, § 3.

which is to apply a punishment on account of the object in view, when the actual assault committed may be so small as to seem almost unworthy of punishment.[1]

*Revenue Officers.*—Individuals assembling to the number of three or more, armed with fire-arms or other offensive weapons, for the landing or carrying away of prohibited or uncustomed goods, or rescuing such goods, were formerly punished with death, but are now punished with transportation for life, or a term not less than fifteen years, or with imprisonment for three years, at the discretion of the court. The same punishment is awarded against persons who, under similar circumstances, rescue or oppose the apprehension of persons charged with any offences against the revenue-laws, which are punishable in the same manner.[2] Any person firing at a vessel in the navy or the revenue-service, within 100 leagues of the coast, or shooting at, maiming, or dangerously wounding a revenue-officer, is liable to the like punishment.[3] In some cases it has been deemed expedient to punish persons who have made preparation for committing an assault. Thus any person, in company with one other person, within five miles of the sea or a navigable river, having smuggled goods, and being armed or disguised, is liable to transportation for seven years.[4]

*Hamesucken.*—Entering a dwelling-house with a view to violence, and assaulting an inmate, is a separate crime termed Hamesucken. It will not be held as committed where the assailant has entered the house with other intentions, and the assault is occasioned by transactions taking place within, as where one enters a house to steal, and in making his escape is stopped by the owner, whom he assaults.[5] It is not hamesucken to strike one in his place of business, or in an inn, or in the house of a friend, where he is temporarily residing.[6] It is hamesucken to enter a man's house, drag him from it and assault him.[7] Hamesucken is a capital crime, but the punishment of death has only been awarded in very atrocious cases.[8]

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[1] A. Pri. 192. See case of the Glasgow Cotton Spinners, January 1838. —[2] 8 & 9 Vict. c. 87, § 63.—[3] Ibid. § 64.—[4] Ibid. § 65.—[5] H. C. i. 319.—[6] Ibid. 313, 314.—[7] Ibid. 317.—[8] A. Pri. 208.

### SECT. 5.—*Rape.*

Rape consists in the having connexion with a female against her will. The act will be held to be rape if accomplished by mere violence, by intimidation, by administering stupifying drugs, or when the woman is, through natural infirmity, or from having fainted in the struggle, incapable of resistance.[1] Connexion with children under twelve years of age is, by the presumption of law, against their will, and whether violence is committed or not, is punishable with death.[2] The bad character of the woman will frequently make the evidence of rape very doubtful, but will be no justification of the act.[3]

### SECT. 6.—*Deforcement.*

Deforcement consists in forcible interruption to officers of justice, or persons assisting them in performance of their duty. The officer must have been lawfully commissioned to act in the particular case, and must be taking the proper means to execute the commission, and keeping within its bounds.[4] An attack on an officer when he is making preparations to proceed to a spot for the purpose of enforcing a warrant, or after he has enforced it, is a simple assault.[5]

The accused must have been aware of the purpose of the officer, or the latter must have taken the proper means to make him acquainted with it, so that there may be no room for his presuming that he resists a person acting illegally. Messengers and constables display their baton and blazon, and officers not possessed of these symbols generally require to proclaim their authority and business, but it may be otherwise proved that the accused knew he was resisting an officer in the pursuance of his legal duty.[6] In those cases which require a warrant, the officer is bound to show it to the party if required, and if he do not produce it, or there appear an informality on its face, the party is justifiable in his opposition, any unnecessary violence he may commit being judged of as a separate offence.[7]

The offence is completed when the officer is defeated in accomplishing his purpose, by such resistance or show of force as would naturally prevent any man of ordinary firmness from proceeding farther: if the opposition has not gone

[1] H. C. i. 302.—[2] Ibid. 303.—[3] Ibid. 304.—[4] Ibid. 387.—[5] Ibid.—[6] Ibid. 390.—[7] Ibid. 391.

the length of impediment, it is the minor offence of attempt to deforce.[1] The punishment in mitigated cases is fine or imprisonment; in aggravated cases transportation.[2]

### SECT. 7.—*Invading, Threatening, and Slandering Judges.*

There are several old statutes on this subject, which being enacted when the bench was in more need of the protection of severe laws than it is at present, are viewed as in disuse. At present, it may be said that the law considers those petty assaults, threats, and insults, which would in other cases perhaps be a mere ground for obtaining damages, a serious offence when perpetrated against a judge in the discharge of his duty, or on account of what he is likely to do or has done in its discharge; while a punishable assault will be considered aggravated by being committed in such circumstances. Slandering a judge on account of his judicial proceedings, is an offence formerly very severely, and now more leniently punished. When caused by any proceeding in the Court of Justiciary, that court has been accustomed to take cognizance of the offence without the intervention of a jury.[3]

### SECT. 8.—*Robbery.*

Robbery consists in the seizing the property of an individual against his will, through the instrumentality of force or intimidation. *Stouthrief* was formerly synonymous with robbery; but it has lately been applied only to robbery committed on a person in or near his dwelling-house.[4] The amount of intimidation which will constitute robbery will depend on the age or sex of the person from whom the property is taken; but, except where a person shows gross negligence in not defending his property, when he could do so at little risk, it may be said that whenever property is taken from the person under the eye of the owner, the crime (if one has been committed) is robbery. If the property is taken through the instrumentality of violence or intimidation, it is not necessary that it should be from the person; thus it is robbery to hold a pistol to one's head, and so discover where his money is kept. Obtaining money, however, on a threat of future injury, is a separate offence.[5]

Whenever the property has been an instant in the posses-

[1] H. C. i. 395.—[2] A. Pri. 507.—[3] H. C. i. 405, *et seq.*—[4] A. Pri. 227.—[5] H. C. i. 105, *et seq.*

sion of the accused, or has been removed by him from its proper place, the robbery is completed, though it be immediately taken from him, or he throw it away.[1] To snatch an article from the person by surprise, without overcoming any resistance, is not robbery.[2] The taking must be for the sake of gain,—forcibly to seize an article, merely for the sake of depriving the owner of it, from jest or malice, is not robbery.[3] Robbery is punishable with death; but, especially in cases where no serious violence has been committed, the libel is generally restricted.

### SECT. 9.—*Theft.*

Theft is accomplished by obtaining the property of an individual without his consent, and it is distinguished from other fraudulent crimes in these particulars, that the property is directly obtained through the commission of the crime, and not through any process which follows it (as in the case of forgery), and that the crime is not perpetrated through the proprietor's consenting to the appropriation of the article for a limited period, for a particular purpose, or through false representations. It does not, however, alter the nature of the offence, that the person committing it has the custody of the property, and thus it is theft for a servant to appropriate the furniture, plate, &c. of which he has charge, or for a porter to make away with the property which he is conveying from one person to another, or for a clerk to take for his own use the money of his employers passing through his hands for their special purposes, or for a person to appropriate any article he has taken on hire.[4] A person intrusted with a horse that he might show it off for sale, but who was not authorized to conclude a bargain, who sold the horse and appropriated the price, was found guilty of theft.[5] The crime of a watchmaker who, having received at various dates a variety of watches to be cleaned or repaired and returned to the owners, appropriated the whole, was found to be theft.[6] It is theft for one to obtain property on the understanding that he is immediately to perform a certain condition, and he makes off with the property, against the owner's will, without performing it; as where one, on the pretence of wishing to purchase, gets goods put into his hands over a counter, or

[1] H. C. i. 105, *et seq.*—[2] Ibid. 106.—[3] Ibid. 108.—[4] Ibid. i. 65, *et seq.*—Burnett, 111, *et seq.* Bell's Supplement, 10. Case of Tait, 30th November 1829, S. J. 225.—[5] Nicholson, 20th June 1842. Bell's Supplement, 14.—[6] Bell's Supplement, 9.

where one gets a note to change, and in either case immediately escapes with the property.[1]

The crime of theft, like that of robbery, is completed by the removal of the property from its proper place.[2] (*See Sect.* 8.) Thus the crime was held as completed where the straps which fastened a trunk behind a carriage were cut, and the trunk fell, though the perpetrators were immediately detected, and ran away without touching it.[3]

The not restoring to the owner an article found, may be theft. It has been settled by several decisions, that not only is it theft to appropriate an article which the finder has observed to drop from another person, but that it is so to retain an article the ownership of which, though not suspected at the time of the finding, becomes subsequently known to the finder.[4]

The subject of a theft is only tangible property—an invention or other secret is not said to be stolen, however fraudulently obtained; so in the case of an apprentice to a printfield company, who had broken open a room and copied a receipt for preparing colours kept there, the act was punished as a distinct offence.[5] It is theft, punishable according to the older authorities, with death, secretly to carry off a child from its parents.[6] In a case in 1839, when the child stated as "under eleven years of age" had not been forcibly carried away, but seduced to accompany the prisoner, the offence being laid as abduction, the punishment was nine months' imprisonment.[7] To remove a dead body from the custody of the relations before interment, is theft,—removing it from the grave is a separate offence.[8] (*See Miscellaneous Offences, Sect.* 23.) Theft may be committed on tame animals, or on wild animals appropriated, and kept within enclosures.[9]

### SECT. 10.—*Aggravations of Theft.*

*Housebreaking.*—When housebreaking has been accomplished, and any article carried off, or removed from its proper place, with the design of its being appropriated, the crime is "theft, aggravated by housebreaking," and it is nominally punishable with death. When the perpetrator has not accomplished the removal of property, it is "housebreaking, with intent to steal," and is generally punished with transportation,

[1] H. C. i. 63.—[2] Ibid. 70. M'Caughie, 29th April 1836, 1 Sw. 205.—[3] H. C. i. 72.—[4] Smith, 12th March 1838, 2 Sw. 28. Cases cited in Bell's Sup. 13.—[5] Burnett, 115.—[6] H. C. i. 84.—[7] Bell's Sup. 26.—[8] H. C. i. 85. A. Pri. 281.—[9] H. C. i. 82.

or a long imprisonment. Housebreaking is committed whenever the ordinary security of the building is invaded, whether it be by breaking open the door, opening it by means of a false key or the ordinary key surreptitiously obtained, opening a window, descending through a chimney, or gaining admission by the aid of servants or others within the house.[1] Entry by a door, accidentally left open, or by a window in the same situation, if it is so near the ground that it can be entered without climbing, or is rendered easily accessible by the arrangement of the building, does not constitute housebreaking.[2] The aggravation was held to be committed where one had put his hand through a hole, and turned a lock inside,[3] but not where the door was unlocked by the key accidentally left in the lock outside.[4] It is not necessary that the whole person should be within the house,—if its security is invaded, and any thing removed, though merely by the insertion of the hand, the offence is housebreaking.[5] All who give their assistance in any way to the removal of property by such means, as, in keeping watch outside, or receiving the goods when thrown out, are guilty to the full extent of the crime.[6]

Any description of edifice, whether inhabited or not, may in Scotland be the subject of housebreaking, provided it has the ordinary securities from intrusion possessed by a dwelling-house; and the term thus applies to every such edifice, "whether it be a counting-room, public office, place of work, sale, store, or what else."[7] Where a tenement is divided into different dwellings, each is considered a house, and an invasion of it, after access has been obtained to the other parts of the building, will be housebreaking.[8]

*Opening Lockfast Places.*—Opening lockfast places is an aggravation of theft, which frequently accompanies the other aggravation of housebreaking. It is accomplished by overcoming the security of the lock of a room, press, box, or any other place of deposit, either by fraud or violence. The offence, thus aggravated, is generally punished with transportation for a limited period.[9]

*Habit and Repute.*—The crime of theft is, by the law of Scotland, aggravated by the perpetrator being "habit and repute a thief." The aggravation does not necessarily infer that he has stolen, upon previous occasions; it is sufficient that he has the *reputation* of having done so. It may be

[1] H. C. i. 98, *et seq.*—[2] Ibid.—[3] Ashton, 14th March 1837, 1 Sw. 478.—[4] Alston, 13th March 1837, ibid. 433.—[5] H. C. i. 101.—[6] A. Pri. 290.—[7] H. C. i. 103.—[8] A. Pri. 293.—[9] Ibid. 296.

proved by the testimony of neighbours, but is now generally referred to that of criminal and police officers. It requires the evidence of two witnesses, or of one witness supported by a course of convictions for theft, and should extend over a period of some months previous to the specific act of theft.[1] It would appear that the period must now be a full year.[2] Theft so aggravated is a capital crime; but the libel is now always restricted.

*Previous Conviction.*—Like other offences, theft is aggravated by previous conviction of the same crime, and in awarding punishment, the number of the convictions, and the length of time during which the character of habit and repute may have been borne, will have more effect on the punishment than the value of the article stolen.[3]

Horse and cattle stealing, and sheep stealing, are capital crimes, although the libel is invariably restricted.[4]

## SECT. 11.—*Reset of Theft.*

Reset of theft is the crime of receiving stolen goods, knowing them to be stolen, for the purpose of continuing the fraud on the owner by keeping them out of his hands. It is reset where the perpetrator takes the property on pledge, or keeps it in his hands for the convenience or security of the thief, or accepts of it as a gift, or purchases it.[5] It is necessary that the accused should know that the property was stolen; but it is not necessary that he should be proved to have been told so; his knowledge of the fact may be presumed from the circumstances.[6]

The danger of the crime of reset arises from the encouragement it gives to theft, by securing a place of deposit for the stolen goods. If the receipt of the goods, however, is so closely connected with the act of stealing, that it serves not only to conceal the property after it is stolen, but materially to aid the theft,—as where a pickpocket in a crowd hands his spoil to an accomplice behind him,—the receiver is guilty art and part of the theft.[7] As a wife is presumed to conceal her husband's delinquencies, frequently without a view of encouraging them, evidence of reset of goods stolen by her husband will require to be very strong, and it will be necessary to show, not merely that she has received particular goods, but that she makes a trade of reset.[8]

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[1] H. C. i. 94. 1 Sw. 253.—[2] 1 Sw. 245.—[3] A. Pri. 303.—[4] See cases cited, A. Pri. 310.—[5] H. C. i. 113.—[6] Ibid. 114.—[7] Ibid. 115.—[8] A. Pri. 338.

### SECT. 12.—*Breach of Trust.*

It has already been stated that it is very difficult to draw the line of distinction between theft and breach of trust. It may be safely taken, however, as a general rule, that where one has the disposal of the property of another in his hands, and ought to dispose of it for his benefit, but, instead of doing so, employs it for his own purposes, it is breach of trust, and not theft. Thus, while it is theft for a clerk who is sent to the bank with money, to appropriate it, it is breach of trust only for a factor to use his employer's money for his own purposes.[1] Where a clerk received money from his master to pay for a wine license, and appropriated the sum, it was held to be theft;[2] but where a person, in a similar position, appropriated £17 which he had received, with instructions to pay £9 to one person, and £8 to another, it was held breach of trust, as he had not to go to the persons merely as a messenger, with the identical notes and coins put into his hands, but had to account to them.[3] The teller, of a bank, who had embezzled some of the money passing through his hands, was found guilty of breach of trust.[4]

Where a clerk secretes the money paid to him on his master's account, or a carrier keeps the money he has got, not merely to convey from place to place as goods, but to pay, it is breach of trust.[5] When a tradesman appropriates articles intrusted to him to be repaired, or to have any operation performed on them, it has in some cases been held to be the same offence;[6] and so it was found where a bookseller made away with books intrusted to him to be bound.[7] It was held breach of trust in the secretary of a friendly society to carry off a cash-box intrusted to his care, and locked.[8] The fraudulent use by a partner of the signature of a firm, would appear to constitute this offence.[9]

### SECT. 13.—*Falsehood, Fraud, and Wilful Imposition.*

Under this head are generally libelled all those offences against property, which are not specifically provided for by act of parliament, or do not come under the heads of theft,

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[1] H. C. i. 60.—[2] Field, 22d January 1838, 2 Sw. 24.—[3] Climie, 21st May 1838, 2 Sw. 119. Bell's Supplement, 11.—[4] H. C. i. 61.—[5] A. Pri. 358, 359.—[6] See cases cited. A. Pri. 358, 359.—[7] Sutherland, 21st March 1836, 1 Sw. 162.—[8] Walker, 3d September 1836, 1 Sw. 294.—[9] Smith, 15th December 1836, 1 Sw. 301.

reset, breach of trust, &c. Borrowing money, or making purchases without an intention to pay, do not constitute this crime, the law leaving individuals to make their own inquiries regarding persons they so trust, or to bear the risk occasioned by not making them. But when the credit is obtained under false representations, as, where one obtained money by a course of proceedings tending to produce a false belief that he had a balance in the hands of a banker, the crime of fraud is committed.[1] A similar decision was given where a person obtained credit for the price of a pair of shoes, on the statement that he was employed in a certain distillery, and was a pensioner, both statements turning out to be untrue.[2] Getting credit on false appearances, such as filling a shop with fictitious bales, obtaining money by assuming a false name or character, fortune-telling, detailing fictitious misfortunes, fraudulently obtaining letters or parcels from carriers, &c., will constitute this crime.[3] The simple crime is generally punished with imprisonment, but when aggravated by previous convictions, or the use of false documents, it is sometimes punished with transportation.[4]

*Fraudulent Bankruptcy* is a separate offence. It consists in any act by which a person whose estate is liable to division, in terms of the bankrupt laws, conceals funds to which his creditors are entitled. It is punished with imprisonment or transportation, and always with "infamy,"[5] which comprehends incapacity to fill a public office, or to be a juryman, and formerly incapacitated the person from being a witness.

### SECT. 14.—*Post-Office Offences.*

Crimes against the post-office are regulated by statute. Servants of the post-office embezzling letters are punishable with transportation for seven or imprisonment for three years; but if a letter embezzled contain any article of property, or any money, or security, or if any such article is stolen by any person out of a letter, the punishment is transportation for life.[6] Any person stealing a post letter-bag, or a letter from such bag, or from an officer of the post-office, or stopping the mail with the intention of robbing it, is liable to transportation for life.[7] Resetters of such stolen articles are liable to be transported for life.[8] An officer of the post-

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[1] H. C. i. 174.—[2] Meldrum, 8th May 1838, 2 Sw. 117.—[3] H. C. i. 173, 174.—[4] Ibid.—[5] 1621, c. 18. H. C. i. 509.—[6] 7 Wm. IV. and 1 Vict. c. 36, §§ 26, 27.—[7] Ibid. § 28.—[8] Ibid. § 30.

office opening or wilfully delaying a letter, is liable to fine or imprisonment, or both, at the discretion of the court.[1] When letter-bags are lost, or letters misdelivered, persons wilfully detaining them are liable to fine and imprisonment.[2] Officers of the post-office stealing or secreting newspapers, or other privileged documents, are liable to fine or imprisonment, or both, at discretion.[3]

In connexion with the new postage system, the following are offences which render persons concerned in them, either as principals or accessories, liable at discretion, either to transportation for life or for any term not less than seven years, or to imprisonment for any term not more than four or less than two years,—viz., Making dies or plates for throwing off counterfeit imitations of post-office stamps; being in possession of such dies or plates, without lawful excuse, the proof of which lies with the possessor; counterfeiting the stamps themselves; using, selling, or exposing for sale counterfeit stamps; having in possession such counterfeit stamps, without lawful excuse, the proof of which lies with the possessor.[4]

The following offences render the party liable to a penalty of £20, recoverable with costs, viz., The fraudulent removal of a stamp from a letter or cover, or the attaching of such fraudulently removed stamp to any other letter or cover; the obliteration of or attempt to obliterate any of the marks impressed on a stamp in its passage through the post-office, with intent to defraud the revenue by employing the same stamp a second time; generally, the commission of "any other fraudulent act, contrivance, or device whatever, not specially provided for by this or some other act of parliament, with intent or design to defraud her Majesty," &c., of postage duties.[5] There is a provision to the effect that "no person shall post or cause to be posted, or send or cause to be sent, or tender or deliver in order to be sent by the post, any letter containing any explosive or any other dangerous material or substance, and no such letter shall be forwarded by the post."[6] There is no punishment assigned by the act to the contravention of this provision, but there can be no doubt that the attempt to send any such article, in the knowlege of its dangerous nature, would be punishable as an offence.

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[1] 7 Wm. IV. and 1 Vict. c. 36, § 25.—[2] Ibid. § 31.—[3] Ibid. § 32.—[4] 3 & 4 Vict. c. 96, § 22.—[5] Ibid. § 23.—[6] Ibid. § 62.

SECT. 15.—*Forgery, and uttering forged Documents.*

Forgery consists in preparing a writing, which is intended to pass for the penmanship of a different person from the writer, and so to be the means of committing a fraud, or other injury. It is not necessary that it should be an imitation of the handwriting of any person, or even that the signature should be correctly spelt if appended, or that the document should be in the name of a person who is in existence,—the intention to defraud by means of a writing, by its being made to appear not the writing of him who really penned it, is sufficient to constitute the crime.[1] On this principle, it is said to be forgery for one to sign his own name in his usual manner to a document, if he makes it pass for the signature of another person having the same name,[2] or for a notary or other person to sign a document for an individual, on a false narrative of having received authority to do so.[3] It was laid down in a late case, that where a person had obtained a genuine signature to a bill, with the design of passing it off as the signature of another person of the same name in better credit, and put this design in execution, he was guilty of forgery.[4] The interpolating or altering a writing, or taking a signature from one document, and appending it to another, are held to be forgery.[5]

Except where the mere possession of forged documents is made criminal by statute, the crime of forgery is not completed until the writing has been uttered or made use of. To complete the uttering, it is not necessary that the object in view should be accomplished, it is sufficient if the forger have made an attempt to accomplish it, though it be by presenting a document which is immediately rejected as a forgery, or putting it into the hands of an agent or accomplice to be made use of.[6] Delivery of a forged bill to a teller of a bank to be discounted is sufficient uttering.[7]

Forging any description of document professing to impose an obligation on the person whose name is attached to it, as a bill, power of attorney, receipt, &c., and passing such documents, were crimes formerly punished capitally.[8] Until

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[1] H. C. i. 140, *et seq.*—[2] Ibid. 142. A. Pri. 376; and in England Deacon's C. L. 1395. In all the cases on this point, however, it would appear that there were other frauds and deceptions besides the attempt to pass off the signature of one man for that of another.—[3] H. C. i. 143.—[4] Hendry, 1839, Bell's Sup. 50.—[5] Bell's Sup. 51.—[6] H. C. i. 150, *et seq.* A. Pri. 401-406.—[7] Pender, 3d January 1836, 1 Sw. 25.—[8] 45 Geo. III. c. 89.

lately, forgeries of wills and powers of attorney as to stock were so punished;[1] but all the higher descriptions of forgery are now punishable with transportation for life, or any term not less than seven years, or with imprisonment for not more than four or less than two years.[2] The imprisonment may be with hard labour, and may be solitary, for not more than a month at a time, and three months in one year.[3]

*Bank Notes.*—Any one imitating the paper, or engraving imitations of the notes, of the Bank of England, or having forged plates, or any forged notes of the Bank of England, in his possession, is liable to be transported for fourteen years.[4] Imitating the paper of a private bank, by incorporating the name of the bank in the substance of the paper, imitating the notes of private banks, having engraved plates for imitating their notes in possession, or issuing imitations of their notes, are each punishable with imprisonment, for a period not more than two years, or less than six months, for the first offence, and with transportation for seven years for the second.[5] Engraving the subscriptions to any bank-bill or note, or having the engraving in possession, is punished with imprisonment for a period not more than three years, or less than twelve months, for the first offence, and with transportation for seven years for the second.[6] Forging foreign bills or notes is punishable with transportation not exceeding fourteen years, and engraving the plates is punishable with imprisonment not exceeding six months for the first, and with transportation for fourteen years for the second offence.[7] These are all offences in themselves, independently of the uttering.

The forging of government stamps, of assay marks on plate, &c., are crimes punishable at common law. There have been many statutes declaring particular forgeries of this description capital, which are now punishable with transportation or imprisonment.[8] An act, of 1841, intended to reduce the number of offences capitally punishable by the law of England, would, if there had been any doubt that such acts had ceased to be capital in Scotland, abolish the punishment of death for the transference of old used deed stamps to fresh paper, and the transferring or forging of

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[1] 2 & 3 Wm. IV. c. 123, § 2.—[2] 7 Wm. IV. and 1 Vict. c. 84, §§ 1, 2.—[3] Ibid. § 3.—[4] 45 Geo. III. c. 89, § 7.—[5] 41 Geo. III. c. 57, §§ 1, 2.—[6] Ibid. § 3.—[7] 43 Geo. III. c. 139, §§ 1, 2. (N. B. The several acts last quoted are repealed so far as respects England, by 11 Geo. IV. and 1 Wm. IV. c. 66.)—[8] 2 & 3 Wm. IV. c. 123. 6 & 7 Wm. IV. c. 69, § 19. 7 Wm. IV. and 1 Vict. c. 84.

stamps on plate. The punishment substituted is transportation, either for life or for a term not less than seven years, or imprisonment for not less than three years.[1]

*Uttering.*—The person who attempts to make use of a forged instrument in the full knowledge of the forgery, is a participator in the fraud intended to be perpetrated, and is viewed by the law as art and part in the forgery. As it can often be proved from the circumstances that a document is uttered in the knowledge of its being forged, while it would be difficult to prove by whom, when, or where the document was forged, it has become customary to libel the uttering as a distinct crime. Selling forged notes at an under-value, in the view of their being circulated by the buyer, is uttering.[2] Uttering forged Bank of England notes is one of the crimes formerly punished with death, now with transportation or imprisonment, as above.[3]

### SECT. 16.—*Coining and Uttering False Coin.*

Counterfeiting the coin of the realm, for the purpose of making the counterfeit pass as genuine money, and passing such counterfeit coin, are crimes by the common law; but as the statute 2d and 3d Wm. IV. c. 34, repeals all other acts on the same subject, and awards a scale of punishments to the different branches of the crime, it may be looked on as containing the whole law on the subject.

By that act, those counterfeiting the gold or silver coin, though the fabrication is not ready to be uttered, are liable to transportation for life, or any term not less than seven years, or to imprisonment not exceeding four years.[4] Persons plating over metal of a size for coining into counterfeit gold or silver coin, or attempting by any process to make a coin pass for a piece of money of a higher standard, are liable to similar punishment.[5] Persons clipping or reducing the gold or silver coin, with the view of making the diminished coin pass at its original value, are liable to transportation for not less than seven or more than fourteen years, or to imprisonment not exceeding three years.[6]

Persons buying or selling counterfeit gold or silver coin at a price beneath its nominal value, or importing counterfeit gold or silver coin of this realm, are liable to transportation

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[1] 4 & 5 Vict. c. 56.—[2] Case of Bell and Mortimer, 1800, H. C. i. 150.—[3] 45 Geo. III. c. 89, § 2. 2 & 3 Wm. IV. c. 123. 7 Wm. IV. and 1 Vict. c. 80.—[4] 2 & 3 Wm. IV. c. 34, § 3.—[5] Ibid. § 4.—[6] Ibid. § 5.

for life, or not less than seven years, or to imprisonment for not less than four years.[1] Persons uttering or tendering base coin, knowing it to be so, are liable to imprisonment not exceeding one year; and a person tendering such coin, who has one or more other pieces in his possession at the time, or a person committing two acts of tendering within ten days of each other, is liable to imprisonment not exceeding two years. A person twice convicted of uttering may be transported for life, or a period not less than seven years, or be imprisoned for a period not exceeding four years.[2] Persons having in their possession three or more pieces of counterfeit coin, with the intent of uttering them, are liable to imprisonment not exceeding three years, and on second conviction, to transportation for life, or for a period not less than seven years, or to imprisonment not exceeding four years.[3] The having, making, repairing, buying, or selling any tool constructed for the purpose of coining, in the knowledge of such purpose, renders the party liable to similar penalties.[4]

Counterfeiting the copper coin, or having, making, repairing, buying, or selling tools for that purpose, or buying or selling such coin at less than its nominal value, renders the party liable to transportation not exceeding seven, or imprisonment not exceeding two years; and persons uttering counterfeit copper coin, or having three or more pieces in their possession, with that intention, are liable to imprisonment, not exceeding one year.[5]

Persons discovering counterfeit coin, or tools for coining, may seize them and bring them before a justice of the peace, who, on sufficient reason being shown him on oath, may grant warrant to search for more coin or tools; and whatever coin or tools are brought before the justice he must cause to be preserved for evidence, after which they are given up to the officers of the mint.[6]

Hard labour may be added to imprisonment when awarded for offences under the act.[7]

### SECT. 17.—*Wilful Fire-raising.*

The crime of wilful fire-raising is committed when a tenement has been set fire to, and any part of it consumed, however small. It is frequently perpetrated by setting fire to furniture, or other articles within or without the house;

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[1] 2 & 3 Wm. IV. c. 34, § 6.—[2] Ibid. § 7.—[3] Ibid. § 8.—[4] Ibid. § 10.—[5] Ibid. § 12.—[6] Ibid. § 14.—[7] Ibid. § 19.

and until the fire so raised has communicated itself to some fixture of the house, so as to consume a part of it, the crime of fire-raising, which is capital, has not been committed, but the minor offence of the attempt.[1] Destruction by fire, occasioned by carelessness, however gross, does not constitute this crime, but is a minor offence, punishable by fine or imprisonment;[2] but it would appear, that if one intends to injure another by burning any of his property (as by burning furze, or a paling in a garden), and the flames communicate with any edifice which it would be wilful fire-raising directly to set fire to, the offence is the same.[3] The law, in punishing this crime capitally, seems to have had in view the preservation of life; and both in Scotland and England, extreme punishment seems to have been only intended to attach to the burning of a dwelling-house, or some edifice from which the flames might be communicated to a dwelling-house.[4] In England, the different tenements on which the crime of arson may be committed, are minutely specified by statute.[5] In Scotland, with the exceptions below stated, the offence is still under the operation of the old law, in virtue of which, it seems to be questionable if the offence would be capital, were it committed on a tenement so remote, that there could be no chance of the flames spreading, so as to endanger life or be communicated to a dwelling-house.[6] The infliction of capital punishment for any branch of this offence may now, however, be held in desuetude.

*Fraudulent Purpose.*—If a tenant burn his furniture for the purpose of defrauding insurers, and the flames communicate to the house, or if one burn his own house with a similar intention, and the flames communicate to a neighbour's house, it would appear that the capital crime is committed.[7] Where one burns his own house with the intention of defrauding insurers, the offence is punishable with transportation.[8] Burning or otherwise destroying a vessel, finished or unfinished, with the intention of injuring the owners of the vessel or cargo, or defrauding insurers, is a capital crime.[9]

Maliciously burning corns, woods or coppice, and coalheughs, are capital offences.[10]

Instigating others to commit wilful fire-raising, threats to commit it, and the malicious burning of any property not in-

[1] H. C. i. 126.—[2] Ibid. 128.—[3] Ibid. 129.—[4] Hale's, P. C. i. 570. A. Pri. 432.—[5] Deacon's C. L. 54.—[6] A. Pri. 432.—[7] H. C. i. 132, *et seq.* A. Pri. 435.—[8] H. C. i. 134.—[9] 29 Geo. III. c. 46, § 1.—[10] 15::8, c. 8. 1592, c. 148. 1 Geo. I. c. 48, § 4.

cluded in the above classifications, are arbitrarily punishable offences.[1] As to burning heath or muir, which is punishable at certain periods, *see Part* VIII. *Chap.* V. *Sect.* 1.

### SECT. 18.—*Bigamy.*

The crime of bigamy is committed by entering on a second marriage while a previous one is valid and subsisting. It is necessary that both marriages should be formal and regular, at least to the extent of a clear legal engagement between the parties to hold each other as man and wife; and so the crime will not be committed if the first or second marriage, or both, be inferred from a promise followed by connexion, which the law pronounces to be marriage in as far as the civil rights of parties are concerned; for in such a case, it may be far from the intention of a party to hold himself married.[2] It appears to be held, however, that if the first union, though irregular in its commencement, has assumed the character of a regular marriage by the parties living together as man and wife, a second marriage will constitute bigamy;[3] and the offence will be committed where either marriage is not solemnized by church rites, if it has taken place before a justice of peace, or is otherwise a formal contract.[4]

The person consenting to be married to one already married to another, in the knowledge that the connexion is subsisting, and those assisting in the solemnization of the second marriage, with a similar knowledge, are art and part guilty of the offence.[5] Where a divorce from the prior marriage has been obtained, or the marriage has been declared void by a court of law, a second marriage cannot be bigamy; and the circumstance that the first spouse has been long absent, or is believed to be dead, must be taken into consideration in viewing the intent with which the second marriage is contracted.[6] Though by statute 1551, c. 19, bigamy may be punished as perjury (*see next section*), it is usual to award simple imprisonment.[7]

### SECT. 19.—*Perjury, Subornation of Perjury, and False Declaration.*

Perjury is committed by a false statement on oath, designedly made in the course of a judicial proceeding. It

[1] H. C. i. 135, 136.—[2] Ibid. 459, *et seq.* A. Pri. 535, *et seq.*—[3] Ibid.—[4] Ibid.—[5] H. C. i. 462.—[6] Ibid. 461. A. Pri. 538.—[7] A. Pri. 542.

is essential to the crime that an assertion has been made distinctly in contradiction to what the accused knows to be the fact, and the law has avoided involving in the punishment of so high a crime those who doubt where there is reason to presume that they can speak with certainty, or who state opinions evidently erroneous, or who exaggerate and give a high colouring to facts, or who make statements which have an appearance of being intended to pervert the truth, but which may be reconciled with it.[1] There can be little doubt, however, that if one is proved to have gone to a court of justice with the design of accomplishing an end, by stating an opinion contrary to that which he holds, and does state an opinion in consequence, which from the circumstances is proved to be different from that which he really holds, he is guilty of perjury. To obviate all questions as to the validity of the form in which an oath has been administered, it has been enacted, that a person uttering a falsehood under any form of oath which he declares to be binding, is liable to the pains of perjury.[2]

The falsehood must be stated in answer to a question which it is competent to put, and which is put in the course of a judicial investigation before a legal tribunal.[3] Hence voluntary statements on oath cannot infer perjury, nor will they do so even when made before a magistrate, unless for the purpose of accomplishing some end for which the law has appointed an oath as the means; as in the case of one making affidavit to false claims, with a view to their being used in a sequestration, which, besides being perjury by common law, is specially punishable by statute.[4] There are many oaths and declarations appointed to be made under various statutes, the making of which falsely is declared to be equivalent to perjury.[5]

It has to be remarked, that justices of the peace are now prohibited from taking voluntary oaths, except where they are specially empowered by statute;* but they may administer a declaration, the taking of which falsely involves the punishment of fine or imprisonment.[6]

It is not perjury by law to break a promissory oath, unless made so by special statute.[7] Falsely taking the statutory oath at an election has been held not to be perjury, but

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[1] H. C. i. 366, *et seq.*—[2] 1 & 2 Vict. c. 105.—[3] H. C. i. 371.—[4] 2 & 3 Vict. c. 41, § 137. A. Pri. 471.—[5] See Bell's Sup. 97.—* See Part I. Chap. VII. Sect. 2.—[6] 5 & 6 Wm. IV. c. 62, §§ 13, 18, 21.—[7] H. C. i. 371.

a separate offence.[1] Where prevarication or falsehood on oath is evident from the statements of a witness, the court is in the habit of summarily sentencing him to a limited imprisonment.[2]

*Subornation.*—The crime of subornation of perjury is committed where one knowingly bribes or persuades another person to commit perjury, and the perjury is in consequence committed.[3]

The punishment of perjury or of subornation is generally imprisonment or transportation, according to the magnitude of the offence, and the suborner occasionally may be visited with a higher punishment than the perjurer.[4] Both crimes infer infamy, and disqualify the offender from acting as a juryman or witness.[5] The attempt to suborn is a separate and minor crime.[6]

A false conspiracy to fix a criminal charge on any one, is a crime punishable according to the amount of injury intended to be inflicted.[7]

## SECT. 20.—*Treason.*

Immediately after the Union, the law of high treason in Scotland was assimilated to that of England, and the English form of trial (viz. by a bill found by a grand jury, and presented to a petty jury of twelve men, who must give a unanimous verdict), was extended to Scotland.[8] The treason laws in England, like most other political codes, being liable to abuse and perversion in the confusions of barbarous times, were so early as the year 1351 limited by a statute, which is still considered the foundation of the treason law. This enacts that it is treason "when a man doth compass or imagine the death of our lord the king, or of our lady the queen, or of their eldest son and heir: or if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir."[9] The prior portion of this enactment is by far the more important: and as to the latter, it may be observed, in the words of Blackstone, that, "by the king's companion is meant his wife: and by violation is understood carnal knowledge, as well without force as with it; and this is high treason in both parties, if both be consenting; as some of the wives of Henry VIII. by fatal experience evinced."[10] The law being

[1] Barr, 1839. Bell's Sup. 94.—[2] A. Pri. 484.—[3] H. C. i. 381.—[4] A. Pri. 482.—[5] A. Prac. 442. 11 Geo. IV. and 1 Wm. IV. c. 37, § 9.—[6] H. C. i. 382.—[7] Ibid. 170.—[8] 7 Anne, c. 21.—[9] 25 Edw. III. Sess. 5, c. 2.—[10] Bl. iv. 81.

construed as made for the security of the succession, is held not applicable to a queen or princess dowager,[1] but it has created some astonishment, that in such a view the protection should not extend to the eldest daughter married, and to the wives of the younger sons.[2]

*Compassing or Imagining the King's Death.*—The law against "compassing or imagining" the sovereign's death was the source of the celebrated system of constructive treason. The intention or imagination could not be divined without inference from some outward acts, and the practice was adopted of stating the "overt acts" which constituted the real treason, as the means made use of for effectuating what was called treason by the statute. Thus, in the case of the persons concerned in the death of Charles I., the fact of having killed him was stated as an overt act, indicating the compassing of his death.[3] The king being considered the head of the body politic, the constructive treason of overt acts to compass his death was extended to all acts tending to the forcible subversion of the system of government, or any portion of it, though it might be a specific feature in the design that the king's person should be inviolate; lawyers founding this extension of the statute on the argument that "the construction of this species of treason extends to every wilful and deliberate act or attempt whereby the king's person may *probably* be endangered, or such as cannot be executed without the *apparent* peril thereof."[4] Thus, in the case of John Horne Tooke (17th Nov. 1794), the overt acts in the indictment principally embraced an attempt to procure a convention, to alter the system of government without the intervention of parliament.[5] The law is not held as applicable to a titular king, or the husband of a reigning queen.[6] As a means of putting an end to some attempts which had been apparently made against her Majesty's life, but are supposed to have been mainly occasioned by a desire to partake in the dignified notoriety of a charge of high treason, an act was passed giving the alternative of punishing such acts with whipping and imprisonment.[7]

*King de facto.*—It was enacted in the year 1495, that none "that attend upon the king and sovereign lord of this land *for the time being*, in his person, and do him true and faithful service of allegiance in the same, or be in other

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[1] East, P. C. 65.—[2] Ibid. Bl. iv. 81, Christison, Note 10.—[3] Foster's Reports, 194.—[4] East, P. C. 59.—[5] Ibid. 60.—[6] Ibid. 54.—[7] 5 & 6 Vict. c. 57.

places by his commandment, in his wars within this land or without," shall be liable in the pains of treason, whether the king for the time being be the rightful king or not.[1] In the case of Sir Harry Vane, this statute was found not to apply, it being held that Charles II. was king not only *de jure* but *de facto* from the moment of his father's death, though he had been "kept out of the exercise of his royal authority by traitors and rebels."[2]

*Levying War.*—It is farther declared by the statute of Edward III. to be treason "if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere." These acts, when committed, are therefore substantive treasons; but acts of warlike hostility against any branch of the government are, by construction, deemed acts of hostility against the king,[3] and it may be said that this branch of the treason law embraces a portion of such overt acts, as the interpretation of the statute has made indicative of a design against the king's life.[4] Under this branch of the statute there must be an actual levying of war, not a mere conspiracy to do so.[5] But it is not necessary that military forms should be observed, or that warlike weapons should be employed; and in the case of an assembly being denounced as traitorous, it will be for the jury to consider, from the evidence, whether the design is to subvert or alter any portion of the law or constitution by force, or merely to create a riot to remove some local grievance, attack some obnoxious individual, &c.[6]

Blackstone thus illustrates the generality of the design which is necessary to constitute this description of treason: "To resist the king's forces by defending a castle against them is a levying of war; and so is an insurrection, with an avowed design to pull down *all* inclosures, *all* brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority."[7]* In the case of Damaree and Purchase, who were tried for destroying dissenting meeting-houses during Sacheverell's trial in 1709, the judges decided that treason had

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[1] 11 Hen. VII. c. 1.—[2] East, P. C. 54.—[3] Ibid. 72.—[4] Ibid. 62.—[5] Ibid. 66.—[6] Ibid. 62.—[7] Bl. iv. 82.

* The word *all* is inserted by Foster and Blackstone to make the cases alluded to correspond with their view of the law. *Vide* Luders' Considerations on the Law of High Treason, in the article Of Levying War, 88.

been committed, "for there was a rising with an avowed intention to demolish all meeting-houses in general, which was carried into execution as far as they were able;"[1] and it has been more lately held on the bench, that where there has been a rising, accompanied by force, and those concerned are proved to have had "in their contemplation to effect by force and violence *any general reform of any description whatever*, or that they had any other *general public purpose*, it will amount to the offence of levying war."[2] Assisting rebels is treason under this branch, unless the accused can prove that he yielded from fear of death, and that he left those who had coerced him as soon as he could do so without danger.[3] Under the branch of adherence to the king's enemies, and giving them aid and comfort, is included any kind of assistance to a hostile power, which may be or is intended to be of service, either in assisting it against the arms of Britain, or in protecting it from calamities arising from the war. Thus it was held, that sending a paper (which was intercepted) to the enemy, with an advice not to invade this country, was treason, if sent with the intention of assisting their councils in the prosecution of the war.[4]

*Statutes of George III.*—By 36 Geo. III. c. 7, as made perpetual by 57 Geo. III. c. 6, some of the constructive treasons of the old act are, to prevent dubiety, made substantive treasons. These are, 1*st*, compassing, devising, or intending death, or any bodily harm which may tend to the death, wounding, imprisonment, restraint, or deposition of the king; 2*d*, levying war, to compel the sovereign to change his measures, or to constrain or overawe either house of parliament; 3*d*, inciting any foreigner to invade the British Isles, or their dependencies; "and such compassings," continues the statute, "imaginings, inventions, devices, intentions, or any of them [if any person] shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed," he becomes guilty of treason.[5] Under this act, which did not alter, but merely specified and explained part of the ancient law,[6] it would be held that speculative opinions, though published, could not be interpreted as treason, nor treasonable opinions written

[1] East, P. C. 75.—[2] Mr Justice Bayley in Watson's case, 1817. State Trials, xxxii. 5.—[3] East, P. C. 70. Bl. iv. 83.—[4] East, P. C. 79. Bl. iv. 82, Ch. Note 12.—[5] 57 Geo. III. c. 6, § 1.—[6] Abbot, C. J., in Thistlewood's case, State Trials, xxxiii. 684.

but not published; but the latter might be founded on as evidence, in connexion with treasonable acts.[1]

*Slaying Judges.*—By the statute of Edward III., it is treason "if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices," and the same law is extended to the act of killing "any one of the lords of session, or lords of justiciary, sitting in judgment in the exercise of their office within Scotland."[2]

*Counterfeiting Seals.*—The law which makes it treason to counterfeit the king's great or privy seal is extended to the counterfeiting any of the "seals appointed, by the 24th article of the Union, to be kept, used, and continued in Scotland."[3]

*Misprision.*—Treason is distinguished from other crimes in the English law, by the circumstance of there being no such separate offence as Accession, either before or after the fact, all who are connected with the design or perpetration being held guilty as Principals. But if one becomes acquainted with the existence of a treasonable design, and does not immediately reveal it, he becomes guilty of the minor crime of Misprision of Treason.[4]

*Punishment.*—The punishment assigned to treason, is, that the person convicted be drawn on a hurdle to the place of execution, and there hanged till he be dead; that afterwards he be beheaded, and the body be divided into four quarters, to be at the royal disposal. The crown may, under the sign-manual, direct that the traitor be not drawn or hanged, but be beheaded alive.[5] The punishment in the case of females is being drawn to the place of execution and hanged.[6] The sentence is followed by attainder, or confiscation of moveables, and forfeiture of landed property against the individual and his heirs;[7] but the forfeiture does not affect the substitutes in a strict entail.[8] The English law of corruption of blood here takes effect, by which no person can succeed through or as representing the attainted person.[9]

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[1] Bl. iv. 80. Foster's Reports, 202.—[2] 7 Anne, c. 21, § 8.—[3] Ibid. § 9.—[4] Bl. iv. 120.—[5] 54 Geo. III. c. 146.—[6] 30 Geo. III. c. 48.—[7] Bl. iv. 381.—[8] H. C. i. 547.—[9] Bl. iv. 383. H. C. i. 549. 39 Geo. III. c. 93. 54 Geo. III c. 145.

## SECT. 21.—*Sedition.*

Perhaps the safest definition which can be given of this offence is, that it is of the same species with high treason, but of a minor degree, and consists of those acts of turbulence which tend to bring about or encourage the greater offence. Most lawyers have found it extremely difficult to give a general definition of the particular acts which amount to sedition; and as those who lived at different periods have given inconsistent views of it, and it is fortunately a considerable time since any trials have occurred, it is difficult to say whether any description given at this period might apply to the law as it would be enforced.

In the seventeenth century, sedition was defined "a commotion of the people without authority;" and the same author continues, "if it be such as tends to the disturbing of the government, *ad exitium principis et senatorum ejus et mutationem reipublicæ*, it is treason; but if it only be raised upon any private account, it is not properly called treason, but it is with us called a convocation of the lieges."[1] In the earlier part of the eighteenth century, it was similarly explained as "an irregular commotion of the people, or convocation of a number of citizens without lawful authority, tending to disturb the peace and order of the society."[2] A writer towards the commencement of the present century, says, "Whatever tends to unsettle the established order of government by producing discontent in the minds of the people, lessening the sovereign in the estimation of his people, or in general exciting a spirit of disloyalty to the king, and disaffection to the established government, is sedition, though there be no commotion, tumult, or rising of the people."[3] Baron Hume says, sedition "reaches all those practices, whether by deed, word, or writing, or of whatsoever kind, which are suited and intended to disturb the tranquillity of the state, for the purpose of producing public trouble or commotion, and moving his majesty's subjects to the dislike, resistance, or subversion of the established government and laws, or settled frame and order of things."[4]

*Punishment.*—The punishment of sedition is now, by statute, fine or imprisonment, or both, at the discretion of the court.[5]

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[1] Mackenzie's Criminal Law, 34.—[2] Bayne's Criminal Law, 11.—[3] Burnet, 239.—[4] H. C. i. 553.—[5] 6 Geo. IV. c. 47. 7 Wm. IV. and 1 Vict. c. 5.

*Statutory Sedition.*—By statute, any person administering or voluntarily taking an unlawful oath, binding him to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be a member of a society for any of these purposes, or to obey any committee or commander not lawfully constituted, or not to reveal the acts done by his associates, or their names, or the nature of the oath, is liable to transportation for seven years.[1] Compulsion is no justification, unless information be given by the party within four days, or within that period after any interruption occasioned by sickness or loss of liberty.[2] Any person administering an oath to commit treason, murder, or any crime punishable with death, was formerly liable to be punished with death; but the offence is now punished with transportation, as in the case of persons assembling to resist the officers of the revenue. (*See above, Sect.* 4.)[3] Any person taking such an oath is liable to transportation, at the discretion of the court, and compulsion is no defence, unless revelation be made within fourteen days.[4]

Members of, and others connected with, societies of the following description, viz.,—at which the oaths declared, as above, to be illegal are administered; or of which the names of members are kept secret from each other, or those of members of any committee or of any office-bearers are kept secret from the society at large, or are not entered in a book patent to the members; or which are divided into branches; or which elect delegates or missionaries to confer with other societies, or with representatives from them,—are liable, on summary conviction before a justice of peace, to a fine of £20, or to imprisonment for three months; or, on trial before the Court of Justiciary, to transportation. Members of mason lodges holding meetings after a notice to discontinue them by the justices at general sessions, are subject to this regulation.[5] Whoever permits such a society to meet in his premises, is liable to forfeit £5 for the first offence; and for all others after conviction to be punished as a member.[6] To prevent vexatious proceedings by common informers, it is provided that prosecutions under these acts—39 Geo. III. c. 79, and 57 Geo. III. c. 19,—must be at the instance of the public prosecutor.[7]

Meetings for the purpose of learning or practising the use

[1] 37 Geo. III. c. 123, § 1.—[2] Ibid. § 2.—[3] 52 Geo. III. c. 104, § 1. 7 Wm. IV. and 1 Vict. c. 91.—[4] 52 Geo. III. c. 104, §§ 1, 2.—[5] 39 Geo. III. c. 79, §§ 1, 5, 7, 8. 57 Geo. III. c. 19, §§ 25, 26.—[6] 39 Geo. III. c. 79, § 13. 57 Geo. III. c. 19, § 28.—[7] 9 & 10 Vict. c. 40.

of arms and military evolutions, without royal commission, or authority from the lord-lieutenant or two justices, are declared illegal. Those who train or drill are liable to transportation for seven or imprisonment for two years, and those who attend to be trained or drilled are liable to fine, and imprisonment not exceeding two years.[1]

### SECT. 22.—*Mobbing and Rioting.*

This offence, as it is now generally defined, very nearly coincides with that of sedition, as explained by our earlier writers. It is committed when several individuals meeting together proceed to commit some act of violence against person or property, or have convened for such a purpose; and the merely local or personal aim of the individuals distinguishes their proceedings from such levying of war against the general authority of the laws as would constitute treason. The number of persons necessary to constitute a mob is not fixed. In England, an "unlawful assembly" may, it is said, be formed by three or more persons assembling together;[2] but in Scotland, it is presumed that unless the number of persons should be such as to inspire terror in the neighbourhood, or put the legal authorities at defiance, any offence committed would be of the nature of assault or wanton mischief. The offence may be committed, even where a legal object is attempted to be accomplished in a tumultuous manner.[3]

It is held that mobbing may be committed where no actual force has been even intended, and where the threatening aspect of a numerous assembly has been alone trusted to for accomplishing the purpose in view.[4] Any person who is employed in doing such acts as are directly intended for convening or assisting the mob, though not present, or who, knowing the intention of the assembly, or seeing its illegal acts, voluntarily continues with it, increasing the number and apparent power of the mob, though he avoid giving assistance, is guilty of mobbing.[5] All persons guilty of mobbing, are likewise guilty of those acts which are done in pursuance of the design of the mob or are the natural result of it; but not of such incidental acts of violence, apart from the general object as individuals in the crowd may commit, unless he be participating in them.[6]

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[1] 60 Geo. III. and 1 Geo. IV. c. 1.—[2] Bl. iv. 146.—[3] H. C. i. 417.—[4] Ibid. 420.—[5] H. C. i. 421, *et seq.*—[6] Ibid. 425.

*Punishment.*—The punishment of this offence varies from a short imprisonment to a long period of transportation, according to the degree of violence, resistance, &c.[1] By statute, persons guilty of pulling down any church, dwelling-house, outhouse, manufactory, or machinery, are liable to the punishment of death.[2]

*Dispersing.*—Where rioters proceed to violence, magistrates and (it is said) private persons may interfere, and will not be responsible for the consequences of measures apparently suited to the protection of the public.[3] By the riot act, if a mob of twelve persons or more, charged to disperse by the proclamation of a magistrate, remained assembled for an hour, or interrupted the proclamation, they were liable to the punishment of death.[4] The punishment is now transportation, as in the case of persons assembling to resist the officers of the revenue.[5] (*See above, Sect.* 4.) The form of proclamation is as follows:—"Our sovereign lord the king [or lady the queen] chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably depart to their habitations, or to their lawful business, upon the pains contained in an act made in the first year of King George the First, and in an act made in the first year of Queen Victoria, for preventing tumults and riotous assemblies. God save the king [or queen]."[6]

## SECT. 23.—*Miscellaneous Offences.*

*Violating Sepulchres.*—Violating the sepulchres of the dead, a crime now of rare occurrence, is generally punished with imprisonment, or, in aggravated cases, with transportation. When a body is surreptitiously abstracted from the custody of the relations before it is committed to the earth, the offence is an ordinary theft.[7]

*Mischief.*—Mischief, or the destruction of property, either from malice or recklessness, is an offence generally punished with a period of imprisonment, according to the magnitude of the injury.[8] Occasioning damage by reckless driving, or careless management of a steam-boat, comes under this class of offences.

*Concealment of Pregnancy.*—Concealment of pregnancy is a statutory crime, chargeable when a child born is found

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[1] A. Pri. 525, *et seq.*—[2] 1 Geo. I. c. 5, § 4. 52 Geo. III. c. 130, § 2.—[3] A. Pri. 533.—[4] 1 Geo. I. c. 5, §§ 2, 3, 5.—[5] 7 Wm. IV. & 1 Vict. c. 91.—[6] 1 Geo. I. c. 5, § 1.—[7] H. C. i. 85.—[8] Ibid. 124. Bell's Sup. 47.

dead or is amissing, and there is no proof of its having been murdered. Pregnancy up to a period when a child might be born alive must be proved. If the accused can bring forward a witness to whom she communicated her pregnancy, or called for assistance at the birth, or (it is believed) can prove that the child was born dead, she is entitled to an acquittal. The punishment is imprisonment not exceeding two years.[1]

*Clandestine Marriages.*—Being concerned in the celebration of clandestine marriages, or going through the ecclesiastical ceremony of marriage without proclamation of banns, &c., subjects the parties married to fine, according to their rank, and three months' imprisonment, the person officiating to banishment from Scotland for life, and the witnesses to a fine of £100 scots (£8, 6s. 8d.) each. Magistrates or others attesting a declaration of a marriage as a mere civil contract are not amenable to these laws. The religion of the officiating clergyman does not now, as formerly, make a marriage clandestine, if the banns have been duly proclaimed.[2]

*Prison Breaking.*—Prison breaking is committed where one, either by force or fraud, or taking advantage of a moment of confusion, escapes from a legal public prison, to which he has been committed by a proper and formal warrant. The punishment is generally imprisonment, if no other crime, such as assault or fire-raising, have been committed in connexion with the attempt.[3]

*Returning from Transportation.*—Returning from transportation before the legal period has expired, subjects the convict to the punishment of death, but the libel is generally restricted.[4] The offence is tried, in the usual manner, before a jury. If the prosecutor, however, demand nothing more than the completion of the original sentence, the Court of Justiciary will grant a warrant accordingly, on proof of the identity of the convict, without the intervention of a jury.[5] A person who is banished from Scotland, or from a particular jurisdiction, not to return for a definite period under a penalty, becomes liable to be summarily subjected to the penalty without regular trial on being discovered within the bounds before expiry of the period, if the judgment of banishment contain a warrant to that effect.[6]

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[1] 49 Geo. III. c. 14.—[2] 1661, c. 34; 1698, c. 6. 4 & 5 Wm. IV. c. 28.—[3] H. C. i. 401. *et seq.* Hutton, 13th April 1837, 1 Sw. 497.—[4] 5 Geo. IV. c. 84, § 22. A. l'ri. 559.—[5] M'Neil, 12th March 1836, 1 Sw. 88.—[6] H. C. ii. 147.

*Challenging.*—Offering, or accepting a challenge to fight a duel, subjects all the parties concerned to an arbitrary punishment.[1]

Administering drugs to procure abortion renders all parties concerned, the pregnant female included, liable to transportation.[2]

By the older practice of Scotland, and according to the opinions of the writers on criminal law, the Court of Justiciary is competent to the consideration of any offence, whether previously recognised or not, and may visit the offender with any punishment from fine or imprisonment, to transportation. The following offences have been, at different times, so recognised and punished according to the degree of guilt:—Inducing children to leave their proper guardians; attempting to extort confession of offences by threats or violence; oppression by persons in authority; wilful neglect of duty by official persons; trading in public offices when not sanctioned by statute or usage; forcibly carrying off voters, and otherwise violently interfering in elections, &c.[3]

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## CHAPTER V.

### EVIDENCE.

### SECT. 1.—*Citation of Witnesses.*

THE prisoner receives a list of witnesses, with their designations, in the copy of citation served on him,* and though the practice was different formerly, he can now take no objection to a witness in the list, on the ground of his being improperly cited.[4] The court, on the application of either party, will grant diligence to cite a witness, who, if he do not appear, is liable to a fine of 100 merks (£5, 11s. 1¾d.) If on his not appearing, the trial is adjourned to another day, or if either party state on oath a belief that the witness intends to abscond, he may be detained till the trial, or till he find

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[1] H. C. i. 442. Bell's Sup. 111.—[2] H. C. i. 187. A. Pri. 628.—[3] H. C. i i. 1. *et seq.* A. Pri. 625 *et seq.*—* See Chap. III. Sect. 4.—[4] 9 Geo. IV. c. 29, § 10.

security to appear.[1] Warrants of local magistrates to cite witnesses are effectual through all parts of Scotland.[2] Letters of diligence against witnesses residing in England or Ireland, become effectual on being indorsed by the supreme criminal judges of those countries.[3]

Any variation between the list of witnesses served on the accused, and that in the original record, must be stated before the jury is sworn.[4] An objection to a witness, on the ground or error in designation, must likewise be stated before the jury is sworn, and will only be sustained if the accused prove, by his agent or otherwise, that the designation has not enabled him to find the witness, or has deceived him as to the person meant.[5]

### SECT. 2.—*Admissibility of Witnesses.*

An oath is administered to the witness, or, if he be a quaker, moravian, or separatist, a solemn declaration, before he is examined.[6] Children under twelve years of age are not put on oath, but may be questioned at the discretion of the judge.[7] Confirmed idiots and madmen, and those who labour under any physical incapacity, cannot be examined. Minor disqualifications merely subject the evidence of the witness to such doubts as the jury may feel on a consideration of all circumstances. The rule as to deaf and dumb persons seems to be, that they are not to be relied on unless they have been scientifically taught to converse by signs.[8]

*Character.*—Persons under sentence for a crime punishable with death (though a smaller penalty has been adjudged), or for a crime involving fraud, such as theft, fraudulent bankruptcy, &c., by the verdict of a jury, are disqualified from bearing testimony.[9] Formerly such witnesses were disqualified for life, but the tendency of later practice has been not to exclude evidence from the jury, but to leave them to attribute to it what weight they think fit, and by an act of 1830, in these cases the fulfilment of the penalty restores the admissibility of the witness; those, however, convicted of perjury or subornation are disqualified for life.[10] Offences which do not disqualify a witness, may be adduced as affecting his credibility; to this end convictions for petty

[1] H. C. ii. 373, *et seq.* A. Prac. 397.—[2] 11 Geo. IV. & 1 Wm. IV. c. 37, § 8.—[3] 54 Geo. III. c. 186, § 3.—[4] Act of Adjournal, 9th July 1821. —[5] 9 Geo. IV. c. 29, § 11.—[6] Ibid. § 13. 1 & 2 Vict. c. 77.—[7] A. Prac. 432.—[8] H. C. ii. 340, *et seq.*—[9] H. C. ii. 352, *et seq.*—[10] 11 Geo. IV. & 1 Wm. IV. c. 37, § 9.

offences not tried by jury may be adduced, and, of course, convictions of those higher offences which disqualify during the currency of the punishment, may be brought forward after its termination. General bad character, according to the practice hitherto, cannot be proved against a witness, but any questions may be put to him tending to elicit his character, such as whether he was ever in jail? whether he ever committed theft? These, however, he is not obliged to answer.[1]

*Accomplice.*—The testimony of an accomplice in the crime is evidence in as far as the jury may choose to trust to it. Such a person, after being examined for the prosecutor, cannot be put on trial for the offence.[2]

*Relations.*—Husband and wife are held incompetent witnesses for or against each other, except where one is under trial for a personal injury inflicted on the other. Children under fourteen years of age are not examined either for or against their parents, except in a similar question of personal injury to themselves.[3] It was formerly law that children could not be compelled to give testimony against their parents, except in such cases of injury,[4] but all disabilities of witnesses on the ground of consanguinity, have been removed by statute.[5]

*Agents.*—The law practitioners employed by the prisoner to conduct his defence, cannot be examined on matters coming to their knowledge in that capacity either for or against him.[6]

*Malice.*—Proof that a witness entertains deadly malice against the accused, and has shown that he will not hesitate to vent it in any illegal act, is held to render him objectionable, but the tendency of late practice is, not to admit disqualification on the ground of malice, unless it really appear that the witness is prompted to appear and give evidence for the purpose of putting his malicious intentions in effect; thus, if it has been found that he has endeavoured to corrupt the other witnesses, or otherwise affect the fairness of the trial, this will render him objectionable. Mere malicious expressions, or undue zeal in urging the prosecution, will subject his testimony to such doubt as the jury may in the circumstances attach to it.[7]

*Interest.*—A witness who has a personal or pecuniary interest in the conviction, is placed in a similar situation.[8]

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[1] H. C. ii. 352, *et seq.* Bell's Sup. 255. Case of Burke, 24th December 1828.—[2] Hare, 2d February 1829, Syme, 373.—[3] H. C. ii. 347, *et seq.* A. Prac. 461, *et seq.*—[4] Ibid.—[5] 3 & 4 Vict. c. 59, § 1.—[6] H. C. ii. 350.—[7] Ibid. 358, *et seq.*—[8] H. C. ii. 365.

A witness cannot give his testimony for the party from whom he has received a reward or promise of reward, or by whom he has been instructed as to the testimony he should give.[1] It was held no objection to a witness that he came forward after a proclamation offering a reward to whoever would give "such information and evidence as would lead to the discovery and conviction" of the person guilty.[2] If third parties have attempted such means of influence, it will be for the jury to consider how far they are likely to affect the truth of the testimony.[3] This does not apply to a previous examination of the witnesses by either party; a precognition is always taken by the crown, and it is the duty of the witnesses to answer all questions relating to the case put to them by the agent of the accused.[4]

### SECT. 3.—*Examination.*

*Direct Evidence.*—The most direct evidence which can be got must always be brought forward; so, if there are eye-witnesses, they must be adduced, unless it is shown that they are inadmissible, or cannot be got at. On the same principle, the contents of a document founded on are not to be reported by a witness if the document is accessible.[5] Where no evil can arise from doing so, the strictness of the principle often yields to convenience; thus, in the case of forgeries on banks, though the best evidence might seem to be that of the officer whose name is forged, it is customary to take the evidence of other officers, who, from their acquaintance with the hand, will detect a forgery with equal certainty.[6]

*Hearsay.*—Hearsay evidence, or the retailing by one person of what another has said, is not received, except (1.) It be the declaration of a witness who has died since the offence was committed; or (2.) The statement of a person assaulted, or on whom rape has been committed, made immediately after the act; or (3.) It consists of statements which virtually constitute a part of the proceedings (as in the case where the witness' attention was called to the crime by the information of another person); or, (4.) The accused was present when the statements repeated were made to the person repeating them.[7] Confessions or admissions by the

[1] H. C. ii. 377. Case of Mackinley, July 1817.—[2] Glasgow Cotton Spinners, 3d January 1838, 2 Sw. 2.—[3] A. Prac. 503.—[4] Ibid. 535.—[5] Ibid. 505, *et seq.*—[6] Ibid. 508. Russel on Crimes, ii. 407.—[7] H. C. ii. 406, *et seq.* Russel on Crimes, ii. 682, *et seq.*

accused may be repeated in evidence, if they have been voluntarily made, and not under any promise of safety from the public prosecutor, or one acting under him.[1] The conversation of prisoners accidentally heard in jail or otherwise, may likewise be repeated, but is received with jealousy.[2]

It has been decided that a witness cannot be asked if he gave a different account of the transaction, at a former period, from what he has just given on oath;[3] nor can proof that he did so be adduced, except as to expressions used immediately after any personal injury, and in such circumstances, that if they agreed with his evidence, they might be brought forward in confirmation of it.[4]

*Character.*—A witness, as has been already stated, cannot be compelled to answer questions put for the purpose of exposing the badness of his character, nor can he be compelled to bear testimony to particular facts connected with the question at issue, if he is conscious that his conduct would render him liable to criminal prosecution, unless he is an accomplice protected from trial for the sake of his evidence; but he cannot decline giving his evidence, on the ground that it would tend to hurt his character, expose him to an action of damages, or otherwise incidentally injure him.[5] In cases of rape, the principal witness may be questioned as to her character, and (if it is made a special defence) evidence may be adduced to show that it has been bad.[6]

Witnesses are not allowed to read written statements as their evidence; but they may refer to notes of facts (such as dates, measurements, &c.) taken at the time of their occurrence. It is the practice in Scotland to examine the witnesses separately; all who are to be examined are therefore excluded from the court during the examination of the others; but medical witnesses, who are merely to give their professional opinion, are generally allowed to hear the facts, though they are examined apart from each other. So lately as 1837, presence during the examination of other witnesses was held to be a disqualification,[7] but by a late statute, the separation of witnesses is made not imperative, and presence during a previous examination is not to disqualify, unless it appear to have been the consequence of "culpable negligence or

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[1] H. C. ii. 333.—[2] Ibid. 335.—[3] Case of Brown for Assault, 9th July 1832.—[4] Hardie, 24th January 1831. Sh. Just. 237. A. Prac. 525.—[5] Pender, 8th June 1836, 1 Sw. 25. Bell's Sup. 254.—[6] A. Prac. 530. Bell's Sup. 254.—[7] Gray, 12th July 1837, 1 Sw. 525.

criminal intent," or that the witness has been "unduly instructed or influenced" by what he has heard.[1]

The proof for the prosecution is first led; but after the examination of each witness, he may be cross-examined for the defender. It used to be held that in this examination no questions can be put but such as are directly cross to the answers given to the prosecutor's questions, or tend to elucidate or explain them, and that if separate evidence tending to exculpation were expected from such a witness, he should be re-examined for the defence. All questions pertinent to the matter at issue, may now, however, be put to witnesses adduced on either side.[2]

### SECT. 4.—*Documentary Evidence.*

All documents and articles to be used against the prisoner at his trial, must be mentioned in the indictment as lodged in the hands of the clerk of court, that the prisoner, or his agent, may have access to them. They must be lodged so long before the trial that there may be full opportunity for inspection,—two days is the general period.[3]

*Judicial Documents.*—The declaration of the prisoner,* proved by two witnesses, or admitted by himself to have been voluntarily emitted while he was in his sound and sober senses, is admissible as evidence against him.[4] Certified extracts from the records of courts are evidence of previous convictions, and it is held that statements contained in them cannot be impeached but on the ground of the record being falsified. A clerk of the court, procurator-fiscal, or officer, must give testimony that the extract applies to the prisoner.[5] Declarations and convictions must be particularized in the libel by their dates, and the names of the magistrates before whom they took place.[6]

*Private Documents.*—Private documents, such as medical reports, &c., must he supported by oral proof. The best of course is that of the writer, and when it can be had it must be resorted to. The next evidence is that of persons who know his hand, and the next that of engravers, or other persons, whose accurate acquaintance with handwriting enables them to detect forgeries on comparison.[7]

The declaration of a person who has died of a wound,

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[1] 3 & 4 Vict. c. 59, § 3.—[2] Ibid. § 4.—[3] H. C. ii. 388, *et seq.*—* See Chap. II. Sect. 2.—[4] Ibid. 328.—[5] A. Prac. 596.—[6] Ibid.—[7] H. C. ii. 395.

uttered between the time of its infliction and his death, is evidence as to the circumstances in which the wound was inflicted, though not taken before a magistrate, if it is distinctly proved to have been freely, voluntarily, and deliberately emitted. In England such a declaration must, it would appear, have been made in the consciousness of approaching death;[1] but in Scotland this seems not to be necessary.[2] The deposition of an ordinary witness, who has since died, taken before a magistrate at a precognition, is admissible;[3] but not if taken before a private individual.[4] Witnesses may produce articles, not enumerated in the indictment or lodged in the clerk's hands, but are allowed merely to use them to illustrate their own evidence.[5]

## CHAPTER VI.

### TRIAL AND JUDGMENT.

#### SECT. 1.—*How Jurors chosen.*

*Qualification.*—ON every criminal trial there are fifteen jurymen, of whom five are special jurymen, and ten common jurymen. The former consist of those paying cess on £100 of valued rent, or house-tax levied on a rent of £30, or possessing heritable property which yields £100 a-year in rent, or personal property worth £1000. The latter consist of persons between the ages of twenty-one and sixty, holding heritable property worth £5 yearly, or possessed of moveable property worth £200. The landed property must be within the county for which the juryman serves. He may be a mere liferenter, or may hold in right of his wife.[6]

*Lists.*—Two lists of jurymen are preserved in the sheriff-clerk's office of each county; the one containing the names and designations of all who are liable to serve as jurymen, and called "the General Jury-book," the other containing the names and designations of such of these as are qualified to act as special jurors, called "the Special Jury-book."

[1] Russel on Crimes, ii. 683.—[2] H. C. ii. 407. Case of Bell, 1835.—[3] A. Prac. 608.—[4] M'Intosh, 26th April 1838, 2 Sw. 103.—[5] H. C. ii. 394.—[6] 55 Geo. III. c. 42, § 24. 6 Geo. IV. c. 22, § 1. 7 Geo. IV. c. 8, § 1.

The jury-books are open to inspection on payment of a fee of 1s.[1]

*Selection.*—When a particular number of jurymen is required for any criminal trial, they are, in the first place, chosen by rotation from the general jury-book; but should it happen that by such a process there will not be one third of the number qualified as special jurors, the deficiency must be made up from the special jury-book.[2]

*Citation.*—A warrant to cite jurymen is embodied in all criminal letters; and in the case of an indictment is in the letters of diligence following on it.[3] The citation may be made by any officer of the law without the presence of witnesses.[4] Jurymen absent without a proper excuse (such as occupation elsewhere in a matter of vital importance, bad health, &c.), which must be presented and read in open court, and will be decided on by the judge,—are liable to be fined 100 merks scots (£5, 11s. 1$\frac{2}{4}$d.)[5]

*Exemptions.*—The following persons are exempt from serving,—peers, judges of the supreme courts, sheriffs, magistrates of royal burghs, clergymen of the establishment and other clergymen who have taken the oaths and are registered, parochial schoolmasters, practising members of legal bodies, clerks and other officers in courts of justice, professors in universities, members of the medical professions, officers in the navy and army in full pay, officers of the customs and excise, keepers of prisons, and officers of the law.[6]

*Ballot.*—Fifteen jurymen are chosen by ballot from among the whole number summoned for each trial, the parties in any trial being entitled to agree to continue the jury which served on the previous one. A third of the fifteen must be special jurymen.

*Challenges.*—The prosecutor, and the individuals on trial, may each respectively challenge five jurymen (of whom not more than two may be special jurymen) without assigning any cause. Any party interested may object to any number of jurymen on cause shown.[7] The general grounds of objection are malice, infamy (viz. the circumstance of being convicted of a fraudulent crime by a jury), minority, and idiocy, or any other circumstance of body or mind which unfits the person summoned for his duty.[8] A landed pro-

[1] 6 Geo. IV. c. 22, §§ 3, 4.—[2] Ibid. §§ 7, 8.—[3] H. C. ii. 307.—[4] 11 Geo. IV. & 1 Wm. IV. c. 37, § 7.—[5] 6 Geo. IV. c. 22, § 19. 1593, c. 170.—[6] 6 Geo. IV. c. 22, § 2.—[7] Ibid. § 16.—[8] H. C. ii. 310.

prietor infeft is entitled to object to a jury of which a majority does not consist of landed men.[1]

### SECT. 2.—*Procedure after Empannelling.*

Before the case is laid before them, an oath is administered to the jury, and after this has been done, no jurymen can be challenged or objected to.[2] The court then pronounces on the relevancy of the libel (*See above, Chap.* III.), and when it is found relevant, the general rule is, that the question as to fact is in the hands of the jury to be finally decided by them in one way or other, and cannot under any circumstances be opened up or reconsidered; but it has been decided, that in the case of a juryman being suddenly seized with illness before the verdict is pronounced, the case may be tried again before a new jury chosen from the same list.[3]

Jurymen may put questions to witnesses, but they must not hold communication with any other individual, except through the medium of the court. It is a general principle, that where a juryman has been absent for a period, or has had clandestine intercourse with any one, the proceedings are null; but in practice, when such a circumstance takes place before the jury have retired for deliberation, the court settle the matter at their discretion, on an inquiry whether or not the fairness of the trial is likely to be affected by it.[4] When a juryman requires to be absent for a short period, he is attended by an officer of court, and the proceedings are staid till his return; and when the length of a trial renders a general adjournment necessary for a short time, or till next day, an officer attends the jurors, and procures accommodation where they can be kept from intercourse with strangers. It is usual in such cases to have the consent of parties to the adjournment.[5]

### SECT. 3.—*Verdict.*

The jury choose by a majority a chancellor or foreman, who returns their verdict as unanimous, or by a majority, as the case may be. They may return their verdict immediately, or retire and deliberate, in which latter case any intercourse with a stranger renders void the whole proceedings, whether it may tend to affect the fairness of the trial or not.[6]

[1] 6 Geo. IV. c. 22, § 12.—[2] Ibid. § 16.—[3] A. Prac. 391. Elder, 12th Feb. 1827, Syme, 76.—[4] H. C. ii. 417.—[5] A. Prac. 632.—[6] 1587, c. 92.

Formerly juries were in the habit of committing their verdicts to writing, but written verdicts can now only be resorted to on the direction of the court, in the case of the jury remaining in deliberation so long that the court finds it inconvenient to wait their return.[1] In such cases, the jury having sealed up their verdict, may disperse. In whichever manner the verdict is returned, the jury must all be present in court when it is announced. If it is written, it is handed by the chancellor to the judge, who opens it and hands it to be copied by the clerk of court. If it is oral, the clerk takes it down from the mouth of the chancellor, and in either case the clerk, turning to the jury, says, "Gentlemen, is this your verdict?" On their assent the verdict is irrevocably recorded.[2]

*Oral and Written Verdict.*—The necessity of having recourse to a written verdict is always avoided when an oral one can with any convenience be waited for, as an error in the former cannot be explained or amended, and may be fatal to the case, while the court may ask an explanation of an oral verdict, and when it is inconsistent with the libel or otherwise absurd, may direct the jury to reconsider it. Even in this more favourable case, however, the effects of an imperfect or inconsistent verdict, by introducing a discussion between the bench and the jury, are by no means favourable to a calm and rational decision, and the chancellor should use all necessary pains, first in discovering the sense of his fellow-jurymen or the majority of them, and next in expressing their decision.

When there are several offences or aggravations charged in the libel, the jury will have to consider how much is proved, and return their verdict accordingly—a general verdict of "guilty," or "guilty as libelled," of course embraces the whole, if the charges are not inconsistent with each other. Where there are alternative charges, such as for "theft *or* breach of trust,"—"assault *or* robbery," the jury must consider which is proved, and return their verdict accordingly. In such circumstances, if a general verdict is returned verbally, the jury may be instructed to amend it; but if returned in writing, it would prove inapplicable, and the accused would be dismissed from the bar.[3] A similar consequence would follow a verdict finding guilty of a different crime from that libelled, though nearly resembling it, as, if "theft" were libelled, and "reset of theft" found by the jury. The jury

[1] 9 Geo. IV. c. 29, § 15.—[2] A. Prac. 640.—[3] Ibid. 644.

may, if they think proper, return a special verdict, finding certain facts proved, leaving the inference as to guilt or innocence to be drawn by the court—this practice has very seldom been adopted since the case of Carnegy of Finhaven in 1728, when the jury asserted their right to return a general verdict.[1]

If any specialties are stated in the verdict, which are inconsistent with the nature of the crime, as, if in a verdict of murder it is specified that it was "committed without malice," or of reset of stolen goods, that the pannel resetted them "without knowing them to be stolen," the verdict will be equivalent to an acquittal.[2]

### SECT. 4.—*Proceedings on Verdict.*

If the verdict of the jury acquit the accused, by either finding that he is not guilty, or that the charge is not proven, he is immediately dismissed from the bar, and cannot be pursued in a criminal action for the same offence by any prosecutor, or before any court.[3] The rule is imperative, and cannot be infringed by giving a new designation or character to the crime, even though the acquittal should have arisen from the circumstance that the libel did not specify the crime which the evidence tended to prove, but a different one.[4] When the verdict finds the prisoner guilty, it is recorded, and the prosecutor moves for judgment.

If the verdict of the jury does not apply to the indictment as found relevant, this is the proper juncture for making the objection. No objections to the relevancy of the libel can be received at this stage of the procedure.[5]

Formerly, when the accused pleaded guilty, it was necessary that a jury should find him guilty on his confession before judgment could be pronounced, but judgment is now given on the confession.[6] The court may adjourn the pronouncing of judgment till a subsequent period, but both the prosecutor and the accused must be present when it is pronounced.[7]

A capital sentence must express a period when it is to be put in execution, which, in places south of the Firth of Forth, must not be less than fifteen or more than twenty-one days after the sentence, and in the other parts of Scotland must not be less than twenty, or more than twenty-seven.[8]

[1] Maclaurin, Introd. xxi.—[2] H. C. ii. 447.—[3] Ibid. 465.—[4] Ibid.—[5] Ibid. 463.—[6] 9 Geo. IV. c. 29, § 14.—[7] H. C. ii. 463-471.—[8] 11 Geo. IV. and 1 Wm. IV. c. 37, § 2.

After judgment is given, the right of pardon and mitigation is in the crown alone; but, in cases of emergency, such as the discovery of exculpatory evidence, the Court of Justiciary may respite, or postpone execution, both of its own judgments and of those of inferior courts.[1]

### SECT. 5.—*Prison Discipline.*

The local prisons are under the immediate superintendence and management of the County Prison Boards, subject to the control of the Central Board. The Penitentiary at Perth is immediately under the direction of the Central Board.[2]

*Discipline.*—The county boards are "charged with the well-ordering and discipline of their several prisons;"[3] and it is provided that the Central Board "shall by themselves or by means of the said county boards, possess and exercise the full power of regulating the confinement, treatment, and diet of all civil and criminal prisoners, and of separating and setting them to work, and taking all due means to train them in good and industrious habits."[4]

By the later act, they are specially empowered to make regulations for distinguishing prisoners as civil or criminal prisoners, "and to direct the classification of criminal prisoners with reference to age, strength, conduct, or other circumstances, and to modify the discipline and treatment in regard to separation or otherwise of any such prisoners or classes of prisoners." The regulations for these purposes are liable to be rescinded or amended by the Secretary of State.[5]

In the act of 1839, there was an absolute rule that convicts sentenced to a certain period of imprisonment should be sent to the Penitentiary; but by the latest act the Central Board are to regulate this matter, and "to make regulations for specifying what description of prisoners shall be received into the said General Prison, having regard therein to the principle, so far as the same shall be compatible with the discipline and due management of the said General Prison, that, all other things being the same, those prisoners whose sentences of imprisonment have the longest time to run shall be preferably received into the prison, and that no prisoner shall be received therein the expiration of whose sentence shall occur within six months from the date of his being so

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[1] H. C. ii. 473.—[2] 2 & 3 Vict. c. 42, §§ 10, 15, 22.—[3] Ibid. § 15.—[4] Ibid. § 22.—[5] 7 & 8 Vict. c. 34, § 4.

received, and to order and cause to be removed to the said General Prison all or any prisoners falling within the description specified in such regulations, but so as in no ways to overcrowd the said General Prison: provided always, that a copy of all such regulations shall be transmitted to one of her majesty's principal secretaries of state, who shall have power to rescind or amend the same in such manner as to him shall seem fit."[1]

It is farther provided "that while any such regulations shall be in force it shall not be lawful for any criminal court to insert in any sentence of imprisonment an order that any prisoner not within such specification shall be conveyed to or confined in the said General Prison, or to order such prisoner to be conveyed to or confined in the said General Prison; and any sentence containing any such order shall be effectual only to the extent of authorizing the confinement of the prisoner in the prison in which he would have been legally confined if no such order had been inserted in the sentence of imprisonment."[2]

*Visitation.*—The principal secretaries of state and the official inspectors or other persons authorized by them, members of the Privy Council, judges of the Court of Session, and persons authorized by the board, may visit prisons; and sheriffs, conveners of counties, justices, magistrates of burghs, members of county prison boards, and "committees of not more than three of the councillors of burghs," may visit and inspect prisons within their several counties and burghs, and report their observations to the Central Board.[3]

The sheriff, on the application of any county board, accompanied by a medical certificate, may cause a prisoner with any infectious disease, or with any disease threatening immediate danger to life which cannot be properly treated in the prison, to be removed to an hospital, with precautions for his safe-custody.[4]

Persons endeavouring to introduce into prisons articles not allowed by the rules, are liable to be apprehended and summarily tried before the sheriff or two justices, and to pay a penalty not less than 40s. or more than £5, or to be imprisoned for a period not exceeding a month.[5]

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[1] 7 & 8 Vict. c. 34 § 5.—[2] Ibid. § 6.—[3] 2 & 3 Vict. c. 42, § 56.—[4] 7 & 8 Vict. c. 34, § 11.—[5] Ibid. § 14.

# APPENDIX

OF

# ACTS RELATING TO PUBLIC COMPANIES AND PUBLIC WORKS.

REFERRED TO AT PAGES 74, 75.

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## I. COMPANIES' CLAUSES CONSOLIDATION ACT, 8 & 9 VICT. c. 17.

*An Act for consolidating in One Act certain Provisions usually inserted in Acts with respect to the Constitution of Companies incorporated for carrying on Undertakings of a Public Nature in Scotland.* May 8, 1845.

WHEREAS it is expedient to comprise in one general act sundry provisions relating to the constitution and management of Joint Stock Companies, usually introduced into acts of parliament authorizing the execution of undertakings of a public nature by such companies in Scotland, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same,—

*Act to apply to all Companies incorporated by Acts hereafter to be passed*—That this act shall apply to every Joint Stock Company in Scotland which shall by any act of parliament which shall hereafter be passed be incorporated for the purpose of carrying on any undertaking; and this act shall be incorporated with such act, and all the clauses and provisions of this act, save so far as they shall be varied or excepted by any such act, shall apply to the company which shall be incorporated by any act, and to the undertaking for carrying on which such company shall be incorporated, so far as the same shall be applicable thereto respectively; and such enactments and provisions, as well as the enactments and provisions of every other act which shall be incorporated with such act, shall, save as aforesaid, form part of such act, and be construed together therewith as forming one act.

II. *Interpretations in this Act.*—And with respect to the construction of this act, and of other acts to be incorporated therewith, be it enacted as follows:

*The special Act.*—The expression "the special act" used in this act shall be construed to mean any act which shall be hereafter passed incorporating or constituting a Joint Stock Company for the purpose of carrying on any undertaking, and with which this act shall be so incorporated as aforesaid; and the word "prescribed" used in this act, in reference to any matter herein stated, shall be construed to refer to such matter as shall be prescribed or provided for in the special act; and the sentence in which such word shall occur shall be construed as if instead of the word "prescribed" the expression "prescribed for that purpose in the special act" had been used; and the expression "the undertaking" shall mean the undertaking or works, of whatever nature, which shall by the special act be authorized to be executed.

III. *Interpretations in this and the special Act.*—The following words and expressions both in this and the special act shall have the several meanings hereby assigned to them, unless there be something in the subject or the context repugnant to such construction (that is to say),

*Number.*—Words importing the singular number only shall include the plural number; and words importing the plural number only shall include the singular number:

*Gender.*—Words importing the masculine gender only shall include females:

*Lands.*—The word "lands" shall extend to houses, lands, tenements, and heritages of any description or tenure:

*Lease.*—The word "lease" shall include a missive or an agreement for a lease:

*Month.*—The word "month" shall mean calendar month:

*Lord Ordinary.*—The "Lord Ordinary" shall mean the Lord Ordinary of the Court of Session in Scotland officiating on the Bills in time of vacation, or the junior Lord Ordinary, if in time of session, as the case may be:

*Sheriff.*—The word "sheriff" shall include the sheriff-substitute:

*Oath.*—The word "oath" shall include affirmation in the case of Quakers, or other declaration lawfully substituted for an oath in the case of any other persons exempted by law from the necessity of taking an oath:

*County.*—The word "county" shall include any ward or other like division of a county:

*Justice.*—The word "justice" shall mean Justice of the Peace acting for the county, city, or place where the matter requiring the cognizance of any such justice shall arise, and who shall not be interested in the matter; and where any matter shall be authorized or required to be done by two justices, the expression "two justices" shall be understood to mean two or more justices assembled and acting together:

*The Company.*—The expression "the company" shall mean the company constituted by the special act:

*Directors.*—The expression "the directors" shall mean the directors of the company, and shall include all persons having the direction of the undertaking, whether under the name of directors, managers, committee of management, or under any other name:

*Shareholder.*—The word "shareholder" shall mean shareholder, proprietor, or member of the company; and in referring to any such shareholder, expressions properly applicable to a person shall be held to apply to a corporation: And

*Secretary.*—The expression "the secretary" shall mean the secretary of the company, and shall include the word "clerk."

IV. *Short title of the Act.*—And be it enacted, that in citing this act in other acts of Parliament and in legal instruments it shall be sufficient to use the expression "The Companies' Clauses Consolidation (Scotland) Act, 1845."

V. *Form in which Portions of this Act may be incorporated with other Acts.*—And whereas it may be convenient in some cases to incorporate with acts hereafter to be passed some portion only of the provisions of this act; be it therefore enacted, that for the purpose of making any such incorporation it shall be sufficient in any such act to enact that the clauses and provisions of this act, with respect to the matter so proposed to be incorporated (describing such matter as it is described in this act in the words introductory to the enactment with respect to such matter), shall be incorporated with such act; and thereupon all the clauses and provisions of this act with respect to the matter so incorporated shall, save so far as they shall be expressly varied or excepted by such act, form part of such act, and such act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such act shall relate.

### Distribution of Capital.

And with respect to the distribution of the capital of the company into shares, be it enacted as follows:

VI. *Capital to be divided into Shares.*—The capital of the company shall be divided into shares of the prescribed number and amount; and such shares shall be numbered in arithmetical progression, beginning with number one; and every such share shall be distinguished by its appropriate number.

VII. *Shares to be Personal Estate.*—All shares in the undertaking shall be personal estate, and transmissible as such, and shall not be of the nature of real estate.

VIII. *Shareholders.*—Every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders herein-after mentioned, shall be deemed a shareholder of the company, and shall be entitled to have one share therein allotted to him in respect of every sum of the prescribed amount so subscribed by him.

IX. *Registry of Shareholders.*—The company shall keep a book, to be called the "register of shareholders;" and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the

number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares; and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time at each ordinary meeting of the company.

X. *Addresses of Shareholders.*—In addition to the said register of shareholders, the company shall provide a book, to be called the "Shareholders Address Book," in which the secretary shall from time to time enter in alphabetical order the corporate names and places of business of the several shareholders of the company, being corporations, and the surnames of the several other shareholders, with their respective christian names, places of abode, and descriptions, so far as the same shall be known to the company; and every shareholder, or if such shareholder be a corporation the clerk or agent of such corporation, may at all convenient times peruse such book *gratis*, and may require a copy thereof, or of any part thereof; and for every hundred words so required to be copied the company may demand a sum not exceeding sixpence.

XI. *Certificates of Shares to be issued to the Shareholders.*—On demand of the holder of any share the company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder; and such certificate shall have the common seal of the company affixed thereto; and such certificate shall specify the share in the undertaking to which such shareholder is entitled; and the same may be according to the form in the schedule (A.) to this act annexed, or to the like effect; and for such certificate the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed then a sum not exceeding two shillings and sixpence.

XII. *Certificate to be Evidence.*—The said certificate shall be admitted in all courts as *prima facie* evidence of the title of such shareholder, his executors, administrators, successors, or assigns, to the share therein specified; nevertheless the want of such certificate shall not prevent the holder of any share from disposing thereof.

XIII. *Certificate to be renewed when destroyed.*—If any such certificate be worn out or damaged, then, upon the same being produced at some meeting of the directors, such directors may order the same to be cancelled, and thereupon another similar certificate shall be given to the party in whom the property of such certificate, and of the share therein mentioned, shall be at the time vested; or if such certificate be lost or destroyed, then, upon proof thereof to the satisfaction of the directors, a similar certificate shall be given to the party entitled to the certificate so lost or destroyed; and in either case a due entry of the substituted certificate shall be made by the Secretary in the register of shareholders; and for every such certificate so given or exchanged the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed then a sum not exceeding two shillings and sixpence.

TRANSFER OF SHARES.

And with respect to the transfer or transmission of shares, be it enacted as follows:

XIV. *Transfer of Shares to be by Deed duly stamped.*—Subject to the regulations herein or in the special act contained, every shareholder may sell and transfer all or any of his shares in the undertaking, or all or any part of his interest in the capital stock of the company, in case such shares shall, under the provisions herein after contained, be consolidated into capital stock; and every such transfer shall be by deed duly stamped, in which the consideration shall be truly stated; and such deed may be according to the form in the schedule (B.) to this act annexed, or to the like effect.

XV. *Regulating the Form of Transfers of Shares.*—Whereas there may be hereafter many shareholders of the company who reside in England, and sales of shares are frequently made by persons in England to persons in Scotland, and *vice versa*, and it would be attended with inconvenience if all transfers of shares were required to be executed according to the forms of the law of Scotland; all transfers of shares of the said company shall be valid and effectual if executed according to the usual mode of executing such instruments either in England or Scotland, or partly according to the one and partly according to the other.

XVI. *Transfers of Shares to be registered, &c.*—The said deed of transfer (when duly executed) shall be delivered to the secretary, and be kept by him; and the secretary, shall enter a memorial thereof in a book, to be called the "register of transfers," and shall endorse such entry on the deed of transfer, and shall, on demand, deliver a new certificate to the purchaser; and for every such entry and endorsement and certificate the company may demand any sum not exceeding the prescribed amount, or if no amount be prescribed then a sum not exceeding 2s. 6d.; and on the request of the purchaser of any share an endorsement of such transfer shall be made on the certificate of such share, instead of a new certificate being granted; and such endorsement, being signed by the secretary, shall be considered in every respect the same as a new certificate; and until such transfer has been so delivered to the secretary as aforesaid the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking, or to vote in respect of such share.

XVII. *Transfers not to be made until all Calls paid.*—No shareholder shall be entitled to transfer any share, after any call shall have been made in respect thereof,

until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him.

XVIII. *Closing of Transfer Books.*—It shall be lawful for the directors to close the register of transfers for the prescribed period, or if no period be prescribed then for a period not exceeding fourteen days previous to each ordinary meeting, and they may fix a day for the closing of the same, of which seven days notice shall be given by advertisement in some newspaper as after mentioned; and any transfer made during the time when the transfer books are so closed shall, as between the company and the party claiming under the same, but not otherwise, be considered as made subsequently to such ordinary meeting.

XIX. *Transmission of Shares by other Means than Transfer to be authenticated by a Declaration.*—If the interest in any share have become transmitted in consequence of the death or bankruptcy or insolvency of any shareholder, or in consequence of the marriage of a female shareholder, or by any other lawful means than by a transfer according to the provisions of this or the special act, such transmission shall be authenticated by a declaration in writing as herein-after mentioned, or in such other manner as the directors shall require; and every such declaration shall state the manner in which and the party to whom such share shall have been so transmitted, and shall be made and signed by some credible person before a sheriff or justice; and such declaration shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders; and for every such entry the company may demand any sum not exceeding the prescribed amount, and where no amount shall be prescribed then not exceeding 5*s.*; and until such transmission has been so authenticated no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking, nor to vote in respect of any such share as the holder thereof.

XX. *Proof of Transmission by Marriage, Will, &c.*—If such transmission be by virtue of the marriage of a female shareholder, the said declaration shall contain a copy of the register of such marriage, or other particulars of the celebration or effecting thereof, and shall declare the identity of the wife with the holder of such share; and if such transmission have taken place by virtue of any testamentary instrument, or by intestacy, the probate of the will or the letters of administration, or an official extract therefrom, obtained from any prerogative court if granted in England, or a testament testamentary or testament dative if expede in Scotland, or an official extract thereof, shall, together with such declaration, be produced to the secretary; and upon such production in either of the cases aforesaid the secretary shall make an entry of the declaration in the said register of transfers.

XXI. *Company not bound to regard Trusts.*—The company shall not be bound to see to the execution of any trust, whether express, implied, or constructive, to which any of the said shares may be subject; and the receipt of the party in whose name any such share shall stand in the books of the company, or if it stands in the names of more parties than one the receipt of the party first named in the register of shareholders and then surviving, shall from time to time be a sufficient discharge to the company for any dividend or other sum of money payable in respect of such share, notwithstanding any trust to which such share may then be subject, and whether or not the company have had notice of such trusts; and the company shall not be bound to see to the application of the money paid upon such receipt.

### Payment of Calls.

And with respect to the payment of subscriptions and the means of enforcing the payment of calls, be it enacted as follows:

XXII. *Subscriptions to be paid when called for.*—The several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by the company; and with respect to the provisions herein or in the special act contained for enforcing the payment of calls, the word "shareholder" shall extend to and include the legal personal representatives of such shareholder.

XXIII. *Power to make Calls.*—It shall be lawful for the company from time to time to make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall think fit, provided that twenty-one days notice at the least be given of each call, and that no call exceed the prescribed amount, if any, and that successive calls be not made at less than the prescribed interval, if any, and that the aggregate amount of calls made in any one year do not exceed the prescribed amount, if any; and every shareholder shall be liable to pay the amount of the calls so made, in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the company.

XXIV. *Interest to be paid on Calls unpaid.*—If, before or on the day appointed for payment, any shareholder do not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate allowed by law from the day appointed for the payment thereof to the time of the actual payment.

XXV. *Power to allow Interest on Payment of Subscriptions before Call.*—It shall be lawful for the company, if they think fit, to receive from any of the shareholders

willing to advance the same all or any part of the monies due upon their respective shares beyond the sums actually called for; and upon the principal monies so paid in advance, or so much thereof as from time to time shall exceed the amount of the calls then made upon the shares in respect of which such advance shall be made, the company may pay interest at such rate, not exceeding the legal rate of interest for the time being, as the shareholder paying such sum in advance and the company shall agree upon.

XXVI. *Enforcement of Calls by Action.*—If at the time appointed by the company for the payment of any call any shareholder fail to pay the amount of such call, it shall be lawful for the company to sue such shareholder for the amount thereof in any court of law or equity having competent jurisdiction, and to recover the same, with lawful interest from the day on which such call was payable.

XXVII. *Averment in Action for Calls.*—In any action or suit to be brought by the company against any shareholder to recover any money due for any call it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to aver that the defender is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act.

XXVIII. *Matter to be proved in Action for Calls.*—On the trial or hearing of such action or suit it shall be sufficient to prove that the defender at the time of making such call was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period.

XXIX. *Proof of Proprietorship.*—The production of the register of shareholders shall be *prima facie* evidence of such defender being a shareholder, and of the number and amount of his shares.

### Nonpayment of Calls.

And with respect to the forfeiture of shares for nonpayment of calls, be it enacted as follows:

XXX. *Forfeiture of Shares for Nonpayment of Calls.*—If any shareholder fail to pay any call payable by him, together with the interest, if any, that shall have accrued thereon, the directors, at any time after the expiration of two months from the day appointed for payment of such call, may declare the share in respect of which such call was payable forfeited, and that whether the company have sued for the amount of such call or not.

XXXI. *Notice of Forfeiture to be given before Declaration thereof.*—Before declaring any share forfeited the directors shall cause notice of such intention to be left at or transmitted by the post to the usual or last place of abode of the person appearing by the register of shareholders to be the proprietor of such share; and if the holder of any such share be abroad, or if his usual or last place of abode be not known to the directors, by reason of its being imperfectly described in the shareholders address book, or otherwise, or if the interest in any such share shall be known by the directors to have become transmitted otherwise than by transfer, as herein-before mentioned, but a declaration of such transmission shall not have been registered as aforesaid, and so the address of the parties to whom the same may have been transmitted, or may for the time being belong, shall not be known to the directors, the directors shall give public notice of such intention in the *Edinburgh Gazette*, and also in some newspaper as after mentioned; and the several notices aforesaid shall be given twenty-one days at least before the directors shall make such declaration of forfeiture.

XXXII. *Forfeiture to be confirmed by a General Meeting.*—The said declaration of forfeiture shall not take effect so as to authorize the sale or other disposition of any share until such declaration have been confirmed at some general meeting of the company to be held after the expiration of two months at the least from the day on which such notice of intention to make such declaration of forfeiture shall have been given; and it shall be lawful for the company to confirm such forfeiture at any such meeting, and by an order at such meeting, or at any subsequent general meeting, to direct the share so forfeited to be sold or otherwise disposed of.

XXXIII. *Sale of forfeited Shares.*—After such confirmation as aforesaid it shall be lawful for the directors to sell the forfeited share, either by public auction or private contract, and if there be more than one such forfeited share, then either separately or together, as to them shall seem fit; and any shareholder may purchase any forfeited share so sold.

XXXIV. *Evidence as to Forfeiture of Shares.*—A declaration in writing, by some credible person not interested in the matter, made before any sheriff or justice, that the call in respect of a share was made, and notice thereof given, and that default in

payment of the call was made, and that the forfeiture of the share was declared and confirmed in manner herein-before required, shall be sufficient evidence of the facts therein stated; and such declaration, and the receipt of the treasurer of the company for the price of such share, shall constitute a good title to such share; and a certificate of proprietorship shall be delivered to such purchaser, and thereupon he shall be deemed the holder of such share, discharged from all calls due prior to such purchase; and he shall not be bound to see to the application of the purchase money, nor shall his title to such share be affected by any irregularity in the proceedings in reference to such sale.

XXXV. *No more Shares to be sold than sufficient for Payment of Calls.*—The company shall not sell or transfer more of the shares of any such defaulter than will be sufficient, as nearly as can be ascertained at the time of such sale, to pay the arrears then due from such defaulter on account of any calls, together with interest, and the expenses attending such sale and declaration of forfeiture; and if the money produced by the sale of any such forfeited shares be more than sufficient to pay all arrears of calls and interest thereon due at the time of such sale, and the expenses attending the declaration of forfeiture and sale thereof, the surplus shall, on demand, be paid to the defaulter.

XXXVI. *On Payment of Calls before Sale the forfeited Shares to revert.*—If payment of such arrears of calls and interest and expenses be made before any share so forfeited and vested in the company shall have been sold, such share shall revert to the party to whom the same belonged before such forfeiture in such manner as if such calls had been duly paid.

XXXVII. *Limiting Responsibility of Shareholders.*—If the said company shall be incorporated, no person or corporation, nor the estate, real or personal, of any such person or corporation, who is or shall be a proprietor of the said incorporated company, shall be liable for or charged with the payment of any debt or demand whatsoever due or to become due by or from the said company beyond the extent of his or their share in the capital of the said company.

### Execution against Shareholders.

And with respect to the remedies of creditors of the company against the shareholders, be it enacted as follows:

XXXVIII. *Execution against Shareholders to the Extent of their Shares in Capital not paid up.*—If any legal diligence or execution shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy under such diligence or execution, then such diligence or execution may be used against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee.

XXXIX. *Reimbursement of such Shareholders.*—If by means of any such diligence or execution any shareholder shall have paid any sum of money beyond the amount then due from him in respect of calls, he shall forthwith be reimbursed such additional sum by the directors out of the funds of the company.

### Power to borrow Money.

And with respect to the borrowing of money by the company on mortgage or bond, be it enacted as follows:

XL. *Company may borrow on Mortgage or Bond.*—If the company be authorized by the special act to borrow money on mortgage or bond, it shall be lawful for them, subject to the restrictions contained in the special act, to borrow on mortgage or bond such sums of money as shall from time to time, by an order of a general meeting of the company, be authorized to be borrowed, not exceeding in the whole the sum prescribed by the special act, and for securing the repayment of the money so borrowed, with interest, to mortgage the undertaking, and the future calls on the shareholders, or to give bonds in manner hereinafter mentioned.

XLI. *Power to reborrow.*—If, after having borrowed any part of the money so authorized to be borrowed on mortgage or bond, the company pay off the same, it shall be lawful for them again to borrow the amount so paid off, and so from time to time; but such power of reborrowing shall not be exercised without the authority of a general meeting of the company, unless the money be so reborrowed in order to pay off any existing bond or security.

XLII. *Evidence of Authority for borrowing.*—Where by the special act the company shall be restricted from borrowing any money on mortgage or bond until a definite portion of their capital shall be subscribed or paid up, or where by this or the special act the authority of a general meeting is required for such borrowing, the certificate of a sheriff that such definite portion of the capital has been subscribed or paid up, and a copy of the order of a general meeting of the company authorizing the borrowing of any money, certified by one of the directors or by the secretary to be a true copy, shall be sufficient evidence of the fact of the capital required to be subscribed or paid up having been so subscribed or paid up, and of the order for borrowing money having been made; and upon production to any sheriff of the books of the

company, and of such other evidence as he shall think sufficient, such sheriff shall grant the certificate as aforesaid.

XLIII. *Mortgages and Bonds to be by Deed duly stamped.*—Every mortgage and bond for securing money borrowed by the company shall be by deed under the common seal of the company, duly stamped, and wherein the consideration shall be truly stated; and every such mortgage deed or bond may be according to the form in the schedule (C.) or (D.) to this act annexed, or to the like effect; and every such mortgage deed shall have the full effect of an assignation in security duly completed.

XLIV. *Rights of Mortgagees.*—The respective mortgagees shall be entitled one with another to their respective proportions of the tolls, sums, and premises comprised in such mortgages, and of the future calls payable by the shareholders, if comprised therein, according to the respective sums in such mortgages mentioned to be advanced by such mortgagees respectively, and to be repaid the sums so advanced, with interest, without any preference one above another by reason of priority of the date of any such mortgage, or of the meeting at which the same was authorized.

XLV. *Application of Calls, notwithstanding Mortgage.*—No such mortgage (although it should comprise future calls on the shareholders) shall, unless expressly so provided, preclude the company from receiving and applying to the purposes of the company any calls to be made by the company.

XLVI. *Mortgages to be Personal Estate.*—All mortgages and money lent on mortgage to the company shall be personal estate, and transmissible as such, and shall not be of the nature of real estate.

XLVII. *Rights of Obligees.*—The respective obligees in such bonds shall, proportionally according to the amount of the monies secured thereby, be entitled to be paid, out of the tolls or other property or effects of the company, the respective sums in such bonds mentioned, and thereby intended to be secured, without any preference one above another by reason of priority of date of any such bond, or of the meeting at which the same was authorized, or otherwise howsoever.

XLVIII. *Register of Mortgages and Bonds.*—A register of mortgages and bonds shall be kept by the secretary, and within fourteen days after the date of any such mortgage or bond an entry or memorial, specifying the number and date of such mortgage or bond, and the sums secured thereby, and the names of the parties thereto, with their proper additions, shall be made in such register; and such register may be perused at all reasonable times by any of the shareholders, or by any mortgagee or bond creditor of the company, or by any person interested in any such mortgage or bond, without fee or reward.

XLIX. *Transfers of Mortgages and Bonds to be stamped.*—Any party entitled to any such mortgage or bond may from time to time transfer his right and interest therein to any other person; and every such transfer shall be by deed duly stamped, wherein the consideration shall be truly stated; and every such transfer may be according to the form in the schedule (E.) to this act annexed, or to the like effect.

L. *Transfers of Mortgages and Bonds to be registered.*—Within thirty days after the date of every such transfer, if executed within the United Kingdom, or otherwise within thirty days after the arrival thereof in the United Kingdom, it shall be produced to the secretary, and thereupon the secretary shall cause an entry or memorial thereof to be made in the same manner as in the case of the original mortgage; and after such entry every such transfer shall entitle the transferee to the full benefit of the original mortgage or bond in all respects; and no party, having made such transfer, shall have power to make void, release, or discharge the mortgage or bond so transferred, or any money thereby secured; and for such entry the company may demand a sum not exceeding the prescribed sum, or, where no sum shall be prescribed, the sum of 2s. 6d.; and until such entry the company shall not be in any manner responsible to the transferee in respect of such mortgage.

LI. *Payment of Interest on Monies borrowed.*—The interest of the money borrowed upon any such mortgage or bond shall be paid at the periods appointed in such mortgage or bond, and if no period be appointed, half-yearly, to the several parties entitled thereto, and in preference to any dividends payable to the shareholders of the company.

LII. *Transfers of Interest to be stamped.*—The interest on any such mortgage or bond shall not be transferable, except by deed duly stamped.

LIII. *Repayment of Money borrowed at a Time fixed.*—The company may, if they think proper, fix a period for the repayment of the principal money so borrowed, with the interest thereof, and in such case the company shall cause such period to be inserted in the mortgage deed or bond; and upon the expiration of such period the principal sum, together with the arrears of interest thereon, shall, on demand, be paid to the party entitled to such mortgage or bond; and if no other place of payment be inserted in such mortgage deed or bond, such principal and interest shall be payable at the principal office or place of business of the company.

LIV. *Repayment of Money borrowed where no Time fixed.*—If no time be fixed in the mortgage deed or bond for the repayment of the money so borrowed, the party entitled to the mortgage or bond may, at the expiration or at any time after the expiration of twelve months from the date of such mortgage or bond, demand payment of the principal money thereby secured, with all arrears of interest, upon giving six months previous notice for that purpose; and in the like case the company may at any

time pay off the money borrowed, on giving the like notice; and every such notice shall be in writing or print, or both, and if given by a mortgagee or bond creditor shall be delivered to the secretary, or left at the principal office of the company, and if given by the company shall be given either personally to such mortgagee or bond creditor or left at his residence, or if such mortgagee or bond creditor be unknown to the directors, or cannot be found after diligent inquiry, such notice shall be given by advertisement in the Edinburgh Gazette, and in some newspaper as after mentioned.

LV. *Interest to cease on Expiration of Notice to pay off Mortgage or Bond.* — If the company shall have given notice of their intention to pay off any such mortgage or bond at a time when the same may lawfully be paid off by them, then at the expiration of such notice all further interest shall cease to be payable on such mortgage or bond, unless on demand of payment made pursuant to such notice, or at any time thereafter, the company shall fail to pay the principal and interest due at the expiration of such notice on such mortgage or bond.

LVI. *Arrears of Interest, when to be enforced by Appointment of a Judicial Factor.* —Where by the special act the mortgagees of the company shall be empowered to enforce the payment of the arrear of interest, or the arrears of principal and interest, due on such mortgages, by the appointment of a judicial factor, then, if within thirty days after the interest accruing upon any such mortgage or bond has become payable, and after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any competent court, require the appointment of a judicial factor, by an application to be made as hereinafter provided; and if within six months after the principal money owing upon any such mortgage or bond has become payable, and after demand thereof in writing, the same be not paid, the mortgagee, without prejudice to his right to sue for such principal money, together with all arrears of interest, in any competent court, may, if his debt amount to the prescribed sum alone, or if his debt does not amount to the prescribed sum, he may, in conjunction with other mortgagees, whose debts, being so in arrear, after demand as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a judicial factor, by an application to be made as hereinafter provided.

LVII. *Appointment of Judicial Factor.*—Every application for a judicial factor in the cases aforesaid shall be made to the Court of Session, and on any such application so made, and after hearing the parties, it shall be lawful for the said court, by order in writing, to appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, as the case may be, until such interest, or until such principal and interest, as the case may be, together with all costs, including the charges of receiving the tolls or sums aforesaid, be fully paid; and upon such appointment being made all such tolls and sums of money as aforesaid shall be paid to and received by the person so to be appointed; and the money so to be received shall be so much money received by or to the use of the party to whom such interest, or such principal and interest, as the case may be, shall be then due, and on whose behalf such judicial factor shall have been appointed; and after such interest and costs, or such principal, interest, and costs, have been so received, the power of such judicial factor shall cease, and he shall be bound to account to the company for his intromissions, or the sums received by him, and to pay over to their treasurer any balance that may be in his hands.

LVIII. *Access to Account Books by Mortgagee* .—At all reasonable times the books of account of the company shall be open to the inspection of the respective mortgagees and bond creditors thereof, with liberty to take extracts therefrom without fee or reward.

### Loans.

And with respect to the conversion of the borrowed money into capital, be it enacted as follows:

LIX. *Power to convert Loan into Capital.*—It shall be lawful for the company, if they think fit, unless it be otherwise provided by the special act, to raise the additional sum so authorized to be borrowed, or any part thereof, by creating new shares of the company, instead of borrowing the same, or having borrowed the same, to continue at interest only a part of such additional sum, and to raise part thereof by creating new shares; but no such augmentation of capital as aforesaid shall take place without the previous authority of a general meeting of the company.

LX. *New Shares to be considered same as original Shares.*—The capital so to be raised by the creation of new shares shall be considered as part of the general capital, and shall be subject to the same provisions in all respects, whether with reference to the payment of calls, or the forfeiture of shares on nonpayment of calls, or otherwise, as if it had been part of the original capital, except as to the times of making calls for such additional capital, and the amount of such calls, which respectively it shall be lawful for the company from time to time to fix as they shall think fit.

LXI. *If old Shares at Premium, new Shares to be offered to original Shareholders.*— If at the time of any such augmentation of capital taking place by the creation of new shares the then existing shares be at a premium, or of greater actual value than the nominal value thereof, then, unless it be otherwise provided by the special act, the sum so to be raised shall be divided into shares of such amount as will conveniently

allow the same to be apportioned among the then shareholders in proportion to the existing shares held by them respectively; and such new shares shall be offered to the then shareholders in the proportion aforesaid; and such offer shall be made by letter under the hand of the secretary given to or sent by post, addressed to each shareholder according to his address in the shareholder's address book, or left at his usual or last place of abode.

LXII. *Shares to vest in the Parties accepting; otherwise to be disposed of by the Directors.*—The said new shares shall vest in and belong to the shareholders who shall accept the same, and pay the value thereof to the company at the time and by the instalments which shall be fixed by the company; and if any shareholder fail for one month after such offer of new shares to accept the same, and pay the instalments called for in respect thereof, it shall be lawful for the company to dispose of such shares in such manner as they shall deem most for the advantage of the company.

LXIII. *If not at a Premium, to be issued as Company think fit.*—If at the time of such augmentation of capital taking place the existing shares be not at a premium, then such new shares may be of such amount, and may be issued in such manner and on such terms, as the company shall think fit.

### Consolidation of Shares.

And with respect to the consolidation of the shares into stock, be it enacted as follows:

LXIV. *Power to consolidate Shares into Stock.*—It shall be lawful for the company from time to time, with the consent of three-fifths of the votes of the shareholders present in person or by proxy at any general meeting of the company, when due notice for that purpose shall have been given, to convert or consolidate all or any part of the shares then existing in the capital of the company, and in respect whereof the whole money subscribed shall have been paid up, into a general capital stock, to be divided amongst the shareholders according to their respective interests therein.

LXV. *Proprietors of Stock may transfer the same.*—After such conversion or consolidation shall have taken place all the provisions contained in this or the special act which require or imply that the capital of the company shall be divided into shares of any fixed amount, and distinguished by numbers, shall, as to so much of the capital as shall have been so converted or consolidated into stock, cease and be of no effect, and the several holders of such stock may thenceforth transfer their respective interests therein, or any parts of such interests, in the same manner and subject to the same regulations and provisions as or according to which any shares in the capital of the company might be transferred under the provisions of this or the special act; and the company shall cause an entry to be made in some book to be kept for that purpose of every such transfer; and for every such entry they may demand any sum not exceeding the prescribed amount, or if no amount be prescribed a sum not exceeding 2s. 6d.

LXVI. *Register of Stock.*—The company shall from time to time cause the names of the several parties who may be interested in any such stock as aforesaid, with the amount of the interest therein possessed by them respectively, to be entered in a book to be kept for the purpose, and to be called "The Register of Holders of Consolidated Stock," and such book shall be accessible at all seasonable times to the several holders of shares or stock in the undertaking.

LXVII. *Proprietors of Stock entitled to Dividends.*—The several holders of such stock shall be entitled to participate in the dividends and profits of the company, according to the amount of their respective interests in such stock; and such interests shall, in proportion to the amount thereof, confer on the holders thereof respectively the same privileges and advantages, for the purpose of voting at meetings of the company, qualification for the office of directors, and for other purposes, as would have been conferred by shares of equal amount in the capital of the company, but so that none of such privileges or advantages, except the participation in the dividends and profits of the company, shall be conferred by any aliquot part of such amount of consolidated stock as would not, if existing in shares, have conferred such privileges or advantages respectively.

LXVIII. *Application of Capital.*—And be it enacted, that all the money raised by the company, whether by subscriptions of the shareholders, or by loan or otherwise, shall be applied, firstly, in paying the costs and expenses incurred in obtaining the special act, and all expenses incident thereto, and, secondly, in carrying the purposes of the company into execution.

### General Meetings.

And with respect to the general meetings of the company, and the exercise of the right of voting by the shareholders, be it enacted as follows:

LXIX. *Ordinary Meetings to be held half-yearly.*—The first general meeting of the shareholders of the company shall be held within the prescribed time, or if no time be prescribed within one month after the passing of the special act, and the future general meetings shall be held at the prescribed periods, and if no periods be prescribed in the months of February and August in each year, or at such other stated periods as shall be appointed for that purpose by an order of a general meeting; and the meetings so appointed to be held as aforesaid shall be called "Ordinary Meetings;" and all meet-

ings, whether ordinary or extraordinary, shall be held in the prescribed place, if any, and if no place be prescribed then at some place to be appointed by the directors.

LXX. *Business at Ordinary Meetings.*—No matters, except such as are appointed by this or the special act to be done at an ordinary meeting, shall be transacted at any such meeting, unless special notice of such matters have been given in the advertisement convening such meeting.

LXXI. *Extraordinary Meetings.*—Every general meeting of the shareholders, other than an ordinary meeting, shall be called an "Extraordinary Meeting;" and such meetings may be convened by the directors at such times as they think fit.

LXXII. *Business at Extraordinary Meetings.*—No extraordinary meeting shall enter upon any business not set forth in the notice upon which it shall have been convened.

LXXIII. *Extraordinary Meetings may be required by Shareholders to be convened.*—It shall be lawful for the prescribed number of shareholders, holding in the aggregate shares to the prescribed amount, or, where the number of shareholders or amount of shares shall not be prescribed, it shall be lawful for twenty or more shareholders, holding in the aggregate not less than one-tenth of the capital of the company, by writing under their hands, at any time to require the directors to call an extraordinary meeting of the company; and such requisition shall fully express the object of the meeting required to be called, and shall be left at the office of the company, or given to at least three directors, or left at their last or usual places of abode; and forthwith upon the receipt of such requisition the directors shall convene a meeting of the shareholders; and if for twenty-one days after such notice the directors fail to call such meeting, the prescribed number of shareholders, or such other number as aforesaid, qualified as aforesaid, may call such meeting by giving fourteen days public notice thereof.

LXXIV. *Notice of Meetings.*—Ten days public notice at the least of all meetings, whether ordinary or extraordinary, shall be given by advertisement, which shall specify the place, the day, and the hour of meeting; and every notice of an extraordinary meeting, or of an ordinary meeting if any other business than the business hereby or by the special act appointed for ordinary meetings is to be done thereat, shall specify the purpose for which the meeting is called.

LXXV. *Quorum for a General Meeting.*—In order to constitute a meeting (whether ordinary or extraordinary) there shall be present, either personally or by proxy, the prescribed quorum, and if no quorum be prescribed then shareholders holding in the aggregate not less than one-twentieth of the capital of the company, and being in number not less than one for every £500 of such required proportion of capital, unless such number would be more than twenty, in which case twenty shareholders holding not less than one-twentieth of the capital of the company shall be the quorum; and if within one hour from the time appointed for such meeting the said quorum be not present no business shall be transacted at the meeting other than the declaring of a dividend, in case that shall be one of the objects of the meeting, but such meeting shall, except in the case of a meeting for the election of directors hereinafter mentioned, be held to be adjourned *sine die*.

LXXVI. *Chairman at General Meetings.*—At every meeting of the company one or other of the following persons shall preside as chairman; that is to say, the chairman of the directors, or in his absence the deputy chairman (if any), or in the absence of the chairman and deputy chairman some one of the directors of the company to be chosen for that purpose by the meeting, or in the absence of the chairman and deputy chairman and of all the directors any shareholder to be chosen for that purpose by a majority of the shareholders present at such meeting.

LXXVII. *Business at Meetings and Adjournments.*—The shareholders present at any such meeting shall proceed in the execution of the powers of the company with respect to the matters for which such meeting shall have been convened, and those only; and every such meeting may be adjourned from time to time, and from place to place; and no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which such adjournment took place.

LXXVIII. *Votes of Shareholders.*—At all general meetings of the company every shareholder shall be entitled to vote according to the prescribed scale of voting, and where no scale shall be prescribed every shareholder shall have one vote for every share up to ten, and he shall have an additional vote for every five shares beyond the first ten shares held by him up to one hundred, and an additional vote for every ten shares held by him beyond the first hundred shares: Provided always, that no shareholder shall be entitled to vote at any meeting unless he shall have paid all the calls then due upon the shares held by him.

LXXIX. *Manner of Voting.*—The votes may be given either personally or by proxies, being shareholders, authorized by writing according to the form in the schedule (F.) to this act annexed, or in a form to the like effect, under the hand of the shareholder nominating such proxy, or if such shareholder be a corporation then under their common seal; and every proposition at any such meeting shall be determined by the majority of votes of the parties present, including proxies, the chairman of the meeting being entitled to vote, not only as a principal and proxy, but to have a casting vote if there be an equality of votes.

LXXX. *Regulations as to Proxies.*—No person shall be entitled to vote as a proxy

unless the instrument appointing such proxy have been transmitted to the secretary of the company within the prescribed period, or, if no period be prescribed, not less than forty-eight hours before the time appointed for holding the meeting at which such proxy is to be used.

LXXXI. *Votes of Joint Shareholders.*—If several persons be jointly entitled to a share, the person whose name stands first in the register of shareholders as one of the holders of such share shall, for the purpose of voting at any meeting, be deemed the sole proprietor thereof; and on all occasions the vote of such first-named shareholder, either in person or by proxy, shall be allowed as the vote in respect of such share, without proof of the concurrence of the other holders thereof.

LXXXII. *Votes of Lunatics and Minors, &c.*—If any shareholder be a lunatic or idiot, fatuous or furious person, such lunatic or idiot, fatuous or furious person, may vote by his tutor, curator, or other person appointed to manage his estate; and if any shareholder be a minor he may vote by his tutors or curators or any one of them; and every such vote may be given either in person or by proxy.

LXXXIII. *Proof of a particular Majority of Votes only required in the event of a Poll being demanded.*—Whenever in this or the special act the consent of any particular majority of votes at any meeting of the company is required in order to authorize any proceeding of the company, such particular majority shall only be required to be proved in the event of a poll being demanded at such meeting; and if such poll be not demanded then a declaration by the chairman that the resolution authorizing such proceeding has been carried, and an entry to that effect in the book of proceedings of the company, shall be sufficient authority for such proceeding, without proof of the number or proportion of votes recorded in favour of or against the same.

### Appointment and Rotation of Directors.

And with respect to the appointment and rotation of directors, be it enacted as follows:

LXXXIV. *Number of Directors.*—The number of directors shall be the prescribed number.

LXXXV. *Power to vary the Number of Directors.*—Where the company shall be authorized by the special act to increase or to reduce the number of the directors it shall be lawful for the company, from time to time in general meeting, after due notice for that purpose, to increase or reduce the number of the directors within the prescribed limits, if any, and to determine the order of rotation in which such reduced or increased number shall go out of office, and what number shall be a quorum of their meetings.

LXXXVI. *Election of Directors.*—The directors appointed by the special act shall, unless thereby otherwise provided, continue in office until the first ordinary meeting to be held in the year next after that in which the special act shall have passed; and at such meeting the shareholders present, personally or by proxy, may either continue in office the directors appointed by the special act, or any number of them, or may elect a new body of directors, or directors to supply the places of those not continued in office, the directors appointed by the special act being eligible as members of such new body; and at the first ordinary meeting to be held every year thereafter the shareholders present, personally or by proxy, shall elect persons to supply the places of the directors then retiring from office, agreeably to the provisions hereinafter contained; and the several persons elected at any such meeting, being neither removed nor disqualified, nor having resigned, shall continue to be directors until others are elected in their stead, as hereinafter mentioned.

LXXXVII. *Existing Directors continued, on Failure of Meeting for Election of Directors.*—If at any meeting at which an election of directors ought to take place the prescribed quorum shall not be present within one hour from the time appointed for the meeting no election of directors shall be made, but such meeting shall stand adjourned to the following day, at the same time and place; and if at the meeting so adjourned the prescribed quorum be not present within one hour from the time appointed for the meeting, the existing directors shall continue to act and retain their powers until new directors be appointed at the first ordinary meeting of the following year.

LXXXVIII. *Qualification of Directors.*—No person shall be capable of being a director unless he be a shareholder, nor unless he be possessed of the prescribed number, if any, of shares; and no person holding an office or place of trust or profit under the company, or interested in any contract with the company, shall be capable of being a director; and no director shall be capable of accepting any other office or place of trust or profit under the company, or of being interested in any contract with the company, during the time he shall be a director.

LXXXIX. *Cases in which Office of Director shall become vacant.*—If any of the directors at any time subsequently to his election accept or continue to hold any other office or place of trust or profit under the company, or be either directly or indirectly concerned in any contract with the company, or participate in any manner in the profits of any work to be done for the company, or if such director at any time cease to be a holder of the prescribed number of shares in the company, then in any of the cases aforesaid the office of such director shall become vacant, and thenceforth he shall cease from voting or acting as a director.

XC. *Shareholder of an incorporated Joint Stock Company not disqualified by reason of Contracts.*—Provided always, that no person, being a shareholder or member of any incorporated joint stock company, shall be disqualified or prevented from acting as a director by reason of any contract entered into between such joint stock company and the company incorporated by the special act; but no such director, being a shareholder or member of such joint stock company, shall vote on any question as to any contract with such joint stock company.

XCI. *Rotation of Directors*.—The directors appointed by the special act, and continued in office as aforesaid, or the directors elected to supply the places of those retiring as aforesaid, shall, subject to the provision hereinbefore contained for increasing or reducing the number of directors, retire from office at the times and in the proportions following; the individuals to retire being in each instance determined by ballot among the directors, unless they shall otherwise agree; (that is to say,)

At the end of the first year after the first election of directors the prescribed number, and if no number be prescribed one-third of such directors, to be determined by ballot among themselves, unless they shall otherwise agree, shall go out of office:

At the end of the second year the prescribed number, and if no number be prescribed one half of the remaining number of such directors, to be determined in like manner, shall go out of office:

At the end of the third year the prescribed number, and if no number be prescribed the remainder of such directors shall go out of office:

And in each instance the places of the retiring directors shall be supplied by an equal number of qualified shareholders; and at the first ordinary meeting in every subsequent year the prescribed number, and if no number be prescribed one-third of the directors, being those who have been longest in office, shall go out of office, and their places shall be supplied in like manner; nevertheless, every director so retiring from office may be re-elected immediately or at any future time, and after such re-election shall, with reference to the going out by rotation, be considered as a new director: Provided always, that if the prescribed number of directors be some number not divisible by three, and the number of directors to retire be not prescribed, the directors shall in each case determine what number of directors, as nearly one-third as may be, shall go out of office, so that the whole number shall go out of office in three years.

XCII. *Supply of occasional Vacancies in Office of Directors.*—If any director die or resign, or become disqualified or incompetent to act as a director, or cease to be a director by any other cause than that of going out of office by rotation as aforesaid, the remaining directors, if they think proper so to do, may elect in his place some other shareholder, duly qualified, to be a director; and the shareholder so elected to fill up any such vacancy shall continue in office as a director so long only as the person in whose place he shall have been elected would have been entitled to continue if he had remained in office.

### Powers of Directors.

And with respect to the powers of the directors and the powers of the company to be exercised only in general meetings, be it enacted as follows:

XCIII. *Powers of the Company to be exercised by the Directors.*—The directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to such matters as are directed by this or the special act to be transacted by a general meeting of the company; but all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of this and the special act; and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting.

XCIV. *Powers of the Company not to be exercised by the Directors.*—Except as otherwise provided by the special act, the following powers of the company, (that is to say,) the choice and removal of the directors, except as hereinbefore mentioned, and the increasing or reducing of their number where authorized by the special act, the choice of auditors, the determination as to the remuneration of the directors, auditors, treasurer, and secretary, the determination as to the amount of money to be borrowed on mortgage, the determination as to the augmentation of capital, and the declaration of dividends, shall be exercised only at a general meeting of the company.

### Proceedings of Directors.

And with respect to the proceedings and liabilities of the directors, be it enacted as follows:

XCV. *Meetings of Directors.*—The directors shall hold meetings at such times as they shall appoint for the purpose, and they may meet and adjourn as they think proper from time to time, and from place to place; and at any time any two of the directors may require the secretary to call a meeting of the directors; and in order to constitute a meeting of directors, there shall be present at the least the prescribed quorum, and when no quorum shall be prescribed there shall be present at least one-third of the directors; and all questions at any such meeting shall be determined by the majority of votes of the directors present, and in case of an equal division of votes the chairman shall have a casting vote, in addition to his vote as one of the directors.

XCVI. *Permanent Chairman of Directors.*—At the first meeting of directors held

after the passing of the special act, and at the first meeting of the directors held after each annual appointment of directors, the directors present at such meeting shall choose one of the directors to act as chairman of the directors for the year following such choice, and shall also, if they think fit, choose another director to act as deputy chairman for the same period; and if the chairman or deputy chairman die or resign, or cease to be a director, or otherwise become disqualified to act, the directors present at the meeting next after the occurrence of such vacancy shall choose some other of the directors to fill such vacancy; and every such chairman or deputy chairman so elected as last aforesaid shall continue in office so long only as the person in whose place he may be so elected would have been entitled to continue if such death, resignation, removal, or disqualification had not happened.

XCVII. *Occasional Chairman of Directors.*—If at any meeting of the directors neither the chairman nor deputy chairman be present the directors present shall choose some one of their number to be chairman of such meeting.

XCVIII. *Committees of Directors. Powers of Committees.*—It shall be lawful for the directors to appoint one or more committees consisting of such number of directors as they think fit, within the prescribed limits, if any, and they may grant to such committees respectively power on behalf of the company to do any acts relating to the affairs of the company which the directors could lawfully do, and which they shall from time to time think proper to intrust to them.

XCIX. *Meetings of Committees.*—The said committees may meet from time to time, and may adjourn from place to place, as they think proper, for carrying into effect the purposes of their appointment; and no such committee shall exercise the powers intrusted to them, except at a meeting at which there shall be present the prescribed quorum, or if no quorum be prescribed then a quorum to be fixed for that purpose by the general body of directors; and at all meetings of the committees one of the members present shall be appointed chairman; and all questions at any meeting of the committee shall be determined by a majority of votes of the members present, and in case of an equal division of votes the chairman shall have a casting vote, in addition to his vote as a member of the committee.

C. *Contracts by Committee or Directors, how to be entered into.*—The power which may be granted to any such committee to make contracts, as well as the power of the directors to make contracts, on behalf of the company, may lawfully be exercised as follows; (that is to say,)

With respect to any contract which, if made between private persons, would be by law required to be by deed or by agreement, in writing, and signed by the parties to be charged therewith, then such committee or the directors may make such contract on behalf of the company, in writing, either under the common seal of the company, or signed by such committee, or any two of them, or any two of the directors, and in the same manner may vary or discharge the same:

With respect to any contract which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, such committee, or the directors, may make such contract on behalf of the company, by parol only, without writing, and in the same manner may vary or discharge the same:

And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be; and on any default in the execution of any such contract, either by the company, or any other party thereto, such actions or suits may be brought, either by or against the company, as might be brought had the same contracts been made between private persons only.

CI. *Proceedings to be entered in a Book, and to be Evidence.*—The directors shall cause notes, minutes, or copies, as the case may require, of all appointments made or contracts entered into by the directors, and of the orders and proceedings of all meetings of the company, and of the directors and committees of directors, to be duly entered in books to be from time to time provided for the purpose, which shall be kept under the superintendence of the directors; and every such entry shall be signed by the chairman of such meeting; and such entry, so signed, shall be received as evidence in all courts, and before all judges, justices, and others, without proof of such respective meetings having been duly convened or held, or of the persons making or entering such orders or proceedings being shareholders or directors or members of committee respectively, or of the signature of the chairman, or of the fact of his having been chairman, all of which last-mentioned matters shall be presumed, until the contrary be proved.

CII. *Informalities in Appointment of Directors not to invalidate Proceedings.*—All acts done by any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding it may be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

CIII. *Directors not to be personally liable. Indemnity of Directors.*—No director, by being party to or executing in his capacity of director any contract or other instrument on behalf of the company, or otherwise lawfully executing any of the powers given to the directors, shall be subject to be sued or prosecuted, either individually or collectively, by any person whomsoever; and the bodies or goods or lands of the direc-

tors shall not be liable to execution of any legal process by reason of any contract or other instrument so entered into, signed, or executed by them, or by reason of any other lawful act done by them in the execution of any of their powers as directors; and the directors, their heirs, executors, and administrators, shall be indemnified out of the capital of the company for all payments made or liability incurred in respect of any acts done by them, and for all losses, costs, and damages which they may incur in the execution of the powers granted to them; and the directors for the time being of the company may apply the existing funds and capital of the company for the purposes of such indemnity, and may, if necessary for that purpose, make calls of the capital remaining unpaid, if any.

AUDITORS.

And with respect to the appointment and duties of auditors, be it enacted as follows:

CIV. *Election of Auditors.*—Except where by the special act auditors shall be directed to be appointed otherwise than by the company, the company shall at the first ordinary meeting after the passing of the special act elect the prescribed number of auditors, and if no number is prescribed two auditors, in like manner as is provided for the election of directors; and at the first ordinary meeting of the company in each year thereafter the company shall in like manner elect an auditor to supply the place of the auditor then retiring from office, according to the provision hereinafter contained; and every auditor elected as hereinbefore provided, being neither removed nor disqualified, nor having resigned, shall continue to be an auditor until another be elected in his stead.

CV. *Qualification of Auditors.*—Where no other qualification shall be prescribed by the special act, every auditor shall have at least one share in the undertaking, and he shall not hold any office in the company, nor be in any other manner interested in its concerns, except as a shareholder.

CVI. *Rotation of Auditors.*—One of such auditors (to be determined in the first instance by ballot between themselves, unless they shall otherwise agree, and afterwards by seniority,) shall go out of office at the first ordinary meeting in each year; but the auditor so going out shall be immediately re-eligible, and after any such re-election shall, with respect to the going out of office by rotation, be deemed a new auditor.

CVII. *Vacancies in office of Auditor.*—If any vacancy take place among the auditors in the course of the current year, then at any general meeting of the company the vacancy may, if the company think fit, be supplied by election of the shareholders.

CVIII. *Failure of Meeting to elect Auditor.*—The provision of this act respecting the failure of an ordinary meeting at which directors ought to be chosen shall apply, *mutatis mutandis*, to any ordinary meeting at which an auditor ought to be appointed.

CIX. *Delivery of Balance Sheet, &c. by Directors to Auditors.*—The directors shall deliver to such auditors the half-yearly or other periodical accounts and balance sheet fourteen days at the least before the ensuing ordinary meeting at which the same are required to be produced to the shareholders, as hereinafter provided.

CX. *Duty of Auditors.*—It shall be the duty of such auditors to receive from the directors the half-yearly or other periodical accounts and balance sheet required to be presented to the shareholders, and to examine the same.

CXI. *Powers of Auditors.*—It shall be lawful for the auditors to employ such accountants and other persons as they may think proper, at the expense of the company, and they shall either make a special report on the said accounts, or simply confirm the same; and such report or confirmation shall be read, together with the report of the directors, at the ordinary meeting.

ACCOUNTABILITY OF OFFICERS.

And with respect to the accountability of the officers of the company, be it enacted as follows:

CXII. *Security to be taken from Officers intrusted with Money.*—Before any person intrusted with the custody or control of monies, whether treasurer, collector, or other officer of the company, shall enter upon his office, the directors shall take sufficient security from him for the faithful execution of his office.

CXIII. *Officers to account on demand.*—Every officer employed by the company shall from time to time, when required by the directors, make out and deliver to them, or to any person appointed by them for that purpose, a true and perfect account, in writing under his hand, of all monies received by him on behalf of the company; and such account shall state how, and to whom, and for what purpose, such monies shall have been disposed of; and, together with such account, such officer shall deliver the vouchers and receipts for such payments; and every such officer shall pay to the directors, or to any person appointed by them to receive the same, all monies which shall appear to be owing by him upon the balance of such accounts.

CXIV. *Summary Remedy against Parties failing to account.*—If any such officer fail to render such account, or to produce and deliver up all the vouchers and receipts relating to the same in his possession or power, or to pay the balance thereof when thereunto required, or if, for three days after being thereunto required, he fail to deliver up to the directors, or to any person appointed by them to receive the same, all papers and writings, property, effects, matters, and things, in his possession or power, relating to the execution of this or the special act, or any act incorporated therewith, or belonging to the company, then, on complaint thereof being made to the sheriff or a justice, such

sheriff or justice shall summon or order such officer to appear before such sheriff, if the summons or order be issued by a sheriff, or before two or more justices, if the summons or order be issued by a justice, at a time and place to be set forth in such summons or order, to answer such charge; and upon the appearance of such officer, or, in his absence, upon proof that such summons or order was personally served upon him, or left at his last known place of abode, such sheriff or justices may hear and determine the matter in a summary way, and may adjust and declare the balance owing by such officer; and if it appear, either upon confession of such officer or upon evidence, or upon inspection of the account, that any monies of the company are in the hands of such officer, or owing by him to the company, such sheriff or justices may order such officer to pay the same; and if he fail to pay the amount it shall be lawful for such sheriff or justices to grant a warrant to levy the same by poinding and sale, or in default thereof to commit the offender to gaol, there to remain without bail for a period not exceeding three months.

CXV. *Officers refusing to deliver up Documents, &c. to be imprisoned.*—If any such officer refuse to produce and deliver to the said sheriff or justices the several vouchers and receipts relating to his accounts, or to deliver up any books, papers, or writings, property, effects, matters, or things, in his possession or power, belonging to the company, such sheriff or justices may lawfully commit such offender to gaol, there to remain until he shall have delivered up all the vouchers and receipts, if any, in his possession or power, relating to such accounts, and have delivered up all books, papers, writings, property, effects, matters, and things, if any, in his possession or power, belonging to the company.

CXVI. *Where Officer about to abscond, a Warrant may be issued in the first instance.*—Provided always, that if any director or other person acting on behalf of the company shall make oath that he has good reason to believe, upon grounds to be stated in his deposition, and does believe, that it is the intention of any such officer as aforesaid to abscond, it shall be lawful for the sheriff or justice before whom the complaint is made, instead of issuing his summons or order, to issue his warrant for the bringing such officer before the sheriff, to answer to the charge, as hereinbefore directed, if the warrant has been issued by the sheriff, or before any justice if the warrant shall have been issued by a justice; and it shall be lawful for the justice before whom such officer may be brought either to discharge such officer, if he thinks there is no sufficient ground for his detention, or to order such officer to be detained in custody, so as to be brought before two justices at a time and place to be named in such order, unless such officer give surety, to the satisfaction of such justice, for his appearance before such justices, to answer the complaint of the company.

CXVII. *Sureties not to be discharged.*—No such proceeding against or dealing with any such officer as aforesaid shall deprive the company of any remedy which they might otherwise have against such officer, or any surety of such officer.

### Accounts.

And with respect to the keeping of accounts, and the right of inspection thereof by the shareholders, be it enacted as follows:

CXVIII. *Accounts to be kept.*—The directors shall cause full and true accounts to be kept of all sums of money received or expended on account of the company by the directors, and all persons employed by or under them, and of the matters and things for which such sums of money shall have been received, or disbursed and paid.

CXIX. *Books to be balanced.*—The books of the company shall be balanced at the prescribed periods, and if no periods be prescribed, fourteen days at least before each ordinary meeting; and forthwith on the books being so balanced an exact balance sheet shall be made up, which shall exhibit a true statement of the capital stock, credits, and property of every description belonging to the company, and the debts due by the company at the date of making such balance sheet, and a distinct view of the profit or loss which shall have arisen on the transactions of the company in the course of the preceding half year; and previously to each ordinary meeting such balance sheet shall be examined by the directors, or any three of their number, and shall be signed by the chairman or deputy chairman of the directors.

CXX. *Inspection of Accounts by Shareholders at stated Times.*—The books so balanced, together with such balance sheet as aforesaid, shall for the prescribed periods, and if no periods be prescribed, for fourteen days previous to each ordinary meeting, and for one month thereafter, be open for the inspection of the shareholders at the principal office or place of business of the company; but the shareholders shall not be entitled at any time, except during the periods aforesaid, to demand the inspection of such books, unless in virtue of a written order signed by three of the directors.

CXXI. *Balance Sheet to be produced at the Meeting.*—And be it enacted, that the directors shall produce to the shareholders assembled at such ordinary meeting the said balance sheet as aforesaid, applicable to the period immediately preceding such meeting, together with the report of the auditors thereon, as hereinbefore provided.

CXXII. *Book-keepers to allow Inspection of the Accounts at appointed Times.*—The directors shall appoint a book-keeper to enter the accounts aforesaid in books to be provided for the purpose; and every such book-keeper shall permit any shareholder to inspect such books, and to take copies or entries therefrom, at any reasonable time during the prescribed periods, and if no periods be prescribed during one fortnight

before and one month after every ordinary meeting; and if he fail to permit any such shareholder to inspect such books, or take copies or extracts therefrom, during the periods aforesaid, he shall forfeit to such shareholder for every such offence a sum not exceeding £5.

### Dividends.

And with respect to the making of dividends, be it enacted as follows:

CXXIII. *Previously to Declaration of Dividends a Scheme to be prepared.*—Previously to every ordinary meeting at which a dividend is intended to be declared the directors shall cause a scheme to be prepared, showing the profits, if any, of the company for the period current since the preceding ordinary meeting at which a dividend was declared, and apportioning the same, or so much thereof as they may consider applicable to the purposes of dividend, among the shareholders, according to the shares held by them respectively, the amount paid thereon, and the periods during which the same may have been paid, and shall exhibit such scheme at such ordinary meeting, and at such meeting a dividend may be declared according to such scheme.

CXXIV. *Dividend not to be made so as to reduce Capital.*—The company shall not make any dividend whereby their capital stock will be in any degree reduced: Provided always, that the word "dividend" shall not be construed to apply to a return of any portion of the capital stock, with the consent of all the mortgagees and bond creditors of the company, due notice being given for that purpose at an extraordinary meeting to be convened for that object.

CXXV. *Power to Directors to set apart a Fund for Contingencies.*—Before apportioning the profits to be divided among the shareholders the directors may, if they think fit, set aside thereout such sum as they may think proper to meet contingencies, or for enlarging, repairing, or improving the works connected with the undertaking, or any part thereof, and may divide the balance only among the shareholders.

CXXVI. *Dividend not to be paid unless all Calls paid.*—No dividend shall be paid in respect of any share until all calls then due in respect of that and every other share held by the person to whom such dividend may be payable shall have been paid.

### By-Laws.

And with respect to the making of by-laws, be it enacted as follows:

CXXVII. *Power to make By-Laws for the Officers of the Company.*—It shall be lawful for the company from time to time to make such by-laws as they think fit, for the purpose of regulating the conduct of the officers and servants of the company, and for providing for the due management of the affairs of the company in all respects whatsoever, and from time to time to alter or repeal any such by-laws, and make others, provided such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special act; and such by-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company, and a copy of such by-laws shall be given to every officer and servant of the company affected thereby.

CXXVIII. *Fines for Breach of such By-Laws.*—It shall be lawful for the company by such by-laws to impose such reasonable penalties upon all persons, being officers or servants of the company, offending against such by-laws, as the company think fit, not exceeding £5 for any one offence.

CXXIX. *By-Laws to be so framed as that Penalties may be mitigated.*—All the by-laws to be made by the company shall be so framed as to allow the sheriff or justices before whom any penalty imposed thereby may be sought to be recovered to order a part only of such penalty to be paid, if such sheriff shall think fit.

CXXX. *Evidence of By-Laws.*—The production of a written or printed copy of the by-laws of the company, having the common seal of the company affixed thereto, shall be sufficient evidence of such by-laws in all cases of prosecution under the same.

### Arbitration.

And with respect to the settlement of disputes by arbitration, be it enacted as follows:

CXXXI. *Appointment of Arbitrators when Questions are to be determined by Arbitration.*—When any dispute directed by this or the special act, or any act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall by writing under his hand nominate and appoint an arbitrator to whom such dispute shall be referred; and after any such appointment shall have been made neither party shall have power to revoke the same, without the consent of the other, nor shall the death of either party operate as such revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then upon such failure the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties; and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final.

CXXXII. *Vacancy of Arbitrator to be supplied.*—If, before the matters so referred shall be determined, any arbitrator appointed by either party die, or become incapable or refuse or for seven days neglect to act as arbitrator, the party by whom such arbitrator was appointed may nominate and appoint in writing some other person to act in his place; and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbitrator may proceed *ex parte*; and every arbitrator so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbitrator at the time of such his death, refusal, or disability as aforesaid.

CXXXIII. *Appointment of Umpire.*—Where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters so referred to them, nominate and appoint by writing under their hands an umpire to decide on any such matters on which they shall differ; and if such umpire shall die, or refuse, or for seven days neglect to act, they shall forthwith after such death, refusal, or neglect appoint another umpire in his place; and the decision of every such umpire on the matters so referred to him shall be final.

CXXXIV. *Board of Trade empowered to appoint an Umpire, on Neglect of the Arbitrators.*—If in either of the cases aforesaid the said arbitrators shall refuse, or shall for seven days after request of either party to such arbitration neglect to appoint an umpire, it shall be lawful for the Lord Ordinary, on the application of either party to such arbitration, to appoint an umpire; and the decision of such umpire on the matters on which the arbitrators shall differ shall be final.

CXXXV. *Power of Arbitrator to call for Books, &c.*—The said arbitrators, or their umpire, may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose, and may also grant diligence for the recovery of such documents as either party may require, or for citing witnesses; and, on application to the Lord Ordinary, letters of supplement, or such other writ as may be necessary, shall be issued by the Lord Ordinary, in support of such diligence.

CXXXVI. *Costs to be in the Discretion of the Arbitrators.*—Except where by this or the special act, or any act incorporated therewith, it shall be otherwise provided, the costs of and attending every such arbitration to be determined by the arbitrators shall be in the discretion of the arbitrators or the umpire, as the case may be.

NOTICES.

And with respect to the giving of notices, be it enacted as follows:

CXXXVII. *Service of Notices upon Company.*—Any summons or notice, or any writ, or other proceeding, at law or in equity, requiring to be served upon the company, may be served by the same being left at or transmitted through the post directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or in case there be no secretary then by being given to any one director of the company.

CXXXVIII. *Service by Company on Shareholders.*—Notices requiring to be served by the company upon the shareholders may, unless expressly required to be served personally, be served by the same being transmitted through the post directed according to the registered address or other known address of the shareholder, within such period as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the giving of such notice; and in proving such service it shall be sufficient to prove that such notice was properly directed, and that it was so put into the post-office.

CXXXIX. *Notices to Joint Proprietors of Shares.*—All notices directed to be given to the shareholders shall, with respect to any share to which persons are jointly entitled, be given to whichever of the said persons shall be named first in the register of shareholders; and notice so given shall be sufficient notice to all the proprietors of such share.

CXL. *Notice by Advertisement.*—All notices required by this or the special act, or any act incorporated therewith, to be given by advertisement, shall be advertised in the prescribed newspaper, or if no newspaper be prescribed, or if the prescribed newspaper cease to be published, in a newspaper circulating in the district within which the company's principal place of business shall be situated.

CXLI. *Authentication of Notices.*—Every summons, demand, or notice, or other such document requiring authentication by the company, may be signed by two directors, or by the treasurer or the secretary of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print.

CXLII. *Proof of Debts in Bankruptcy.*—And be it enacted, that if any person against whom the company shall have any claim or demand become bankrupt, or take the benefit of any act for the relief of insolvent debtors, it shall be lawful for the secretary or treasurer of the company, in all proceedings against the estate of such bankrupt or insolvent, or under any flat, sequestration, or act of insolvency against such bankrupt or insolvent, to represent the company, and act in their behalf, in all respects as if such claim or demand had been the claim or demand of such secretary or treasurer, and not of the company.

CXLIII. *Tender of Amends.*—And be it enacted, that if any party shall have committed any irregularity, trespass, or other wrongful proceeding in the execution of this or the special act, or by virtue of any power or authority thereby given, and if, before action brought in respect thereof, such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and if no such tender shall have been made it shall be lawful for the defender, by leave of the court where such action shall be pending, at any time before the record is closed, to pay into court such sum of money as he shall think fit; and thereupon such proceedings shall be had as in other cases where defenders are allowed to pay money into court.

### Recovery of Damages and Penalties.

And with respect to the recovery of damages not specially provided for, be it enacted as follows:

CXLIV. *Provision for Damages not otherwise provided for.*—In all cases where any damages, costs, or expenses, are by this or the special act, or any act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by the sheriff; and if the amount so ascertained be not paid by the company or other party liable to pay the same within seven days after demand, the amount may be recovered by poinding and sale of the goods of the company or other party liable as aforesaid; and the sheriff shall, on application, issue his warrant accordingly.

CXLV. *Distress, &c. against the Treasurer.*—If sufficient goods of the company cannot be found whereon to levy any such damages, costs, or expenses, payable by the company, the same may, if the amount thereof do not exceed £20, be recovered by poinding and sale of the goods of the treasurer of the company; and the sheriff, on application, shall issue his warrant accordingly; but no such poinding and sale shall be executed against the goods of such treasurer unless seven days previous notice in writing, stating the amount so due, and demanding payment thereof, have been given to such treasurer, or left at his residence; and if such treasurer pay any money under such distress or poinding and sale as aforesaid, he may retain the amount so paid by him, and all costs and expenses occasioned thereby, out of any money belonging to the company coming into his custody or control, or he may sue the company for the same.

CXLVI. *Method of proceeding before the Sheriff or Justices in Questions of Damages, &c.*—Where, in this or the special act, or any act incorporated therewith, any question of expenses, charges, or damages is referred to the determination of any sheriff or justices, it shall be lawful for the sheriff or any justice, upon the application of either party, to summon the other party to appear before such sheriff, or before two justices, as the case may require, at a time and place to be named in such summons; and upon the appearance of such parties, or, in the absence of any of them, upon proof of due service of the summons, it shall be lawful for such sheriff, or such two justices, as the case may be, to hear and determine such question, and for that purpose to examine such parties or any of them, and their witnesses, on oath; and the costs of every such inquiry shall be in the discretion of such sheriff or justices, and he or they shall determine the amount thereof.

CXLVII. *Publication of Penalties.*—The company shall publish the short particulars of the several offences for which any penalty is imposed by this or the special act, or any act incorporated therewith, or by any by-law of the company affecting other persons than the shareholders, officers, or servants of the company, and of the amount of every such penalty, and shall cause such particulars to be painted on a board, or printed upon paper and pasted thereon, and shall cause such board to be hung up or affixed on some conspicuous part of the principal place of business of the company, and where any such penalties are of local application shall cause such boards to be affixed in some conspicuous place in the immediate neighbourhood to which such penalties are applicable or have reference; and such particulars shall be renewed as often as the same or any part thereof is obliterated or destroyed; and no such penalty shall be recoverable unless it shall have been published and kept published in the manner hereinbefore required.

CXLVIII. *Penalty for defacing Boards used for such Publication.*—If any person pull down or injure any Board put up or affixed as required by this or the special act, or any act incorporated therewith, for the purpose of publishing any by-law or penalty, or shall obliterate any of the letters or figures thereon, he shall forfeit for every such offence a sum not exceeding £5, and shall defray the expenses attending the restoration of such board.

CXLIX. *Penalties to be summarily recovered before the Sheriff or two Justices.*—Every penalty or forfeiture imposed by this or the special act, or by any by-law made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before the sheriff or two justices; and on complaint being made to any sheriff or justice he shall issue an order requiring the party complained against to appear before himself, if the order be issued by a sheriff, or before two or more justices, if the order be issued by a justice, at a time and place to be named in such order; and every such order shall be served on the party offending, either in person or by leaving the same with some inmate at his usual place of abode;

and upon the appearance of the party complained against, or in his absence, after proof of the due service of such order, it shall be lawful for any sheriff or two justices to proceed to the hearing of the complaint; and upon proof of the offence, either by the confession of the party complained against, or upon the oath of one credible witness or more, it shall be lawful for such sheriff or justices to convict the offender, and upon such conviction to adjudge the offender to pay the penalty or forfeiture incurred, as well as such costs attending the conviction, as such sheriff or justices shall think fit.

CL. *Penalties to be levied by Distress.*—If forthwith upon any such adjudication as aforesaid the amount of the penalty or forfeiture, and of such costs as aforesaid, be not paid, the amount of such penalty and costs shall be levied by poinding and sale; and such sheriff or justices, or either of them, shall issue his or their warrant of poinding and sale accordingly.

CLI. *Imprisonment in default of Distress.*—It shall be lawful for any such sheriff or justices to order any offender so convicted as aforesaid to be detained and kept in safe custody until return can be conveniently made to the warrant of poinding and sale to be issued for levying such penalty or forfeiture, and costs, unless the offender give sufficient security, by way of recognizance or otherwise, to the satisfaction of the sheriff or justices, for his appearance before him on the day appointed for such return, such day not being more than eight days from the time of taking such security; but if before issuing such warrant of poinding and sale it shall appear to the sheriff or justices, by the admission of the offender or otherwise, that no sufficient poinding and sale can be had within the jurisdiction of such sheriff or justices whereon to levy such penalty or forfeiture, and costs, he or they may, if he or they think fit, refrain from issuing such warrant; and in such case, or if such warrant shall have been issued, and upon the return thereof such insufficiency as aforesaid shall be made to appear to the sheriff or justices, then such sheriff or justices shall, by warrant, cause such offender to be committed to gaol, there to remain without bail for any term not exceeding three months, unless such penalty or forfeiture, and costs, be sooner paid and satisfied.

CLII. *Distress, &c. how to be levied.*—Where in this or the special act, or any act incorporated therewith, any sum of money, whether in the nature of penalty or otherwise, is directed to be levied by poinding and sale, such sum of money shall be levied by poinding and sale of the goods and effects of the party liable to pay the same, and the overplus arising from the sale of such goods and effects, after satisfying such sum of money and the expenses of the poinding and sale, shall be returned, on demand, to the party whose goods shall have been seized.

CLIII. *Distress, &c. not unlawful for Want of Form.*—No poinding and sale made by virtue of this or the special act, or any act incorporated therewith, shall be deemed unlawful, nor shall any party making the same be deemed a trespasser or wrongdoer, on account of any defect or want of form in the summons, conviction, warrant, or other proceeding relating thereto; but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage in an action before the sheriff court.

CLIV. *Application of Penalties.*—The sheriff or justices by whom any such penalty or forfeiture shall be imposed, where the application thereof is not otherwise provided for, may award not more than one-half thereof to the informer, and shall award the remainder to the kirk-session of the parish in which the offence shall have been committed, for the benefit of the poor of such parish.

CLV. *Penalties to be sued for within Six Months.*—No person shall be liable to the payment of any penalty or forfeiture imposed by virtue of this or the special act, or any act incorporated therewith, for any offence made cognizable before the sheriff or justices, unless the complaint respecting such offence shall have been made before such sheriff or some justice within six months next after the commission of such offence.

CLVI. *Damage to be made good in addition to Penalty.*—If, through any act, neglect, or default on account whereof any person shall have incurred any penalty imposed by this or the special act, or any act incorporated therewith, any damage to the property of the company shall have been committed by such person, he shall be liable to make good such damage, as well as to pay such penalty; and the amount of such damages shall, in case of dispute, be determined by the sheriff or justices by whom the party incurring such penalty shall have been convicted; and on nonpayment of such damages, on demand, the same shall be levied by poinding and sale, and such sheriff or justices shall issue his or their warrant accordingly.

CLVII. *Penalty on Witnesses making Default.*—It shall be lawful for any sheriff or justice to summon any person to appear before him as a witness in any matter in which such sheriff or justice, or two or more justices, shall have jurisdiction, under the provisions of this or the special act, or any act incorporated therewith, at a time and place mentioned in such summons, and to administer to him an oath to testify the truth in such matter; and if any person so summoned shall, without reasonable excuse, refuse or neglect to appear at the time and place appointed for that purpose, having been paid or tendered a reasonable sum for his expenses, or if any person appearing shall refuse to be examined upon oath or to give evidence before such sheriff or justice, or justices, every such person shall forfeit a sum not exceeding £5 for every such offence.

CLVIII. *Transient Offenders.*—It shall be lawful for any officer or agent of the company, and all persons called by him to his assistance, to seize and detain any person who shall be found committing any offence against the provisions of this or the special,

act, or any act incorporated therewith, and whose name and residence shall be unknown to such officer or agent, and convey him, with all convenient despatch, before the sheriff or a justice, without any warrant or other authority than this or the special act; and such sheriff or justice shall proceed with all convenient despatch in the matter of the complaint against such offender.

CLIX. *Proceedings by Sheriff need not be in Writing.*—Any sheriff to whom any application is authorized to be made, and before whom any judicial proceedings shall in consequence take place or become necessary, under or by virtue of this or the special act, or any act incorporated therewith, shall, and he is hereby authorized and required summarily to call before him all parties who appear to him to be interested therein, and to proceed forthwith to hear *vivâ voce*, and pronounce judgment regarding the matters mentioned in such application or proceeding, or to do the several matters and things required by this act to be done by him, without waiting the ordinary course of the roll of causes before him, and without written pleadings, or a written record, or reducing any evidence which may be led by either of the parties to writing, unless and except where the said sheriff shall consider that the matters mentioned in such application or proceedings can with more advantage be decided with written pleadings and with a written record, in which case he shall proceed to make up a record, and bring the said matters to a conclusion with all convenient despatch; and the orders and judgments of the said sheriff, when pronounced without a record, shall be final and conclusive, and not subject to review by suspension or advocation, or to reduction, on any ground whatever.

CLX. *Form of Conviction.*—The sheriff or justice, or justices, before whom any person shall be convicted of any offence against this or the special act, or any act incorporated therewith, may cause the conviction to be drawn up according to the form in the schedule (G) to this act annexed.

CLXI. *Proceedings not to be quashed for Want of Form, nor removed by Suspension.*—No proceeding in pursuance of this or the special act, or any act incorporated therewith, shall be quashed or vacated for want of form, nor shall the same be removed by suspension or otherwise into any superior court.

CLXII. *Power of Appeal to Sheriff.*—In all cases which may come before any sheriff-substitute under this or the special act, or any act incorporated therewith, in which written pleadings shall have been allowed, and a written record shall have been made up, and where the evidence which has been led by the parties shall have been reduced to writing, but in no other case whatever, it shall be competent for any of the parties thereto, within seven days after a final judgment shall have been pronounced by such sheriff-substitute, to appeal against the same to the sheriff of the county, by lodging a minute of appeal with the sheriff-clerk of such county, or his depute; and the said sheriff shall thereupon review the proceedings of the said sheriff-substitute, and whole process, and, if he think proper, hear the parties *vivâ voce* thereon, and pronounce judgment; and such judgment shall in no case be subject to review by suspension or advocation, or to reduction, on any ground whatever.

CLXIII. *Parties allowed to appeal from Justices to Quarter Sessions, on giving Security.*—If any party shall feel aggrieved by any determination or adjudication of any justice, or two or more justices, with respect to any penalty or forfeiture under the provisions of this or the special act, or any act incorporated therewith, such party may appeal to the general quarter sessions for the county or place in which the cause of appeal shall have arisen; but no such appeal shall be entertained unless it be made within four months next after the making of such determination or adjudication, nor unless ten days notice in writing of such appeal, stating the nature and grounds thereof, be given to the party against whom the appeal shall be brought, nor unless the appellant forthwith after such notice enter into recognizances, with two sufficient sureties, before a justice, conditioned duly to prosecute such appeal, and to abide the order of the court thereon.

CLXIV. *Court to make such Order as they think reasonable.*—At the quarter sessions for which such notice shall be given the court shall proceed to hear and determine the appeal in a summary way, or they may, if they think fit, adjourn it to the following sessions; and upon the hearing of such appeal the court may, if they think fit, mitigate any penalty or forfeiture, or they may confirm or quash the adjudication, and order any money paid by the appellant, or levied by distress upon his goods, to be returned to him, and may also order such further satisfaction to be made to the party injured as they may judge reasonable; and they may make such order concerning the costs, both of the adjudication and of the appeal, as they may think reasonable.

### Access to Special Act.

And with respect to the provision to be made for affording access to the special act by all parties interested, be it enacted as follows:

CLXV. *Copies of Special Act to be kept and deposited, and allowed to be inspected.*—The company shall at all times after the expiration of six months after the passing of the special act keep in their principal office of business a copy of the special act printed by the printers to Her Majesty, or some of them; and where the undertaking shall be a railway, canal, or other like undertaking, the works of which shall not be confined to one town or place, shall also within the space of such six months deposit in the office of each of the clerks of the peace of the several counties into which the works shall

extend, and in the office of the town clerk of every burgh or city into which, or within one mile of which, the works shall extend, a copy of such special act, so printed as aforesaid; and the said clerks of the peace and town clerks shall receive, and they and the company respectively shall retain, the said copies of the special act, and shall permit all persons interested to inspect the same, and make extracts or copies therefrom, in the like manner, and upon the like terms, and under the like penalty for default, as is provided in the case of certain plans and sections by an act passed in the first year of the reign of Her present Majesty, intituled *An Act to compel Clerks of the Peace for Counties, and other Persons, to take the Custody of such Documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament.*

CLXVI. *Penalty on Company failing to keep or deposit such Copies.*—If the company shall fail to keep or deposit, as hereinbefore mentioned, any of the said copies of the special act, they shall forfeit £20 for every such offence, and also £5 for every day afterwards during which such copy shall be not so kept or deposited.

CLXVII. *Act may be amended this Session.*—And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

## SCHEDULES REFERRED TO BY THE FOREGOING ACT.

### SCHEDULE (A.)

*Form of Certificate of Share.*

"The Company."

Number

THIS is to certify, that A. B. of is the proprietor of the share number of "The Company," subject to the regulations of the said company. Given under the common seal of the said company, the day of in the year of our Lord

### SCHEDULE (B.)

*Form of Transfer of Shares or Stock.*

I of in consideration of the sum of paid to me by of do hereby transfer to the said share [*or* shares] numbered in the undertaking called "The Company" [*or* pounds consolidated stock in the undertaking called "The Company," standing (*or* part of the stock standing) in my name in the books of the company], to hold unto the said his executors, administrators, and assigns [*or* successors and assigns], subject to the several conditions on which I held the same at the time of the execution hereof; and I the said do hereby agree to take the said share [*or* shares] [*or* stock], subject to the same conditions. [*Here insert Testing Clause according to the form of the Law of Scotland, if executed in Scotland, and if executed in England, the form of attestation usual in England.*]

### SCHEDULE (C.)

*Form of Mortgage Deed.*

"The Company."

Mortgage, Number £

By virtue [*here name the special act*], we, "The Company," in consideration of the sum of pounds paid to us by A. B. of do assign unto the said A. B., his executors, administrators, and assignees, the said undertaking [and (*in case such loan shall be in anticipation of the capital authorized to be raised*) all future calls on shareholders], and all the tolls and sums of money arising by virtue of the said act, and all the estate, right, title, and interest of the company in the same, to hold unto the said A. B., his executors, administrators, and assigns, until the said sum of pounds, together with interest for the same at the rate of pounds for every one hundred pounds by the year, be satisfied [the principal sum to be repaid at the end of years from the date hereof (*in case any period be agreed upon for that purpose*), at *or any place of payment other than the principal office of the company*]. In witness whereof, &c. [*Here insert the Testing Clause of deeds executed in Scotland.*]

### SCHEDULE (D.)

*Form of Bond.*

"The Company."

Bond, Number £

By virtue of [*here name the special act*], we "The Company," in consideration of the sum of pounds to us in hand paid by A. B. of do bind ourselves and our successors unto the said A. B., his executors, administrators, and assigns, in the sum of pounds

to be repaid to the said A. B., his executors, administrators, or assigns, at (*in case any other place of payment than the principal office of the company be intended*) on the day of which will be in the year one thousand eight hundred and , with a fifth part more of liquidate penalty in case of failure, together with interest for the same at the rate of pounds per centum per annum, payable half-yearly on the day of and day of In witness whereof, &c. [*Here insert the Testing Clause of deeds executed in Scotland.*]

SCHEDULE (E.)

*Form of Transfer of Mortgage or Bond.*

I A. B. of in consideration of the sum of paid to me by G. H. of do hereby transfer to the said G. H., his executors, administrators, and assigns, a certain bond [*or* mortgage] Number made by "The Company" to bearing date the day of for securing the sum of and interest [*or, if such transfer be by endorsement*, the within security,] and all my right, estate, and interest in and to the money thereby secured [*and if the transfer be of a mortgage*, and in and to the tolls, money, and property thereby assigned.] [*Here insert Scotch Testing clause, if executed in Scotland, and if executed in England, the form of attestation usual in England.*]

SCHEDULE (F.)

*Form of Proxy.*

A. B. one of the proprietors of "The Company," doth hereby appoint C. D. of to be the proxy of the said A. B., in his absence to vote in his name upon any matter relating to the undertaking proposed at the meeting of the proprietors of the said company to be held on the day of next, in such manner as he the said C. D. doth think proper. In witness whereof the said A. B. hath hereunto set his hand [*or, if a corporation, say* the common seal of the corporation], the day of one thousand eight hundred and

SCHEDULE (G.)

*Form of Conviction before*

to wit.

Be it remembered, That on the day of in the year of our Lord A. B. is convicted before me C., the sheriff, *or* before us D., E., two of Her Majesty's justices of the peace for the county of [*here describe the offence generally, and the time and place when and where committed*], contrary to the [*here name the special act*]. Given under my hand [*or* under our hands], the day and year first above written.

C.
D.
E.

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## II. LANDS' CLAUSES CONSOLIDATION ACT, 8 & 9 VICT. c. 19.

*An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the taking of Lands for Undertakings of a Public Nature in Scotland.* May 8, 1845.

WHEREAS it is expedient to comprise in one general act sundry provisions usually introduced into acts of Parliament relative to the acquisition of lands in Scotland required for undertakings or works of a public nature, and the compensation to be made for the same, and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same,—

*This Act to apply to all Undertakings authorized by Acts hereafter passed.*—That this act shall apply to every undertaking in Scotland authorized by any act of Parliament which shall hereafter be passed, and which shall authorize the taking of lands for such undertaking, and this act shall be incorporated with such act; and all the

provisions of this act, save so far as they shall be expressly varied or excepted by any such act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other act which shall be incorporated with such act, form part of such act, and be construed together therewith as forming one act.

*Interpretations in this Act.*—And with respect to the construction of this act, and other acts to be incorporated therewith, be it enacted as follows:

II. *Special Act.*—The expression "special act" used in this act shall be construed to mean any act which shall be hereafter passed, and which shall authorize the taking of lands for the undertaking to which the same relates, and with which this act shall be so incorporated as aforesaid; and the word "prescribed" used in this act, in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special act, and the sentence in which such word shall occur shall be construed as if instead of the word "prescribed" the expression "prescribed for that purpose in the special act" had been used; and the expression "the works" or "the undertaking" shall mean the works or undertaking, of whatever nature, which shall by the special act be authorized to be executed; and the expression "the promoters of the undertaking" shall mean the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, by the special act empowered to execute such works or undertaking.

III. *Interpretations in this and the special Act.*—And be it enacted, that the following words and expressions both in this and the special act shall have the several meanings hereby assigned to them, unless there be something either in the subject or context repugnant to such construction; (that is to say,)

*Number.*—Words importing the singular number only shall include the plural number; and words importing the plural number only shall include the singular number:

*Gender.*—Words importing the masculine gender only shall include females:

*Lands.*—The word "lands" shall extend to houses, lands, tenements, and heritages of any description or tenure:

*Lease.*—The word "lease" shall include a missive of lease:

*Month.*—The word "month" shall mean calendar month:

*Lord Ordinary.*—The "Lord Ordinary" shall mean the Lord Ordinary of the Court of Session in *Scotland* officiating on the bills in time of vacation, or the junior Lord Ordinary, if in time of session, as the case may be:

*Oath.*—The word "oath" shall include affirmation in the case of Quakers, or other declaration or solemnity lawfully substituted for an oath in the case of any other persons exempted by law from the necessity of taking an oath:

*County.*—The word "county" shall include any ward or other like division of a county:

*Sheriff.*—The word "sheriff" shall include the sheriff substitute:

*Justices.*—The word "justices" shall mean justices of the peace acting for the county, city, liberty, or place where the matter requiring the cognizance of any such justice shall arise, and who shall not be interested in the matter; and where such matter shall arise in respect of lands, being the property of one and the same party, situate not wholly in any one county, city, liberty, or place, the same shall mean a justice acting for the county, city, liberty, or place where any part of such lands shall be situate, and who shall not be interested in such matter; and where any matter shall be authorized or required to be done by two justices, the expression "two justices" shall be understood to mean two or more justices assembled and acting together:

Where, under the provisions of this or the special act, or any act incorporated therewith, any notice shall be required to be given to the owner of any lands, or where any act shall be authorized or required to be done with the consent of any such owner, the word "owner" shall be understood to mean any person or corporation, or trustees or others, who, under the provisions of this or the special act, would be enabled to sell and convey lands to the promoters of the undertaking:

*The Bank.*—The expression "the bank" shall mean any of the incorporated or chartered banks in Scotland.

IV. *Short Title of the Act.*—And be it enacted, that in citing this act in other acts of parliament and in legal instruments it shall be sufficient to use the expression "the Lands' Clauses Consolidation (Scotland) Act, 1845."

V. *Forms in which Portions of this Act may be incorporated with other Acts.*—And whereas it may be convenient in some cases to incorporate with acts of parliament hereafter to be passed some portion only of the provisions of this act; be it therefore enacted, that for the purpose of making any such incorporation it shall be sufficient in any such act to enact that the clauses of this act with respect to the matter so proposed to be incorporated (describing such matter as it is described in this act in the words introductory to the enactment with respect to such matter) shall be incorporated with such act; and thereupon all the clauses and provisions of this act with respect to the matter so incorporated shall, save so far as they shall be expressly varied or excepted by such act, form part of such act, and such act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such act shall relate.

PURCHASE OF LANDS BY AGREEMENT.

And with respect to the purchase of lands by agreement, be it enacted as follows:

VI. *Power to Purchase Lands by Agreement.*—Subject to the provisions of this and the special act, it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the special act authorized to be taken, and which shall be required for the purposes of such act, and with all parties having any right or interest in such lands, or by this or the special act enabled to sell and convey the same, for the absolute purchase of any such lands, or such parts thereof as they shall think proper, and for the purchase of all rights and interests in such lands of what kind soever.

VII.—*Parties under Disability enabled to Sell and Convey.*—It shall be lawful for all parties, being possessed of any lands, or any such right or interest therein, to contract for, sell, convey, and dispose of such lands, or of such right therein, to the promoters of the undertaking, and to enter into all necessary agreements for these purposes, and particularly it shall be lawful for the parties following so to do; (that is to say,) all corporations, heirs of entail, liferenters, or persons holding any other partial or qualified estate or interest, married women seised in their own right or entitled to terce or dower, or any other right or interest, husbands, tutors, curators, and other guardians for infants, minors, lunatics or idiots, fatuous or furious persons, or for persons under any other disability or incapacity, judicial factors, trustees or feoffees in trust for charitable or other purposes, executors, and administrators; and the power so to contract for, sell, convey, and dispose of as aforesaid may lawfully be exercised by all such parties, not only on behalf of themselves and their respective heirs, executors, administrators, and successors, but also for and on behalf of every person entitled in reversion or expectancy after them, and as to such married women as if they were sole, and as to such tutors, curators, guardians, judicial factors, and trustees, on behalf of those for whom they respectively act, whether infants, minors, issue unborn, bankrupts, lunatics, idiots, fatuous and furious persons, married women, or other incapacitated persons, and that to the same extent as such infants, minors, bankrupts, lunatics, idiots, fatuous and furious persons, married women, and other incapacitated persons respectively could have exercised the same power under the authority of this and the special act if they had respectively been under no disability.

VIII. *Parties under Disability may exercise other Powers.*—The power hereinafter given to discharge any lands from feu duties or casualties of superiority, as well as every other power required to be exercised by any superior pursuant to the provisions of this or the special act, or any act incorporated therewith, and the power to discharge lands from any rent, payment, charge, feu duties, ground annuals, or other real burdens or incumbrances, and to agree for the apportionment of any such rent, payment, charge, feu duties, ground annuals, or other real burdens and incumbrances, shall extend to and may lawfully be exercised by every party hereinbefore enabled to contract for, sell, dispose of, or convey lands or rights or interests therein to the company.

IX. *Amount of Compensation, in Case of Parties under Disability, to be ascertained by Valuation, and paid into the Bank.*—The purchase money or compensation to be paid for any lands, or any rights or interests therein, to be purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such lands, or rights or interests therein, except under the provisions of this or the special act, and the compensation to be paid for any permanent damage or injury to any such lands, shall not, except where the same shall have been determined by the sheriff, or by the verdict of a jury, or by arbitration, or by the valuation of a valuator appointed by the sheriff under the provision hereinafter contained, be less than shall be determined by the valuation of two able practical valuators, one of whom shall be nominated by the promoters of the undertaking, and the other by the other party, and if such two valuators cannot agree in the valuation then by such third valuator as the sheriff shall, upon application of either party, after notice to the other party, for that purpose nominate; and each of such two valuators, if they agree, or if not, then the valuator nominated by the said sheriff, shall annex to the valuation a declaration in writing, subscribed by them or him, of the correctness thereof; and all such purchase money or compensation shall be deposited in the bank, for the benefit of the parties interested, in manner hereinafter mentioned.

X. *Where Vendor absolutely entitled Lands may be sold on Feu Duties, &c.*—It shall be lawful for all parties entitled to dispose of absolutely any lands authorized to be purchased for the purposes of the special act to convey such lands or any part thereof unto the promoters of the undertaking in consideration of an annual feu duty or ground annual payable by the promoters of the undertaking.

XI. *Payment of Feu Duties, &c. to be charged on Tolls.*—The feu duties or ground annuals stipulated by any such conveyance shall be charged on the tolls or rates, if any, payable under the special act, and shall be otherwise secured in such manner as shall be agreed between the parties, and shall be paid by the promoters of the undertaking as such feu duties or ground annuals become payable; and if at any time the same be not paid within thirty days after they so become payable, and after demand thereof in writing, the person to whom any such feu duties or ground annuals shall be payable may either recover the same from the promoters of the undertaking, with expenses of

suit, by action in any competent court, or it shall be lawful for him to levy the same by poinding and sale of the goods and effects of the promoters of the undertaking.

XII. *Power to purchase Lands required for additional Accommodation.*—In case the promoters of the undertaking shall be empowered by the special act to purchase lands for extraordinary purposes, it shall be lawful for all parties who, under the provisions hereinbefore contained, would be enabled to sell, feu, and convey lands, to sell, feu, and convey the lands so authorized to be purchased for extraordinary purposes.

XIII. *Authority to sell and repurchase such Lands.*—It shall be lawful for the promoters of the undertaking to sell the lands which they shall have so acquired for extraordinary purposes, or any part thereof, in such manner and for such considerations and to such persons as the promoters of the undertaking may think fit, and again to purchase other lands for the like purposes, and afterwards sell the same, and so from time to time, but the total quantity of land to be held at any one time by the promoters of the undertaking for the purposes aforesaid shall not exceed the prescribed quantity.

XIV. *Restraint on Purchase from incapacitated Persons.*—The promoters of the undertaking shall not, by virtue of the power to purchase land for extraordinary purposes, purchase or acquire more than the prescribed quantity from any party under legal disability, or who would not be able to sell or convey such lands, except under the powers of this and the special act; and if the promoters of the undertaking purchase or acquire the said quantity of land from any party under such legal disability, and afterwards sell or dispose of the whole or any part of the land so purchased, it shall not be lawful for any party, being under legal disability, to sell or convey to the promoters of the undertaking any other lands in lieu of the land so sold or disposed of by them.

XV. *Capital to be subscribed before compulsory Powers of Purchase put in Force.*—Where the undertaking is intended to be carried into effect by means of a capital to be subscribed by the promoters of the undertaking, the whole of the capital of the company or estimated sum for defraying the expenses of the undertaking shall be subscribed under contract binding the parties thereto, their heirs, executors, and administrators, for the payment of the several sums by them respectively subscribed before it shall be lawful to put in force any of the powers of this or the special act, or any act incorporated therewith, in relation to the compulsory taking of land for the purposes of the undertaking.

XVI. *A Certificate of the Sheriff to be Evidence that the Capital has been subscribed.*—A certificate, under the hands of the sheriff, certifying that the whole of the prescribed sum has been subscribed, shall be sufficient evidence thereof; and on the application of the promoters of the undertaking, and the production of such evidence as such sheriff thinks proper and sufficient, such sheriff shall grant such certificate accordingly.

### Purchase of Lands otherwise than by Agreement.

And with respect to the purchase and taking of lands otherwise than by agreement, be it enacted as follows:

XVII. *Notice of Intention to take Lands.*—When the promoters of the undertaking shall require to purchase any of the lands which by this or the special act, or any act incorporated therewith, they are authorized to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this or the special act to sell and convey the same, or their rights and interests therein, or such of the said parties as shall, after diligent inquiry, be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works.

XVIII. *Service of Notices on Owners and Occupiers of Lands.*—All notices required to be served by the promoters of the undertaking upon the parties interested in or entitled to sell any such lands shall either be served personally on such parties, or left at their last usual place of abode, if any such can, after diligent inquiry, be found; and in case any such parties shall be absent from the United Kingdom, or cannot be found after diligent inquiry, such notices when the same are to be given to an owner of lands shall be served on the factor or agent, if any, of such owner, and shall also be left with the occupier of such lands; or, if there be no such occupier, shall be affixed upon some conspicuous part of such lands.

XIX. *If Parties fail to treat, or in Case of Dispute, Question to be settled as after mentioned.*—If for twenty-one days after the service of such notice any such party shall fail to state the particulars of his claim in respect of any such land, or to treat with the promoters of the undertaking in respect thereof, or if such party and the promoters of the undertaking shall not agree as to the amount of the compensation to be paid by the promoters of the undertaking for the interest in such lands belonging to such party, or which he is by this or the special act enabled to sell, or for any damage that may be sustained by him by reason of the execution of the

works, the amount of such compensation shall be settled in the manner hereinafter provided for settling cases of disputed compensation.

XX. *Dispute as to Compensation may be referred to Arbitration.*—If no agreement be come to between the promoters of the undertaking and the owners of or parties by this or the special act enabled to sell and convey any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands, or of any interest therein, or as to the compensation to be made in respect thereof, it shall be lawful for the parties to refer the same to arbitration.

XXI. *If Claim does not exceed Fifty Pounds to be settled by the Sheriff.*—If the compensation claimed and disputed shall not exceed fifty pounds, unless both parties agree to refer such compensation to arbitration, the same shall be settled by the sheriff.

XXII. *Method of Proceeding for Settling Disputes as to Compensation by Sheriff.*—It shall be lawful for the sheriff, upon the application of either party with respect to any such question of disputed compensation, to issue an order for the other party to appear before such sheriff, at a time and place to be named in the order; and upon the appearance of such parties, or in the absence of any of them upon proof of due service of the order, it shall be lawful for such sheriff to hear and determine such question, and for that purpose to examine such parties or any of them, and their witnesses upon oath, without written pleadings or reducing the evidence to writing; and the expenses of every such inquiry, excepting the remunerative expenses of the sheriff, shall be in the discretion of such sheriff, and he shall settle the amount thereof; and the determination of the sheriff upon such question shall be final and conclusive, and not subject to review or appeal in any form or court whatever.

XXIII. *Where Compensation claimed exceeds Fifty Pounds, it may be settled by Arbitration if Claimant so desire.*—If the compensation claimed or offered in any case shall exceed fifty pounds, and if the party claiming such compensation desire to have the same settled by arbitration, and signify such desire to the promoters of the undertaking, before they have presented their petition to the sheriff to summon a jury in respect of such lands, under the provisions hereinafter contained, by a notice in writing, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose, then, within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner hereinafter provided.

XXIV. *Appointment of Arbiters when Questions are to be determined by Arbitration.*—When any question of disputed compensation by this or the special act, or any act incorporated therewith, authorized or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbiter, each party, on the request of the other party, shall nominate and appoint an arbiter, to whom such dispute shall be referred; and every appointment of an arbiter shall be made on the part of the company under the hand of the secretary or any two of the directors of the company, and on the part of any other party under the hand of such party, or if such party be a company or corporation under the hand of the proper officer or person authorized by such company or corporation, and such appointment shall be delivered to the arbiters and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as such revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matters so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbiter, such other party fail to appoint an arbiter, then upon such failure the party making the request, and having himself appointed an arbiter, may appoint such arbiter to act on behalf of both parties, and such arbiter may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbiter shall be final.

XXV. *Vacancy of Arbiter to be supplied.*—If, before the matters so referred shall be determined, any arbiter appointed by either party die, or become incapable, the party by whom such arbiter was appointed may nominate and appoint in writing some other person to act in his place, and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbiter may proceed *ex parte*; and every arbiter so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbiter at the time of such his death or disability as aforesaid.

XXVI. *Appointment of Oversman.*—Where more than one arbiter shall have been appointed such arbiters shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an oversman to decide on any such matters on which they shall differ, or which shall be referred to him under the provisions of this or the special act; and if such oversman shall die, or become incapable to act, they shall forthwith after such death or incapacity appoint another oversman in

his place; and the decision of every such oversman on the matters on which the arbiters shall differ shall be final.

XXVII. *Lord Ordinary empowered to appoint an Oversman on Neglect of the Arbiters.*—If in either of the cases aforesaid the said arbiters shall refuse, or shall, for seven days after request of either party to such arbitration, neglect to appoint an oversman, it shall be lawful for the Lord Ordinary, on the application of either party to such arbitration, to appoint an oversman, and the decision of such oversman on the matters on which the arbiters shall differ, or which shall be referred to him under this or the special act, shall be final.

XXVIII. *In Case of Death of single Arbiter, the Matter to begin de novo.*—If, when a single arbiter shall have been appointed, such arbiter shall die, or become incapable to act, before he shall have made his award, the matters referred to him shall be determined by arbitration, under the provisions of this or the special act, in the same manner as if such arbiter had not been appointed.

XXIX. *If either Arbiter refuse to act, the other to proceed ex parte.*—If, when more than one arbiter shall have been appointed, either of the arbiters refuse or for seven days neglect to act, the other arbiter may proceed *ex parte*, and the decision of such arbiter shall be as effectual as if he had been the single arbiter appointed by both parties.

XXX. *If Arbiters fail to make their Award within Twenty-one Days, the Matter to go to the Umpire.*—If, where more than one arbiter shall have been appointed, and neither of them shall refuse or neglect to act as aforesaid, such arbiters shall fail to make their award within twenty-one days after the day on which the last of such arbiters shall have been appointed, or within such extended time as shall have been appointed for that purpose by both such arbiters under this act, the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

XXXI. *Power of Arbiters to call for Books, &c.*—The said arbiters or their oversman may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose, and take all evidence competent according to the law of Scotland.

XXXII. *Costs of Arbitration how to be borne.*—All the expenses of any such arbitration and incident thereto, to be settled by the arbiters or oversman, as the case may be, shall be borne by the promoters of the undertaking, unless the arbiters or oversman shall award the same sum as or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own expenses incident to the arbitration; and in all cases the expenses of the arbiters or oversman, as the case may be, and of recording the decreet arbitral or award in the books of the Council and Session, shall be borne by the promoters of the undertaking.

XXXIII. *Award to be delivered to the Promoters of the Undertaking.*—The arbiters shall make their decreet arbitral or award in writing, and shall cause the same to be recorded in the books of Council and Session, or shall deliver the same to the promoters of the undertaking, to be by them so recorded, and the said promoters shall, on demand, at their own expense, furnish an extract thereof from the said books to the other party to the arbitration; and extracts of decrees arbitral or awards shall bear faith in all courts and cases the same as the original writings, unless the originals be improven.

XXXIV. *Award not to be set aside for Error in Form.*—No award made with respect to any question referred to arbitration under the provisions of this or the special act, shall be set aside for irregularity or error in matter of form.

XXXV. *If Arbitration or Award not made within a limited Time, Compensation to be settled by a Jury.*—If the party claiming compensation shall not as hereinbefore provided, signify his desire to have the question of such compensation settled by arbitration, or if, when the matter shall have been referred to arbitration, the arbiters or their umpire shall for three months have failed to make their or his award, the question of such compensation shall be settled by the verdict of a jury, as hereinafter provided.

XXXVI. *Party claiming Compensation may require a Jury to be summoned.*—But if any party entitled to any compensation in respect of any such lands or interest therein, exceeding fifty pounds as aforesaid, shall desire to have the amount of such compensation determined by a jury, it shall in like manner be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed by him; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose, then within twenty-one days after the receipt of any such notice from any party so entitled, they shall, unless the question shall previously have been agreed to be settled by arbitration, present their petition to the sheriff to summon a jury for settling the same in the manner hereinafter provided, and in default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any competent court.

XXXVII. *Promoters of the Undertaking to give Notice before summoning a Jury.*—Before the promoters of the undertaking shall present their petition for summoning a jury for settling any case of disputed compensation they shall give not less than ten days notice to the other party of their intention to cause such jury to be summoned; and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works.

XXXVIII. *Petition for summoning Jury to be addressed to the Sheriff.*—In every case in which any such question of disputed compensation shall be required to be determined by the verdict of a jury the promoters of the undertaking shall present their petition to the sheriff to summon a jury for that purpose; and such petition shall, if the promoters be a company or corporation, be signed by the secretary or proper officer or person authorized by such company or corporation, and if they be not a company or corporation such petition shall be signed by the promoters, or any two of them if more than one.

XXXIX. *Jurymen to be summoned.*—Upon the receipt of such petition as aforesaid the sheriff shall summon a jury of twenty-five indifferent persons, duly qualified to act as common jurymen for the trial of civil causes in the Court of Session, to meet at a time and place to be named by the sheriff in the warrant for that purpose.

XL. *Notice of Inquiry.*—Not less than ten days notice of the time and place of the inquiry shall be given in writing by the promoters of the undertaking to the other party, or to his known agent.

XLI. *Jury to be impannelled.*—Out of the jurors appearing upon such summons a jury of thirteen persons shall be drawn by ballot; and if a sufficient number of jurymen do not appear in obedience to such summons the sheriff shall return other indifferent men, duly qualified as aforesaid, of the bystanders or others that can speedily be procured, to make up the jury to the number aforesaid; and all parties concerned may have their lawful challenges for cause against any of the jurymen; and each party may have three peremptory challenges.

XLII. *Sheriff to preside; Jury may view.*—The sheriff shall preside on the said inquiry; and the party claiming compensation shall be deemed the pursuer, and the proceedings at such trials shall be conducted in like manner as in criminal trials; and, if either party so request, the sheriff shall order the jury, or any seven or more of them, to view the place or matter in controversy.

XLIII. *Penalty on Jury for default.*—If any person summoned and returned upon any jury under this or the special act, whether common or special, do not appear, or if appearing he refuse to make oath, or in any other manner unlawfully neglect his duty, he shall, unless he show reasonable excuse to the satisfaction of the sheriff, forfeit a sum not exceeding ten pounds; and every such penalty shall be applied in satisfaction of the costs of the inquiry, so far as the same will extend; and, in addition to the penalty hereby imposed, every such juryman shall be subject to the same regulations, pains, and penalties as if such jury had been returned for the trial of a civil cause in the Court of Session.

XLIV. *Witnesses to be summoned.*—If either party so request in writing, the sheriff shall summon before him any person considered necessary to be examined as a witness touching the matters in question.

XLV. *Penalty on Witnesses making default.*—If any person duly summoned to give evidence upon any such inquiry, and to whom a tender of his reasonable expenses shall have been made, fail to appear at the time and place specified in the summons, without sufficient cause, or if any person, whether summoned or not, who shall appear as a witness, refuse to be examined on oath touching the subject matter in question, every person so offending shall forfeit to the party aggrieved a sum not exceeding ten pounds, and, in addition to the penalty hereby imposed, shall be subject to the same regulations, pains, and penalties as if such witness, having been duly summoned, had failed to appear, or having appeared had refused to be examined in any other cause.

XLVI. *If the Party make default the Inquiry not to proceed.*—If the party claiming compensation shall not appear at the time appointed for the inquiry such inquiry shall not be further proceeded in, but the compensation to be paid shall be such as shall be ascertained by a valuator appointed by the sheriff in manner hereinafter provided.

XLVII. *Jury to be sworn.*—Before the jury proceed to inquire of and assess the compensation or damage in respect of which their verdict is to be given they shall make oath that they will truly and faithfully inquire of and assess such compensation or damage; and the sheriff shall administer such oaths, as well as the oaths of all persons called upon to give evidence.

XLVIII. *Sums to be paid for Purchase of Lands and for Damage, to be assessed separately.*—Where such inquiry shall relate to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict by a majority of their number separately for the sum of money to be paid for the purchase of the lands required for the works, or of any interest therein belonging to the party with whom the question of disputed compensation shall have arisen, or which under the provisions herein con-

tained, such party is entitled to sell or convey, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special act, or any act incorporated therewith: Provided always, that if the parties agree to dispense with such separation the verdict may be returned for one sum.

XLIX. *Verdict and Judgment to be recorded.*—The sheriff before whom such inquiry shall be held shall give judgment for the purchase money or compensation assessed by such jury; and the verdict and judgment shall be signed by the sheriff, and being so signed shall be kept by the clerk of the sheriff court among the records of that court; and such verdicts and judgments shall be deemed records, and the same or official copies thereof shall be deemed good evidence in all courts and elsewhere; and all persons may inspect the said verdicts and judgments, and may have copies thereof or extracts therefrom on paying for each inspection thereof one shilling, and for every one hundred words copied or extracted therefrom sixpence.

L. *Expenses of the Inquiry how to be borne.*—On every such inquiry before a jury all the expenses of such inquiry shall be borne by the promoters of the undertaking, unless the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or unless the owner of or party interested in the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, in either of which cases one half of the expenses of the promoters of the undertaking shall be defrayed by the owner of or party interested in the lands.

LI. *Particulars of the Expenses.*—The expenses of any such inquiry shall, in case of difference, be settled by the sheriff on the application of either party; and such expenses shall include all reasonable charges and expenses incurred in summoning, impannelling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and agents, recording the verdict and judgment thereon, and otherwise incident to such inquiry, including the remuneration to the sheriff for his time and labour, and his reasonable travelling expenses, which remuneration for time and labour, exclusive of travelling expenses, shall be five guineas and no more for any inquiry as aforesaid, whether with or without a jury, unless such inquiry shall occupy more than one day or period of eight hours, in which case there shall be paid to the sheriff a sum of five guineas for each day or period of eight hours the inquiry may occupy, including the time necessarily occupied in travelling to and from the place of trial: Provided always, that the time occupied in travelling shall not in reference to any inquiry be computed at more than two days; and in all cases of inquiry as aforesaid before the sheriff, with or without a jury, the remuneration or expenses of the sheriff shall be borne by the promoters of the undertaking.

LII. *Payment of Expenses.*—If any such costs shall be payable by the promoters of the undertaking, and if within seven days after demand such expenses be not paid to the party entitled to receive the same, they shall be recoverable by poinding and sale, and on application to the sheriff he shall issue his warrant accordingly; and if any such expenses shall be payable by the owner of the lands, or of any interest therein, the same may be deducted and retained by the promoters of the undertaking out of any money awarded by the jury to such owner or party interested, or determined by the valuation of a valuator under the provision hereinafter contained; and the payment or deposit of the remainder, if any, of such money shall be deemed payment and satisfaction of the whole thereof, or, if such expenses shall exceed the amount of the money so awarded or determined, the excess shall be recoverable by poinding and sale, and on application to the sheriff he shall issue his warrant accordingly.

LIII. *Special Jury to be summoned at the Request of either Party.*—If either party desire any such question of disputed compensation as aforesaid to be tried before a special jury, such question shall be so tried, provided that notice of such desire, if coming from the other party, be given to the promoters of the undertaking before they have presented their petition to the sheriff; and for that purpose the promoters of the undertaking shall, by their petition to the sheriff, require him to nominate a special jury for such trial; and thereupon the sheriff shall, as soon as conveniently may be after the receipt by him of such petition, summon both the parties to appear before him, by themselves or their agents, at some convenient time and place appointed by him, for the purpose of nominating a special jury (not being less than five days from the service of such summons; and at the place and time so appointed the sheriff shall proceed to nominate a special jury in the manner in which such juries shall be required by the laws for the time being in force to be nominated by the sheriff in other cases, and the sheriff shall appoint a day for the parties or their agents to appear before him to reduce the number of such jury, and thereof shall give four days notice to the parties; and on the day so appointed the sheriff shall proceed to reduce the said special jury to the number of twenty, in the manner used and accustomed in reducing special juries in the Court of Session.

LIV. *Deficiency of special Jurymen.*—The special jury on such inquiry shall consist of thirteen of the said twenty who shall first appear on the names being called over, the parties having their lawful challenges against any of the said jurymen; and if a full jury do not appear, or if after such challenges a full jury do not remain,

then, upon the application of either party, the sheriff shall add to the list of such jury the names of any other disinterested persons, qualified to act as special or common jurymen, who shall not have been previously struck off the aforesaid list, and who may then be attending the court, or can speedily be procured so as to complete such jury, all parties having their lawful challenges against such persons; and the sheriff shall proceed to the trial and adjudication of the matters in question by such jury; and such trial shall be attended in all respects with the like incidents and consequences, and the like penalties shall be applicable as hereinbefore provided in the case of a trial by common jury.

LV. *Other Inquiries before same Special Jury by Consent.*—Any other inquiry than that for the trial of which such special jury may have been struck and reduced as aforesaid may be tried by such jury, provided the parties thereto respectively shall give their consent to such trial.

LVI. *Compensation to absent Parties to be determined by a Valuator, appointed by the Sheriff.*—The purchase money or compensation to be paid for any lands to be purchased or taken by the promoters of the undertaking from any party who, by reason of absence from the kingdom, is prevented from treating, or who cannot after diligent inquiry be found, or who shall not appear at the time appointed for the inquiry before the jury, after due notice thereof, and the compensation to be paid for any permanent injury to such lands, shall be such as shall be determined by the valuation of such valuator as the sheriff shall nominate for that purpose, as hereinafter mentioned.

LVII. *Sheriff to nominate a Valuator.*—Upon application by the promoters of the undertaking to the sheriff, and upon such proof as shall be satisfactory to him that any such party is, by reason of absence from the kingdom, prevented from treating, or cannot after diligent inquiry be found, or that any such party failed to appear on such inquiry before a jury as aforesaid, after due notice to him for that purpose, such sheriff shall, by writing under his hand, nominate a valuator for determining such compensation as aforesaid, and such valuator shall determine the same accordingly, and shall annex to his valuation a declaration in writing, subscribed by him, of the correctness thereof.

LVIII. *Declaration to be made by the Valuator.*—Before such valuator shall enter upon the duty of making such valuation as aforesaid he shall, in the presence of such sheriff, make and subscribe the oath following at the foot of such nomination; (that is to say,)

"I *A. B.* do solemnly swear, that I will faithfully, impartially, and honestly, according to the best of my skill and ability, execute the duty of making the valuation "hereby referred to me. So help me God. *A. B.*

"Sworn and subscribed in the presence of ."

And if any valuator shall corruptly make such oath, or having made such oath shall wilfully act contrary thereto, he shall be guilty of and incur the pains of perjury.

LIX. *Valuation, &c. to be produced to the Owner of the Lands on Demand.*—The said nomination and declaration shall be annexed to the valuation to be made by such valuator, and shall be preserved together therewith, by the promoters of the undertaking, and they shall at all times produce the said valuation and other documents, on demand, to the owner of the lands comprised in such valuation, and to all other parties interested therein.

LX. *Expense to be borne by the Promoters.*—All the expenses of and incident to every such valuation shall be borne by the promoters of the undertaking.

LXI. *Purchase Money and Compensation how to be estimated.*—In estimating the purchase money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid regard shall be had not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special act, or any other act incorporated therewith.

LXII. *Compensation may be apportioned among different Parties.*—On estimating the purchase money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, the sheriff, arbiters, valuator, or jury, as the case may be, shall apportion the said compensation among the parties who may be interested in the said lands as joint owners or lessees, or as holding some security or burden or claim thereon, or interest therein, and who shall have been parties to the said trial or arbitration or valuation: Provided always, that nothing herein contained shall prevent any person having a separate interest from having the same separately tried.

LXIII. *Where Compensation to absent Party has been determined by a Valuator, the Party may have the same submitted to Arbitration.*—When the compensation payable in respect of any lands, or any interest therein, shall have been ascertained by the valuation of a valuator, and deposited in the bank under the provisions herein contained, by reason that the owner of or party entitled to convey such lands, or such interest therein as aforesaid, could not be found, or was absent from the kingdom, and if such owner or party shall be dissatisfied with such valuation, it shall be lawful for him, before he shall have applied to the Court of Session for payment or investment of the monies so deposited under the provisions herein contained, by notice in writing to the

promoters of the undertaking, to require the question of such compensation to be submitted to arbitration, and thereupon the same shall be so submitted to and settled by arbitration in the manner hereinbefore provided for settling disputes by arbitration.

LXIV. *Question to be submitted to the Arbiters.*—The question to be submitted to the arbiters in the case last aforesaid shall be, whether the said sum so deposited as aforesaid by the promoters of the undertaking was a sufficient sum, or whether any and what further sum ought to be paid or deposited by them.

LXV. *If further sum awarded, Promoters to pay or deposit same within fourteen Days.*—If the Arbiters shall decide that a further sum ought to be paid or deposited by the promoters of the undertaking they shall pay or deposit, as the case may require, such further sum within fourteen days after the making of such decreet arbitral or award, or in default thereof the same may be enforced by diligence or recovered, with expenses, by action in any competent court.

LXVI. *Expenses of the Arbitration.*—If the arbiters shall determine that the sum so deposited was sufficient, the expenses of and incident to such arbitration, to be determined by the arbiters, shall be in the discretion of the arbiters; but if the arbiters shall determine that a further sum ought to be paid or deposited by the promoters of the undertaking, all the expenses of and incident to the arbitration shall be borne by the promoters of the undertaking.

### Application of Compensation.

And with respect to the purchase money or compensation coming to parties having limited interests, or prevented from treating, or not making title, be it enacted as follows:

LXVII. *Purchase Money payable to Parties under Disability, amounting to £200, to be deposited in the Bank.*—The purchase money or compensation which shall be payable in respect of any lands, or any interest therein, purchased or taken by the promoters of the undertaking from any corporation, heir of entail, liferenter, married woman seised in her own right or entitled to terce or dower, or any other right or interest, husband, tutors, curators, or other guardians for any infant, minor, lunatic, or idiot, fatuous or furious person, or for any person under any other disability or incapacity, judicial factor, trustee, executor, or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same, except under the provisions of this or the special act, or the compensation to be paid for any permanent damage to any such lands, shall, if it amount to or exceed the sum of £200, the same shall be paid into the bank, to the intent that such monies shall be applied, under the authority of the Court of Session, to some one or more of the following purposes; (that is to say,)

*Application of Monies deposited.*—In the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith on the same heirs, or for the same trusts or purposes, or affecting succeeding heirs of entail in any such lands, whether imposed and constituted by the entailer, or in virtue of powers given by the entail, or in virtue of powers conferred by any act of parliament;

In the purchase of other lands to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner, as the lands in respect of which such money shall have been paid stood settled; or

If such monies shall be paid in respect of any buildings taken under the authority of this or the special act, or injured by the proximity of the works, or in removing or replacing such buildings, or substituting others in their stead, in such manner as the said court shall direct; or

In payment to any party becoming absolutely entitled to such money.

LXVIII. *Order for Application and Investment meanwhile.*—Such money may be so applied as aforesaid upon an order of the Court of Session, made on the petition of the party who would have been entitled to the rents and profits of the lands in respect of which such money shall have been deposited; and until the money can be so applied it shall be retained in the bank at interest, or shall be laid out and invested in the public funds or in heritable securities, and the interest, dividends, and annual proceeds thereof shall from time to time, under the like order, be paid to the party who would for the time being have been entitled to the rents and profits of the lands.

LXIX. *Sums from £20 to £200, to be deposited or paid to Trustees.*—If such purchase money or compensation shall not amount to the sum of £200, and shall exceed the sum of £20, the same shall either be paid into the bank, and applied in the manner hereinbefore directed with respect to sums amounting to or exceeding £200, or the same may lawfully be paid to two trustees, to be nominated by the parties entitled to the rents or profits of the lands in respect whereof the same shall be payable, such nomination to be signified by writing under the hands of the parties so entitled; and in case of the coverture, infancy, lunacy, or other incapacity of the parties entitled to such monies, such nomination may lawfully be made by their respective husbands, guardians, tutors, curators, judicial factors, or trustees; but such last-mentioned application of the monies shall not be made unless the promoters of the undertaking approve thereof, and of the trustees named for the purpose; and the money so paid to such trustees, and

the produce arising therefrom, shall, at the expense of the promoters of the undertaking, be by such trustees applied in the manner hereinbefore directed with respect to money paid into the bank, but it shall not be necessary to obtain any order of court for that purpose.

LXX. *Sums not exceeding £20, to be paid to parties.*—If such money shall not exceed the sum of £20, the same shall be paid to the parties entitled to the rents and profits of the lands in respect whereof the same shall be payable, for their own use and benefit; or in the case of the coverture, infancy, idiocy, lunacy, or other incapacity of any such parties, then such money shall be paid, for their use, to the respective husbands, guardians, tutors, curators, judicial factors, or trustees of such persons.

LXXI. *All sums payable under Contract with Persons not absolutely entitled to be paid into the Bank.*—All sums of money exceeding £20, which may be payable by the promoters of the undertaking, in respect of the taking, using, or interfering with any lands under a contract or agreement with any person who shall not be entitled to dispose of such lands, or of the interest therein contracted to be sold by him, absolutely for his own benefit, shall be paid into the bank or to trustees in manner aforesaid; and it shall not be lawful for any contracting party, not entitled as aforesaid, to retain to his own use any portion of the sums so agreed or contracted to be paid for or in respect of the taking, using, or interfering with any such lands, or for assenting to or not opposing the passing of the bill authorizing the taking of such lands, or in lieu of bridges, tunnels, or other accommodation works, but all such monies shall be deemed to have been contracted to be paid for and on account of the several parties interested in such lands, as well in possession as in succession or expectancy: Provided always, that it shall be in the discretion of the Court of Session or the said trustees, as the case may be, to allot to any liferenter or person holding for any other partial or qualified right or interest, for his own use, a portion of the sum so paid into the bank or to such trustees as aforesaid as compensation for any injury, inconvenience, or annoyance which he may be considered to sustain, independently of the actual value of the lands to be taken, and of the damage occasioned to the lands held therewith by reason of the taking of such lands and the making of the works.

LXXII. *Court of Session may direct Application of Money in respect of Leases or Reversions as they may think just.*—Where any purchase money or compensation paid into the bank under the provisions of this or the special act shall have been paid in respect of any lease for lives or years, or any right or interest in lands less than the fee thereof, or of any reversion dependent on any such lease, or right or interest, it shall be lawful for the Court of Session, on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, right, interest, or reversion in respect of which such money shall have been paid, or as near thereto as may be.

LXXIII. *On the Purchase of Lands to be entailed, not necessary to insert the provisions verbatim.*—If such money shall be laid out and invested in the purchase of lands to be held under entail, or under uses, trusts, intents, and purposes, it shall not be necessary to ingross verbatim in the titles to such new lands the provisions of the entail or other investiture of the said old lands, or to mention specifically the uses, trusts, intents, and purposes for and upon which the said new lands are to be held, but it shall be sufficient to state the dates of executing and recording the deed or deeds containing the provisions and conditions subject to which, or the uses, trusts, intents, and purposes to, for, and upon which, the said old lands were held, and to declare that the said new lands shall be held subject to the same provisions and conditions, and to, for, and upon the like uses, trusts, intents, and purposes, and to record the title deed containing such general reference in the register of tailzies, sasines, or other proper record, according to the nature of such title deed, which the keepers of the said registers are hereby authorized and required to do without a special order to that effect: Provided always, that upon the first occasion of completing titles to the said entailed estates the lands acquired to the estate may be introduced into the titles then completed, after which they shall descend regularly as part and portion of the entailed estates.

LXXIV. *Upon deposit being made, the Owners of the Lands to convey, or in default the Lands to vest in the Promoters of the Undertaking, upon a notarial Instrument being executed.*—Upon deposit in the bank in manner hereinbefore provided of the purchase money or compensation agreed or awarded to be paid in respect of any lands purchased or taken by the promoters of the undertaking, under the provisions of this or the special act, or any act incorporated therewith, the owner of such lands, including in such term all parties by this act enabled to sell or convey lands, shall, when required so to do by the promoters of the undertaking, duly convey such lands to the promoters of the undertaking, or as they shall direct; and in default thereof, or if he fail to adduce a good title to such lands, it shall be lawful for the promoters of the undertaking, if they think fit, to expede an instrument under the hands of a notary public, containing a description of the lands in respect of which such default shall be made, and reciting the purchase or taking thereof by the promoters of the undertaking, and the names of the parties from whom the same were purchased or taken, and the deposit made in respect thereof, and declaring the fact of such default having been made; and such instrument shall be stamped with the stamp duty which would have been payable upon a convey-

ance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of or capable of being sold and conveyed by the party between whom and the promoters of the undertaking such agreement shall have been come to, or as between whom and the promoters of the undertaking such purchase money or compensation shall have been determined by the sheriff, by a jury, or by arbiters, or by a valuation appointed by the sheriff, as herein provided, and shall have been deposited as aforesaid, shall vest absolutely in the promoters of the undertaking; and as against such parties, and all parties on behalf of whom they are hereinbefore enabled to sell and convey, the promoters of the undertaking shall be entitled to immediate possession of such lands: and such instrument, being registered in the register of sasines in manner hereinafter provided in regard to conveyances of lands, shall have the same effect as a conveyance so registered.

LXXV. *Where Parties refuse to convey, or do not show Title, or cannot be found, the Purchase Money to be deposited.*—If the owner of any such lands purchased or taken by the promoters of the undertaking, or of any interest therein, on tendor of the purchase money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands, or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking, or if he refuse or is unable validly to convey such lands as directed by the promoters of the undertaking, or to discharge or obtain a discharge of any burden or incumbrance thereon which was not specially excepted from discharge, or if any such owner be absent from the kingdom, or cannot after diligent inquiry be found, or fail to appear, on the inquiry before a jury, as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase money or compensation payable in respect of such lands or any interest therein in the bank, to be placed, except in the cases herein otherwise provided for, to an account to be opened in the name of the parties interested in such lands (describing them, so far as the promoters of the undertaking can do), subject to the control and disposition of the Court of Session.

LXXVI. *Upon Deposit being made, a Receipt to be given, and the Lands to vest, upon a notarial Instrument being executed.*—Upon any such deposit of money as last aforesaid being made, the cashier or other proper officer of such bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what and for whose use (described as aforesaid) the same shall have been received, and in respect of what purchase the same shall have been paid in; and it shall be lawful for the promoters of the undertaking, if they think fit, to expede an instrument under the hands of a notary public, containing a description of the lands in respect whereof such deposit shall have been made, and declaring the circumstances under which and the names of the parties to whose credit such deposit shall have been made, and such instrument shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of the parties for whose use and in respect whereof such purchase money or compensation shall have been deposited shall vest absolutely in the promoters of the undertaking, and as against such parties they shall be entitled to immediate possession of such lands; and such instrument, being registered in the register of sasines in manner hereinafter directed in regard to conveyances of lands, shall have the same effect as a conveyance so registered.

LXXVII. *Application of Monies so deposited.*—Upon the application by petition of any party making claim to the money so deposited as last aforesaid, or any part thereof, or to the lands in respect whereof the same shall have been so deposited, or any part of such lands, or any interest in the same, the said Court of Session may, in a summary way, as to such court shall seem fit, order such money to be laid out or invested in the public funds, or on heritable securities, or may order distribution thereof, or payment of the dividends thereof, according to the respective estates, titles, or interests of the parties making claim to such money or lands, or any part thereof, and may make such other order in the premises as to such court shall seem fit.

LXXVIII. *Party in Possession to be deemed to be the Owner.*—If any question arise respecting the title to the lands in respect whereof such monies shall have been so paid or deposited as aforesaid, the parties respectively in possession of such lands, as being the owners thereof, at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands, until the contrary be shown to the satisfaction of the court; and unless the contrary be shown as aforesaid the parties so in possession, and all parties claiming under them, or consistently with their possession, shall be deemed entitled to the money so deposited, and to the dividends or interest of the annuities or securities purchased therewith, and the same shall be paid and applied accordingly.

LXXIX. *Expenses in Cases of Money deposited.*—In all cases of monies deposited in the bank under the provisions of this or the special act, or any act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to feu or convey the lands in respect whereof the same shall be payable, or by reason of his refusal or inability to discharge or obtain a discharge of any burden on such lands which was not specially excepted from discharge, or by reason of the failure or neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Session to order the

expenses of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking; (that is to say,) the expense of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such expenses as are herein otherwise provided for, and the expense of the investment of such monies in government or real securities, and of the re-investment thereof in the purchase of other lands, and of re-entailing any of such lands, and incident thereto, and also the expense of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment of the principal of such monies, or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants: Provided always, that the expense of one application only for re-investment in land shall be allowed, unless it shall appear to the Court of Session that it is for the benefit of the parties interested in the said monies that the same should be invested in the purchase of lands in different sums and at different times, in which case it shall be lawful for the court, if it think fit, to order the expenses of any such investments to be paid by the promoters of the undertaking.

### Conveyances.

And with respect to the conveyances of lands, be it enacted as follows:

LXXX. *Form of Conveyances.*—Feus and conveyances of lands so to be purchased as aforesaid may be according to the form in the schedules (A.) and (B.) respectively to this act annexed, or as near thereto as the circumstances of the case will admit; which feus and conveyances, being duly executed, and being registered in the particular register of sasines kept for the county, burgh, or district in which the lands are locally situated, or in the general register of sasines for Scotland kept at Edinburgh, within sixty days from the last date thereof, which the respective keepers of the said registers are hereby authorized and required to do, shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking, and their successors and assigns, to the premises therein described, any law or custom to the contrary notwithstanding: Provided always, that it shall not be necessary for the promoters of the undertaking to record in any register of sasines any feus or conveyances in their favour which shall contain a procuratory of resignation or precept of sasine, or which may be completed by infeftment; and the title of the company under such last-mentioned feus or conveyances shall be regulated by the ordinary law of Scotland, until the said feus or conveyances, or the instruments of sasine thereon, shall have been recorded in a register of sasines.

LXXXI. *Expenses of Conveyances.*—The expenses of all conveyances of lands shall be borne by the promoters of the undertaking; and such expenses shall include all charges and expenses, incurred on the part as well of the seller as of the purchaser, of all conveyances of any such lands, and of any interests therein, and of establishing the title to such lands, and all other reasonable expenses incident to the investigation of such title.

LXXXII. *Taxation of Expenses of Conveyances.*—If the promoters of the undertaking and the party entitled to any such expenses shall not agree as to the amount thereof, such amount shall be ascertained and decerned for by the Lord Ordinary, on a summary petition presented to him by the party entitled to recover the same; and the promoters of the undertaking shall pay to the party entitled thereto what the said Lord Ordinary shall decree for or in respect of such expenses, or in default thereof the same may be recovered in the same way as any other expenses payable under an order or decree of the court, or the same may be recovered by poinding and sale in the manner hereinbefore provided in other cases of expenses; and the expense of taxing such expenses shall be borne by the promoters of the undertaking, unless upon such taxation one sixth part of the amount of such expenses shall be disallowed, in which case the expenses of such taxation, and of or incident to the application to the Lord Ordinary, shall be borne by the party whose expenses shall be so taxed, and the amount thereof shall be ascertained by the said Lord Ordinary, and deducted by him accordingly in his judgment or decerniture.

### Entry on Lands.

And with respect to the entry upon lands by the promoters of the undertaking, be it enacted as follows:

LXXXIII. *Payment of Price to be made previous to Entry, except to Survey, &c.*—The promoters of the undertaking shall not, except by consent of the owners and occupiers, enter upon any lands which shall be required to be purchased or permanently used for the purposes and under the powers of this or the special act, until they shall either have paid to every party having any interest in such lands, or deposited in the bank in the manner herein mentioned, the purchase money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein: Provided always, that for the purpose merely of surveying and taking levels of such lands, and of probing or boring to ascertain the nature of the soil, and of setting out the line of the works, it shall be lawful for the promoters of the undertaking, after giving not less than three nor more than fourteen days notice to the owners or occupiers thereof,

to enter upon such lands without previous consent, making compensation for any damage thereby occasioned to the owners or occupiers thereof.

LXXXIV. *Promoters to be allowed to enter on Lands before Purchase, on making Deposit by way of Security and giving Bond.*—Provided also, that if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to, or an award made or verdict given, for the purchase money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the bank by way of security, as hereinafter mentioned, either the amount of purchase money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry, or such a sum as shall by a valuator, appointed by the sheriff in the manner hereinbefore provided in the case of parties who cannot be found, be determined to be the value of such lands, or of the interest therein which such party is entitled to, or enabled to sell and convey, and also, if required so to do, to give to such party a bond, under the hand of the secretary or proper officer or person authorized, if the promoters be a company or corporation, or if they be not a company or corporation under the hand of the promoters, or any two of them if more than one, with two sufficient securities, to be approved of by the sheriff in case the parties differ for a sum equal to the sum so to be deposited, for payment to such party, or for making a deposit in the bank for the benefit of the parties interested in such lands, as the case may require, under the provisions herein contained, of all such purchase money or compensation as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon at the rate of five pounds *per centum per annum* from the time of entering on such lands until such purchase money or compensation shall be paid to such party, or deposited in the bank for the benefit of the parties interested in such lands, under the provisions herein contained; and upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them under the provisions of this or the special act.

LXXXV. *Deposit to be paid into Bank, and Cashier to give a Receipt.*—The money so to be deposited as last aforesaid shall be paid into the bank, to be placed to an account to be opened in the name of the parties interested in or entitled to sell and convey the lands so to be entered upon, and who shall not have consented to such entry, subject to the control and disposition of the Court of Session; and upon such deposit being made the cashier or other proper officer of the bank shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what purpose and to whose credit the same shall have been paid in.

LXXXVI. *Deposit to remain as a Security, and to be applied under the Direction of the Court.*—The money so deposited as last aforesaid shall remain in the bank by way of security to the parties whose lands shall so have been entered upon for the performance of the bond to be given by the promoters of the undertaking, as hereinbefore mentioned, and the same may, on the application by petition of the promoters of the undertaking, be ordered to be invested in the public funds or upon heritable securities, and accumulated; and upon the conditions of such bond being fully performed it shall be lawful for the Court of Session, upon a like application, to order the money so deposited, or the funds in which the same shall have been invested, together with the accumulation thereof, to be repaid or transferred to the promoters of the undertaking, or, if such conditions shall not be fully performed, it shall be lawful for the said court to order the same to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall so have been deposited.

LXXXVII. *Penalty on the Promoters of the Undertaking entering upon Lands without Consent, before Payment of the Purchase Money.*—If the promoters of the undertaking or any of their contractors shall, except as aforesaid, wilfully enter upon and take possession of any lands which shall be required to be purchased or permanently used for the purposes of the special act, without such consent as aforesaid, or without having made such payment for the benefit of the parties interested in the lands, or such deposit by way of security as aforesaid, the promoters of the undertaking shall forfeit to the party in possession of such lands the sum of £10, over and above the amount of any damage done to such lands by reason of such entry and taking possession as aforesaid, such penalty and damage respectively to be recovered before the sheriff; and if the promoters of the undertaking or their contractors shall, after conviction in such penalty as aforesaid, continue in unlawful possession of any such lands, the promoters of the undertaking shall be liable to forfeit the sum of £25 for every day they or their contractors shall so remain in possession as aforesaid, such penalty to be recoverable by the party in possession of such lands, with expenses, by action in any competent court: Provided always, that nothing herein contained shall be held to subject the promoters of the undertaking to the payment of any such penalties as aforesaid, if they shall *bonâ fide* and without collusion have paid the compensation agreed or awarded to be paid in respect of the said lands to any person whom the promoters of the undertaking may have reasonably believed to be entitled thereto, or shall have deposited the same

in the bank for the benefit of the parties interested in the lands, or made such deposit by way of security in respect thereof as hereinbefore mentioned, although such person may not have been legally entitled thereto.

LXXXVIII. *Decision of Sheriff not conclusive as to the Right of the Promoters.*—On the trial of any action for any such penalty as aforesaid the decision of the sheriff, under the provision hereinbefore contained, shall not be held conclusive as to the right of entry on any such lands by the promoters of the undertaking.

LXXXIX. *Proceedings in Case of Refusal to deliver Possession of Lands.*—If in any case in which, according to the provisions of this or the special act, or any act incorporated therewith, the promoters of the undertaking are authorized to enter upon and take possession of any lands required for the purposes of the undertaking, the owner or occupier of any such lands, or any other person, refuse to give up the possession thereof, or hinder the promoters of the undertaking from entering upon or taking possession of the same, it shall be lawful for the promoters of the undertaking to apply by petition to the sheriff for possession of the same, and upon such application the sheriff may authorize and order possession of any such lands accordingly; and the expenses accruing by reason of such application, to be settled and decerned for by the sheriff, shall be paid by the person wrongfully refusing to give or hindering possession; and the amount of such expenses shall be deducted and retained by the promoters of the undertaking from the compensation, if any, then payable by them to such party; or if no such compensation be payable to such party, or if the same be less than the amount of such expenses, then such expenses, or the excess thereof beyond such compensation, if not paid on demand, may be levied by poinding and sale, and the sheriff may issue his warrant accordingly.

XC. *Parties not to be required to sell Part of a House.*—And be it enacted, that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof.

### Intersected Lands.

And with respect to small portions of intersected land, be it enacted as follows:

XCI. *Power to Owners of intersected Lands to insist on Sale.*—If any lands, not being situate in a town or built upon, shall be so cut through and divided by the works as to leave, either on both sides or on one side thereof, a less quantity of land than half a statute acre, and if the owner of such small parcel of land require the promoters of the undertaking to purchase the same along with the other land required for the purposes of the special act, the promoters of the undertaking shall purchase the same accordingly, unless the owner thereof have other land adjoining to that so left into which the same can be thrown; and if such owner have any other land so adjoining, the promoters of the undertaking shall, if so required by the owner, at their own expense, throw the piece of land so left into such adjoining land, by removing the fences and levelling the sites thereof, and by soiling the same in a sufficient and workmanlike manner.

XCII. *Power of Promoters of the Undertaking to insist on Purchase where Expense of Bridges, &c. exceeds the Value.*—If any such land shall be so cut through and divided as to leave on either side of the works a piece of land of less extent than half a statute acre, or of less value than the expense of making a bridge, culvert, or such other communication between the land so divided as the promoters of the undertaking are, under the provisions of this or the special act, or any act incorporated therewith, compellable to make, and if the owner of such lands have not other lands adjoining such piece of land, and require the promoters of the undertaking to make such communication, then the promoters of the undertaking may require such owner to sell to them such piece of land; and any dispute as to the value of such piece of land, or as to what would be the expense of making such communication, shall be ascertained as herein provided for cases of disputed compensation; and on the occasion of ascertaining the value of the land required to be taken for the purposes of the works, the sheriff, or the jury, or the arbiters, as the case may be, shall, if required by either party, ascertain by their verdict or award the value of any such severed piece of land, and also what would be the expense of making such communication.

### Common Lands.

And with respect to such lands as shall be of the nature of commonty, be it enacted as follows:

XCIII. *Proceedings in Regard to Lands in Commonty, &c.*—The promoters of the undertaking may convene a meeting of the parties entitled to any rights of property or servitude, or other rights, in or over such lands, to be held at some convenient place in the neighbourhood of the lands, for the purpose of their appointing a committee to treat with the promoters of the undertaking for the compensation to be paid for the extinction of such rights; and every such meeting shall be called by public advertisement to be inserted once at least in two consecutive weeks in some newspaper circulating in the county, or in the respective counties and in the neighbourhood in which such lands shall be situate, the last of such insertions being not more than fourteen nor less than seven days prior to any such meeting; and notice of such meeting shall also, not less than seven days previous to the holding thereof, be affixed upon the door of the church

of the parish where such meeting is intended to be held, or, if there be no such church, some other place in the neighbourhood to which notices are usually affixed; and if such lands be part of a barony a like notice shall be given to the superior or baron.

XCIV. *Meeting to appoint a Committee.*—The meeting so called may appoint a committee, not exceeding five in number, of the parties entitled to any such rights; and at such meeting the decision of the majority of the persons entitled to such rights present shall bind the minority and all absent parties; but such meeting shall not be effectual for the purpose unless five at least of the parties entitled attend the same, if there be so many as five in all of the parties entitled to such rights.

XCV. *Committee to agree with Promoters of the Undertaking.*—It shall be lawful for the committee so chosen to enter into an agreement with the promoters of the undertaking for the compensation to be paid for the extinction of such rights, and all matters relating thereto, for and on behalf of themselves and all other parties interested therein, and all such parties shall be bound by such agreement, and it shall be lawful for such committee to receive the compensation so agreed to be paid; and the receipt of such committee, or of any three of them, for such compensation, shall be an effectual discharge for the same; and such compensation, when received, shall be apportioned by the committee among the several persons interested therein, according to their respective interests; but the promoters of the undertaking shall not be bound to see to the apportionment or to the application of such compensation, nor shall they be liable for the misapplication or nonapplication thereof.

XCVI. *Disputes to be settled as in other Cases.*—If upon such committee being appointed they shall fail to agree with the promoters of the undertaking as to the amount of the compensation to be paid as aforesaid, the same shall be determined as in other cases of disputed compensation, the said committee being deemed and held to be the proprietors of the said rights, with reference to all proceedings for ascertaining the value thereof.

XCVII. *If no Committee be appointed, the Amount to be determined by a Valuator.*—If upon being duly convened by the promoters of the undertaking, no effectual meeting of the parties entitled to such rights shall take place, or if, taking place, such meeting fail to appoint such committee, the amount of such compensation shall be determined by a valuator, to be appointed by the sheriff as hereinbefore provided in the case of parties who cannot be found.

XCVIII. *Upon Payment of Compensation payable to Commoners, the Lands to vest.*—Upon payment or tender to such committee, or any three of them, or if there shall be no such committee, then upon deposit in the bank in the manner provided in the like case of the compensation which shall have been agreed upon or determined in respect of such rights, and it shall be lawful for the promoters of the undertaking, if they think fit, to execute a disposition, duly stamped, in the manner hereinbefore provided in the case of the purchase of lands by them, and thereupon the lands in respect of which such compensation shall have been so paid or deposited shall vest in the promoters of the undertaking freed and discharged from all such rights, and they shall be entitled to immediate possession thereof; and it shall be lawful for the Court of Session, by an order made upon petition, to order payment of the money so deposited as aforesaid, and to make such other order in respect thereto, for the benefit of the parties interested, as it shall think fit.

### Lands in Mortgage.

And with respect to lands subject to any security by real lien, wadset, heritable bond, redeemable bond of annuity, or other right in security, be it enacted as follows:

XCIX. *Power to redeem Heritable Securities.*—It shall be lawful for the promoters of the undertaking to purchase or redeem the interest of any holder of any security upon such lands the whole or part of which may be required for the purposes of the special act, and that whether such promoters shall have previously purchased the right to such lands under burden of the security thereon or not, and whether the holder of such security be entitled thereto in his own right or in trust for any other party, and whether he be in possession of such lands by virtue of such security or not, and whether such security affect such lands solely, or jointly with any other lands not required for the purposes of the special act; and in order thereto the promoters of the undertaking may pay or tender to the holder of such security the principal and interest due on such security, together with his expenses and charges, if any, and also six months additional interest, and thereupon such holder shall immediately convey his interest in the lands comprised in such security to the promoters of the undertaking, or as they shall direct; or the promoters of the undertaking may give notice in writing to such holder that they will pay off the principal and interest due on such security at the end of six months, computed from the day of giving such notice; and if they shall have given any such notice, or if the party entitled to the lands under burden of such security shall have given six months notice of his intention to redeem the same, then, at the expiration of either of such notices, or at any intermediate period, upon payment or tender by the promoters of the undertaking to the holder of such security of the principal money thereon due, and the interest which would become due at the end of six months from the time of giving either of such notices, together with his expenses and charges, if any, such holder shall convey or discharge his interest in the lands comprised in such security to the promoters of the undertaking, or as they shall direct.

C. *Deposit of Money on Refusal to accept Redemption.*—If, in either of the cases

aforesaid, upon such payment or tender, any holder of such securities shall fail to convey or discharge his interest therein as directed by the promoters of the undertaking, or if he fail to adduce a good title thereto, then it shall be lawful for the promoters of the undertaking to deposit in the bank, in the manner provided by this act in like cases, the principal and interest, together with the expenses, if any, due on such security, and also, if such payment be made before the expiration of six months notice as aforesaid, such further interest as would at that time become due; and it shall be lawful for them, if they think fit, to expede an instrument under the hands of a notary public, duly stamped, and to register the same in the manner hereinbefore provided in the case of the purchase of lands by them; and thereupon, as well as upon such conveyance by the holder of the security, if any such be made, all the estate and interest of such holder, and of all persons in trust for him, or for whom he may be a trustee, in such lands, shall vest in the promoters of the undertaking, and they shall be entitled to immediate possession thereof in case such holder were himself entitled to such possession.

CI. *Sum to be paid when Security exceeds Value of Lands.*—If any such lands subject to such security as aforesaid shall be of less value than the principal, interest, and expenses secured thereon, the value of such lands, or the compensation to be made by the promoters of the undertaking in respect thereof, shall be settled by agreement between the holder of such security and the party claiming or entitled to the lands under burden on the one part, and the promoters of the undertaking on the other part; and if the parties aforesaid fail to agree respecting the amount of such value or compensation the same shall be determined as in other cases of disputed compensation; and the amount of such value or compensation, being so agreed upon or determined, shall be paid by the promoters of the undertaking to the holder of the security, in satisfaction of his claim, so far as the same will extend; and upon payment or tender thereof such holder shall, at the expense of the promoters of the undertaking, dispone and assign his debt, so far as paid, and his security, and all his interest in such lands, to the promoters of the undertaking, or as they shall direct, and thereupon the party claiming or entitled to the said lands under burden of the security shall cease to be interested in or have any right thereto, or to any part thereof.

CII. *Deposit of Money when refused on Tender.*—If upon such payment or tender as aforesaid being made any holder of such security fail so to convey his interest therein, or to adduce a good title thereto to the promoters of the undertaking, it shall be lawful for them to deposit the amount of such value or compensation in the bank in the manner provided by this act in like cases; and every such payment or deposit shall be accepted by the holder of the security in satisfaction of his claim, so far as the same will extend, and shall be a full discharge of the lands from all money due thereon; and it shall be lawful for the promoters of the undertaking to expede an instrument under the hands of a notary public, duly stamped, and to register the same in the manner hereinbefore provided in the case of the purchase of lands by them; and thereupon such lands, as to all such right and interest as were then vested in the holder of the security, or any person in trust for him, or in the party claiming or entitled to the lands under burden of the security, shall become absolutely vested in the promoters of the undertaking, and they shall be entitled to immediate possession thereof; nevertheless, all rights and remedies possessed by the holder of such security for recovering payment of his debt, or the residue thereof (as the case may be), or the interest thereof respectively, and all expenses, shall remain in force as a claim against the granter of such security, and against all other parties bound for the same, but not as a claim on the said lands, or against the promoters of the undertaking.

CIII. *Sum to be paid where Part only of Lands under Security taken.*—If a part only of any such lands subject to any security as aforesaid be required for the purposes of the special act, and if the part so required be of less value than the principal money, interest, and costs secured on such lands, and the holder of the security shall not consider the remaining part of such lands a sufficient security for the money charged thereon, or be not willing to discharge the part so required, and if the promoters of the undertaking be unwilling to advance the debt on an assignment thereto, then the value of such part, and also the compensation (if any) to be paid in respect of the severance thereof, or otherwise, shall be settled by agreement between the holder of the security and the party entitled to the land under burden of the security on the one part, and the promoters of the undertaking on the other; and if the parties aforesaid fail to agree respecting the amount of such value or compensation, the same shall be determined as in other cases of disputed compensation; and the amount of such value or compensation, being so agreed upon or determined, shall be paid by the promoters of the undertaking to the holder of the security, in satisfaction of his debt, so far as the same will extend, and thereupon such holder shall convey or discharge to them, or as they shall direct, all his interest in such lands the value whereof shall have been so paid, and the party claiming or entitled to the said lands under burden of the security shall cease to be interested in or have any right thereto or to any part thereof; and a memorandum of what shall have been so paid shall be endorsed on the deed or instrument creating such security, and shall be signed by the holder thereof; and a copy of such memorandum shall at the same time (if required) be furnished by the promoters of the undertaking, at their expense, to the party entitled to the lands under burden of the security.

CIV. *Deposit of Money when refused on Tender.*—If upon payment or tender to any holder of such security of the amount of the value or compensation so agreed upon or determined such holder shall fail to convey or discharge to the promoters of the undertaking, or as they shall direct, his interest in the lands in respect of which such compensation shall so have been paid or tendered, or if he shall fail to adduce a good title thereto, it shall be lawful for the promoters of the undertaking to pay the amount of such value or compensation into the bank in the manner provided by this act in the case of monies required to be deposited in such bank; and such payment or deposit shall be accepted by the holder of such security in satisfaction of his claim, so far as the same will extend, and shall be a full discharge of the portion of the lands so required from all money due thereon, and shall bar the claim of the party claiming or entitled to the said lands under burden of the security; and it shall be lawful for the promoters of the undertaking, if they think fit, to expede an instrument under the hands of a notary public, duly stamped, and to register the same in the manner hereinbefore provided in the case of the purchase of lands by them, and thereupon such lands shall become absolutely vested in the promoters of the undertaking, as to all such right and interest as were then vested in the holder of such security, or any person in trust for him, and in case such holder were himself entitled to such possession, they shall be entitled to immediate possession thereof; nevertheless, every such holder shall have the same powers and remedies for recovering or compelling payment of his claim, or the residue thereof, (as the case may be,) and the interest thereof respectively, upon and out of the residue of the lands subject to such security, or the portion thereof not required for the purposes of the special act, as he would otherwise have had or been entitled to for recovering or compelling payment thereof upon or out of the whole of the lands originally comprised in such security.

CV. *If Sums secured paid off before the stipulated Time, Promoters to pay Expenses incidental to Re-investment.*—Provided always, that in any of the cases hereinbefore provided with respect to lands subject to securities, if in the deed or instrument creating the same a time shall have been limited within which the holder of the security shall not be obliged to receive payment of the principal money thereby secured, and under the provisions hereinbefore contained the holder of the security shall have been required to accept payment of his claim, or of part thereof, at a time earlier than the time so limited, the promoters of the undertaking shall pay to the holders of the security, in addition to the sum which shall have been so paid off, all such expenses as shall be incurred by him in respect of or which shall be incidental to the re-investment of the sum so paid off; such expenses, in case of difference, to be taxed, and payment thereof enforced in the manner herein provided with respect to the expenses of conveyances.

CVI. *Compensation in respect of Loss of Interest.*—If the rate of interest secured by such deed be higher than at the time of the same being so paid off can reasonably be expected to be obtained on re-investing the same, regard being had to the then current rate of interest, the holder of such security shall be entitled to receive from the promoters of the undertaking, in addition to the principal and interest hereinbefore provided for, compensation in respect of the loss to be sustained by him by reason of his claim being so prematurely paid off, the amount of such compensation to be ascertained, in case of difference, as in other cases of disputed compensation; and until payment or tender of such compensation as aforesaid the promoters of the undertaking shall not be entitled, as against such holder, to possession of the lands under the provision hereinbefore contained.

### Lands subject to Rent-Charges.

And with respect to any lands which shall be charged with any feu-duty, ground annual, casualty of superiority, or any rent or other annual or recurring payment or incumbrance not hereinbefore provided for, be it enacted as follows:

CVII. *Company to continue the Payment of Feu-duties, &c.*—It shall be lawful for the promoters of the undertaking to enter upon and continue in possession of such lands, without redeeming the charges thereon, provided they pay the amount of such annual or recurring payment when due, and otherwise fulfil all obligations accordingly, and provided they shall not be called upon by the party entitled to the charge to redeem the same.

CVIII. *Discharge of Lands from such Charge.*—If any difference shall arise between the promoters of the undertaking, and the party entitled to any such charge upon any lands required to be taken for the purposes of the special act, respecting the consideration to be paid for the discharge of such lands therefrom, or from the portion thereof affecting the lands required for the purposes of the special act, the same shall be determined as in other cases of disputed compensation.

CIX. *Discharge of Part of Lands from Charge.*—If part only of the lands charged with any such feu-duty, ground annual, casualty of superiority, or any rent, payment, or incumbrance, be required to be taken for the purposes of the special act, the apportionment of any such charge may be settled by agreement between the party entitled to such charge and the owner of the lands on the one part, and the promoters of the undertaking on the other part, and if such apportionment be not so settled by agreement the same shall be settled by the sheriff; but if the remaining part of the lands so jointly subject be a sufficient security for such charge, then, with consent of the owner of the lands so jointly subject, it shall be lawful for the party entitled to

such charge to discharge therefrom the lands required, on condition or in consideration of such other lands remaining exclusively subject to the whole thereof.

CX. *Deposit in Case of Refusal to discharge.*—Upon payment or tender of the compensation so agreed upon or determined to the party entitled to any such charge as aforesaid, such party shall execute to the promoters of the undertaking a discharge thereof; and if he fail so to do, or if he fail to adduce a good title to such charge, it shall be lawful for them to deposit the amount of such compensation in the bank in the manner hereinbefore provided in like cases; and also, if they think fit, to expede an instrument under the hands of a notary public, duly stamped, and to register the same in the manner hereinbefore provided in the case of the purchase of lands by them; and thereupon the feu-duty, ground annual, casualty of superiority, rent, payment, or incumbrance, or the portion thereof in respect whereof such compensation shall so have been paid, shall cease and be extinguished.

CXI. *Charge to continue on Lands not taken.*—If any such lands be so discharged from any such charge or incumbrance, or portion thereof, to which they were subject jointly with other lands, such last-mentioned lands shall alone be charged with the whole of such charge, or with the remainder thereof, as the case may be, and the party entitled to the charge shall have all the same rights and remedies over such last-mentioned lands, for the whole or for the remainder of the charge, as the case may be, as he had previously over the whole of the lands subject to such charge; and upon any such charge or portion of charge being so discharged the promoters of the undertaking, if required so to do, shall execute and grant in due form a probative deed or instrument, declaring what part of the lands originally subject to such charge shall have been purchased by virtue of the special act, and if the lands be discharged from part of such charge, what proportion of such charge shall have been discharged, and how much thereof continues payable, or if the lands so required shall have been discharged from the whole of such charge, then that the remaining lands are thenceforward to remain exclusively charged therewith; and such deed or instrument shall be made and executed at the expense of the promoters of the undertaking, and shall be competent evidence in all courts and elsewhere of the facts therein stated.

### Lands subject to Leases.

And with respect to lands subject to leases, be it enacted as follows:

CXII. *Where Part only of Lands under Lease taken, the Rent to be apportioned.*—If any lands shall be comprised in a lease or missive of lease for a term of years unexpired, part only of which lands shall be required for the purposes of the special act, the rent payable in respect of the lands comprised in such lease or missive of lease shall be apportioned between the lands so required and the residue of such lands, and such apportionment may be settled by agreement between the lessor and lessee of such lands on the one part, and the promoters of the undertaking on the other part, and if such apportionment be not so settled by agreement between the parties such apportionment shall be settled by the sheriff; and after such apportionment the lessee of such lands shall, as to all future accruing rent, be liable only to so much of the rent as shall be so apportioned in respect of the lands not required for the purposes of the special act; and as to the lands not so required, and as against the lessee, the lessor shall have all the same rights and remedies for the recovery of such portion of rent as previously to such apportionment he had for the recovery of the whole rent reserved by such lease or missive of lease; and all the obligations, conditions, and agreements of such lease or missive of lease, except as to the amount of rent to be paid, shall remain in force with regard to that part of the land which shall not be required for the purposes of the special act, in the same manner as they would have been in case such part only of the land had been included in the lease or missive of lease.

CXIII. *Tenants to be compensated.*—Every such lessee as last aforesaid shall be entitled to receive from the promoters of the undertaking compensation for the damage done to him in his tenancy by reason of the severance of the lands required from those not required, or otherwise by reason of the execution of the works.

CXIV. *Compensation to be made to Tenants for a Year, &c.*—If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any land so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by any in-coming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by the severing of the lands held by him, or otherwise injuriously affecting the same, and the amount of such compensation shall be determined by the sheriff, in case the parties differ about the same; and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special act.

CXV. *Where greater Interest claimed than from Year to Year the Lease or Missive to be produced.*—If any party, having a greater interest than as tenant for a year or from year to year, claim compensation in respect of any unexpired term or interest

under any lease, missive of lease, or grant of any such lands, the promoters of the undertaking may require such party to produce the lease, missive of lease, or grant in respect of which such claim shall be made, or other legal evidence thereof in his power; and if, after demand made in writing by the promoters of the undertaking, such lease, missive of lease, or grant or other legal evidence thereof, be not produced within twenty-one days, the party so claiming compensation shall be considered as a tenant holding only from year to year, and be entitled to compensation accordingly.

CXVI. *Limit of Time for compulsory Purchase.*—And be it enacted, that the powers of the promoters of the undertaking for the compulsory purchase or taking of lands for the purposes of the special act shall not be exercised after the expiration of the prescribed period, and if no period be prescribed not after the expiration of three years from the passing of the special act.

### Interests omitted to be purchased.

And with respect to interest in lands which have by mistake been omitted to be purchased, be it enacted as follows:

CXVII. *Promoters of the Undertaking empowered to purchase Interests in Lands the Purchase whereof may have been omitted by Mistake.*—If at any time after the promoters of the undertaking shall have entered upon any lands which under the provisions of this or the special act, or any act incorporated therewith, they were authorized to purchase, and which shall be permanently required for the purposes of the special act, any party shall appear to be entitled to any estate, right, or interest in or charge affecting such lands which the promoters of the undertaking shall through mistake or inadvertency have failed or omitted duly to purchase or to pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters of the undertaking shall remain in the undisturbed possession of such lands, provided, within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters of the undertaking, or in case the same shall be disputed, then within six months after the right thereto shall have been finally established by law in favour of the party claiming the same, the promoters of the undertaking shall purchase or pay compensation for the same, and shall also pay to such party, or to any other party who may establish a right thereto, full compensation for the profits or interest which would have accrued to such parties respectively in respect thereof during the interval between the entry of the promoters of the undertaking thereon and the time of the payment of such purchase money or compensation by the promoters of the undertaking, so far as such profits or interest may be recoverable in law; and such purchase money or compensation shall be agreed on or awarded and paid in like manner as according to the provisions of this act the same respectively would have been agreed on or awarded and paid in case the promoters of the undertaking had purchased such estate, right, interest, or charge before their entering upon such land, or as near thereto as circumstances will admit.

CXVIII. *How Value of such Lands to be estimated.*—In estimating the compensation to be given for any such last-mentioned lands, or any estate or interest in the same, or for any profits thereof, the jury, or arbiters, or sheriff, as the case may be, shall assess the same according to what they shall find to have been the value of such lands, estate, or interest, and profits, at the time such lands were entered upon by the promoters of the undertaking, and without regard to any improvements or works made in the said lands by the promoters of the undertaking, and as though the works had not been constructed.

CXIX. *Promoters of the Undertaking to pay the Expenses of Litigation as to such Lands.*—In addition to the said purchase money, compensation, or satisfaction, and before the promoters of the undertaking shall become absolutely entitled to any such estate, interest, or charge, or to have the same merged or extinguished for their benefit, they shall, when the right to any such estate, interest, or charge shall have been disputed by the company, and determined in favour of the party claiming the same, pay the full expenses of any proceedings at law or in equity for the determination or recovery of the same to the parties with whom any such litigation in respect thereof shall have taken place; and such expenses shall, in case the same shall be disputed, be settled by the proper officer of the Court in which such litigation took place.

### Sale of superfluous Lands.

And with respect to lands acquired by the promoters of the undertaking, under the provisions of this or the special act, or any act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:

CXX. *Lands not wanted to be sold, or in Default to vest in Owners of adjoining Lands.*—Within the prescribed period, or if no period be prescribed within ten years after the expiration of the time limited by the special act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands in such manner as they may deem most advantageous, and apply the purchase money arising from such sales to the purposes of the special act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the

a nds adjoining thereto in proportion to the extent of their lands respectively adjoining the same.

CXXI. *Lands to be offered to Owner of Lands from which they were severed, or to adjoining Owners.*—Before the promoters of the undertaking dispose of any such superfluous lands they shall, unless such lands be situate within a town, or be lands built upon, or be used for building purposes, first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed; or if such person refuse to purchase the same, or cannot, after diligent inquiry, be found, then the like offer shall be made to the person or to the several persons whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands; and where more than one such person shall be entitled to such right of pre-emption such offer shall be made to such persons in succession, one after another, in such order as the promoters of the undertaking shall think fit.

CXXII. *Right of Pre-emption to be claimed within Six Weeks.*—If any such persons be desirous of purchasing such lands, then, within six weeks after such offer of sale, they shall signify their desire in that behalf to the promoters of the undertaking; or if they decline such offer, or if for six weeks they neglect to signify their desire to purchase such lands, the right of pre-emption of every such person so declining or neglecting, in respect of the lands included in such offer, shall cease; and a declaration in writing, made before the sheriff by some person not interested in the matter in question, stating that such offer was made, and was refused, or not accepted within six weeks from the time of making the same, or that the person or all the persons entitled to the right of pre-emption were out of the country, or could not, after diligent inquiry, be found, or were not capable of entering into a contract for the purchase of such lands, shall in all courts be sufficient evidence of the facts therein stated.

CXXIII. *Differences as to Price to be settled by Arbitration.*—If any person entitled to such pre-emption be desirous of purchasing any such lands, and such person and the promoters of the undertaking do not agree as to the price thereof, then such price shall be ascertained by arbitration, and the expenses of such arbitration shall be in the discretion of the arbiters.

CXXIV. *Lands to be conveyed to the Purchasers.*—Upon payment or tender to the promoters of the undertaking of the purchase money so agreed upon or determined as aforesaid they shall convey such lands to the purchasers thereof by deed, under the common seal of the promoters of the undertaking, if they be a corporation, or if not a corporation under the hands of the promoters of the undertaking or any two of the directors or managers thereof acting by the authority of the body; and a deed so executed shall be effectual to vest the lands comprised therein in the purchaser of such lands for the estate which shall so have been purchased by him, and a receipt under such common seal, or under the hands of two of the directors or managers of the undertaking, as aforesaid, shall be a sufficient discharge to the purchaser of any such lands for the purchase money in such receipt expressed to be received.

CXXV. *Effect of Word "dispone" in Conveyances.*—And be it enacted, that in every conveyance of lands to be made by the promoters of the undertaking under this or the special act the word "dispone" shall operate as a clause of absolute warrandice by the promoters of the undertaking, for themselves and their successors, or for themselves, their heirs, executors, administrators, and assigns, as the case may be, to the respective disponees therein named, and the successors, heirs, executors, administrators, and assigns of such disponees, according to the quality or nature of such conveyances, and of the estate or interest therein expressed to be thereby conveyed, except so far as the same shall be restrained or limited by express words contained in such conveyance.

CXXVI. *Superiorities not to be affected.*—And be it enacted, that the rights and titles to be granted in manner herein mentioned in and to any lands taken and used for the purposes of this act shall, unless otherwise specially provided for, in nowise affect or diminish the right of superiority in the same, which shall remain entire in the person granting such rights and titles; but in the event of the lands so used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors: Provided always, that before entering into possession of any lands full compensation shall be made to the said superiors for all loss which they may sustain by being deprived of any casualties, or otherwise by reason of any procedure under this act.

CXXVII. *Land Tax and Poor's Rate to be made good.*—And be it enacted, that if the promoters of the undertaking become possessed, by virtue of this or the special act, or any act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor's rate or prison assessment, they shall from time to time, until the works shall be completed and assessed to such land tax and poor's rate and prison assessment, be liable to make good the deficiency in the several assessments for land tax and poor's rate and prison assessment by reason of such lands having been taken or used for the purposes of the work; and such deficiency shall be computed according to the rental at which such lands, with any building thereon,

were valued or rated at the time of the passing of the special act; and on demand of such deficiency the promoters of the undertaking or their treasurer shall pay all such deficiencies to the collector of the said assessments respectively; nevertheless, if at any time the promoters of the undertaking think fit to redeem such land tax, they may do so, in accordance with the powers in that behalf given by the acts for the redemption of the land tax.

### Notices.

And with respect to the giving of notices, be it enacted as follows:

CXXVIII. *Service of Notices upon the Promoters of the Undertaking.*—Any summons or notice, or any writ or other proceeding at law or equity required to be served upon the promoters of the undertaking, may be served by the same being left at or transmitted through the post, directed to the principal office of the promoters of the undertaking, or one of the principal offices where there shall be more than one, or being given personally, or transmitted through the post, directed to the secretary, or in case there be no secretary then by being given to the solicitor of the said promoters.

CXXIX. *Tender of Amends.*—And be it enacted, That if any party shall have committed any irregularity, trespass, or other wrongful proceeding in the execution of this or the special act, or any act incorporated therewith, or by virtue of any power or authority thereby given, and if, before action brought in respect thereof, such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and if no such tender shall have been made it shall be lawful for the defender, by leave of the court where such action shall be pending, at any time before the record is closed to pay into court such sum of money as he shall think fit, and thereupon such proceedings shall be had as in other cases where defenders are allowed to pay money into court.

### Recovery of Penalties.

And with respect to the recovery of forfeitures, penalties, and expenses, be it enacted as follows:

CXXX. *Penalties to be summarily recovered before the Sheriff or two Justices.*—Every penalty or forfeiture imposed by this or the special act, or any act incorporated therewith, or by any by-law made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before the sheriff or two justices; and on complaint being made to any sheriff or justice he shall issue an order requiring the party complained against to appear before himself, if the order be issued by a sheriff, or before two or more justices, if the order be issued by a justice, at a time and place to be named in such order; and every such order shall be served on the party offending either in person or by leaving the same with some inmate at his usual place of abode; and upon the appearance of the party complained against, or in his absence, after proof of the due service of such order, it shall be lawful for any sheriff or two justices to proceed to the hearing of the complaint; and upon proof of the offence, either by the confession of the party complained against, or upon the oath of one credible witness or more, it shall be lawful for such sheriff or justices to convict the offender, and upon such conviction to adjudge the offender to pay the penalty or forfeiture incurred, as well as such expenses attending the conviction as such sheriff or justices shall think fit.

CXXXI. *Penalties to be levied by Poinding and Sale.*—If forthwith upon any such adjudication as aforesaid the amount of the penalty or forfeiture, and of such expenses as aforesaid, be not paid, the amount of such penalty and expenses may be levied by poinding and sale, and such sheriff or justices shall issue his or their warrant of poinding and sale accordingly.

CXXXII. *Poinding, &c. against the Treasurer.*—If any such sum shall be payable by the promoters of the undertaking, and if sufficient goods of the said promoters cannot be found whereon to levy the same, it may, if the amount thereof do not exceed £20, be recovered by poinding and sale of the goods of the treasurer of the said promoters, and the sheriff, on application, shall issue his warrant accordingly; but no such poinding and sale shall be executed against the goods of such treasurer unless seven days previous notice in writing, stating the amount so due, and demanding payment thereof, have been given to such treasurer, or left at his residence; and if such treasurer pay any money under such poinding and sale as aforesaid he may retain the amount so paid by him, and all expenses occasioned thereby, out of any money belonging to the promoters of the undertaking coming into his custody or control, or he may sue the promoters of the undertaking for the same.

CXXXIII. *Poinding, &c. how to be levied.*—Where in this or the special act, or any act incorporated therewith, any sum of money, whether in the nature of penalty, expenses, or otherwise, is directed to be levied by poinding and sale, such sum of money shall be levied by poinding and sale of the goods and effects of the party liable to pay the same, and the overplus arising from the sale of such goods and effects, after satisfying such sum of money, and the expenses of the poinding and sale, shall be returned, on demand, to the party whose goods shall have been seized.

CXXXIV. *Poinding not unlawful for Want of Form.*—No poinding and sale made by virtue of this or the special act, or any act incorporated therewith, shall be deemed

unlawful, nor shall any party making the same be deemed a trespasser or wrong-doer, on account of any defect or want of form in the summons, conviction, warrant, or other proceeding relating thereto, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage in an action before the sheriff court.

CXXXV. *Application of Penalties.*—The sheriff or justices by whom any such penalty or forfeiture shall be imposed, where the application thereof is not otherwise provided for, may award not more than one half thereof to the informer, and shall award the remainder to the kirk session, or treasurer or collector of the funds for the poor of the parish in which the offence shall have been committed, for the benefit of the poor of such parish.

CXXXVI. *Penalties to be sued for within Six Months.*—No person shall be liable to the payment of any penalty or forfeiture imposed by virtue of this or the special act, or any act incorporated therewith, for any offence made cognizable before the sheriff or justices, unless the complaint respecting such offence shall have been made before such sheriff or some justice within six months next after the commission of such offence.

CXXXVII. *Form of Conviction.*—The sheriff or justice or justices before whom any person shall be convicted of any offence against this or the special act, or any act incorporated therewith, may cause the conviction to be drawn up according to the form in the schedule (C.) to this act annexed.

CXXXVIII. *Proceedings not to be quashed for Want of Form, &c.*—No proceeding in pursuance of this or the special act, or any act incorporated therewith, shall be quashed or vacated for want of form, nor shall the same be removed by suspension or otherwise into any superior court.

CXXXIX. *Power of Appeal from Sheriff Substitute to Sheriff.*—In all cases which may come before any sheriff substitute under this or the special act, or any act incorporated therewith, in which written pleadings shall have been allowed, and a written record shall have been made up, and where the evidence which has been led by the parties shall have been reduced to writing, but in no other case whatever, it shall be competent for any of the parties thereto, within seven days after a final judgment shall have been pronounced by such sheriff substitute, to appeal against the same to the sheriff of the county, by lodging a minute of appeal with the sheriff clerk of such county or his depute; and the said sheriff shall thereupon review the proceedings of the said sheriff substitute, and whole process, and, if he think proper, hear the parties *vivâ voce* thereon, and pronounce judgment; and such judgment shall in no case be subject to review by suspension or advocation, or by reduction, on any ground whatever.

CXL. *Parties allowed to appeal from Justices to Quarter Sessions, on giving Security.*—If any party shall feel aggrieved by any determination or adjudication of any justice or two or more justices, with respect to any penalty or forfeiture under the provisions of this or the special act, or any act incorporated therewith, such party may appeal to the general quarter sessions for the county or place in which the cause of appeal shall have arisen; but no such appeal shall be entertained unless it be made within four months next after the making of such determination or adjudication, nor unless ten days notice in writing of such appeal, stating the nature and grounds thereof, be given to the party against whom the appeal shall be brought, nor unless the appellant forthwith after such notice enter into recognizances, with two sufficient sureties, before a justice, conditioned duly to prosecute such appeal, and to abide the order of the court thereon.

CXLI. *Court to make such Order as they think reasonable.*—At the quarter sessions for which such notice shall be given the court shall proceed to hear and determine the appeal in a summary way, or they may, if they think fit, adjourn it to the following sessions; and upon the hearing of such appeal the court may, if they think fit, mitigate any penalty or forfeiture, or they may confirm or quash the adjudication, and order any money paid by the appellant, or levied by distress upon his goods, to be returned to him, and may also order such further satisfaction to be made to the party injured as they may judge reasonable, and they may make such order concerning the expenses, both of the adjudication and of the appeal as they may think reasonable.

### Access to Special Act.

And with respect to the provision to be made for affording access to the special act by all parties interested, be it enacted as follows:

CXLII. *Copies of special Act to be kept and deposited, and allowed to be inspected.*—The company shall at all times, after the expiration of six months after the passing of the special act, keep in their principal office of business a copy of the special act, printed by the printers to her Majesty, or some of them; and where the undertaking shall be a railway, canal, or other like undertaking, the works of which shall not be confined to one county, shall also within the space of such six months deposit in the office of each of the sheriff clerks of the several counties into which the works shall extend a copy of such special act, so printed as aforesaid; and the said sheriff clerks shall receive, and they and the company respectively shall retain, the said copies of the special act, and shall permit all persons interested to inspect the same, and make extracts or copies therefrom, in the like manner, and upon the like terms,

and under the like penalty for default, as is provided in the case of certain plans and sections by an act passed in the first year of the reign of her present Majesty, intituled *An Act to compel Clerks of the Peace for Counties, and other Persons, to take the Custody of such Documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament.* [7 Wm. IV. and 1 Vict. c. 83.]

CXLIII. *Penalty on Company failing to keep and deposit Act.*—If the company shall fail to keep or deposit, as hereinbefore mentioned, any of the said copies of the special act, they shall forfeit £20 for every such offence, and also £5 for every day afterwards during which such copy shall be not so kept or deposited.

CXLIV. *Act may be amended this Session.*—And be it enacted, that this act may be amended or repealed by any act to be passed in the present session of parliament.

## SCHEDULES REFERRED TO IN THE FOREGOING ACT.

### SCHEDULE (A.)

*Form of Conveyance.*

I of in consideration of the sum of paid to me [*or, as the case may be*, into the Bank (*or* to *A. B.* of and *C. D.* of two trustees appointed to receive the same)], pursuant to an act passed, &c., intituled, &c., by the [*here name the Company*], incorporated by the said act, do hereby sell, alienate, dispone, convey, assign, and make over from me, my heirs and successors, to the said Company, their successors and assignees, for ever, according to the true intent and meaning of the said act, all [*describing the premises to be conveyed*], together with all rights and pertinents thereto belonging, and all such right, title, and interest in and to the same as I and my foresaids are or shall become possessed of, or are by the said act empowered to convey. [*Here insert the conditions (if any) of the conveyance, and a registration clause for preservation and diligence, and a testing clause, according to the form of the law of Scotland.*]

### SCHEDULE (B.)

*Form of Conveyance in Consideration of Feu-duty or Rent-charge.*

I of in consideration of the feu-duty or rent to be paid to me, my heirs and assigns, as hereinafter mentioned, by the [*here name the company*], established and incorporated by virtue of an act passed, &c., intituled, &c. do hereby dispone, convey, and make over from me, my heirs and successors, to the said company, their successors and assignees, for ever, according to the true intent and meaning of the said act, all [*describing the premises to be conveyed*], together with all rights and pertinents thereunto belonging, and all my right, title, and interest in and to the same and every part thereof, they the said company, their successors and assignees, yielding and paying unto me, my heirs and assignees, one clear annual feu duty or rent of

by equal half-yearly portions henceforth on the [*stating the days. Here insert conditions of the conveyance (if any), and insert a registration clause for preservation and diligence, and a testing clause, according to the form of the law of Scotland.*]

### SCHEDULE (C.)

*Form of Conviction before*

to wit.

Be it remembered, That on the day of in the year of our Lord A. B. is convicted before me C., the sheriff, *or* before us D., E., two of Her Majesty's justices of the peace for the county of [*here describe the offence generally, and the time and place when and where committed*], contrary to the [*here name the special act*]. Given under my hand [*or* under our hands], the day and year first above written.

C.
D.
E.

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## III. RAILWAYS' CLAUSES CONSOLIDATION ACT, 8 & 9 VICT. c. 33.

*An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the making of Railways in Scotland.* July 21, 1845.

WHEREAS it is expedient to comprise in one general act sundry provisions usually introduced into Acts of Parliament authorizing the construction of railways in Scotland, and that as well for the purpose of avoiding the necessity of repeating such provisions

in each of the several acts relating to such undertakings, as for ensuring greater uniformity in the provisions themselves: And whereas a bill is now pending in Parliament, intituled *An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the taking of Lands for Undertakings of a Public Nature in Scotland*, and which is intended to be called "The Lands' Clauses Consolidation (Scotland) Act, 1845:" Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same,—

*Operation of the Act confined to future Railways.*—That the provisions of this act shall apply to every railway in Scotland which shall by any act which shall hereafter be passed be authorized to be constructed, and this act shall be incorporated with such act; and all the clauses and provisions of this act, save so far as they shall be expressly varied or excepted by any such act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other act which shall be incorporated with such act, form part of such act, and be construed together therewith, as forming one act.

*Interpretations in this Act.*—And with respect to the construction of this act, and other acts to be incorporated therewith, be it enacted as follows:

II. *Special Act.*—The expression "the special act" used in this act shall be construed to mean any act which shall be hereafter passed authorizing the construction of a railway, and with which this act shall be so incorporated as aforesaid; and the word "prescribed" used in this act in reference to any matter herein stated shall be construed to refer to such matter as the same shall be prescribed or provided for in the special act, and the sentence in which such word shall occur shall be construed as if, instead of the word "prescribed," the expression "prescribed for that purpose in the special act" had been used; and the expression "the lands" shall mean the lands which shall by the special act be authorized to be taken or used for the purposes thereof; and the expression "the undertaking" shall mean the railway and works, of whatever description, by the special act authorized to be executed.

III. *Interpretations in this and the special Act.*—The following words and expressions both in this and the special act shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; (that is to say,)

*Number.*—Words importing the singular number only shall include the plural number; and words importing the plural number only shall include also the singular number:

*Gender.*—Words importing the masculine gender only shall include females:

*Lands.*—The word "lands" shall include lands, houses, tenements, and heritages of any tenure:

*Lease.*—The word "lease" shall include a missive or an agreement for a lease:

*Toll.*—The word "toll" shall include any rate or charge or other payment payable under the special act, for any passenger, animal, carriage, goods, merchandise, articles, matters, or things conveyed on the railway:

*Month.*—The word "month" shall mean calendar month:

*Lord Ordinary.*—The "Lord Ordinary" shall mean the Lord Ordinary of the Court of Session in Scotland officiating on the bills in time of vacation, or the junior Lord Ordinary, if in time of session, as the case may be:

*Oath.*—The word "oath" shall include affirmation in the case of Quakers, or other declaration or solemnity lawfully substituted for an oath in the case of any other persons exempted by law from the necessity of taking an oath:

*County.*—The word "county" shall include any ward or other like division of a county:

*Sheriff.*—The word "sheriff" shall include the sheriff substitute:

*Justice.*—The word "justice" shall mean justice of the peace acting for the county, city, or place where the matter requiring the cognizance of any such justice shall arise, and who shall not be interested in the matter; and where such matter shall arise in respect of lands, being the property of one and the same party, situate not wholly in any one county, city, or place, shall mean a justice acting for the county, city, or place where any part of such lands shall be situate, and who shall not be interested in such matter; and where any matter shall be authorized or required to be done by two justices, the expression "two justices" shall be understood to mean two or more justices assembled and acting together:

*Owner.*—Where, under the provisions of this or the special act, any notice shall be required to be given to the owner of any lands, or where any act shall be authorized or required to be done with the consent of any such owner, the word "owner" shall be understood to mean any person or corporation, who, under the provisions of this or the special act, or any act incorporated therewith, would be enabled to sell and convey lands to the company:

*The Bank.*—The expression "the bank" shall mean any one of the incorporated or chartered banks in Scotland.

*The Company.*—The expression "the company" shall mean the company or party which shall be authorized by the special act to construct the railway:

*The Railway.*—The expression "the railway" shall mean the railway and works by the special act authorized to be constructed:

*Board of Trade.*—The expression "the Board of Trade" shall mean the Lords of

the Committee of her Majesty's Privy Council appointed for trade and foreign plantations.

IV. *Short Title of the Act.*—And be it enacted, that in citing this act in other acts of parliament and in legal instruments it shall be sufficient to use the expression "The Railways' Clauses Consolidation (Scotland) Act, 1845."

V. *Form in which Portions of this Act may be incorporated in other Acts.*—And whereas it may be convenient in some cases to incorporate with acts hereafter to be passed some portion only of the provisions of this act; be it therefore enacted, that for the purpose of making any such incorporation it shall be sufficient in any such act to enact that the clauses of this act with respect to the matter so proposed to be incorporated (describing such matter as it is described in this act in the words introductory to the enactment with respect to such matter) shall be incorporated with such act; and thereupon all the clauses and provisions of this act with respect to the matter so incorporated shall, save so far as they shall be expressly varied or excepted by such act, form part of such act, and such act shall be construed as if the substance of such clauses and provisions were set forth therein with reference to the matter to which such act shall relate.

CONSTRUCTION OF RAILWAY.

And with respect to the construction of the railway and the works connected therewith, be it enacted as follows:

VI. *The Construction of the Railway to be subject to the Provisions of this Act and he Lands' Clauses Consolidation (Scotland) Act.*—In exercising the power given to the company by the special act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this act and in the said Lands' Clauses Consolidation (Scotland) Act; and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special act or any act incorporated therewith, vested in the company; and, except where otherwise provided by this or the special act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands' Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the said last-mentioned act shall be applicable to determine the amount of any such compensation, and to enforcing the payment or other satisfaction thereof.

VII. *Errors and Omissions in Plans to be corrected.*—If any omission, misstatement, or erroneous description shall have been made of any lands, or of the owners, lessees, or occupiers of any lands, described on the plans or books of reference mentioned in the special act, or in the schedule to the special act, it shall be lawful for the company, after giving ten days notice to the owners of the lands affected by such proposed correction, to apply to the sheriff for the correction thereof; and if it shall appear to such sheriff that such omission, misstatement, or erroneous description arose from mistake, he shall certify the same accordingly, and shall in such certificate state the particulars of any such omission, and in what respect any such matter shall have been misstated or erroneously described; and such certificate shall be deposited in the office of the principal sheriff-clerk in every county in which the lands affected thereby shall be situate, and shall also be deposited with the schoolmasters of the several parishes (or, in royal burghs, with the town clerk,) in which the lands affected thereby shall be situate; and such certificate shall be kept by such sheriff clerks, schoolmasters, and other persons respectively, along with the other documents to which they relate; and thereupon such plan, book of reference, or schedule, shall be deemed to be corrected according to such certificate; and it shall be lawful for the company to make the works in accordance with such certificate.

VIII. *Works not to be proceeded with until Plans of all Alterations authorized by Parliament have been deposited.*—It shall not be lawful for the company to proceed in the execution of the railway unless they shall have previously to the commencement of such work deposited in the office of the principal sheriff clerk in every county in or through which the railway is intended to pass, a plan and section of all such alterations from the original plan and section as shall have been approved of by parliament, on the same scale and containing the same particulars as the original plan and section of the railway, and shall also have deposited with the schoolmasters of the several parishes (or, in royal burghs, with the town clerk,) in or through which such alterations shall have been authorized to be made, copies or extracts of or from such plans and sections as shall relate to such parishes respectively.

IX. *Sheriff Clerks, &c. to receive Plans of Alterations, and allow Inspection.*—The said sheriff clerks, schoolmasters, and town clerks shall receive the said plans and sections of alterations, and copies and extracts thereof respectively, and shall retain the same, as well as the said original plans and sections, and shall permit all persons interested to inspect any of the documents aforesaid, and to make copies and extracts of and from the same, in the like manner and upon the like terms, and under the like penalty for default, as is provided in the case of the original plans and sections by an act passed in the first year of the reign of her present Majesty, intituled *An Act to compel Clerks of the Peace for Counties and other persons to take the Custody of such*

*Documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament.* [7 Wm. IV. & 1 Vict. c. 83.]

X. *Copies to be Evidence.*—True copies of the said plans and books of reference, or of any alteration or correction thereof, or extract therefrom, certified by any such sheriff clerk in Scotland, which certificate such sheriff clerk shall give to all parties interested, when required, shall be received in all courts of justice or elsewhere as evidence of the contents thereof.

XI. *Limiting Deviation from Datum Line described on Sections, &c.*—In making the railway it shall not be lawful for the company to deviate from the levels of the railway, as referred to the common datum line described in the section approved of by parliament, and as marked on the same, to any extent exceeding in any place five feet, or, in passing through a town, village, street, or land continuously built upon two feet, without the previous consent in writing of the owners and occupiers of the land in which such deviation is intended to be made; or in case any street or public highway shall be affected by such deviation, then the same shall not be made without the consent of the trustees or commissioners having the control of such street or public highway, or, if there be no such trustees or commissioners, without the consent of the sheriff, or without the consent of the trustees or commissioners for any public sewers, or the proprietors of any canal, navigation, gas works, or water-works, affected by such deviation: Provided always, that it shall be lawful for the company to deviate from the said levels to a further extent without such consent as aforesaid, by lowering solid embankments or viaducts, provided that the requisite height of headway as prescribed by act of parliament be left for roads, streets, or canals passing under the same: Provided also, that notice of every application to the sheriff for the purpose of considering the matter shall, fourteen days previous to such application, be given in some newspaper circulating in the county, and also be affixed upon the door of the parish church in which such deviation or alteration is intended to be made, or, if there be no church, some other place to which notices are usually affixed.

XII. *Previous Notice of such Deviation to be given.*—Before it shall be lawful for the company to make any greater deviation from the level than five feet, or in any town, village, street, or land continuously built upon, two feet, after having obtained such consent as aforesaid, it shall be incumbent on the company to give notice of such intended deviation by public advertisement, inserted once at least in two newspapers, or twice at least in one newspaper, circulating in the district or neighbourhood where such deviation is intended to be made, three weeks at least before commencing to make such deviation; and it shall be lawful for the owner of any lands prejudicially affected thereby, at any time before the commencement of the making of such deviation, to apply to the Board of Trade, after giving ten days notice to the company, to decide whether, having regard to the interests of such applicant, such proposed deviation is proper to be made; and it shall be lawful for the Board of Trade, if they think fit to decide such question accordingly, and by their certificate in writing either to disallow the making of such deviation, or to authorize the making thereof, either simply or with any such modification as shall seem proper to the Board of Trade; and after any such certificate shall have been given by the Board of Trade it shall not be lawful for the company to make such deviation, except in conformity with such certificate.

XIII. *Arches, Tunnels, &c. to be made as marked on deposited Plans.*—Where in any place it is intended to carry the railway on an arch, or arches, or other viaduct, as marked on the said plan or section, the same shall be made accordingly; and where a tunnel is marked on the said plan or section as intended to be made at any place, the same shall be made accordingly; unless the owners, lessees, and occupiers of the land in which such tunnel is intended to be made shall consent that the same shall not be so made.

XIV. *Limiting Deviations from Gradients, Curves, &c.*—It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, or other engineering works described in the said plan or section, except within the following limits, and under the following conditions; (that is to say,)

Subject to the above provisions in regard to altering levels, it shall be lawful for the company to diminish the inclination or gradients of the railway to any extent, and to increase the said inclination or gradients as follows; (that is to say,) in gradients of an inclination not exceeding one in a hundred, to any extent not exceeding ten feet per mile, or to any further extent which shall be certified by the Board of Trade to be consistent with the public safety, and not prejudicial to the public interest; and in gradients exceeding the inclination of one in a hundred, to any extent not exceeding three feet per mile, or to any further extent which shall be so certified by the Board of Trade as aforesaid:

It shall be lawful for the company to diminish the radius of any curve described in the said plan to any extent which shall leave a radius of not less than half a mile, or to any further extent authorized by such certificate as aforesaid from the Board of Trade:

It shall be lawful for the company to make a tunnel, not marked on the said plan or section, instead of a cutting, or a viaduct instead of a solid embankment, if authorized by such certificate as aforesaid from the Board of Trade:

XV. *Lateral Deviations.*—It shall be lawful for the company to deviate from the line delineated on the plans so deposited, provided that no such deviation shall extend to a greater distance than the limits of deviation delineated upon the said plans, nor to

a greater extent in passing through a town than ten yards, or elsewhere to a greater extent than one hundred yards from the said line, and that the railway by means of such deviation be not made to extend into the lands of any person, whether owner, lessee, or occupier, whose name is not mentioned in the books of reference, without the previous consent in writing of such person, unless the name of such person shall have been omitted by mistake, and the fact that such omission proceeded from mistake shall have been certified in manner herein or in the special act provided for in cases of unintentional errors in the said book of reference.

XVI. *Works to be executed.*—Subject to the provisions and restrictions in this and the special act, and any act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works; (that is to say,)

*Inclined Planes, &c.*—They may make or construct, in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, railroads, or tramroads, rivers, canals, brooks, streams, or other waters, within the lands described in the said plans, or mentioned in the said books of reference or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences as they think proper;

*Alteration of Course of Rivers, &c.*—They may alter the course of any rivers not navigable, canals, brooks, streams, or watercourses, and of any branches of navigable rivers, such branches not being themselves navigable, within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper;

*Drains, &c.*—They may make drains or conduits into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway;

*Warehouses, &c.*—They may erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences, as they think proper;

*Alterations and Repairs.*—They may from time to time alter, repair, or discontinue the beforementioned works or any of them, and substitute others in their stead; and

*General Power.*—They may do all other acts necessary for making, maintaining, altering, or repairing, and using the railway:

*Proviso as to Damages.*—Provided always, that in the exercise of the powers by this or the special act granted the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special act, and any act incorporated therewith, provided, to all parties interested, for all damage by them sustained by reason of the exercise of such powers.

XVII. *Works on the Shore of the Sea, &c. not to be constructed without the Authority of the Commissioners of Woods and Forests and Commissioners of the Admiralty.*—It shall not be lawful for the company to construct on the shore of the sea, or of any creek, bay, arm of the sea, or navigable river communicating therewith, where and so far up the same as the tide flows and reflows, any work, or to construct any railway or bridge across any creek, bay, arm of the sea, or navigable river, where and so far up the same as the tide flows and reflows, without the previous consent of her Majesty, her heirs and successors, to be signified in writing under the hands of two of the commissioners of her Majesty's woods, forests, land revenues, works, and buildings, and of the Lord High Admiral of the United Kingdom of Great Britain and Ireland, or the commissioners for executing the office of the Lord High Admiral aforesaid for the time being, to be signified in writing under the hand of the secretary of the Admiralty, and then only according to such plan and under such restrictions and regulations as the said commissioners of her Majesty's woods, forests, land revenues, works, and buildings, and the said Lord High Admiral, or the said commissioners may approve of, such approval being signified as last aforesaid; and where any such work, railway, or bridge shall have been constructed it shall not be lawful for the company at any time to alter or extend the same without obtaining, previously to making any such alteration or extension, the like consents or approvals; and if any such work, railway, or bridge shall be commenced or completed contrary to the provisions of this act, it shall be lawful for the said commissioners of her Majesty's woods, forests, land revenues, works, and buildings, or the said Lord High Admiral, or the said commissioners for executing the office of Lord High Admiral, to abate and remove the same, and to restore the site thereof to its former condition, at the costs and charge of the company; and the amount thereof may be recovered in the same manner as a penalty is recoverable against the company.

XVIII. *Alteration of Water and Gas Pipes, &c.*—It shall be lawful for the company, for the purpose of constructing the railway, to raise, sink, or otherwise alter the position of any of the watercourses, water pipes, or gas pipes belonging to any of the houses adjoining or near to the railway, and also the mains and other pipes laid down by any company or society, who may furnish the inhabitants of such houses or places with

water or gas, and also to remove all other obstructions to such construction, so as the same respectively be done with as little detriment and inconvenience to such company, society, or inhabitants, as the circumstances will admit, and be done under the superintendence of the company to which such water pipes or gas pipes belong, and of the several commissioners or trustees, or persons having control of the pavements, sewers, roads, streets, highways, lanes, and other public passages and places within the parish or district where such mains, pipes, or obstructions shall be situate, or of their surveyor, if they or he think fit to attend, after receiving not less than forty-eight hours notice for that purpose.

XIX. *Company not to disturb Pipes until they have laid down others.*—Provided always, that it shall not be lawful for the company to remove or displace any of the mains or pipes (other than private service pipes), syphons, plugs, or other works belonging to any such company or society, or to do any thing to impede the passage of water or gas into or through such mains or pipes, until good and sufficient mains or pipes, syphons, plugs, and all other works necessary or proper for continuing the supply of water or gas as sufficiently as the same was supplied by the mains or pipes proposed to be removed or displaced, shall at the expense of the company, have been first made and laid down in lieu thereof, and be ready for use, in a position as little varying from that of the pipes or mains proposed to be removed or displaced as may be consistent with the construction of the railway, and to the satisfaction of the surveyor or engineer of such water or gas company or society, or, in case of disagreement between such surveyor or engineer and the company, as a justice shall direct.

XX. *Pipes not to be laid contrary to Act of Parliament, and* 18 *Inches surface Road to be retained.*—It shall not be lawful for the company to lay down any such pipes contrary to the regulations of any act of Parliament relating to such water or gas company or society, or to cause any road to be lowered for the purposes of the railway, without leaving a covering of not less than eighteen inches from the surface of the road over such mains or pipes.

XXI. *Company to make good all Damage.*—The company shall make good all damage done to the property of the water or gas company or society, by the disturbance thereof, and shall make full compensation to all parties for any loss or damage which they may sustain by reason of any interference with the main pipes or works of such water or gas company or society, or with the private service pipes of any person supplied by them with water.

XXII. *When Railway crosses Pipes, Company to make a Culvert.*—If it shall be necessary to construct the railway or any of the works over any mains or pipes of any such water or gas company or society, the company shall, at their own expense, construct and maintain a good and sufficient culvert over such main or pipe, so as to leave the same accessible for the purpose of repairs.

XXIII. *Penalty for obstructing Supply of Gas or Water.*—If by any such operations as aforesaid the company shall interrupt the supply of water or gas they shall forfeit twenty pounds for every day that such supply shall be so interrupted; and such penalty shall be appropriated to the benefit of the poor of the parish in which such obstruction shall occur, in such manner as the minister and kirk session of the parish shall direct.

XXIV. *Penalty for obstructing construction of Railway.*—If any person wilfully obstruct any person acting under the authority of the company in the lawful exercise of their power, in setting out the line of the railway, or pull up or remove any poles or stakes driven into the ground for the purpose of so setting out the line of the railway, or deface or destroy any marks made for the same purpose, he shall forfeit a sum not exceeding five pounds for every such offence.

### Temporary Use of Lands.

And with respect to the temporary occupation of lands near the railway during the construction thereof, be it enacted as follows:

XXV. *Company may occupy temporarily private Roads within Five Hundred Yards of the Railway.*—Subject to the provisions herein and in the special act contained, it shall be lawful for the company, at any time before the expiration of the period by the special act limited for the completion of the railway, to enter upon and use any existing private road, being a road gravelled or formed with stones or other hard materials, and not being an avenue, or a planted or ornamental road, or an approach to any mansion house within the prescribed limits, if any, or, if no limits be prescribed, not being more than five hundred yards distant from the centre of the railway, as delineated on the plans; but before the company shall enter upon or use any such existing road they shall give three weeks notice of their intention to the owners and occupiers of such road, and of the lands over which the same shall pass, and shall in such notice state the time during which, and the purposes for which, they intend to occupy such road, and shall pay to the owners and occupiers of such road, and of the lands through which the same shall pass, such compensation for the use and occupation of such road, either in a gross sum of money or by half-yearly instalments, as shall be agreed upon between such owners and occupiers respectively and the company, or, in case they differ about the compensation, the same shall be settled by the sheriff in the same manner as any compensation not exceeding fifty pounds is directed to be settled by the Lands' Clauses Consolidation (Scotland) Act, 1845.

XXVI. *Power to Owners and Occupiers of Road and Land to object that other Roads should be taken.*—It shall be lawful for the owners and occupiers of any such road, and of the lands over which the same passes, within ten days after the service of the aforesaid notice, by notice in writing to the company, to object to the company making use of such road, on the ground that other roads, such as the company are hereinbefore authorized to use for the purposes aforesaid, or that some public road, would be more fitting to be used for the same, and upon the objection being so made such proceedings may be had as are hereinafter mentioned with respect to lands temporarily occupied by the company, in respect of which three weeks notice is hereinafter required to be given, and in the same manner as if in the provisions relative to such proceedings the word road or roads, or the words road and the land over which the same passes, as the case may require, had been substituted in such provisions for the word lands.

XXVII. *Power to take temporary Possession of Land without previous Payment of Price.*—Subject to the provisions herein and in the special act contained, it shall be lawful for the company, at any time before the expiration of the period by the special act limited for the completion of the railway, without making any previous payment, tender or deposit, to enter upon any lands, within the prescribed limits, or if no limits be prescribed, not being more than two hundred yards distant from the centre of the railway, as delineated on the plans, and not being a garden, orchard, or plantation attached or belonging to a house, nor a park, planted walk, avenue, or ground ornamentally planted, and not being nearer to the mansion house of the owner of any such lands than the prescribed distance, or if no distance be prescribed, then not nearer than five hundred yards therefrom, and to occupy the said lands so long as may be necessary for the construction or repair of that portion of the railway, or of the accommodation works connected therewith, hereinafter mentioned, and to use the same for any of the following purposes; (that is to say,)

For the purpose of taking earth or soil by side cuttings therefrom;

For the purpose of depositing soil thereon;

For the purpose of obtaining materials therefrom for the construction or repair of the railway or such accommodation works as aforesaid; or

For the purpose of forming roads thereon to or from or by the side of the railway: And in exercise of the powers aforesaid it shall be lawful for the company to deposit and also to manufacture and work upon such lands materials of every kind used in constructing the railway, and also to dig and take from out of any such lands any clay, stone, gravel, sand or other things that may be found therein, useful or proper for constructing the railway or any such roads as aforesaid, and for the purposes aforesaid, to erect thereon workshops, sheds, and other buildings of a temporary nature: Provided always, that nothing in this act contained shall exempt the company from an action for nuisance or other injury, if any done, in the exercise of the powers hereinbefore given, to the lands or habitations of any party other than the party whose lands shall be so taken or used for any of the purposes aforesaid: Provided always, that no stone or slate quarry, brick field, or other like place, which at the time of the passing of the special act shall be commonly worked or used for getting materials therefrom for the purpose of selling or disposing of the same, shall be taken or used by the company, either wholly or in part, for any of the purposes lastly hereinbefore mentioned.

XXVIII. *Company to give Notice previous to such temporary Possession.*—In case any such lands shall be required for spoil banks or for side cuttings, or for obtaining materials for the construction or repairing of the railway, the company shall before entering thereon (except in the case of accident to the railway requiring immediate reparation) give three weeks notice in writing to the owners and occupiers of such lands of their intention to enter upon the same for such purposes, and in case the said lands are required for any of the other purposes hereinbefore mentioned the company shall (except in the cases aforesaid) give ten days like notice thereof; and the company shall in such notices respectively state the substance of the provisions hereinafter contained respecting the right of such owner or occupier to require the company to purchase any such lands, or to receive compensation for the temporary occupation thereof, as the case may be.

XXIX. *Service of Notices on Owners and Occupiers of Lands.*—The said notice shall either be served personally on such owners and occupiers, or left at their last usual place of abode, if any such can, after diligent inquiry, be found, and in case any such owner shall be absent from the United Kingdom, or cannot be found after diligent inquiry, such notice shall be served on the factor or agent (if any) of such owner, and shall also be left with the occupier of such lands, or, if there be no such occupier, shall be affixed upon some conspicuous part of such lands.

XXX. *Power to Owner to object that other Lands ought to be taken.*—In any case in which a notice of three weeks is hereinbefore required to be given it shall be lawful for the owner or occupier of the lands therein referred to, within ten days after the service of such notice, by notice in writing to the company, to object to the company making use of such lands, either on the ground that the lands proposed to be taken for the purposes aforesaid, or some part thereof, or of the materials contained therein, are essential to be retained by such owner, in order to the beneficial enjoyment of other neighbouring lands belonging to him, or on the ground that other lands lying contiguous or near to those proposed to be taken would be more fitting to be used for such purposes by the company; and upon objection being so made such proceedings

may be had as hereinafter mentioned; and if in such case the company shall refuse to occupy such other lands in lieu of those mentioned in the notice, it shall be lawful for the sheriff, on the application of such owner or occupier, to summon the company and the owners and occupiers of such other lands to appear before him at a time and place to be named in such summons, such time not being more than fourteen days after such application nor less than seven days from the service of such summons; and on the appearance of the parties, or in the absence of any of them, upon proof of due service of the summons, it shall be lawful for such sheriff to determine summarily which of the said lands shall be used by the company for the purposes aforesaid, and to authorize the company to occupy and use the same accordingly.

XXXI. *Power to the Sheriff to summon other Owners before him.*—If in the case last mentioned it shall appear to such sheriff, upon the inquiry before him, that the lands of any other party not summoned before him, being sufficient in quantity, and such as the company are hereinbefore authorized to take or use for the purposes aforesaid, would be more fitting to be used by the company than the lands of the person who shall have been so summoned as aforesaid, it shall be lawful for the said sheriff to adjourn such inquiry, and to summon such other person to appear before him at any time, not being more than fourteen days from such inquiry nor less than seven days from the service of such summons; and on the appearance of the parties, or, in the absence of any of them, on proof of due service of the summons, it shall be lawful for such sheriff to determine finally which lands shall be used for the purposes aforesaid, and to authorize the company to occupy and use the same accordingly.

XXXII. *The Company to give Sureties, if required.*—Before entering, under the provisions hereinbefore contained, upon any such lands as shall be required for spoil banks or for side cuttings, or for obtaining materials or forming roads as aforesaid, the company shall, if required by the owner or occupier thereof, seven days at least before the expiration of the notice to take such lands as hereinbefore mentioned, find two sufficient persons, to be approved of by the sheriff, in case the parties differ, who shall enter into a bond to such owner or occupier in a sum to such amount as shall be approved of by the sheriff, in case the parties differ, for the payment of such compensation as may become payable in respect of the same in manner herein mentioned.

XXXIII. *Company to separate the Lands before using them.*—Before the company shall use any such lands for any of the purposes aforesaid, they shall, if required so to do by the owner or occupier thereof, separate the same by a sufficient fence from the lands adjoining thereto, with such gates as may be required by the said owner or occupier for the convenient occupation of such lands, and shall also, to all private roads used by them as aforesaid, put up fences and gates, in like manner, in all cases where the same may be necessary, to prevent the straying of cattle from or upon the lands traversed by such roads, and in case of any difference between the owners or occupiers of such roads and lands, and the company as to the necessity for such fences and gates, such fences and gates as any two justices shall deem necessary for the purposes aforesaid, on application being made to them, in like manner as hereinbefore is provided in respect of the use of such road.

XXXIV. *Stone Quarries, &c., to be worked as Surveyor or Owner shall direct.*—That if any land shall be taken or used by the company, under the provisions of this or the special act, for the purpose of getting materials therefrom for the construction or repair of the railway or the accommodation works connected therewith, they shall work the same in such manner as the surveyor or agent of the owner of such land shall direct; or, in case of disagreement between such surveyor or agent and the company, in such manner as any justice shall direct, on the application of either party, after notice of the hearing of the application shall have been given to the other party.

XXXV. *Owners of Lands may compel Company to purchase Lands so temporarily occupied.*—In all cases in which the company shall in exercise of the powers aforesaid enter upon any lands for the purpose of making spoil banks or side cuttings thereon, or for obtaining therefrom materials for the construction or repair of the railway, it shall be lawful for the owners or occupiers of such lands, or parties having such interests therein as, under the provisions in the said Lands' Clauses Consolidation Act mentioned, are capable of being by them sold or conveyed to the company, at any time during the possession of any such lands by the company, and before such owners or occupiers shall have accepted compensation from the company in respect of such temporary occupation, to serve a notice in writing on the company, requiring them to purchase the said lands, or interests therein capable of being sold and conveyed by them respectively; and in such notice such owners or occupiers shall set forth the particulars of such their interest in such lands, and the amount of their claim in respect thereof; and the company shall thereupon be bound to purchase the said lands, or the interest therein capable of being sold and conveyed by the parties serving such notice.

XXXVI. *Compensation to be made for temporary Occupation.*—In any of the cases aforesaid, where the company shall not be required to purchase such lands, and in all other cases where they shall take temporary possession of lands by virtue of the powers herein or in the special act granted, it shall be incumbent on the company, within one month after their entry upon such lands, upon being required so to do, to pay to the occupier of the said lands the value of any crop or dressing that may be thereon, as well as full compensation for any other damage of a temporary nature

which he may sustain by reason of their so taking possession of his lands, and shall also from time to time during their occupation of the said lands pay half-yearly to such occupier or to the owner of the lands, as the case may require, a rent, to be fixed by the sheriff, in case the parties differ, and shall also within six months after they shall have ceased to occupy the said lands, and not later than six months after the expiration of the time by the special act limited for the completion of the railway, pay to such owner and occupier, or deposit in the bank for the benefit of all parties interested, as the case may require, compensation for all permanent or other loss, damage, or injury that may have been sustained by them by reason of the exercise, as regards the said lands, of the powers herein or in the special act granted, including the full value of all clay, stone, gravel, sand, and other things taken from such lands.

XXXVII. *Compensation to be ascertained under the Lands' Clauses Act.*—The amount and application of the purchase money and other compensation payable by the company in any of the cases aforesaid shall be determined in the manner provided by the said Lands' Clauses Consolidation Act for determining the amount and application of the compensation to be paid for lands taken under the provisions thereof.

LANDS FOR ADDITIONAL STATIONS.

XXXVIII. *Lands to be taken for additional Stations, &c.*—And be it enacted, that it shall be lawful for the company, in addition to the lands authorized to be compulsorily taken by them under the powers of this or the special act, to contract with any party willing to sell the same for the purchase of any land adjoining or near to the railway, or to any other railway communicating therewith, and on which the traffic thereupon may pass, and in any town or city adjoining to or near such railways, not exceeding in the whole the prescribed number of acres for extraordinary purposes; (that is to say,)

For the purpose of making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, and loading or unloading goods or cattle to be conveyed upon the railway, and for the erection of weighing machines, toll houses, offices, warehouses, and other buildings and conveniences;

For the purpose of making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation or use of the railway.

CROSSING OF ROADS, AND CONSTRUCTION OF BRIDGES.

And with respect to the crossing of roads, or other interference therewith, be it enacted as follows:

XXXIX. *Crossing of Roads.*—If the line of the railway cross any turnpike road or public highway, then, except where otherwise provided by the special act, either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: Provided always, that, with the consent of the sheriff or two or more justices, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level.

XL. *Provision in Cases where Roads are crossed on a Level.*—If the railway cross any turnpike road or public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway where the same shall communicate therewith, and shall employ proper persons to open and shut such gates; and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway, and prevent cattle or horses passing along the road from entering upon the railway; and the person intrusted with the care of such gates shall cause the same to be closed as soon as such horses, cattle, carts, or carriages shall have passed through the same, under a penalty of forty shillings for every default therein: Provided always, that it shall be lawful for the Board of Trade, in any case in which they are satisfied that it will be more conducive to the public safety that the gates on any level crossing over any such road should be kept closed across the railway, to order that such gates shall be kept so closed, instead of across the road, and in such case such gates shall be kept constantly closed across the railway, except when engines or carriages passing along the railway shall have occasion to cross such road, in the same manner and under the like penalty as above directed with respect to the gates being kept closed across the road.

XLI. *As to Crossing of Turnpike Roads adjoining Stations.*—Where the railway crosses any turnpike road on a level adjoining to a station, all trains on the railway shall be made to slacken their speed before arriving at such turnpike road, and shall not cross the same at any greater rate of speed than four miles an hour; and the company shall be subject to all such rules and regulations with regard to such crossings as may from time to time be made by the Board of Trade.

XLII. *Construction of Bridges over Roads.*—Every bridge to be erected for the purpose of carrying the railway over any road, except as otherwise provided by the special act, shall be built in conformity with the following regulations; (that is to say,)

The width of the arch shall be such as to leave thereunder a clear space of not less than thirty-five feet if the arch be over a turnpike road, and of twenty-five feet if over a public carriage road, and of twelve feet if over a private road:

The clear height of the arch from the surface of the road shall be not less than sixteen feet for a space of twelve feet if the arch be over a turnpike road, and fifteen feet for a space of ten feet if over a public carriage road; and in each of such cases the clear height at the springing of the arch shall not be less than twelve feet:

The clear height of the arch for a space of nine feet shall not be less than fourteen feet over a private carriage road:

The descent made in the road in order to carry the same under the bridge shall not be more than one foot in thirty feet if the bridge be over a turnpike road, one foot in twenty feet if over a public carriage road, and one foot in sixteen feet if over a private carriage road, not being a tramroad or railroad, or if the same be a tramroad or railroad the descent shall not be greater than the prescribed rate of inclination, and if no rate be prescribed the same shall not be greater than as it existed at the passing of the special act.

XLIII. *Construction of Bridges over Railway.*—Every bridge erected for carrying any road over the railway shall, except as otherwise provided by the special act, be built in conformity with the following regulations; (that is to say,)

There shall be a good and sufficient fence on each side of the bridge of not less height than four feet, and on each side of the immediate approaches of such bridge of not less than three feet:

The road over the bridge shall have a clear space between the fences thereof of thirty-five feet if the road be a turnpike road, and twenty-five feet if a public carriage road, and twelve feet if a private road:

The ascent shall not be more than one foot in thirty feet if the road be a turnpike road, one foot in twenty feet if a public carriage road, and one foot in sixteen feet if a private carriage road, not being a tramroad or railroad, or if the same be a tramroad or railroad the ascent shall not be greater than the prescribed rate of inclination, and if no rate be prescribed the same shall not be greater than as it existed at the passing of the special act.

XLIV. *The Width of the Bridges need not exceed the Width of Road in certain Cases.*—Provided always, that in all cases where the average available width for the passage of carriages of any existing roads within fifty yards of the points of crossing the same is less than the width hereinbefore prescribed for bridges over or under the railway, the width of such bridges need not be greater than such average available width of such roads, but so nevertheless that such bridges be not of less width, in the case of a turnpike road or public carriage road, than twenty feet: Provided also, that if at any time after the construction of the railway the average available width of any such road shall be increased beyond the width of such bridge on either side thereof, the company shall be bound, at their own expense, to increase the width of the said bridge to such extent as they may be required by the trustees or surveyors of such road, not exceeding the width of such road as so widened, or the maximum width herein or in the special act prescribed for a bridge in the like case over or under the railway.

XLV. *Existing Inclinations of Roads crossed or diverted need not be improved.*—Provided also, that if the mesne inclination of any road within two hundred and fifty yards of the point of crossing the same, or the inclination of such portion of any road as may require to be altered, or for which another road shall be substituted, shall be steeper than the inclination hereinbefore required to be preserved by the company, then the company may carry any such road over or under the railway, or may construct such altered or substituted road at an inclination not steeper than the said mesne inclination of the road so to be crossed, or of the road so requiring to be altered, or for which another road shall be substituted.

XLVI. *Before Roads interfered with, others to be substituted.*—If, in the exercise of the powers by this or the special act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether carriage road, horse road, tramroad, or railway, either public or private, so as to render it impassable for or dangerous to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be.

XLVII. *Penalty for not substituting a Road.*—If the company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid, they shall forfeit twenty pounds for every day during which such substituted road shall not be made after the existing road shall have been interrupted; and such penalty shall be paid to the trustees, commissioners, surveyor, or other person having the management of such road, if a public road, and shall be applied for the purposes thereof, or in case of a private road, the same shall be paid to the owner thereof; and every such penalty shall be recoverable, with costs, by action in any competent court.

XLVIII. *Party suffering Damage from Interruption of Road to recover in an Action*

*on the Case.*—If any party entitled to a right of way over any road so interfered with by the company shall suffer any special damage by reason that the company shall fail to cause another sufficient road to be made before they interfere with the existing road, it shall be lawful for such party to recover the amount of such special damage from the company, with expenses, by action in the Court of Session, if the damage claimed exceeds twenty-five pounds, or in the Sheriff Court, if the damage claimed does not exceed twenty-five pounds, and that whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same.

XLIX. *Period for Restoration of Roads interfered with.*—If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have been commenced, unless the trustees or parties having the management of the road to be restored by writing under their hands consent to an extension of the period, and in such case within such extended period, (that is to say,) if the road be a turnpike road, within six months, and if the road be not a turnpike road, within twelve months.

L. *Penalty for Failing to restore Road.*—If any such road be not so restored, or the substituted road so completed as aforesaid, within the periods herein or in the special act fixed for that purpose, the company shall forfeit to the trustees, commissioners, surveyor, or other person having the management of the road interfered with by the company, if a public road, or if a private road to the owner thereof, twenty pounds for every day after the expiration of such periods respectively during which such road shall not be so restored or the substituted road completed; and it shall be lawful for the sheriff or justices by whom any such penalty is imposed to order the whole or any part thereof to be laid out in executing the work in respect whereof such penalty was incurred.

LI. *Company to repair Roads used by them.*—If in the course of making the railway the company shall use or interfere with any road they shall from time to time make good all damage done by them to such road; and if any question shall arise as to the damage done to any such road by the company, or as to the repair thereof by them, the same shall be determined by the sheriff or two justices; and such sheriff or justices may direct such repairs to be made in the state of such road, in respect of the damage done by the company, and within such period as they think reasonable, and may impose on the company, for not carrying into effect such repairs, any penalty, not exceeding five pounds per day, as to such sheriff or justices shall seem just; and such penalty shall be paid to the surveyor or other person having the management of the road interfered with by the company, if a public road, and be applied for the purposes of such road, or if a private road the same shall be paid to the owner thereof: Provided always, that in determining any such question with regard to a turnpike road the said sheriff or justices shall have regard to and make full allowance for any tolls that may have been paid by the company on such road in the course of the using thereof.

LII. *Company to make sufficient Approaches and Fences to Bridleways and Footways crossing on the Level.*—If the railway shall cross any highway other than a public carriageway on the level the company shall at their own expense make and at all times maintain convenient ascents and descents and other convenient approaches, with handrails and other fences, and shall, if such highway be a bridleway, erect and at all times maintain good and sufficient gates, and if the same shall be a footway, good and sufficient gates or stiles on each side of the railway where the highway shall communicate therewith.

LIII. *Proceedings on Application to Sheriff or Justices to consent to level Crossings of Bridleways and Footways.*—When the company shall intend to apply for the consent of the sheriff or two justices, as hereinbefore provided, so as to authorize them to carry the railway across any highway other than a public carriage road on the level, they shall, fourteen days at least previous to the time at which such application is intended to be made, cause notice of such intended application to be given in some newspaper circulating in the county, and also to be affixed upon the door of the parish church of the parish in which such crossing is intended to be made, or if there be no such church some other place to which notices are usually affixed; and if it appear to the sheriff, or to any two or more justices acting for the district in which such highway at the proper crossing thereof is situate, after such notice as aforesaid, that the railway can, consistently with a due regard to the public safety and convenience, be carried across such highway in the level, it shall be lawful for such sheriff or justices to consent that the same may be so carried accordingly.

LIV. *Sheriff or Justices to have Power to order Approaches and Fences to be made to Highways crossing on the Level.*—If, when the railway shall cross any highway on the level the company fail to make convenient ascents and descents or other conve-

nient approaches, and such handrails, fences, gates, and stiles as they are hereinbefore required to make, it shall be lawful for the sheriff or two justices, on the application of the surveyor of roads, or of any two householders within the parish or district where such crossing shall be situate, after not less than ten days notice to the company, to order the company to make such ascent and descent or other approach, or such handrails, fences, gates, or stiles as aforesaid, within a period to be limited for that purpose by such sheriff or justices; and if the company fail to comply with such order they shall forfeit five pounds for every day that they fail so to do; and it shall be lawful for the sheriff or justices by whom any such penalty is imposed to order the whole or any part thereof to be applied, in such manner and by such person as they think fit, in executing the work in respect whereof such penalty was incurred.

### Screens for Turnpike Roads.

LV. *Screen for Turnpike Road to be made if required by the Board of Trade.*—If the commissioners or trustees of any turnpike road, or the surveyor of any highway, apprehend danger to the passengers on such road in consequence of horses being frightened by the sight of the engines or carriages travelling upon the railway, it shall be lawful for such commissioners or trustees or surveyor, after giving fourteen days notice to the company, to apply to the Board of Trade with respect thereto; and if it shall appear to the said Board that such danger might be obviated or lessened by the construction of any works in the nature of a screen near to or adjoining the side of such road, it shall be lawful for them, if they shall think fit, to certify the works necessary or proper to be executed by the company for the purpose of obviating or lessening such danger, and by such certificate to require the company to execute such works within a certain time after the service of such certificate to be appointed by the said Board.

LVI. *Penalty for failing to construct.*—Where by any such certificate as aforesaid the company shall have been required to execute any such work in the nature of a screen they shall execute and complete the same within the period appointed for that purpose in such certificate, and if they fail so to do they shall forfeit to the commissioners or trustees or surveyor five pounds for every day during which such works shall remain uncompleted beyond the period so appointed for their completion; and it shall be lawful for the justices by whom any such penalty is imposed to order the whole or any part thereof to be laid out in executing the work in respect whereof such penalty was incurred.

### Construction or Reparation of Bridges.

LVII. *Sheriff or Justices to have Power to order Repair of Bridges, &c.*—Where, under the provisions of this or the special act, or any act incorporated therewith, the company are required to maintain or keep in repair any bridge, fence, approach, gate, or other work executed by them, it shall be lawful for the sheriff or two justices, on the application of the surveyor of roads, or of any two householders of the parish or district where such work may be situate, complaining that any such work is out of repair, after not less than ten days notice to the company, to order the company to put such work into complete repair within a period to be limited for that purpose by such sheriff or justices; and if the company fail to comply with such order they shall forfeit five pounds for every day that they fail so to do; and it shall be lawful for the sheriff or justices by whom any such penalty is imposed to order the whole or any part thereof to be applied, in such manner and by such persons as they think fit, in putting such work into repair.

LVIII. *Board of Trade empowered to modify the Construction of certain Roads, Bridges, &c. where a strict Compliance with the Act impossible or inconvenient.*—And whereas expense might frequently be avoided, and public convenience promoted, by a reference to the Board of Trade upon the construction of public works of an engineering nature connected with the railway, where a strict compliance with the provisions of this or the special act might be impossible, or attended with inconvenience to the company, and without adequate advantage to the public; be it enacted, that in case any difference in regard to the construction, alteration, or restoration of any road or bridge, or other public work of an engineering nature, required by the provisions of this or the special act, shall arise between the company and any trustees, commissioners, surveyors, or other persons having the control of or being authorized by law to enforce the construction of such road, bridge, or work, it shall be lawful for either party, after giving fourteen days notice in writing of their intention so to do to the other party, to apply to the Board of Trade to decide upon the proper manner of constructing, altering, or restoring such road, bridge, or other work; and it shall be lawful for the Board of Trade, if they shall think fit, to decide the same accordingly, and to authorize, by certificate in writing any arrangement or mode of construction in regard to any such road, bridge, or other work which shall appear to them either to be in substantial compliance with the provisions of this and the special act, or to be calculated to afford equal or greater accommodation to the public using such road, bridge, or other work; and after any such certificate shall have been given by the Board of Trade, the road, bridge, or other work therein mentioned shall be constructed by the company in conformity with the terms of such certificate, and being so constructed shall be deemed to be constructed in conformity with the provisions of this and the special act: Provided always, that no such certificate shall be granted by the Board

of Trade unless they shall be satisfied that existing private rights or interests will not be injuriously affected thereby.

LIX. *Authentication of Certificates of the Board of Trade, Service of Notices, &c.*—And be it enacted, that all regulations, certificates, notices, and other documents in writing purporting to be made or issued by or by the authority of the Board of Trade, and signed by some officer appointed for that purpose by the Board of Trade, shall, for the purposes of this and the special act, and any act incorporated therewith, be deemed to have been so made and issued, and that without proof of the authority of the person signing the same, or of the signature thereto, which matters shall be presumed until the contrary be proved; and service of any such document by leaving the same at one of the principal offices of the railway company, or by sending the same by post addressed to the secretary at such office, shall be deemed good service upon the company; and all notices and other documents required by this or the special act to be given to or laid before the Board of Trade shall be delivered at, or sent by post addressed to, the office of the Board of Trade in London.

WORKS FOR ACCOMMODATION AND PROTECTION OF LANDS.

And with respect to works for the accommodation of lands adjoining the railway, be it enacted as follows:

LX. *Works to be erected for Accommodation of adjoining Lands.*—The Company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway; (that is to say,)

*Gates, Bridges, &c.*—Such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof:

*Fences.*—Also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout, by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be:

*Drains.*—Also all necessary arches, tunnels, culverts, drains, or other passages, either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be; and such works shall be made from time to time as the railway works proceed:

*Watering Places.*—Also proper watering places for cattle where by reason of the railway the cattle of any person occupying any lands lying near thereto shall be deprived of access to their former watering places; and such watering places shall be so made as to be at all times as sufficiently supplied with water as theretofore, and as if the railway had not been made, or as nearly so as may be; and the company shall make all necessary watercourses and drains for the purpose of conveying water to the said watering places:

Provided always that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, and that the company may, in lieu of such accommodation works, make compensation to the owners and occupiers of the lands, for the want thereof, in such manner as may be agreed upon between the company and such owners and occupiers, nor to make any accommodation works with respect to which the owners, lessees, and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making of them.

LXI. *Differences as to Accommodation Works to be settled by Sheriff or Justices.*—If any difference arise respecting the kind or number of any such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintaining thereof, the same shall be determined by the sheriff or two justices; and such sheriff or justices shall also appoint the time within which such works shall be commenced and executed by the company.

LXII. *Execution of Works by Owners on default by the Company.*—If for seven days next after the time appointed by such sheriff or justices for the commencement of any such works the company shall fail to commence such works, or having commenced shall fail to proceed diligently to execute the same in a sufficient manner, it shall be lawful for the party aggrieved by such failure himself to execute such works or repairs; and the reasonable expenses thereof shall be repaid by the company to the party by whom the same shall so have been executed; and if there be any dispute about such expenses the same shall be settled by the sheriff or two justices: Provided always, that no such owner or occupier or other person shall obstruct or injure the railway, or any of the works connected therewith, for a longer time, nor use them in any other manner than is unavoidably necessary for the execution or repair of such accommodation works.

LXIII. *Power to Owners of Land to make additional Accommodation Works.*—If any of the owners or occupiers of lands affected by such railway shall consider the accommodation works made by the company, or directed by such sheriff or justices to be made by the company, insufficient for the commodious use of their respective lands, it shall be lawful for any such owner or occupier, at his own expense, to make such further works for that purpose as he shall think necessary, and as shall be agreed to by the company, or, in case of difference, as shall be authorized by the sheriff or two justices.

LXIV. *Works to be constructed under the Superintendence of the Company's Engineer.*—If the company so desire, all such last-mentioned accommodation works shall be constructed under the superintendence of their engineer; and according to plans and specifications to be submitted to and approved by such engineer; nevertheless the owners or occupiers of lands shall not be entitled to require either that plans should be adopted which would involve a greater expense than that incurred in the execution of similar works by the company, or that the plans selected should be executed in a more expensive manner than that adopted in similar cases by the company.

LXV. *Accommodation Works not to be required after Five Years.*—The company shall not be compelled to make any further or additional accommodation works for the use of owners and occupiers of land adjoining the railway after the expiration of the prescribed period, or, if no period be prescribed, after five years from the opening of the railway for public use.

LXVI. *Owners to be allowed to cross until Accommodation Works made.*—Until the company shall have made the bridges or other proper communications which they shall under the provisions herein or in the special act, or any act incorporated therewith, contained, have been required to make between lands intersected by the railway, and no longer, the owners and occupiers of such lands, and any other persons whose right of way shall be affected by the want of such communication, and their respective servants, may at all times freely pass and repass, with carriages, horses, and other animals, directly (but not otherwise) across the part of the railway made in or through their respective lands, solely for the purpose of occupying the same lands, or for the exercise of such right of way, and so as not to obstruct the passage along the railway, or to damage the same: nevertheless, if the owner or occupier of any such lands have in his arrangements with the company received or agree to receive compensation for or on account of any such communications, instead of the same being formed, such owner or occupier, or those claiming under him, shall not be entitled so to cross the railway.

LXVII. *Materials, &c. to vest in Company for Purposes of Prosecution.*—During the execution of any contract made with the company the works in course of being done under such contract, and all the materials of every description brought upon or near such works for the purpose of being used in the execution of such contract, shall, in all proceedings instituted by them for the purpose of protecting the same, or by the public prosecutor for the purpose of punishment on account of offences committed against the same, be held to be the property of the company.

LXVIII. *Penalty on Persons omitting to fasten Gates.*—If any person omit to shut and fasten any gate set up at either side of the railway, for the accommodation of the owners or occupiers of the adjoining lands, as soon as he and the carriage, cattle, or other animals, under his care, have passed through the same, he shall forfeit for every such offence any sum not exceeding forty shillings.

BRANCH RAILWAYS.

LXIX. *Power to Parties to make private Branch Railways communicating with the Railway.*—And be it enacted, that this or the special act shall not prevent the owners or occupiers of lands adjoining to the railway, or any other persons, from laying down, either upon their own lands or upon the lands of other persons, with the consent of such persons, any collateral branches of railway to communicate with the railway, for the purpose of bringing carriages to or from or upon the railway, but under and subject to the provisions and restrictions of an act passed in the sixth year of the reign of her present majesty, intituled *An Act for the better Regulation of Railways, and for the Conveyance of Troops* [5 & 6 Vict. c. 55]; and the company shall, if required, at the expense of such owners and occupiers and other persons, and subject also to the provisions of the said last-mentioned act, make openings in the rails, and such additional lines of rail as may be necessary for effecting such communication, in places where the communication can be made with safety to the public, and without injury to the railway, and without inconvenience to the traffic thereon; and the company shall not take any rate or toll or other monies for the passing of any passengers, goods, or other things along any branch so to be made by any such owner or occupier or other person; but this enactment shall be subject to the following restrictions and conditions; (that is to say,)

*Restrictions and Conditions.*—No such branch railway shall run parallel to the railway:

The company shall not be bound to make any such openings in any place which they shall have set apart for any specific purpose with which such communication would interfere, nor upon any inclined plane or bridge, nor in any tunnel:

The persons making or using such branch railways shall be subject to all by-laws and regulations of the company from time to time made with respect to passing upon

or crossing the railway, and otherwise; and the persons making or using such branch railways shall be bound to construct, and from time to time, as need may require, to renew the offset plates and switches according to the most approved plan adopted by the company, and under the direction of their engineer.

### Working of Mines.

And with respect to mines lying under or near the railway, be it enacted as follows:

LXX. *Promoters of the Undertaking not to be entitled to Minerals.*—The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.

LXXI. *Mines lying near the Railway not to be worked if the Company willing to purchase them.*—If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway, and if the company be desirous that such mines or any parts thereof should be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they desire to be left unworked, they shall give notice to such owner, lessee, or occupier of such their desire, and shall in such notice specify the parts of the mines under the railway or works or within the distance aforesaid which they shall desire to be left unworked, and for which they shall be willing to make compensation; and in such case such owner, lessee, or occupier shall not work or get the mines or minerals, comprised in such notice; and the company shall make compensation for the same, and for all loss or damage occasioned by the non-working thereof, to the owner, lessee, and occupier thereof respectively; and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation.

LXXII. *If Company unwilling to purchase, Owner may work the Mines.*—If before the expiration of such thirty days the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner, lessee, or occupier to work the said mines, or such parts thereof for which the company shall not have agreed to pay compensation, up to the limits of the mines or minerals for which they shall have agreed to make compensation, in such manner as such owner, lessee, or occupier shall think fit, for the purpose of getting the minerals contained therein; and if any damage or obstruction be occasioned to the railway or works by the working or getting of any such minerals which the company shall so have required to be left unworked, and for which they shall so have agreed to make compensation, the same shall be forthwith repaired or removed, as the case may require, and such damage made good, by the owner, lessee, or occupier of such mines or minerals, and at his own expense; and if such repair or removal be not forthwith done, or, if the company shall so think fit, without waiting for the same to be done by such owner, lessee, or occupier, it shall be lawful for the company to execute the same, and recover from such owner, lessee, or occupier the expense occasioned thereby by action in any competent court.

LXXIII. *Mining Communications.*—If the working of any such mines or minerals under the railway or works, or within the above mentioned distance therefrom, be prevented as aforesaid by reason of apprehended injury to the railway, it shall be lawful for the respective owners, lessees, and occupiers of such mines, and whose mines shall extend so as to be on both sides of the railway, to cut and make such and so many airways, headways, gateways, or water levels through the mines, measures, or strata, the working whereof shall be so prevented, as may be requisite to enable them to ventilate, drain, and work their said mines; but no such airway, headway, gateway, or water level shall be of greater dimensions or section than the prescribed dimensions and sections, and where no dimensions shall be prescribed not greater than eight feet wide and eight feet high, nor shall the same be cut or made upon any part of the railway or works, or so as to injure the same, or to impede the passage thereon.

LXXIV. *Company to make Compensation for Injury done to Mines;*—The company shall from time to time pay to the owner, lessee, or occupier of any such mines extending so as to be on both sides of the railway all such additional expenses and losses as shall be incurred by such owner, lessee, or occupier by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid, or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company, which cannot be obtained by reason of making and maintaining the railway; and if any dispute or question shall arise

between the company, and such owner, lessee, or occupier as aforesaid, touching the amount of such losses or expenses, the same shall be settled as in other cases of disputed compensation.

LXXV. *And also for any Airway or other Work made necessary by the Railway.*—If any loss or damage be sustained by the owner or occupier of the lands lying over any such mines the working whereof shall have been so prevented as aforesaid (and not being the owner, lessee, or occupier of such mines), by reason of the making of any such airway or other work as aforesaid, which or any like work would not have been necessary to be made but for the working of such mines having been so prevented as aforesaid, the company shall make full compensation to such owner or occupier of the surface lands for the loss or damage so sustained by him.

LXXVI. *Power to the Company to enter and inspect the working of Mines.*—For better ascertaining whether any such mines are being worked or have been worked so as to damage the railway or works, it shall be lawful for the company, after giving twenty-four hours notice in writing, to enter upon any lands through or near which the railway passes wherein any such mines are being worked or are supposed so to be, and to enter into and return from any such mines or the works connected therewith; and for that purpose it shall be lawful for them to make use of any apparatus or machinery connected with such mines belonging to the owner, lessee, or occupier of such mines, upon payment of the reasonable cost of using and working the same, and of any loss thereby occasioned to the working of the mines, or otherwise, and to use all necessary means for discovering the distance from the railway to the parts of such mines which are being worked or about so to be.

LXXVII. *Penalty for Refusal to allow Inspection.*—If any such owner, lessee, or occupier of any such mine shall refuse to allow any person appointed by the company for that purpose to enter into and inspect any such mines or works in manner aforesaid, every person so offending shall for every such refusal forfeit to the company a sum not exceeding twenty pounds.

LXXVIII. *If Mines improperly worked, Supports to be made.*—If it appear that any such mines have been worked contrary to the provisions of this or the special act, the company may, if they think fit, give notice to the owner, lessee, or occupier thereof to construct such supports or works, and to adopt such means as may be necessary or proper for making safe the railway, and preventing injury thereto; and if after such notice any such owner, lessee, or occupier do not forthwith proceed to construct the works necessary for making safe the railway, the company may themselves construct such works, and recover the expense thereof from such owner, lessee, or occupier by action in any competent court.

### Passengers and Goods on Railway.

And with respect to the carrying of passengers and goods upon the railway, and the tolls to be taken thereon, be it enacted as follows:

LXXIX. *Company to employ locomotive Power, Carriages, &c.*—It shall be lawful for the company to use and employ locomotive engines or other moving power, and carriages and waggons to be drawn or propelled thereby, and to carry and convey upon the railway all such passengers and goods as shall be offered to them for that purpose, and to make such reasonable charges in respect thereof as they may from time to time determine upon, not exceeding the tolls by the special act authorized to be taken by them.

LXXX. *Company empowered to contract with other Companies.*—It shall be lawful for the company from time to time to enter into any contract with any other company being the owners or lessees or in possession of any other railway for the passage over or along the railway by the special act authorized to be made of any engines, coaches, waggons, or other carriages of any other company, or which shall pass over any other line of railway, or for the passage over any other line of railway of any engines, coaches, waggons, or other carriages of the company, or which shall pass over their line of railway, upon the payment of such tolls and under such conditions and restrictions as may be mutually agreed upon; and for the purpose aforesaid it shall be lawful for the respective parties to enter into any contract for the division or apportionment of the tolls to be taken upon their respective railways.

LXXXI. *Contract not to affect Persons not Parties to it.*—Provided always, that no such contract as aforesaid shall in any manner alter, affect, increase, or diminish any of the tolls which the respective companies, parties to such contracts, shall for the time being be respectively authorized and entitled to demand or receive from any person, or any other company, but that all other persons and companies shall, notwithstanding any such contract, be entitled to the use and benefit of any of the said railways, upon the same terms and conditions, and on payment of the same tolls, as they would have been in case no such contract had been entered into.

LXXXII. *Company not to be liable to a greater Extent than Common Carriers.*—Nothing in this or the special act contained shall extend to charge or make liable the company further or in any other case than where, according to the laws of Scotland, stage coach proprietors and common carriers would be liable, nor shall extend in any degree to deprive the company of any protection or privilege which common carriers or stage coach proprietors may be entitled to; but, on the contrary, the company shall at all times be entitled to the benefit of every such protection and privilege.

LXXXIII.—*Power to vary Tolls under like Circumstances. Tolls to be charged equally under like Circumstances.*—And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful therefore for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway.

LXXXIV. *How Tolls to be calculated where Railways are amalgamated.*—And whereas authority has been given by various acts of parliament to railway companies to demand tolls for the conveyance of passengers and goods and for other services over a fraction of a mile equal to the toll which they are authorized to demand for one mile; be it enacted, that in cases in which any railway shall be amalgamated with any other adjoining railway or railways such tolls shall be calculated and imposed at such rates as if such amalgamated railways had originally formed one line of railway.

LXXXV. *Railway to be free on Payment of Tolls.*—It shall not be lawful for the company at any time to demand or take a greater amount of toll, or make any greater charge for the carriage of passengers or goods, than they are by this and the special act authorized to demand; and upon payment of the tolls from time to time demandable all companies and persons shall be entitled to use the railway, with engines and carriages properly constructed as by this and the special act directed, subject nevertheless to the provisions and restrictions of the said act of the sixth year of her present Majesty, intituled *An Act for the better Regulation of Railways and for the Conveyance of Troops* [5 & 6 Vict. c. 55], and to the regulations to be from time to time made by the company by virtue of the powers in that behalf hereby and by the special act conferred upon them.

COLLECTION OF TOLLS.

LXXXVI. *List of Tolls to be exhibited on a Board.*—A list of all the tolls authorized by the special act to be taken, and which shall be exacted by the company, shall be published by the same being painted upon one toll board or more in distinct black letters on a white ground, or white letters on a black ground, or by the same being printed in legible characters on paper affixed to such board, and such board being exhibited in some conspicuous place on the stations or places where such tolls shall be made payable.

LXXXVII. *Milestones.*—The company shall cause the length of the railway to be measured, and posts or other conspicuous objects to be set up and maintained along the whole line thereof, at the distance of one quarter of a mile from each other, with numbers or marks inscribed thereon denoting such distances.

LXXXVIII. *Tolls to be taken only whilst Board exhibited and Milestones set up.*—No tolls shall be demanded or taken by the company for the use of the railway during any time at which the boards hereinbefore directed to be exhibited shall not be so exhibited, or at which the milestones hereinbefore directed to be set up and maintained shall not be so set up and maintained; and if any person wilfully pull down, deface, or destroy any such board or milestone he shall forfeit a sum not exceeding five pounds for every such offence.

LXXXIX. *Tolls to be paid as directed by the Company.*—The tolls shall be paid to such persons and at such places upon or near to the railway, and in such manner and under such regulations, as the company shall, by notice to be annexed to the list of tolls, appoint.

XC. *In default of Payment of Tolls, Goods, &c. may be detained and sold.*—If on demand, any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods, or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto, or it shall be lawful for the company to recover any such tolls by action at law.

XCI. *Account of Lading, &c. to be given.*—Every person being the owner or having the care of any carriage or goods passing or being upon the railway shall, on demand, give to the collector of tolls, at the places where he attends for the purpose of receiving goods or of collecting tolls for the part of the railway on which such carriage or goods may have travelled or be about to travel, an exact account in writing signed by him of the number or quantity of goods conveyed by any such carriage, and of the point on

the railway from which such carriage or goods have set out or are about to set out, and at what point the same are intended to be unloaded or taken off the railway; and if the goods conveyed by any such carriage, or brought for conveyance as aforesaid, be liable to the payment of different tolls, then such owner or other person shall specify the respective numbers or quantities thereof liable to each or any of such tolls.

XCII. *Penalty for not giving Account of Lading.*—If any such owner or other such person fail to give such account, or to produce his way-bill or bill of lading, to such collector or other officer or servant of the company demanding the same, or if he give a false account, or if he unload or take off any part of his lading or goods at any other place than shall be mentioned in such account, with intent to avoid the payment of any tolls payable in respect thereof, he shall for every such offence forfeit to the company a sum not exceeding ten pounds for every ton of goods, or for any parcel not exceeding one hundredweight, and so in proportion for any less quantity of goods than one ton, or for any parcel exceeding one hundredweight, (as the case may be,) which shall be upon any such carriage; and such penalty shall be in addition to the toll to which such goods may be liable.

XCIII. *Disputes as to Amount of Tolls chargeable.*—If any dispute arise concerning the amount of the tolls due to the company, or concerning the charges occasioned by any detention or sale thereof under the provisions herein or in the special act contained, the same shall be settled by the sheriff or by two justices; and it shall be lawful for the company in the meanwhile to detain the goods, or (if the case so require) the proceeds of the sale thereof.

XCIV. *Differences as to Weights, &c.*—If any difference arise between any toll collector or other officer or servant of the company and any owner of or person having the charge of any carriage passing or being upon the railway, or of any goods conveyed or to be conveyed by such carriage, respecting the weight, quantity, quality, or nature of such goods, such collector or other officer may lawfully detain such carriage or goods, and examine, weigh, guage, or otherwise measure the same; and if upon such measuring or examination such goods appear to be of greater weight or quantity or of other nature than shall have been stated in the account given thereof, then the person who shall have given such account shall pay, and the owner of such carriage, or the respective owners of such goods, shall also, at the option of the company, be liable to pay the costs of such measuring and examining; but if such goods appear to be of the same or less weight or quantity than and of the same nature as shall have been stated in such account, then the company shall pay such costs, and they shall also pay to such owner of or person having charge of such carriage, and to the respective owners of such goods, such damage (if any) as shall appear to the sheriff or any two justices, on a summary application to him or them for that purpose, to have arisen from such detention.

XCV. *Toll Collector to be liable for wrongful Detention of Goods.*—If at any time it be made to appear to any such sheriff or justices, upon the complaint of the company, that any such detention, measuring, or examining of any carriage, or goods, as hereinbefore mentioned, was without reasonable ground, or that it was vexatious on the part of such collector or other officer, then the collector or other officer shall himself pay the costs of such detention and measuring, and the damage occasioned thereby; and in default of immediate payment of any such costs or damage the same may be recovered by pounding and sale of the goods of such collector, and such sheriff or justices shall issue his or their warrant accordingly.

XCVI. *Penalty on Passengers practising Frauds on the Company.*—If any person travel or attempt to travel in any carriage of the company, or of any other company or party using the railway, without having previously paid his fare, and with intent to avoid payment thereof, or if any person, having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings.

XCVII. *Detention of Offenders.*—If any person be discovered, either in or after committing or attempting to commit any such offence as in the preceding enactment mentioned, all officers and servants and other persons on behalf of the company, or such other company or party as aforesaid, and all constables, gaolers, and peace officers, may lawfully apprehend and detain such person until he can conveniently be taken before the sheriff or some justice, or until he be otherwise discharged by due course of law.

XCVIII. *Penalty for bringing dangerous Goods on Railway.*—No person shall be entitled to carry, or to require the company to carry, upon the railway, any aquafortis oil of vitriol, gunpowder, lucifer matches, or any other goods which in the judgment of the company may be of a dangerous nature; and if any person send by the railway any such goods without distinctly marking their nature on the outside of the package containing the same, or otherwise giving notice in writing to the book-keeper or other servant of the company with whom the same are left, at the time of so sending, he shall forfeit to the company twenty pounds for every such offence; and it shall be lawful for the company to refuse to take any parcel that they may suspect to contain goods of a dangerous nature, or require the same to be opened to ascertain the fact.

XCIX. *Delivery of Matters in Possession or Custody of Toll Collector at Removal.*—

If any collector of tolls or other officer employed by the company be discharged or suspended from his office, or die, abscond, or absent himself, and if such collector or other officer, or the wife, widow, or any of the family or representatives of any such collector or other officer, refuse or neglect, after seven days notice in writing for that purpose, to deliver up to the company, or to any person appointed by them for that purpose, any station, dwelling house, office, or other building, with its appurtenances, or any books, papers, or other matters belonging to the company in the possession or custody of any such collector or officer at the occurrence of any such event as aforesaid, then, upon application being made by the company to the sheriff or to any two justices, it shall be lawful for such sheriff or justices to order any constable, with proper assistance, to enter upon such station or other building, and to remove any person found therein, and to take possession thereof, and of any such books, papers, or other matters, and to deliver the same to the company, or any person appointed by them for that purpose.

C. *Annual Account to be made up and a Copy transmitted to the Sheriff Clerk.*—And be it enacted, that the company shall every year cause an annual account in abstract to be prepared, showing the total receipts and expenditure of all funds levied by virtue of this or the special act for the year ending on the thirty-first day of December, or some other convenient day in each year, under the several distinct heads of receipt and expenditure, with a statement of the balance of such account, duly audited and certified by the directors or some of them, and by the auditors, and shall, if required, transmit a copy of the said account, free of charge, to the sheriff clerks of the counties through which the railway shall pass, on or before the thirty-first day of January then next; and the copy of such account shall be open to the inspection of the public at all seasonable hours, on payment of the sum of one shilling for every such inspection: Provided always, that if the said company shall omit to prepare or transmit such account as aforesaid, if required so to do by any such sheriff clerk, they shall forfeit for every such omission the sum of twenty pounds.

BY-LAWS.

And with respect to the regulations of the use of the railway, be it enacted as follows:

CI. *Company to regulate the Use of the Railway.*—It shall be lawful for the company from time to time, subject to the provisions and restrictions in this and the special act contained, to make regulations for the following purposes; (that is to say,)

For regulating the mode by which and the speed at which carriages using the railway are to be moved or propelled;

For regulating the times of the arrival and departure of any such carriages;

For regulating the loading or unloading of such carriages, and the weights which they are respectively to carry;

For regulating the receipt and delivery of goods and other things which are to be conveyed upon such carriages;

For preventing the smoking of tobacco, and the commission of any other nuisance, in or upon such carriages, or in any of the stations or premises occupied by the company;

And, generally, for regulating the travelling upon or using and working of the railway:

But no such regulation shall authorize the closing of the railway, or prevent the passage of engines or carriages on the railway, at reasonable times, except at any time when in consequence of any of the works being out of repair, or from any other sufficient cause, it shall be necessary to close the railway or any part thereof.

CII. *Power to make Regulations by By-Laws.*—For better enforcing the observance of all or any of such regulations it shall be lawful for the company, subject to the provisions of an act passed in the fourth year of the reign of her present majesty, intituled *An Act for regulating Railways* [3 & 4 Vict. c. 97], to make by-laws, and from time to time to repeal or alter such by-laws, and make others, provided that such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special act; and such by-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company; and any person offending against any such by-law shall forfeit for every such offence any sum not exceeding five pounds, to be imposed by the company in such by-laws as a penalty for any such offence; and if the infraction or non-observance of any such by-law or other such regulation as aforesaid be attended with danger or annoyance to the public or hindrance to the company in the lawful use of the railway, it shall be lawful for the company summarily to interfere to obviate or remove such danger, annoyance, or hindrance, and that without prejudice to any penalty incurred by the infraction of any such by-law.

CIII. *Publication of such By-Laws.*—The substance of such last-mentioned by-laws, when confirmed or allowed according to the provisions of any act in force regulating the allowance or confirmation of the same, shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject matter of such by-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and such boards shall from time to

time be renewed as often as the by-laws thereon, or any part thereof, shall be obliterated or destroyed; and no penalty imposed by any such by-law shall be recoverable unless the same shall have been published and kept published in manner aforesaid.

CIV. *Such By-Laws to be binding on all Parties.*—Such by-laws, when so confirmed, published, and affixed, shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under the same; and for proof of the publication of any such by-laws it shall be sufficient to prove that a printed paper or painted board, containing a copy of such by-laws, was affixed and continued in manner by this act directed, and in case of its being afterwards displaced or damaged then that such paper or board was replaced as soon as conveniently might be.

LEASING OF RAILWAY.

CV. *Exercise of Power to lease Railway.*—Where the company shall be authorized by the special act to lease the railway, or any part thereof, to any company or person, the lease to be executed in pursuance of such authority shall contain all usual and proper obligations on the part of the lessee for maintaining the railway, or the portion thereof comprised in such lease, in good and efficient repair and working condition during the continuance thereof, and for so leaving the same at the expiration of the term thereby granted, and such other provisions, conditions, obligations, and agreements as are usually inserted in leases of a like nature.

CVI. *Powers vested in Company to be exercised by Lessees.*—Such lease shall entitle the company or person to whom the same shall be granted to the free use of the railway or portion of railway comprised therein, and during the continuance of any such lease all the powers and privileges granted to and which might otherwise be exercised and enjoyed by the company, or the directors thereof, or their officers, agents, or servants, by virtue of this or the special act, with regard to the possession, enjoyment, and management of the railway, or of the part thereof comprised in such lease, and the tolls to be taken thereon, shall be exercised and enjoyed by the lessee, and the officers and servants of such lessee, under the same regulations and restrictions as are by this or the special act imposed on the company and their directors, officers, and servants; and such lessee shall, with respect to the railway comprised in such lease, be subject to all the obligations by this or the special act imposed on the company.

CARRIAGES AND ENGINES.

And with respect to the engines and carriages to be brought on the railway, be it enacted as follows:

CVII. *Engines to consume their Smoke.*—Every locomotive steam engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be constructed on the principle of consuming and so as to consume its own smoke; and if any engine be not so constructed the company or party using such engine shall forfeit five pounds for every day during which such engine shall be used on the railway.

CVIII. *Engines to be approved by the Company and Certificate of Approval given. Unfit Engines to be removed.*—No locomotive or other engine, or other description of moving power, shall at any time be brought upon or used on the railway unless the same have first been approved of by the company; and within fourteen days after notice given to the company by any party desirous of bringing any such engine on the railway the company shall cause their engineer or other agent to examine such engine at any place within three miles distance from the railway to be appointed by the owner thereof, and to report thereon to the company; and within seven days after such report, if such engine be proper to be used on the railway, the company shall give a certificate to the party requiring the same of their approval of such engine; and if at any time the engineer or other agent of the company report that any engine used upon the railway is out of repair, or unfit to be used upon the railway, the company may require the same to be taken off, or may forbid its use upon the railway until the same shall have been repaired to the satisfaction of the company, and upon the engine being so repaired the company shall give a certificate to the party requiring the same of their approval of such engine; and if any difference of opinion arise between the company and the owner of any such engine as to the fitness or unfitness thereof for the purpose of being used on the railway, such difference shall be settled by arbitration.

CIX. *Penalties on Persons using improper Engines.*—If any person, whether the owner or other person having the care thereof, bring or use upon the railway any locomotive or other engine, or any moving power, without having first obtained such certificate of approval as aforesaid, or if, after notice given by the company to remove any such engine from the railway such person do not forthwith remove the same, or if, after notice given by the company not to use any such engine upon the railway, such person do so use such engine, without having first repaired the same to the satisfaction of the company, and obtained such certificate of approval, every such person shall in any of the cases aforesaid forfeit to the company a sum not exceeding twenty pounds; and in any such case it shall be lawful for the company to remove such engine from the railway.

CX. *Carriages to be constructed according to Company's Regulations.*—No carriage shall pass along or be upon the railway (except in directly crossing the same, as herein or by the special act authorized,) unless such carriage be at all times, so long as it shall be used or shall remain on the railway, of the construction and in the condition which the regulations of the company for the time being shall require; and if any dispute arise between the company and the owner of any such carriage as to the construction or

condition thereof, in reference to the then existing regulations of the company, such dispute shall be settled by arbitration.

CXI. *Regulations to apply also to Company's Carriages.*—The regulations from time to time to be made by the company respecting the carriages to be used on the railway shall be drawn up in writing, and be authenticated by the common seal of the company, and shall be applicable alike to the carriages of the company and to the carriages of other companies or persons using the railway; and a copy of such regulations shall, on demand, be furnished by the secretary of the company to any person applying for the same.

CXII. *Penalty for using improper Carriages.*—If any carriage, not being of such construction or in such condition as the regulations of the company for the time being require, be made to pass or be upon any part of the railway, (except as aforesaid), the owner thereof, or any person having for the time being the charge of such carriage, shall forfeit to the company a sum not exceeding ten pounds for every such offence, and it shall be lawful for the company to remove any such carriage from the railway.

CXIII. *Owner's Name, &c. to be registered, and exhibited on Carriages.*—The respective owners of carriages using the railway shall cause to be entered with the secretary or other officer of the company appointed for that purpose the names and places of abode of the owners of such carriages respectively, and the numbers, weights, and gauges of their respective carriages; and such owners shall also, if so required by the company, cause the same particulars to be painted in legible characters on some conspicuous part of the outside of every such carriage, so as to be always open to view; and every such owner shall, whenever required by the company, permit his carriage to be weighed, measured, or gauged at the expense of the company.

CXIV. *On Non-compliance Carriage may be removed.*—If the owner of any carriage fail to comply with the requisitions contained in the preceding enactment, it shall be lawful for the company to refuse to allow such carriage to be brought upon the railway, or to remove the same therefrom, until such compliance.

CXV. *Carriages improperly loaded, or suffered to obstruct the Way, may be unloaded or removed.*—If the loading of any carriage using the railway be such as to be liable to collision with other carriages properly loaded, or to be otherwise dangerous, or if the person having the care of any carriage or goods upon the railway suffer the same or any part thereof to remain on the railway so as to obstruct the passage or working thereof, it shall be lawful for the company to cause such carriage or goods to be unloaded and removed in any manner proper for preventing such collision or obstruction, and to detain such carriage or goods, or any part thereof, until the expenses occasioned by such unloading, removal, or detention be paid.

CXVI. *Company not to be liable for Damage by unloading, &c.*—The company shall not be liable for any damage or loss occasioned by any such unloading, removal, or detention as aforesaid, except for damage wilfully or negligently done to any carriage or goods so unloaded, removed, or detained; nor shall they be liable for the safe custody of any such carriage or goods so detained unless the same be wrongfully detained by them and then only for so long a time as the same shall have been so wrongfully detained.

CXVII. *Owners liable for Damage by Servants.*—The respective owners of engines and carriages passing or being upon the railway shall be answerable for any damage done by their engines or carriages, or by any of the servants or persons employed by them, to or upon the railway, or the machinery or works belonging thereto, or to or upon the property of any other person.

CXVIII. *Owners to recover from Servants.*—It shall be lawful for any owner of any engine or carriage who shall pay the amount of any damage caused by the misfeasance or negligence of any servant or other person employed by him to recover the amount so paid by him from such servant or other person.

### Arbitration.

And with respect to the settlement of disputes by arbitration, be it enacted as follows:

CXIX. *Where Questions are to be determined by Arbitration Arbiters to be appointed within Fourteen Days after Notice.*—When any dispute directed by this or the special act, or any act incorporated therewith, to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbiter, each party, on the request of the other party, shall nominate and appoint an arbiter to whom such dispute shall be referred; and every appointment of an arbiter shall be made on the part of the company under the hand of the secretary or any two of the directors of the company, and on the part of any other party under the hand of such party, or if such party be a company or corporation, under the hand of the proper officer or person authorized by such company or corporation; and such appointment shall be delivered to the arbiter, and shall be deemed a submission to arbitration on the part of the party by whom the same shall be made; and after any such appointment shall have been made neither party shall have power to revoke the same, without the consent of the other, nor shall the death of either party operate as such revocation; and if for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matters so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbiter, such last-mentioned party fail to appoint such arbiter, then upon such

failure the party making the request, and having himself appointed an arbiter, may appoint such arbiter to act on behalf of both parties; and such arbiter may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbiter shall be final.

CXX. *Vacancy of Arbiter to be supplied.*—If before the matters so referred shall be determined any arbiter appointed by either party die, or become incapable to act, the party by whom such arbiter was appointed may nominate and appoint in writing some other person to act in his place; and if for the space of seven days after notice in writing from the other party for that purpose he fail to do so, the remaining or other arbiter may proceed *ex parte*; and every arbiter so to be substituted as aforesaid shall have the same powers and authorities as were vested in the former arbiter at the time of such his death or incapacity as aforesaid.

CXXI. *Appointment of Oversman.*—Where more than one arbiter shall have been appointed such arbiters shall, before they enter upon the matters so referred to them, nominate and appoint by writing under their hands an oversman to decide on any such matters on which they shall differ, or which shall be referred to them under this or the special act; and if such oversman shall die or become incapable to act, they shall forthwith after such death or incapacity appoint another oversman in his place; and the decision of every such oversman on the matters on which the arbiters shall differ shall be final.

CXXII. *Lord Ordinary to appoint an Oversman on Neglect of Arbiters.*—If in either of the cases aforesaid the said arbiters shall refuse, or shall for seven days after request of either party to such arbitration neglect to appoint an oversman, the Lord Ordinary, on the application of either party to such arbitration, shall appoint an oversman; and the decision of such oversman on the matters on which the arbiters shall differ, or which shall be referred to them under this or the special act, shall be final.

CXXIII. *In case of Death of single Arbiter, Matter to begin de novo.*—If when a single arbiter shall have been appointed such arbiter shall die or become incapable to act before he shall have made his award, the matters referred to him shall be determined by arbitration, under the provisions of this or the special act, in the same manner as if such arbiter had not been appointed.

CXXIV. *If either Arbiter refuse to act, the other to proceed ex parte.*—If where more than one arbiter shall have been appointed either of the arbiters refuse or for seven days neglect to act, the other arbiter may proceed *ex parte*, and the decision of such arbiter shall be as effectual as if he had been the single arbiter by both parties.

CXXV. *If Arbiters fail to make their Award within Twenty-one Days the Matter to go to the Umpire.*—If where more than one arbiter shall have been appointed, and where neither of them shall refuse or neglect to act as aforesaid, such arbiters shall fail to make their award within twenty-one days after the day on which the last of such arbiters shall have been appointed, or within such extended time as shall have been appointed for that purpose by both such arbiters, under their hands, the matters referred to them shall be determined by the umpire to be appointed as aforesaid.

CXXVI. *Power of Arbiters to call for Books, &c.*—The said arbiters or their oversman may call for the production of any documents in the possession or power of either party which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose, and may also grant diligence for the recovery of such documents as either party may require, or for citing witnesses, and on application to the Lord Ordinary letters of supplement, or such other writ as may be necessary, shall be issued by the Lord Ordinary in support of such diligence.

CXXVII. *Expenses to be in the Discretion of the Arbiters.*—Except where by this or the special act, or any act incorporated therewith, it shall be otherwise provided, the expenses of and attending every such arbitration, to be determined by the arbiters, including the expense of recording the decreet arbitral or award in the books of council and session, and of furnishing extracts thereof from the said books, shall be in the discretion of the arbiters or the oversman, as the case may be.

CXXVIII. *Awards to be in Writing and recorded.*—The arbiters or oversman, as the case may be, shall make the decreet arbitral or award in writing, and shall cause the same to be recorded in the books of Council and Session; and extracts of decreets arbitral or awards so recorded shall make faith in all courts and cases in like manner as the original decreets arbitral or awards themselves, except where the originals are offered to be improven.

CXXIX. *Not to be set aside for Matter of Form.*—No award made in respect to any question referred to arbitration under the provisions of this or the special act shall be set aside for irregularity or error in matter of form.

CXXX. *Service of Notices upon Company.*—And be it enacted, that any summons or notice, or any writ or other proceeding at law, requiring to be served upon the company, may be served by the same being left at or transmitted through the post directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or in case there be no secretary then by being given to any one director of the company.

CXXXI. *Tender of Amends.*—And be it enacted, that if any party shall have committed any irregularity, trespass, or other wrongful proceeding in the execution of this or the special act, or any act incorporated therewith, or by virtue of any power or au-

thority thereby given, and if before action brought in respect thereof such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and if no such tender shall have been made it shall be lawful for the defender, by leave of the court where such action shall be pending, at any time before the record is closed to pay into court such sum of money as he shall think fit, and thereupon such proceedings shall be had as in other cases where defenders are allowed to pay money into court.

RECOVERY OF DAMAGES AND PENALTIES.

And with respect to the recovery of damages not specially provided for, and to the determination of any other matter referred to the sheriff or to justices, be it enacted as follows:

CXXXII. *Provision for Damages not otherwise provided for.*—In all cases where any damages, charges, or expenses are by this or the special act, or any act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by the sheriff; and if the amount so ascertained be not paid by the company or other party liable to pay the same, within seven days after demand the amount may be recovered by poinding and sale of the goods of the company or other party liable as aforesaid, and the sheriff shall, on application, issue his warrant accordingly.

CXXXIII. *Distress, &c. against the Treasurer.*—If sufficient goods of the company cannot be found whereon to levy any such damages, charges, or expenses payable by the company, the same may, if the amount thereof do not exceed twenty pounds, be recovered by poinding and sale of the goods of the treasurer of the company, and the sheriff, on application, shall issue his warrant accordingly; but no such poinding and sale shall be executed against the goods of such treasurer unless seven days previous notice in writing, stating the amount so due, and demanding payment thereof, have been given to such treasurer, or left at his residence; and if such treasurer pay any money under such distress or poinding and sale as aforesaid, he may retain the amount so paid by him, and all expenses occasioned thereby, out of any money belonging to the company coming into his custody or control, or he may sue the company for the same.

CXXXIV. *Method of proceeding before the Sheriff or Justices in Questions of Damages.*—Where in this or the special act, or any act incorporated therewith, any question of damages, charges, expenses, or other matter is referred to the determination of any sheriff or justices, it shall be lawful for the sheriff or any justice, upon the application of either party, to order the other party to appear before such sheriff if the order shall be issued by the sheriff, or before two justices if the order shall have been issued by a justice, at a time and place to be named in such summons; and upon the appearance of such parties, or in the absence of any of them upon proof of due service of the summons, it shall be lawful for such sheriff or such two justices, as the case may be, to hear and determine such question, and for that purpose to examine such parties or any of them, and their witnesses, on oath: and the expenses of every such inquiry shall be in the discretion of such sheriff or justices, and he or they shall determine the amount thereof.

CXXXV. *Publication of Penalties.*—The company shall publish the short particulars of the several offences for which any penalty is imposed by this or the special act, or any act incorporated therewith, or by any by-law of the company affecting other persons than the shareholders, officers, or servants of the company, and of the amount of every such penalty, and shall cause such particulars to be painted on a board, or printed upon paper and pasted thereon, and shall cause such board to be hung up or affixed on some conspicuous part of the principal place of business of the company, and where any such penalties are of local application shall cause such boards to be affixed in some conspicuous place in the immediate neighbourhood to which such penalties are applicable or have reference; and such particulars shall be renewed as often as the same or any part thereof is obliterated or destroyed; and no such penalty shall be recoverable unless it shall have been published and kept published in the manner hereinbefore required.

CXXXVI. *Penalty for defacing Boards used for such Publication.*—If any person pull down or injure any board put up or affixed as required by this or the special act, or any act incorporated therewith, for the purpose of publishing any by-law or penalty, or shall obliterate any of the letters or figures thereon, he shall forfeit for every such offence a sum not exceeding five pounds, and shall defray the expenses attending the restoration of such board.

CXXXVII. *Penalties to be summarily recovered before the Sheriff or Two Justices.*—Every penalty or forfeiture imposed by this or the special act, or by any by-law made in pursuance thereof, the recovery of which is not otherwise provided for, may be recovered by summary proceeding before the sheriff or two justices; and on complaint being made to any sheriff or justice he shall issue an order requiring the party complained against to appear before himself if the order be issued by a sheriff or before two or more justices if the order be issued by a justice, at a time and place to be named in such order; and every such order shall be served on the party offending either in person or by leaving the same with some inmate at his usual place of abode; and upon

the appearance of the party complained against, or in his absence after proof of the due service of such order, it shall be lawful for any sheriff or two justices to proceed to the hearing of the complaint; and upon proof of the offence, either by the confession of the party complained against, or upon the oath of one credible witness or more, it shall be lawful for such sheriff or justices to convict the offender, and upon such conviction to adjudge the offender to pay the penalty or forfeiture incurred, as well as such expenses attending the conviction as such sheriff or justices shall think fit.

CXXXVIII.—*Penalties may be levied by Poinding and Sale.* If forthwith upon any such adjudication as aforesaid the amount of the penalty or forfeiture, and of such expenses as aforesaid, be not paid, the amount of such penalty and expenses shall be levied by poinding and sale, and such sheriff or justices, or either of them, shall issue his or their warrant of poinding and sale accordingly.

CXXXIX. *Imprisonment in default of sufficient Poinding.*—It shall be lawful for any such sheriff or justices to order any offender so convicted as aforesaid to be detained and kept in safe custody until return can be conveniently made to the warrant of poinding and sale to be issued for levying such penalty or forfeiture and expenses, unless the offender give sufficient security, by way of recognizance or otherwise, to the satisfaction of the sheriff or justices, for his appearance before him or them on the day appointed for such return, such day not being more than eight days from the time of taking such security; but if before issuing such warrant of poinding and sale it shall appear to the sheriff or justices, by the admission of the offender or otherwise, that no sufficient poinding and sale can be had within the jurisdiction of such sheriff or justices whereon to levy such penalty or forfeiture and expenses, he or they may, if he or they think fit, refrain from issuing such warrant; and in such case, or if such warrant shall have been issued, and upon the return thereof such insufficiency as aforesaid shall be made to appear to the sheriff or justices, then such sheriff or justices shall by warrant cause such offender to be committed to gaol, there to remain without bail for any term not exceeding three months, unless such penalty or forfeiture and expenses be sooner paid and satisfied.

CXL. *Poinding and Sale how to be made.*—Where in this or the special act, or any act incorporated therewith, any sum of money, whether in the nature of penalty or otherwise, is directed to be levied by poinding and sale, such sum of money shall be levied by poinding and sale of the goods and effects of the party liable to pay the same; and the overplus arising from the sale of such goods and effects, after satisfying such sum of money, and the expenses of the poinding and sale, shall be returned, on demand, to the party whose goods shall have been seized.

CXLI. *Poinding not unlawful for Want of Form.*—No poinding and sale made by virtue of this or the special act or any act incorporated therewith, shall be deemed unlawful, nor shall any party making the same be deemed a trespasser or wrong-doer, on account of any defect or want of form in the summons, conviction, warrant, or other proceeding relating thereto, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage in an action before the sheriff court.

CXLII. *Application of Penalties.*—The sheriff or justices by whom any such penalty or forfeiture shall be imposed, where the application thereof is not otherwise provided for, may award not more than one half thereof to the informer, and shall award the remainder to the kirk session, or treasurer or collector of the funds for the poor of the parish in which the offence shall have been committed, for the benefit of the poor of such parish.

CXLIII. *Penalties to be sued for within Six Months.*—No person shall be liable to the payment of any penalty or forfeiture imposed by virtue of this or the special act, or any act incorporated therewith, for any offence made cognizable before the sheriff or justices, unless the complaint respecting such offence shall have been made before such sheriff or some justice within six months next after the commission of such offence.

CXLIV. *Damage to be made good in addition to Penalty.*—If, through any act, neglect, or default on account whereof any person shall have incurred any penalty imposed by this or the special act, or any act incorporated therewith, any damage to the property of the company shall have been committed by such person, he shall be liable to make good such damage as well as to pay such penalty; and the amount of such damage shall, in case of dispute, be determined by the sheriff or justices by whom the party incurring such penalty shall have been convicted; and on non-payment of such damages, on demand, the same shall be levied by poinding and sale, and such sheriff or justices shall issue his or their warrant accordingly

CXLV. *Penalty on Witnesses making default.*—It shall be lawful for any sheriff or justice to summon any person to appear before him as a witness in any matter in which such sheriff or justice or two or more justices shall have jurisdiction under the provisions of this or the special act, or any act incorporated therewith, at a time and place mentioned in such summons, and to administer to him an oath to testify the truth in such matter; and if any person so summoned shall, without reasonable excuse, refuse or neglect to appear at the time and place appointed for that purpose, having been paid or tendered a reasonable sum for his expenses, or if any person appearing shall refuse to be examined upon oath, or to give evidence before such sheriff or justice or justices, every such person shall forfeit a sum not exceeding five pounds for every such offence.

CXLVI. *Transient Offenders.*—It shall be lawful for any officer or agent of the company, and all persons called by him to his assistance, to seize and detain any person who shall be found committing any offence against the provisions of this or the special act, or any act incorporated therewith, and whose name and residence shall be unknown to such officer or agent, and convey him, with all convenient despatch, before the sheriff or a justice, without any warrant or other authority than this or the special act; and such sheriff or justice shall proceed with all convenient despatch in the matter of the complaint against such offender.

CXLVII. *Proceedings by Sheriff need not be in Writing.*—Any sheriff to whom any application is authorized to be made, and before whom any judicial proceeding shall in consequence take place or become necessary, under or by virtue of this or the special act, or any act incorporated therewith, shall, and he is hereby authorized and required summarily to call before him all parties who appear to him to be interested therein, and to proceed forthwith to hear *vivâ voce*, and pronounce judgment regarding the matters mentioned in such application or proceedings, or to do the several matters and things required by this act to be done by him, without waiting the ordinary course of the roll of causes before him, and without written pleadings, or a written record, or reducing any evidence which may be led by either of the parties to writing, unless and except where the said sheriff shall consider that the matters mentioned in such application or proceedings can with more advantage be decided with written pleadings and with a written record, in which case he shall proceed to make up a record, and bring the said matters to a conclusion with all convenient despatch; and the orders and judgments of the said sheriff, when pronounced without a record, shall be final and conclusive, and not subject to review by suspension or advocation, or to reduction, on any ground whatever.

CXLVIII. *Form of Conviction.*—The sheriff or justice, or justices, before whom any person shall be convicted of any offence against this or the special act, or any act incorporated therewith, may cause the conviction to be drawn up according to the form in the schedule to this act annexed.

CXLIX. *Proceedings not to be quashed for Want of Form, &c.*—No proceeding in pursuance of this or the special act, or any act incorporated therewith, shall be quashed or vacated for want of form, nor shall the same be removed by suspension or otherwise into any superior court.

CL. *Power of Appeal to Sheriff.*—In all cases which may come before any sheriff-substitute under this or the special act, or any act incorporated therewith, in which written pleadings shall have been allowed, and a written record shall have been made up, and where the evidence which has been led by the parties shall have been reduced to writing, but in no other case whatever, it shall be competent for any of the parties thereto, within seven days after a final judgment shall have been pronounced by such sheriff-substitute, to appeal against the same to the sheriff of the county, by lodging a minute of appeal with the sheriff-clerk of such county, or his depute; and the said sheriff shall thereupon review the proceedings of the said sheriff-substitute, and whole process, and, if he think proper, hear the parties *vivâ voce* thereon, and pronounce judgment; and such judgment shall in no case be subject to review by suspension or advocation, or to reduction, on any ground whatever.

CLI. *Parties allowed to appeal from Justices to Quarter Sessions, on giving Security.*—If any party shall feel aggrieved by any determination or adjudication of any justices, with respect to any matter under the provisions of this or the special act, or any act incorporated therewith, he may, unless otherwise specially provided, appeal to the general quarter sessions for the county or place in which the cause of appeal shall have arisen; but no such appeal shall be entertained unless it be made within four months next after the making of such determination or adjudication, nor unless ten days notice in writing of such appeal, stating the nature and grounds thereof, be given to the party against whom the appeal shall be brought, nor unless the appellant forthwith after such notice enter into recognizances, with two sufficient sureties, before a justice, conditioned duly to prosecute such appeal, and to abide the order of the court thereon.

CLII. *Court to make such Order as they think reasonable.*—At the quarter sessions for which such notice shall be given the court shall proceed to hear and determine the appeal in a summary way, or they may, if they think fit, adjourn it to the following sessions; and upon the hearing of such appeal the court may, if they think fit, mitigate any penalty or forfeiture, or they may confirm or quash the adjudication, and order any money paid by the appellant, or levied by distress upon his goods, to be returned to him, and may also order such further satisfaction to be made to the party injured as they may judge reasonable; and they may make such order concerning the expenses, both of the adjudication and of the appeal, as they may think reasonable.

### Special Act.

And with respect to the provision to be made for affording access to the special act by all parties interested, be it enacted as follows:

CLIII. *Copies of Special Act to be kept and deposited, and allowed to be inspected.*—The company shall at all times after the expiration of six months after the passing of the special act keep in their principal office of business a copy of the special act printed by the printers to her Majesty, or some of them; and shall also within the space of

such six months deposit in the office of each of the Sheriff-clerks of the several counties into which the works shall extend, a copy of such special act, so printed as aforesaid; and the said sheriff-clerks shall receive, and they and the company respectively shall retain, the said copies of the special act, and shall permit all persons interested to inspect the same, and make extracts or copies therefrom, in the like manner, and upon the like terms, and under the like penalty for default, as is provided in the case of certain plans and sections by an act passed in the first year of the reign of her present Majesty, intituled *An Act to compel Clerks of the Peace for Counties, and other Persons, to take the Custody of such Documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament.* [7 Wm. IV. and 1 Vict. c. 83.]

CLIV. *Penalty on Company failing to keep or deposit Act.*—If the company shall fail to keep or deposit, as hereinbefore mentioned, any of the said copies of the special act, they shall forfeit £20 for every such offence, and also £5 for every day afterwards during which such copy shall be not so kept or deposited.

CLV. *Alteration of Act.*—And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

## SCHEDULE REFERRED TO BY THE FOREGOING ACT.

*Form of Conviction before*

to wit.

Be it remembered, That on the day of in the year of our Lord A. B. is convicted before me C., the sheriff, *or* before us D., E., two of her Majesty's justices of the peace for the county of [*here describe the offence generally, and the time and place when and where committed*], contrary to the [*here name the special act*]. Given under my hand [*or* under our hands], the day and year first above written.

C.
*or*
D.
E.

# INDEX.

D.

## Q.

T.

THE END.

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TWEEDDALE COURT, *April* 1847.

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